



P. AND S. V. POLAND:

Poland's Obligations to Provide Legal Abortion Services to Adolescents

In 2012, the European Court of Human Rights issued *P. and S. v. Poland*, a landmark decision that slams Poland's flawed abortion policies and sets groundbreaking standards for the rights of adolescents to reproductive health services. The judgment sheds light on the country's abysmal reproductive health policies and calls for urgent reform. Poland has one of the most restrictive abortion laws in Europe.¹ Terminations are only permitted in cases of rape, incest, serious fetal abnormalities, or when the health or life of the pregnant woman is in danger. In practice, women are often unable to obtain even the abortions to which they are legally entitled. The legal framework surrounding abortion is so unclear that it functions as a shield to doctors who do not want to perform abortions based on their conscience, and stifles the willingness of others to provide any care that might possibly have an effect on the fetus for fear of repercussions.² In the last ten years, international human rights bodies have repeatedly impressed upon Poland that in practice its abortion policies run contrary to human rights law, yet Poland has been unwilling to heed the calls for urgent reform.³ The European Court of Human Rights (the Court) has previously recognized the dangers of Poland's exceedingly restrictive abortion policies and the human rights violations that Poland consequently subjects women to. In *Tysic v. Poland (2007)* and *R.R. v. Poland (2011)* the Court found that Poland's failure to ensure practical and enforceable access to legal reproductive health services, including abortion and genetic prenatal testing, amounted to violations of the state's positive obligations under Article 8, right to respect for private and family life, of the European Convention on Human Rights (the Convention).⁴ It also, in *R.R. v.*

Why this case is important

Poland's abortion law and practice, which fail to guarantee access to legal abortion, perpetuates gender discrimination because they prevent women from exercising their human rights to life, health, and dignity. Building on the landmark cases against Poland's restrictive abortion practice, *Tysic v. Poland* and *R.R. v. Poland*, the *P. and S.* judgment further clarifies the Court's stance that reproductive health services that are legal must also be accessible. The case also serves as a call to action for the Polish government to clarify and enforce important standards on conscientious objection. It elaborates on the vulnerability of young rape victims and is the first European case that emphasizes the right of adolescents to personal autonomy in matters of reproductive choice. The case thus has the potential to support the abolishment of parental consent laws in the context of health care access. Ensuring that reproductive health care services, including abortion, are available to women and adolescents is necessary to protect their health and lives, and to protect their rights to equality, autonomy and dignity. The *P. and S.* judgment highlights clearly the continuing human rights violations that scores of women in Poland face by the repeated denial of necessary and legal reproductive health care. It makes a strong case for the urgent need to reform the Polish abortion law and practice, and sets new standards on the reproductive rights of young people with bearing far beyond the borders of Poland.

Poland, concluded that the deliberate delay in providing legal genetic testing, in combination with the extreme vulnerability of the woman seeking the services, constituted a violation of the her rights under Article 3, the right not to be subjected to inhuman and degrading treatment.⁵

Case History

This case centers on P, a fourteen-year-old girl who in 2008 was raped by a classmate and became pregnant as a result. P obtained a certificate from the prosecutor confirming that her pregnancy resulted from unlawful sexual intercourse, and thereby she had a right to legal abortion under Polish law. However, her access to abortion was severely obstructed. Supported by her mother, S, P visited three different hospitals, receiving deliberately distorted information about the requirements for obtaining an abortion. One of the hospitals disclosed P's personal and medical data to the press and the general public. She and her mother were manipulated and harassed by doctors, anti-abortion groups, and representatives of the Catholic Church. Doctors invoked conscientious objection without referring P to another provider or hospital. Hospital staff, a priest and the police attempted to manipulate the relationship between P and her mother, asserting that the mother tried to coerce P into having an abortion—a process which resulted in state authorities removing P from her mother's custody and detaining her in a juvenile center. Weeks after the rape occurred, the Ministry of Health intervened and P was able to get an abortion in a hospital 500 kilometers away from her home. Although the abortion was legal, the hospital refused to register P as a patient; she was given anesthesia without warning; and was not given information about the procedure or any post-abortion care. P was also told to leave the hospital immediately after the procedure. Unable to gain recognition of wrongdoing and receive an effective remedy in the Polish legal system, P and S, with the support from the Reproductive Rights Legal Network of the Polish Federation for Women and Family Planning and in cooperation with the Center for Reproductive Rights, filed a complaint before the European Court of Human Rights in May 2009.

