

**Amicus curiae brief prepared by the  
Helsinki Foundation for Human Rights  
in the cases of**

***K.B. v. Poland and 3 other applications (Application no. 1819/21)***  
***A.L.-B. v. Poland and 3 other applications (Application no. 3801/21)***  
***K.C. v. Poland and 3 other applications (Application no. 3639/21)***

**EXECUTIVE SUMMARY**

- On 22 October 2020, the Constitutional Tribunal declared the provision enabling the termination of pregnancy in cases of severe foetal defects or an incurable ailment threatening the foetus's life unconstitutional. The ruling of the Constitutional Tribunal provoked mass social protests in Poland. Also, in the public debate, doubts as to the legal effectiveness of the aforementioned ruling have been expressed.
- In Poland there is no effective and expedient procedure that would ensure that women can exercise their right to have an abortion which is allowed by domestic law.
- The existing procedure for objecting to an opinion or decision of a doctor is excessively formalistic and does not guarantee that a pregnancy can be terminated within the legal time-limit. Additionally, medical institutions are currently under no direct legal obligation to inform a woman that abortion can be performed by a different doctor in a situation when a medical practitioner invokes the conscience clause as the basis for the refusal of an abortion.
- According to a survey conducted by the Foundation in November and December 2020, almost 40% of hospitals in Poland declared that they could not perform abortions for embryopathological reasons.
- The obstacles faced by women who want to terminate a pregnancy in accordance with domestic law should be treated as a systemic problem in Poland.
- In the cases *K.B. v. Poland and others*, *A.L.-B. v. Poland and others*, *K.C. v. Poland and others*, the ECtHR has the opportunity to develop standards for the protection of rights of women seeking lawful abortion.

**I. INTRODUCTION**

1. The Helsinki Foundation for Human Rights ("HFHR") is a non-governmental organisation working in the field of human rights protection, whose statutory activities include, inter alia, dealing with issues related to the access to an lawful abortion. Furthermore, HFHR has undertaken numerous initiatives to ensure women's access to reproductive health and rights. For instance the HFHR has been involved in monitoring execution of the judgments delivered by the High Court in the cases *Tysic v. Poland*<sup>1</sup>, *R. R. v. Poland*<sup>2</sup>, and *P. and S. v. Poland*<sup>3</sup>.

2. In the cases of *K.B. and others v. Poland*, *A.L.-B. and others v. Poland*, *K.C. and others v. Poland*, the Applicants allege that they are potential victims of a breach of Article 3 and 8 of the Convention. They claim that the Constitutional Court's judgment deprives them of the possibility to terminate pregnancy on the ground of foetal defects. The prospect of being forced to give birth to an ill or dead child causes them anguish and distress and they afraid to get pregnant.

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<sup>1</sup> Judgment of ECtHR of 20 March 2007, application no. 5410/03.

<sup>2</sup> Judgment of ECtHR of 26 May 2011, application no. 2761/04.

<sup>3</sup> Judgment of ECtHR of 30 October 2012, application no. 57375/08 .

3. In light of the scope of consent granted by the ECtHR, the amicus curiae does not refer directly to the case under review but presents instead the broader context of the situation. In particular, HFHR wants to turn attention to the practical and legal aspects of accessibility of lawful abortion procedures in Poland. In addition we would like to discuss the effectiveness of procedures provided by national law, which may be undertaken by the women in case of refusal to perform an abortion. Also, we would like to present views that are expressed in Poland on the impact of irregularities in the composition of the CC on the legal effects of its judgments.

## II. THE JUDGMENT OF THE CONSTITUTIONAL TRIBUNAL OF 22 OCTOBER 2020

4. In the judgment of 22 October 2020, case no. K 1/20, the Constitutional Tribunal (“CT”) ruled that art. 4a (1) (2) of the Family Planning Act. That provision allowed for the termination of pregnancy where a prenatal test and other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffer from an incurable life-threatening ailment.

5. However, almost immediately after the said ruling was issued, discussions about its legal force and consequences arose. The main source of controversies about its effectiveness was the fact that it was issued in a panel of the CT which included three unlawfully elected persons. Moreover, as noted by the applicants in the present case, there are serious doubts as to the legality of appointment of the President of the Constitutional Tribunal and impartiality of certain members of the adjudicating panel.

