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POLSKIE TOWARZYSTWO
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All downhill from here :

The rapid degradation of the rule of law in Poland: what it means for women's sexual and reproductive rights, and LGBT+ persons' rights

COVER PHOTO : People wearing black bands on their eyes and mouth demonstrate in Stolen Justice silent protest at the Main Square in Krakow, Poland on 21 January, 2018.
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ABBREVIATIONS

CAT U.N. Convention against Torture
CC Criminal Code
CEDAW U.N. Convention on the Elimination of Discrimination
CEDAW Committee U.N. Committee on the Elimination of Discrimination
CESCR U.N. Committee on Economic, Social and Cultural Rights
CoE Council of Europe
CJEU Court of Justice of the European Union
CRC U.N. Convention on the Rights of the Child
CRC Committee U.N. Committee on the Rights of the Child
CRPD U.N. Convention on the Rights of Persons with Disabilities
EC European Commission
ECHR European Convention on Human Rights
ECRI European Commission against Racism and Intolerance
ECSR European Committee on Social Rights
ECtHR European Court of Human Rights
EP European Parliament
ETA Equal Treatment Act
EU European Union
FWFP Federation for Women and Family Planning
GONGO government-organised non-governmental organisation
GPET Government Plenipotentiary for Equal Treatment
HFHR Helsinki Foundation for Human Rights
ICCPR International Covenant on Civil and Political Rights
ICESCR International Covenant on Economic and Social Rights
KPH (Campaign against Homophobia)
LBGT+ lesbian, bisexual, gay, and transgender persons
ODIHR Office for Democratic Institutions and Human Rights
OSCE Organisation for Security and Co-operation in Europe
PiS Law and Justice Party or *Prawo i Sprawiedliwość*
PSAL or PTPA Polish Society of Anti-discrimination Law or *Polskie Towarzystwo Prawa Antydyskryminacyjnego*
SOGIE sexual orientation, gender identity or expression
TEU Treaty on European Union
TFEU Treaty on the Function of the European Union
UPR Universal Periodic Review

GLOSSARY

FIDH advocates for the enjoyment and respect for the human rights of everyone, regardless of one's gender, gender identity, or sexual orientation, among others.

For FIDH, gender identity and sexual orientation in particular are fundamental questions, as the respect for an individual's gender identity or sexual orientation, which make the core of an individual's intimacy and sense of self, is intrinsically linked to the respect for human dignity. FIDH strongly affirms its recognition of the existence of a diversity of sexualities and genders, beyond what society usually sees as the "norm" – heterosexuality and cisgender –, and urges States to respect their international obligations when it comes to ensuring LGBT+ persons' enjoyment of their human rights, in law and in fact.¹

As such, FIDH defines **gender** as the roles, behaviours, activities and traits corresponding to a social representation that is deemed appropriate for women and men in a given society. It is to be strictly distinguished from **gender identity**, which refers to the gender a person deeply feels and experiences they belong to, and with which they identify. This gender may not be the gender which was assigned at birth. Gender identity may thus not necessarily be related to one's **gender expression**, to be understood as the way a person expresses their gender by making use of a variety of social, behavioural, or physical codes (such as clothing, body language, or tone of voice) usually attributed to a specific gender.

Questions of gender are to be distinguished from **sexual orientation**, which FIDH defines as one of the components of a person's identity, which refers to this person's physical, romantic and/or emotional attraction towards other people. FIDH views sexual orientation as not necessarily related to gender identity and sex characteristics.

Throughout the report, FIDH will thus use the acronym **LGBT +** to refer to a group of persons with a wide variety of sexual orientations, or gender identities, or gender expressions. The acronym stands for lesbian (L), gay (G), bisexual (B), transgender (T), and the countless other groups of sexual and gender minorities that would make the acronym too long for practical use (+).

FIDH also defines the following terms as:

Actual or perceived non-conforming sexual orientation, gender identity or expression: encompasses individuals who either identifies as lesbian, gay, bisexual, transgender, or any other sexual orientation and/or gender identity and/or gender expression that is not heterosexual or cisgender, and are thus considered to not "conform" to societal expectations, or who could be perceived as identifying as such regardless of whether this is actually how they identify.