Important Precedents

The Court decided the case on October 30, 2012, finding that there had been violations of Article 3 (right to be free from inhuman and degrading treatment), Article 5 (right to liberty) and Article 8 (right to respect for private and family life) in regard to P, and Article 8 in regard to S.⁶ The Court's decision sheds light on Poland's failure to implement the legal right to abortion and its failure to protect women, including adolescents,

in need of reproductive health services. Most importantly, it illustrates the continued urgency and need for abortion law and policy reform in Poland.

The Court made a number of important findings:

Women legally entitled to abortion must be able to exercise their right and have effective access to the procedure. The Court built on its reasoning in *Tysic* and *R.R.*, reaffirming that once a State has adopted statutory regulations that allow abortion in some situations, it must also make access available in practice. The Court reasoned that “effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy.”⁷ The decision also emphasized that the time factor is of critical importance in a woman's decision to terminate a pregnancy. Finding a violation of P's right to private life under Article 8 of the Convention, the Court noted that the uncertainty faced by P reflected the striking discrepancy between the right to lawful abortion and the reality of its implementation. It reiterated that the notion of private life within the meaning of Article 8 applies both to decisions to become and not to become a parent.

States must respect adolescents' personal autonomy in the sphere of reproductive health. For the first time ever, the Court addressed the special vulnerability of an adolescent in need of abortion services and confirmed young people's autonomy when it comes to their reproductive health. The Court specifically noted that during P's entire ordeal, there was no proper regard for her “vulnerability and young age and her own views and feelings.”⁸ Even though in the case at hand there was no conflict between the teenager and her mother in regard to the decision to terminate the pregnancy, the Court stated that “legal guardianship cannot be considered to automatically confer on the parents of a minor the right to take decisions concerning the minor's reproductive choices, because proper regard must be had to the minor's personal autonomy in this sphere.”⁹ The decision thereby makes a strong case for sexual and reproductive self-determination of adolescents.

Abuse and humiliation of adolescents within the reproductive health sector amounts to inhuman and degrading treatment. This conclusion built on the decision in *R.R.*, where the Court for the first time found that an abortion-related violation could amount to inhuman and degrading treatment under Article 3. In *P. and S.*, the Court concluded that the pressure and harassment P had to endure from hospital staff, representatives of the Church, the police, and the judiciary, amounted to inhuman or

degrading treatment in violation of Article 3. It determined that it was of “cardinal importance”¹⁰ that P at the time was only fourteen years old and yet despite her young age and special vulnerability due to the sexual abuse, she was subjected to pressure, coercion and manipulation when attempting to access a legal abortion. Notably, the Court determined that the authorities had treated P in a “deplorable manner” and had shown a profound lack of understanding of P’s predicament.¹¹ It stated that the authorities “not only failed to provide protection to her, having regard to her young age and vulnerability,” but further compounded the situation in various ways—which suggests that states have elevated obligations toward adolescents in particular situations of vulnerability.¹²

States must adequately regulate the practice of conscientious objection to ensure the availability of legal abortion services and information. The Court highlighted that health professionals’ denial of lawful reproductive health services based on their moral and religious objections plays a key role in the continued violations of reproductive rights in Poland. It reaffirmed its statement from *R.R.*, that States are obliged to organize their health systems in a way that reconciles the freedom of conscience of health professionals with patients’ rights to lawful services. The Court went even further in *P. and S.* and noted that Polish law in principle provides for a mechanism “allowing the right to conscientious objection to be reconciled with the patient’s interests, by 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.”¹³ In the specifics of P’s case, the Court found that those requirements had not been complied with and that the medical staff had not considered themselves obliged to carry out the legal services requested by the applicants. Rather, P and her mother had been given misleading and contradictory information and had not received objective medical counseling. No set procedure had been available to them under which they could have had their views heard. Accordingly, by finding that health professionals failed to abide by the existing provisions on conscientious objection, the Court essentially laid out minimum safeguards to ensure patients’ access to legal services: at the very least, refusals must be expressed in writing, included in the patient’s file, and the objector must make a referral to a non-objecting provider.