6. With regards to the impact of the presence of unlawfully elected persons in adjudicating panels of the CT upon the legal effectiveness of the Tribunal’s judgments, so far no uniform and consistent approach has been developed in the case law or legal literature. Initially, Polish legal scholars expressed the view that despite such flaws, all judgments of the CT remain final and universally binding as provided in Article 190(1) of the Constitution. Such interpretation was presented, among others, by P. Radziewicz: “The repeatedly voiced position of the Tribunal that its decisions concerning the hierarchical compliance of legal regulations (norms) are unconditionally final retains its currency also in the situation whereby the adjudicating panel includes an unauthorized person. This is a serious defect and gives rise to other legal consequences, but does not eliminate the constitutional attributes of a judgment referred to in Art. 190 (1) of the Constitution”.<sup>4</sup> Similarly, M. Florczak-Wątor assessed that such judgments of the CT cannot be deemed legally non-existent and even though one may argue that they were issued in invalid proceedings there are no procedural measures allowing to challenge and quash them.<sup>5</sup> However, according to M. Florczak-Wątor, courts can take into account the fact that given judgment of the CT confirming compliance of legal norm with the Constitution was issued in invalid proceedings as presumption of constitutionality in this situation would be weaker.<sup>6</sup> Moreover, she did not exclude that in the future the same provision which was found to be constitutional in invalid proceedings could be once again subject of proceedings before lawfully composed CT.<sup>7</sup> It is also worth to note the view presented by M. Wiącek, according to whom: “Polish courts are not empowered to evaluate the lawfulness of CT’s judgments, including the situation where a court raises doubts as regards the composition of a particular Tribunal’s adjudicating panel. Such a conclusion flows from the fact that one of the crucial elements of the rule of law principle is the certainty of law”.<sup>8</sup> However, different views were

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<sup>4</sup> P. Radziewicz, *On Legal Consequences of Judgements of the Polish Constitutional Tribunal Passed by an Irregular Panel*, “Review of European and Comparative Law” 2017, no. 4, p. 57.

<sup>5</sup> M. Florczak-Wątor, *O skutkach prawnych orzeczeń TK wydanych z udziałem osób nieuprawnionych do orzekania* in: R. Balicki and M. Jabłoński (eds.), *Państwo i jego instytucje. Konstytucje – sądownictwo – samorząd terytorialny* (Wydawnictwo Uniwersytetu Wrocławskiego 2018) p. 307-311.

<sup>6</sup> *Ibid.*, p. 312.

<sup>7</sup> *Ibid.*

<sup>8</sup> M. Wiącek, *Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle* in: A. von Bogdandy, P. Bogdanowicz, I. Canor, C. Grabenwarter, M. Taborowski, M. Schmidt (eds), *Defending Checks and Balances in EU Member*

also presented. For example, according to P. Polak judgments of the CT issued with participation of unlawfully elected persons are legally non-existent and as such cannot serve as a basis for reopening of proceedings before courts.<sup>9</sup> Still, in practice courts, while noting serious irregularities in the personal composition of the CT, usually did not explicitly hold that its judgments are devoid of legal effectiveness.<sup>10</sup>

7. However, it is worth to underline that the abovementioned controversies concerned only the impact of irregularities in the personal composition of the CT upon legal effectiveness of its rulings and not a mere existence of such irregularities. The view that in the light of the case-law of the CT (in particular, judgment of 3 December 2015, No. K 34/15) three persons were elected with manifest violation of law was widely accepted among the Polish legal scholars and courts.

8. After the announcement of the Court's judgment in the case of *Xero Flor w Polsce sp. z o.o. v. Poland* (7 May 2021, app. no. 4907/18) the view according to which judgments of the CT are devoid of legal effects seems to become more popular. For example, in the judgment of 24 May 2021 (No. I C 1326/19 – judgment is not yet final) the District Court in Gorzów Wielkopolski, referring among others to *Xero Flor* judgment held that the ruling of the CT issued with participation of unlawfully elected person must be disregarded and so the constitutionality of applicable legal norm must be reviewed by this court independently. Similarly, in the decision of 16 September 2021 (No. I KZ 29/21), the Supreme Court held that judgments of the CT issued in unlawful personal composition cannot be deemed “final and universally binding” within the meaning of the Constitution and added that the Supreme Court “cannot accept a ruling which was issued as a consequence of a violation of the Constitution of the Republic of Poland, because if such a ruling were deemed binding, the Supreme Court would accept the existence of a constitutional tort and the legal effects of a ruling aimed at protection the effects caused by such a tort (...)”. It is too early at the moment to predict whether the approach presented in these two rulings will turn into a settled case-law of the Polish courts. One should note, however, that on 28 October 2021 the First President of the Supreme Court asked the Criminal Chamber of the Supreme Court to adopt an interpretative resolution concerning the issue of the Supreme Court has a competence to examine validity of the CT's rulings.