Bisexuality: the fact of being able to experience emotional, affectional, and/or sexual attraction to both men and women, or of being able to have romantic and/or sexual relations with men and women.

Endocrinology: the branch of biology dealing with the endocrine glands and their secretions, and hormones of the body, especially in relation to their processes or functions.

Gay: a person who identifies as a man and is romantically, emotionally, and/or sexually attracted to men.

Gender reaffirming procedures: surgical procedures that change one's body to conform to one's gender identity. These procedures may include "top surgery" (breast augmentation or removal) and "bottom surgery" (altering genitals). Gender affirming surgery is sometimes referred to as "gender reassignment surgery" or "gender confirming surgery."²

Hate crimes (or "crimes motivated by prejudice"): they are committed against people due to their real or perceived identity or membership to a group defined by personal characteristics such as race,

1. FIDH, International Bureau resolution on the Protection of the rights of LGBTI persons and the rights of the persons advocating for them, 2014.

2. Cornell University, Transgender Terminology, <<https://hr.cornell.edu/sites/default/files/trans%20terms.pdf>> (last visited 11 July 2018).

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ethnicity, sexual orientation, gender identity, disability or social and economic status (among others). These personal characteristics are afforded heightened protection under international human rights law. These characteristics constitute the main motive that led the offender to commit a crime against the victim.

Hysterectomy: the surgical removal of the uterus. It may also involve removal of the cervix, ovaries, fallopian tubes and other surrounding structures.

Lesbian: a person who identifies as a woman and is romantically, emotionally, and/or sexually attracted to women.

Sexology: the scientific study of human sexuality, including human sexual interests, behaviours and functions.

Transgender: (sometimes shortened to “trans”) is an umbrella term used to describe a wide range of identities whose appearance and characteristics are perceived as gender atypical – including transsexual people, cross-dressers (sometimes referred to as “transvestites”), and people who identify as third gender. Transgender women identify as women but were classified as males when they were born, transgender men identify as men but were classified female when they were born, while other transgender persons don’t identify with the gender-binary at all. Some transgender persons seek surgery or take hormones to bring their body into alignment with their gender identity; others do not. The opposite of transgender is cisgender (a person whose sense of their own gender is aligned with the sex assigned at birth; for example, a person who was assigned male sex at birth and who identifies himself as a man is cisgender).³

3. Ibid.

EXECUTIVE SUMMARY



Polish Supreme Court Justice Malgorzata Gersdorf (C) attends a demonstration in support of Supreme Court judges in front of the Supreme Court in Warsaw on July 3, 2018. Poland's chief justice refused to step down, defying a controversial new law by the right-wing government which requires her and other senior judges to retire early.

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This report is the result of several months of desk-based research, combined with an international fact-finding mission conducted by the International Federation for Human Rights (FIDH) in Poland, on LGBT+ persons and women's sexual and reproductive rights in the context of the degradation of the rule of law these past three years.

FIDH was able to conduct approximately 20 interviews, all in Warsaw, of a wide range of actors: civil society organisations, members of the Polish government, members of the Parliament, the office of the Prosecutor, the office of the Polish Commissioner for Human Rights, associations of professionals – lawyers, doctors, teachers –, and national experts. The fact-finding mission took place from 19 to 24 June 2017, in Warsaw, Poland. It is based on:

- a series of discussions and interviews organised in Poland with a wide range of actors (previously described) whose work was relevant to the subject of the mission – the consequences of the degradation of the rule of law for women's sexual and reproductive rights and LGBT+ persons' rights;
- desk-based research of FIDH Western Europe Desk on the subject of the mission; and
- discussions with members of the European Commission and the European Parliament, and the Polish Society of Anti-discrimination Law.

It must be noted that the name of some of the interlocutors, notably from civil society organisations, have been concealed so as to avoid any personal backlash after the publication of this report.