States must protect personal information in the health care field and patients’ privacy regarding their sexual life. The Court found that the disclosure of P’s personal data constituted interference with her right to respect for private life under Article 8. Even

though the issue of availability of legal abortion in Poland was the subject of a heated public debate, the Court noted, this did not absolve the medical staff from their professional obligations regarding medical confidentiality. It also, importantly, noted that P “was entitled to respect for her privacy regarding her sexual life, whatever concerns or interest her predicament generated in the local community.”¹⁴

States cannot deprive adolescents of their liberty unless all less drastic measures have been considered. The Court held that the essential purpose of P’s placement in the juvenile shelter had been to separate her from her parents and to prevent the abortion. In light of that, her placement could not be justified as detention of a minor for the purpose of educational supervision within the meaning of Article 5, section 1 (d). If the authorities had been concerned that an abortion would be carried out against P’s will, the courts should have considered less drastic measures than locking her up. They had failed to do so which, the Court found, constituted a violation of Article 5.

Relevant Human Rights Provisions

The European Convention for the Protection of Human Rights and Fundamental Freedoms recognizes the following human rights:

Article 3. Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5. Right to liberty and security

(1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

Article 8. Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Remedies

Individual Measures:

The Court held that Poland was to pay P EUR 30,000 and her mother EUR 15,000 in respect of non-pecuniary damage. It ordered the government to pay the applicants EUR 16,000 in respect of costs and expenses.

General Measures:

Poland is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion and ensure that such procedures respect the critical importance of time involved in the decision.

Poland must organize its health system in a way that conscientious objection of health professionals does not impede access to legal health services. Health providers who object must make their refusals in writing and are obliged to refer their patients to other, non-objecting, providers.

Poland must give proper regard to adolescents' personal autonomy and decision-making around reproductive choices and must protect their personal information in the health care field.

Endnotes

- ¹ See Law of Jan. 7, 1993 on Family Planning, Human Embryo Protection, and Conditions of Legal Pregnancy Termination, *amended as of Dec. 23, 1997*, art. 4a. 1 (1-3) (Pol.).
- ² See, *i.e.*, 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 physical and mental health, Anand Grover – Addendum – Mission to Poland*, paras. 38, 48, 50, U.N. Doc. A/HRC/14/20/Add.3 (May 20, 2010) [hereinafter SRRH, *Mission to Poland* (2010)] (The Rapporteur “note[d] with regret that women in Poland face numerous obstacles in accessing abortion...even when they are legally entitled to [it],” and “non-State actors, such as priests, interfere with access to legal and safe abortions.”); Council of Europe, Commissioner for Human Rights, *Memorandum to the Polish Government: Assessment of the Progress Made in Implementing the 2002 of the Council of Europe Commissioner for Human Rights*, para. 95, CommDH (2007) 13 (Jun. 20, 2007) (The Commissioner noted that “access to legal abortion for women... is frequently hindered,” and urged the “government to ensure that women falling within the categories foreseen by the law are allowed, in practice, to terminate their pregnancy without additional hindrance or reproach.”).
- ³ See Human Rights Committee, *Concluding Observations: Poland*, U.N. Doc. CCPR/C/79/Add.110 (1999); *Poland*, para. 8, U.N. Doc. CCPR/CO/82/POL (2004); *Poland*, para. 12, U.N. Doc. CCPR/C/POL/CO/6 (2010); *Committee on Elimination of All Forms of Discrimination against Women, Concluding Observations: Poland*, para. 25, U.N. Doc. C/POL/CO/6 (2007); *Committee on Economic, Social and Cultural Rights, Concluding Observations: Poland*, para. 28, UN Doc. E/C.12/POL/CO/5 (2009); SRRH, *Mission to Poland* (2010), *supra* note 2, para. 24.
- ⁴ *Tysi c v. Poland*, No. 5410/03 Eur. Ct. H.R. (2007); *RR v. Poland*, No. 27617/04 Eur. Ct. H.R. (2011).
- ⁵ *RR v. Poland*, No. 27617/04, paras. 148-152.
- ⁶ *P. and S. v. Poland*, No. 57375/08 Eur. Ct. H.R. (2008).
- ⁷ *Id.* para. 111.
- ⁸ *Id.* para. 166.
- ⁹ *Id.* para. 109.
- ¹⁰ *Id.* para. 161.
- ¹¹ *Id.* para. 168.
- ¹² *Id.* para. 164.
- ¹³ *Id.* para. 107.
- ¹⁴ *Id.* para. 134.