9. The discussion about the legal force of the CT's rulings issued in violation of law concerned also the status of the judgment in the case K 1/20. In this regard, for example, D. Szumiło-Kulczycka and K. Kozub-Ciembroniewicz noted that there are at least three factors which make the personal composition of the adjudicating panel in K 1/20 inconsistent with law: presence of unlawfully elected persons, presence of persons who could not be lawfully elected due to their age exceeding age of mandatory retirement of judges of the Supreme Court and finally non-recusal of judges despite circumstances which may raise doubts about their impartiality.<sup>11</sup> The authors noted the controversies around the concept of non-existent rulings, however in their opinion violations of law in the said proceedings are so grave that there is no other option than to consider the CT's judgment as non-existent: “Turning a blind eye to such flaws opens

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*States*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht (Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht), vol 298 (Springer 2021) p. 31.

<sup>9</sup> P. Polak, *Związanie sądu wyrokiem Trybunału Konstytucyjnego wydanym w nieprawidłowo umocowanym składzie (refleksje na tle wyroku Wojewódzkiego Sądu Administracyjnego w Warszawie z dnia 20 czerwca 2018 r., sygn. akt V SA/Wa 459/18)*, „Zeszyty Naukowe Sądownictwa Administracyjnego 2020”, no. 3, p. 77-83.

<sup>10</sup> See e.g. Supreme Administrative Court, judgment of 11 September 2018, No. I FSK 158/18 (judgment of the Constitutional Tribunal issued in unlawful personal composition may serve as a basis for reopening of proceedings before administrative courts); Supreme Court, decision of 28 March 2019, No. III KO 154/18 (“Therefore, irrespective of the reservations that arise with regard to the manner in which the Tribunal proceeds in the present case, including the composition of the adjudicating panel [...] it should be noted that pursuant to Art. 190 paragraph. 1 of the Constitution, the judgments of the Tribunal are generally binding and final.”).

<sup>11</sup> D. Szumiło-Kulczycka, K. Kozub-Ciembroniewicz, *Konsekwencje uchybień w obsadzie TK (uwagi na tle orzeczenia w sprawie K 1/20)*, „Państwo i Prawo” 2021, no. 8, p. 81-90.

the way to future manipulations of panels in other cases. As it is easy to imagine, in the future this may lead to the full dependence of the tribunal's verdicts on the political demand".<sup>12</sup> Also R. Piotrowski argued that the proceedings before the CT were invalid and its judgment must be considered non-existent. The author noted that the mere lack of procedure allowing for verification of judgments of the CT does not mean that violations of law must be ignored: "lack of body and procedure for the establishment of unlawfulness does not mean that it becomes lawfulness"<sup>13</sup>. Multiple violations of law in the proceedings before the CT were noted also, among others, by A. Rakowska-Trela.<sup>14</sup>

### III. ACCESS TO ABORTION IN POLAND – RESULTS OF THE HFHR'S SURVEY

10. The HFHR would like to present the main results of a survey about access to abortion in Poland which was conducted in November and December 2020 and January 2021<sup>15</sup>. The data were collected in the period between the CT delivered the judgment of 22 October 2020 and the mentioned judgment came into force. The HFHR obtained information on the possibility of abortion being performed for embryopathological reasons from 103 hospitals operating gynaecological and obstetric departments from all over Poland. Questions were sent to a total of 130 hospitals. The primary objective of the inquiry was to determine whether hospitals comply with the unpublished judgment of the CT of 22 October 2020, but the collected information allows for more general conclusions on access abortion.

#### **Key results**

11. The analysis of the collected data shows that:

- 56% of the hospitals declared that abortion procedures could be carried out for embryopathological reasons.
- 38% of the hospitals indicated that such procedures could not be performed.
- 6% of institutions provided unclear and evasive answers, despite requests for clarification.

12. When conducting the survey, the Foundation did not ask the hospitals to justify negative answers, if any, but some hospitals voluntarily and independently listed reasons why they couldn't perform abortions. Among the 39 hospitals that responded negatively:

- 7 hospitals revealed that all their doctors (or all doctors of their gynaecology departments) had signed the conscience clause and refuse to perform abortions.
- 7 hospitals stated that they were designated to perform tasks related to the treatment of COVID-19 patients.
- 7 hospitals referred to various organisational and procedural reasons that, in their opinion, prevented them from performing abortions.
- 4 hospitals explicitly indicated that the delivery of the Constitutional Tribunal judgment was the reason for their inability to perform abortions for embryopathological reasons.

13. What is more, five hospitals declared that abortion procedures could be carried out in them, but at the same time made various reservations in this regard. Three hospitals indicated that they were generally capable of carrying out abortions but noted that the procedure would not be performed by doctors who invoke the conscience clause. A hospital from the Mazowieckie

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<sup>12</sup> Ibid., p. 97-98.

<sup>13</sup> R. Piotrowski, *Nowa regulacja przerywania ciąży w świetle Konstytucji*, „Państwo i Prawo” 2021, no. 8, p. 77.

<sup>14</sup> A. Rakowska-Trela, *Wyrok czy „niewyrok”. Glosa do wyroku Trybunału Konstytucyjnego z 22.10.2020 r., K 1/20, dotyczącego możliwości przerywania ciąży*, „Przegląd Sądowy” 2021, no. 6, p. 106-118.

<sup>15</sup> Detailed results of the survey were discussed in report: *Dostępność aborcji w Polsce. Raport z badań przeprowadzonych po tzw. wyroku TK*, Helsinki Foundation for Human Rights, available at: <https://www.hfhr.pl/dostepnosc-aborcji-embriopatologicznej-w-polsce-raport-z-badan-przeprowadzonych-po-tzw-wyroku-tk/>.

Province emphasised that this possibility exists “procedurally, under the contract with the National Health Fund”. A hospital from the Dolnośląskie Province emphasised that most of its staff did not sign the conscience clause, so the institution was obliged to provide abortion procedures. However, these procedures were only available in cases with an extremely poor fetal viability prognosis, and pregnant women were provided information about the possibility of perinatal hospice care. In situations where the slightest doubt arises, patients were informed of the need for an additional consultation at a (more specialised) reference centre.

14. Consequently, it must be concluded that only slightly over 50% of the hospitals surveyed by the Foundation have clearly declared their willingness to perform abortion procedures. Nevertheless, it should be recalled that these answers showed merely the theoretical willingness of these hospitals to carry out abortions, These results should be compared with the data collected by the Federation for Women and Family Planning, which show that in 2017 abortions were carried out in 45 facilities, which constitutes 9% of all 478 facilities which signed contracts with the National Health Fund for gynaecological and obstetrics hospitalization services<sup>16</sup>.

### **Hospitals that have indicated procedural and organisational obstacles**

15. The data collected by the HFHR show that women experience difficulties in accessing abortion procedures. This is primarily due to a doctor (or all doctors in a given facility) invoking the conscience clause. Also women may face different procedural obstacles in hospitals which have no basis in law and are misleading as to the scope of the medical services provided by those hospitals. Such obstacles include, in particular, making the possibility of carrying out an abortion for embryopathological reasons dependent on the level of reference (specialisation) of a given hospital. Such circumstances were invoked by 5 hospitals, each of whom stated that it was a hospital with a low level of reference (specialisation) and that such procedures should only be performed in specialist hospitals.

16. The review of data revealed that the Provincial Consultant in Obstetrics and Gynaecology for the Pomorskie Province gave verbal recommendations to hospitals to redirect patients eligible for abortion for embryopathological reasons to hospitals with the highest level of reference (specialisation). In the consultant’s opinion, this practice ensures the most effective protection of the patients’ interests.<sup>17</sup> It should be recognised that the recommendations issued by the provincial consultant have led to the situation in which only one of the hospitals in the Pomorskie Province surveyed by the HFHR declared the capacity to carry out abortions. It should be noted at this point that there were no binding legal regulations that would require that patients wishing to have an abortion for embryopathological reasons had to be referred to specialist hospitals. Further, the abortion procedure may be performed in any hospital operating an obstetrics and gynaecology department. Moreover, one hospital from the Łódzkie Province noted that the absence of its capacity to perform abortion procedures resulted from a decision of the local Provincial Consultant in Obstetrics and Gynaecology, while the Provincial Consultant denied making any decisions in this regard<sup>18</sup>.

17. Also, a hospital from the Wielkopolskie Province declared that the medical services encompassing abortion for embryopathological reasons were not covered by the contract for the provision of medical services concluded by the hospital with the National Health Fund although, according to the hospital’s website, it operates an obstetrics and gynaecology department. It should be noted that abortion belonged to the group of “guaranteed services”

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<sup>16</sup> Federation for Women and Family Planning, *Przemoc instytucjonalna w Polsce. O systemowych naruszeniach praw reprodukcyjnych*, p. 23, access: [https://federa.org.pl/wp-content/uploads/2019/12/Przemoc\\_instytucjonalna.pdf](https://federa.org.pl/wp-content/uploads/2019/12/Przemoc_instytucjonalna.pdf).

<sup>17</sup> An e-mail from Prof. K. Preiss MD PhD, Provincial Consultant in Obstetrics and Gynaecology for the Pomorskie Province, dated 22 December 2020, sent in response to the HFHR’s letter.

<sup>18</sup> Letter from the Provincial Consultant in Obstetrics and Gynaecology for the Łódzkie Province dated 23.12.2020.

and any medical facility whose agreement with the NHF covered hospital treatments included in the category of “obstetrics and gynaecology in-patient services” (*położnictwo i ginekologia – hospitalizacja*) and “oncological gynaecology in-patient services” (*ginekologia onkologiczna – hospitalizacja*) was obliged to provide these services and they couldn’t be excluded from the scope of the agreement<sup>19</sup>.

### **Hospitals that treat COVID-19 patients**

18. The analysis of the above data shows that the COVID-19 pandemic is an additional factor that reduced access to abortion. According to the information collected, some hospitals have ceased their normal operations upon having been designated to treat exclusively COVID-19 patients.

19. Notably, a hospital from the Podkarpackie Province surveyed by the HFHR explained that its obstetrics and gynaecology department admitted only patients in labour or need of an emergency caesarean section. Another hospital located in the Podlaskie Province pointed out that its obstetrics and gynaecology department has been designated to treat pregnant women infected with SARS-COV-2 which means that abortion procedures (along with other types of elective surgeries) were not performed. What is particularly worrying is that none of the hospitals treating patients with COVID-19 declared its capacity to carry out abortions on women diagnosed with a coronavirus infection.

20. Likewise, it is not possible to draw the simple conclusion that, were it not for the coronavirus pandemic, the hospitals in question would have declared themselves ready to carry out abortions. The above is indicated by a response from a hospital located in the Małopolskie Province, which stated that apart from the fact that the hospital was at the time treating exclusively COVID-19 patients, it generally did not perform abortions.

### **Hospitals that have applied the unpublished judgment of the Constitutional Tribunal**

21. According to the data collected by the HFHR, three hospitals<sup>20</sup> declared that they were unable to perform abortions, whereas one hospital reported that all its doctors invoked the conscience clause following announcement Constitutional Tribunal’s judgment but before its publication in the Journal of Laws.<sup>21</sup> One should note that 3 of the above-mentioned hospitals ultimately changed their stance<sup>22</sup> after the Foundation intervened<sup>23</sup> and publicised the problem. Interestingly, among these hospitals was the one which declared that all its doctors invoked the conscience clause in connection with the judgment of the Constitutional Tribunal<sup>24</sup>. However, there has been no information about any change in the position of the hospital in Łódź which declared the suspension of performance of abortion procedures due to the unclear legal situation and was refereeing the patients to Provincial Consultant in Obstetrics and Gynaecology. Incidentally, according to media reports, other hospitals, including a Poznań<sup>25</sup>

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<sup>19</sup> Letter from the National Health Fund dated 22.12.2020, ref. DSOZ-DRSJGP.0123.48.2020, 2020.210749.CPKO.

<sup>20</sup> The Nikolai Pirogov Provincial Specialist Hospital in Łódź, letter of 1.12.2020, ref. D-8020-114/2020; Municipal Consolidated Hospital in Olsztyn, letter of 20.11.2020, ref. DO.011.6.2020.SG; Independent Public Healthcare Centre in Świdnik, letter of 19.11.2020, ref. SPZOZ/ON/0710-161/20.

<sup>21</sup> The Władysław Biegański District Hospital in Iława, letter of 12.11.2020, ref. P.Sz/DO/5171/2020.

<sup>22</sup> Letter from the Municipal Consolidated Hospital in Olsztyn dated 4.12.2020, ref. DO.011.6.2.2020.SG; Letter from the Independent Public Healthcare Centre in Świdnik dated 8.12.2020, ref. SPZOZ/ON/0710-187/2020.

<sup>23</sup> The HFHR’s interventions available at: <https://www.hfhr.pl/szpital-stosuja-tzw-wyrok-tk-dotyczacy-aborcji-chociaz-nie-zostal-opublikowany-interwencja-hfpc/>.

<sup>24</sup> Letter from the Władysław Biegański District Hospital in Iława dated 14.12.2020, ref. P.Sz./DO/6026/2020.

<sup>25</sup> <https://poznan.wyborcza.pl/poznan/7,36001,26479875,po-wyroku-tk-poznanski-szpital-przy-polnej-wstrzymal-aborcje.html> (access 19.01.2021).

and Warsaw-based <sup>26</sup> facility, also suspended access to termination of pregnancy for embryopathological reasons before the CT judgment entered into force.

### **Geographical differences in the availability of abortions in Poland**

22. The data collected by the Foundation also show geographical differences in access to abortion procedures across Poland. There are regions where access to abortion for embryopathological reasons is particularly difficult.

23. In the Podkarpackie Province (with the population of 2.1 million), only one hospital declared the possibility of carrying out abortion procedures as services contracted by the NHF but noted that a doctor can invoke the conscience clause. Other surveyed hospitals located in that region ruled out the possibility of abortion. A similar state of affairs has been revealed in the Pomorskie Province (population: 2.3 million), where only one hospital declared the possibility of carrying out abortion procedures. As already mentioned, this is probably related to the guidelines formulated verbally by the Provincial Consultant in Obstetrics and Gynaecology who directed that patients diagnosed with fetal defects should be referred to centres with the highest level of specialisation.

24. Readiness to carry out abortion procedures was declared by one out of the three responding hospitals from the Lubuskie Province (1 million inhabitants) and one out of the four responding hospitals from the Opolskie Province (nearly 1 million inhabitants). In Podlaskie Province (almost 1.2 million inhabitants), every second hospital excluded the carrying out of abortions (6 hospitals responded). Abortions were excluded in 3 out of the 7 responding hospitals located in each of the following provinces: Wielkopolskie Province (3.5 million inhabitants), Lubelskie Province (2.1 million inhabitants) and Małopolskie Province (3.4 million inhabitants). In the remaining provinces, the vast majority of hospitals responded positively to the HFHR's inquiry.

### **IV. PROCEDURE FOR OBJECTING TO A DOCTOR'S OPINION OR CERTIFICATE**

25. In 2008 the procedure for objecting to an opinion or decision of a doctor was introduced to the Polish law. The procedure was adopted in the Act of 6 November 2008 on Patients' Rights and the Commissioner for Patients' Rights<sup>27</sup> and is related to implementation the ECtHR judgment in case *Tysi c v. Poland*. However the procedure has a universal character and its application is not necessarily limited to the area of reproductive rights. An objection to an opinion or certificate issued by a doctor or a dentist may be lodged with a Medical Commission with the Commissioner for Patients' Rights, if an opinion or a certificate impacts the rights or obligations of a patient under the law. The time limit for lodging the objection is 30 days from the date of issue of the opinion or a certificate. In HFHR's opinion, the procedure for objecting to a doctor's opinion or certificate, does not constitute an adequate procedural guarantee for women to use in situations when doctors refuse to perform a lawful abortion.

26. The objection procedure is excessively formalised. In particular, in rationales to their objection, patients are required to indicate particular legal provisions which set forth the patient's rights and duties affected by a given doctor's opinion or certificate. A copy of the opinion or certificate should be attached to the objection. At the same time, the procedure does not foresee the participation of a legal representative, in particular a professional counsel. A review of statistics concerning objections raised by patients shows that only a small part meet the formal requirements and are considered by the Medical Board by the Commissioner for Patient's Rights. In 2020, the Commissioner received 29 objections but only 12 met the formal

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<sup>26</sup> <https://www.tokfm.pl/Tokfm/7,171710,26430608,szpital-bielanski-nie-bedzie-zabiegow-aborcji-w-zwiazku-z-ciezkimi.html> (access 19.01.2021).

<sup>27</sup> Journal of Laws of 2020, position 849 with subsequent changes.

requirements.<sup>28</sup> In 2019, 18 out of 70 submitted objections were considered on the merits.<sup>29</sup> In 2018, 5 out of 31 objections were analysed by the Medical Board.<sup>30</sup> In 2017, the Commissioner received 15 objections, of which only one fulfilled the formal criteria.<sup>31</sup> Also in 2016, only one of 24 registered objections complied with criteria given by the law.<sup>32</sup> Similarly in 2015, only one objection was considered as to the substance.<sup>33</sup> In 2014, five out of 34 submitted objections were considered on the merits, while in 2013 only two out of 28 submitted objections met the formal requirements.<sup>34</sup>

27. What is more, the current legal framework concerning the objection procedure does not specify whether it is possible to raise an objection when a doctor refuses to issue an opinion or a certificate, or does it only orally. A possibility of raising an objection in such circumstances may have a particular importance in the context of applying for a lawful abortion. In such situations, doctors can refuse to issue a negative decision in writing or may delay issuance of such a decision, which can effectively undermine a woman's right to terminate pregnancy within a legally specified period. There are some doubts if the right to object applies also to refusals to refer a person for medical examination, including prenatal testing. This raised concerns which were expressed, for example, by the Commissioner for Patients' Rights. The Commissioner pointed to the need for a clear regulation which would foresee that the objection procedure applies to refusals to refer a person for medical testing<sup>35</sup>. Results of such testing can play a crucial role in making an assessment as to whether the state of the foetus justifies termination of pregnancy and, as a consequence, can be indispensable for a woman to make a decision on continuing her pregnancy.

28. In cases concerning abortion, time plays a crucial role. For this reason, one should negatively assess the 30-day deadline set up in law for consideration of an objection by the Medical Board. There is no regulation which would guarantee that the Medical Board will issue a decision before the end of the period when it is possible to obtain a lawful abortion.

29. For these reasons, in HFHR's assessment the procedure of objecting against a doctor's certificate or opinion does not secure the respect for the right to a legal termination of pregnancy.

## **V. ACCESS TO LAWFUL ABORTION, IN PARTICULAR IN A SITUATION WHERE A DOCTOR INVOKES THE CONSCIENCE CLAUSE**

### **The objection procedure**

30. In HFHR's assessment the objection procedure does not safeguard access to abortion in a situation where the conscience clause is invoked by a doctor. Such conclusion is evidenced by

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<sup>28</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2020 and 31 December 2020, p. 36, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2020-rok>.

<sup>29</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2019 and 31 December 2019, p. 34, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2019-rok>.

<sup>30</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2018 and 31 December 2018, p. 39, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2018-rok>.

<sup>31</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2017 and 31 December 2017, p. 40, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2017-rok>.

<sup>32</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2016 and 31 December 2016, p. 46, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2016-rok>.

<sup>33</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2015 and 31 December 2015, p. 43, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2015-rok>.

<sup>34</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2014 and 31 December 2014, p. 38, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2014-rok>.

<sup>35</sup> Report on the respect for patient's rights in the territory of Poland. Covers the period between 1 January 2015 and 31 December 2015, p. 43, available at: <https://www.gov.pl/web/rpp/sprawozdanie-za-2015-rok>; <https://archiwum.rpp.gov.pl/prawo-do-zgloszenia-sprzeciwu>.



the data obtained by the HFHR from the Commissioner for Patients' Rights.<sup>36</sup> In this context it is worth to note the case concerning an objection lodged in 2019 by a woman who was not admitted to a hospital gynaecology department due to the lack of possibility to perform an abortion. The woman was eligible for lawful abortion under domestic law, which permits the termination of pregnancy in cases of a high probability of foetal defects or an incurable medical condition endangering the foetus' life (in this case: Edwards' syndrome). However, all doctors in the hospital, including the one who issued the negative decision, refused to terminate the pregnancy by invoking the conscience clause. Ultimately, the Medical Review Board at the Commissioner for Patients' Rights found the objection unjustified. The Board underlined that under Polish law a doctor has the right to refrain from performing a procedure on the basis of the conscience clause.

31. Additionally, the objection procedure in its current form does not guarantee that a woman may receive reliable, exhaustive and objective information on whether she has the right to have a lawful abortion performed. The objection procedure further fails to ensure that a woman will receive information on where the abortion procedure can be performed in a situation where the originally approached doctor invokes the conscience clause.

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32. Since 2015 there is no provision of Polish law that would oblige a doctor or other medical practitioner to inform the patient about an effective way of obtaining a healthcare service (here, undergoing abortion) from a different healthcare provider (medical institution) in the case where the doctor or other practitioner refuses to perform the said service by invoking the conscience clause. This state of affairs is a consequence of the judgment of the CT delivered on 7 October 2015<sup>37</sup>, in which the CT found the provisions introducing such an obligation unconstitutional. According to the CT, if a doctor invoking the conscience clause was legally obliged to refer the patient to a different medical facility, such an obligation would disproportionately interfere with the doctor's freedom of conscience protected under Article 53 (1) of the Constitution. The current legal situation, created after the relevant provisions lost their legal force in consequence of the CT's decision, leads to a significant disparity in the protection of doctors' freedom of conscience and patients' right to obtain medical services.

## **VI. VIEWS OF INTERNATIONAL BODIES**

33. Also several international bodies expressed serious concerns about access to lawful abortion in Poland.

34. The Committee against Torture (CAT) in Concluding observations on the combined fifth and sixth (2013)<sup>38</sup> and seventh (2019)<sup>39</sup> periodic reports of Poland underlined the necessity of introducing in Polish law an effective mechanism ensuring access to safe and legal abortion, especially in cases of conscientious objection. In 2019 the CAT stated that: "there is no effective regulation of conscience-based refusals by doctors to perform abortions, with no guidelines on how to access legal abortion services and no information on the lack of obligation to seek additional medical opinions from a specialist, a joint consultation or confirmation by a ward

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<sup>36</sup> Letter of the Commissioner for Patients' Rights to the HFHR of 17 January 2020, ref. RzPP-DPR-WPL.0133.1.2020.

<sup>37</sup> Case No. K 12/14.

<sup>38</sup> Committee Against Torture, Concluding observations on the combined fifth and sixth periodic reports of Poland adopted by the Committee at its fifty-first session (28 October–22 November 2013), ref. CAT/C/POL/CO/5-6, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fPOL%2fCO%2f5-6&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fPOL%2fCO%2f5-6&Lang=en).

<sup>39</sup> Committee Against Torture, Concluding observations on the seventh periodic report of Poland adopted by the Committee at its sixty-seventh session (22 July–9 August 2019). Ref. CAT/C/POL/CO/7, available at: [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fPOL%2fCO%2f7&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fPOL%2fCO%2f7&Lang=en).

administrator in cases where denial of procedure will result in physical and mental suffering so severe in pain and intensity as to amount to torture (...).<sup>40</sup>

35. Similar comments were included in Human Rights Committee's (HRC) Concluding observations on the seventh periodic report of Poland (2016).<sup>41</sup> The HRC was concerned that: "women face significant procedural and practical obstacles in accessing safe legal abortion, which prompts many of them to travel long distances or abroad to access safe legal abortion".<sup>42</sup>

36. It is worth to underline that the Poland is under the pending enhanced procedure of supervision of the execution of ECtHR's judgments in cases *Tysic v. Poland*, *R.R. v. Poland* and *P. and S. v. Poland*. Since 2011, the Committee of Ministers of Council of Europe (CoM) regularly examines whether the authorities adopt necessary reforms in order to implement standards established in mentioned cases. In 2019 the CoM clearly noted the lack of positive progress since 2014 in introducing legal framework enabling women effectively exercise the right to lawful abortion.<sup>43</sup> On 11 March 2021, the CoM issued an interim resolution in which it strongly urged Polish authorities to ensure effective access to lawful abortion and pre-natal examination.<sup>44</sup> What is important, in communication from the Commissioner for Human Rights of the Council of Europe presented to the CoM in 2020 was underlined that: "the situation in the area of sexual and reproductive health and rights in Poland has not only failed to improve, but has in fact worsened in recent years. She considers that much remains to be done to ensure women and girls' access to sexual and reproductive health and rights in Poland as an essential component of guaranteeing women's human rights and advancing gender equality".<sup>45</sup>

## VII. CONCLUSIONS

37. Bearing in mind the arguments presented, we submit the following conclusions:

- in the cases *K.B. and others v. Poland*, *A.L.-B. and others v. Poland*, *K.C. and others v. Poland*, the ECtHR has the opportunity to develop standards for the protection of rights of women seeking lawful abortion;
- the judgment of the CT of 22 October 2020 strictly narrowed the possibilities in which termination the pregnancy is in accordance with Polish law. Mentioned ruling affected the availability of abortion in Poland even before its formal publication in the Journal of Laws. Almost immediately after its announcement, serious doubts about its legal force occurred. According to many lawyers, the said ruling was issued with such a serious violations of law that it may be considered as "non-existent judgment" which is devoid of any legal effects;
- in Poland there is no effective and expedient procedure that would ensure that women can exercise their right to have an abortion which is allowed by domestic law. In particular, the existing procedure for objecting to an opinion or decision of a doctor is excessively formalistic and does not guarantee that a pregnancy can be terminated within the legal time-limit.

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<sup>40</sup> Ibidem.

<sup>41</sup> Human Rights Committee, Concluding observations on the seventh periodic report of Poland adopted by the Committee at its 118th session (17 October-4 November 2016), ref. CCPR/C/POL/CO/7, [https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fPOL%2fCO%2f7&Lang=en).

<sup>42</sup> Ibidem.

<sup>43</sup> Decision of the Committee of Ministers of 14 March 2019 concerning the execution of the ECtHR judgment of *Tysic* and *R.R. v. Poland*, ref. CM/Del/Dec(2019)1340/H46-31, available at: <http://hudoc.exec.coe.int/eng?i=004-20592>.

<sup>44</sup> The Interim Resolution of the Committee of Ministers, ref. CM/ResDH(2021)44, is available at [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=0900001680a1bdc4](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a1bdc4).

<sup>45</sup> Communication from the Council of Europe Commissioner for Human Rights (27/01/2020) in the cases of *R.R.*, *Tysic* and *P. and S. v. Poland*, available at: [http://hudoc.exec.coe.int/eng?i=DH-DD\(2020\)101-revE](http://hudoc.exec.coe.int/eng?i=DH-DD(2020)101-revE). Commissioner's observations were based i.a. on the report by Dunja Mijatovic, Commissioner for Human Rights of the Council of Europe, following her visit to Poland from 11 to 15 March 2019, ref. CommDH(2019)17, available at: <https://rm.coe.int/report-on-the-visit-to-poland-from-11-to-15-march-2019-by-dunja-mijato/168094d848>.

Additionally, medical institutions are currently under no direct legal obligation to inform a woman that abortion can be performed by a different doctor in a situation when a medical practitioner invokes the conscience clause as the basis for the refusal of an abortion;

- the obstacles faced by women who want to terminate a pregnancy in accordance with domestic law should be treated as a systemic problem in Poland;

- the decision in the present cases will be important not merely to the Applicant, but also for other women seeking lawful abortion.