The findings illustrate not only a clear lowering in the protection of the rights of LGBT+ persons and

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women's sexual and reproductive rights since 2015 when the Law and Justice Party (PiS) came into power following parliamentary elections, but also virulent attempts at backtracking on these rights.

PiS started implementing its anti-democratic agenda in 2015 through its majority in the Sejm, profoundly undermining checks and balances, such as the independence of the judiciary or the space for civil society. This degradation of the rule of law, which has triggered strong reactions from international and European human rights bodies, has been accompanied by heightened powers awarded to the Catholic Church, and worrying attacks on the rights of LGBT+ persons and on women's sexual and reproductive rights, left with no voice or safeguard to protect them. The current government has remained deaf to any international or European calls to stop the democratic backsliding and afferent human rights abuses, to the point where there exist today a clear risk of a serious breach of democracy, the rule of law, and human rights in the country.

This report focuses on the impacts this rule of law crisis has on LGBT+ persons and women's sexual and reproductive rights. While the situation of both these categories of individuals was already worrisome before PiS came into power, it has become dire since October 2015. Over the past three years, new attempts at further restricting women's already very restrictive right to abortion, expanding the scope of the conscientious objection, and refusing to implement ECtHR rulings, have heightened to the point where it is currently almost impossible for women to undergo a legal and safe abortion in the country. The increasing influence of the Catholic Church in this area, and the apparent willingness of the State to leave it under its control, through numerous anti-choice declarations and public support to stricter anti-abortion laws by officials, have been extremely damaging to women's sexual and reproductive rights. During this period, the weight given to the Catholic Church has also induced heightened intolerance towards LGBT+ persons, as appears from the national equality body (the Government Plenipotentiary for Equal Rights)'s refusal to deal with LGBT+ issues and favouring "family mainstreaming" instead, and from the numerous instances (e.g. in employment) where religion is invoked to justify discrimination on the basis of sexual orientation, gender identity, or expression. This, combined with attempts by the current government to incapacitate the Polish Commissioner for Human Rights, the lack of public officials' reactions in the face of physical attacks against several organisations advocating for LGBT+ persons' rights, and the fact that Polish law almost does not prohibit discrimination on the ground of sexual orientation, gender identity, or expression, entail LGBT+ persons' interests are not being safeguarded. Under this context, civil society organisations and opposition parties are even reluctant to introduce new laws which would expand the rights and protection afforded to LGBT+ persons, for fear this would backlash into further restrictions of these rights.

All these developments take place in a context of rapidly and drastically shrinking space for civil society critical of the current government.

Based on these findings, this report formulates several recommendations to the Polish government and other stakeholders such as the Council of Europe and the European Union. In documenting and analysing the impact the degradation of the rule of law has on the rights of LGBT+ persons and on women's sexual and reproductive rights vis-à-vis the State's international and European human rights obligations, FIDH hopes to trigger change in the current government's approach towards the protection of these rights, and in the EU's way of dealing with the situation in Poland – notably by the Council immediately triggering the Art. 7(1) TEU procedure.⁴

MAJOR RECOMMENDATIONS

To the European Union:

• To the European Union:

- Pay attention to the consequences that the degradation of the rule of law in Poland, the constitutional crisis and lack of independence of the judiciary, have on LGBT+ and reproductive rights.

• To European Union member States:

- Support in the Council action on Poland under the Article 7(1) procedure if the authorities fail to respond to the EU Commission's concerns and rule of law recommendations.

• To the Members of the European Parliament in particular:

4. For more information on Art. 7 TEU, see the Annex of this report.

-
- Organise follow-up visits in Poland on the situation of the rule of law and its consequences for LGBT+ persons and women's sexual and reproductive rights. On these occasions, secure meetings with the Polish Human Rights Commissioner and civil society organisations working on equality issues.
 - **To the European Union institutions, the European Commission and the European Parliament:**
 - Use all necessary means to ensure full compliance by Poland with its obligations under European Union law, particularly with regards to the EU's founding values of respect for democracy, the rule of law, and human rights, as enshrined in Article 2 of the Treaty on European Union (TEU). Having regard to Articles 2 and 7 TEU, engage a structured dialogue with Poland on serious violations and deterioration of human rights, with a special focus on LGBT+, reproductive rights, freedom of expression, freedom of association, and more broadly on the shrinking space for civil society; and
 - Enhance cooperation with the Council of Europe and its Venice Commission, and civil society, in monitoring observance and ensuring full compliance by Poland with such obligations.
 - **To the European Commission:**
 - Make better and more comprehensive use of infringement proceedings when Polish law is not in accordance with EU law obligations, including the Charter of Fundamental Rights of the European Union. This is notably the case for:
 - o the Law on the Protection and Assistance for Victims and Witnesses, which fails to fully implement the EU Victims' Rights Directive into national legislation by de facto excluding homophobic, biphobic, and transphobic crimes' victims from its scope and from the specific protection and support that are required for them
 - o the Law on Civil Status, which is not compliant with CJEU's ruling in Coman requiring member States to recognise same-sex marriages concluded lawfully in the EU, irrespective of whether they have opened marriage to same-sex couples in their own territory, and thus closely follow what is the interpretation of the Polish administration of Art. 18 of the Polish Constitution which provides special protection for a marriage defined as "a union of a man and a woman"
 - Find new and flexible ways to provide financial support to local NGOs and human rights defenders, overcoming the shrinking space for civil society in Poland, and ensuring civil society is enabled to pursue its work on LGBT+ and reproductive rights.
 - **To the European Agency for Fundamental Rights:**
 - Pay thorough attention to the situation of Poland when investigating and drafting the upcoming report on the shrinking space for civil society in EU member States, and to that effect, ensure Polish civil society organisations and the Polish Human Rights Commissioner are consulted.

To the Council of Europe:

- **To the Parliamentary Assembly of the Council of Europe:**
 - Publicly voice concerns regarding the rapidly deteriorating situation in Poland and formally reinstate a monitoring procedure on this member State; and
 - As an aim of the Parliamentary Assembly of the Council of Europe respectively since 1981 and 2010, fighting discrimination based on sexual orientation and gender identity should remain one of the top priorities of the Parliamentary Assembly. As such, the Parliamentary Assembly should ensure the recommendations issued in 2010 be implemented in all member States of the Council of Europe; and
 - Issue written declarations on the situation of LGBT+ and sexual and reproductive rights in Poland, especially the way they have been impacted by the degradation of the rule of law and the weakening of checks and balances in the country since 2015; and
 - Analyse the policies and good practices to define and promote the necessary measures to ensure access to reproductive health and rights for all women, irrespective of their income, education or social status, in all member States of the Council of Europe.
- **To the General Rapporteur on the rights of LGBTI people:**
 - Urge politicians and decision-makers to promote an inclusive society in which all LGBT+ persons can express their identity freely and without fear; and
 - Organise a special mission of the General Rapporteur to Poland.
- **To the General Rapporteur on violence against women:**
 - Urge the Parliamentary Assembly of the Council of Europe to analyse the policies and good practices to define and promote the necessary measures to ensure access to reproductive health

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and rights for all women, irrespective of their income, education or social status, in all member States of the Council of Europe; and

- Organise a special mission of the General Rapporteur to Poland.

• ***To the Venice Commission of Democracy through Law of the Council of Europe:***

- Maintain cooperation, dialogue, and offers of legal advice to the government of Poland regarding legislative initiatives, in order to ensure their compliance with European standards regarding democracy, human rights and the rule of law, with a special focus on the legal and factual circumstances of the daily functioning of the Commissioner for Human Rights.

To the U.N. Committee on the Elimination of all forms of Discrimination against Women, to the U.N. Committee on Economic, Social, and Cultural Rights, to the U.N. Special Rapporteur on the right to the highest attainable standard of physical and mental health, to the U.N. Special Rapporteur on violence against women, including its causes and consequences:

- Urge the Polish government to ensure the legalisation of abortion for women and girls under all circumstances; and
- Urge the Polish government to ensure women have physical, economic, and informational access to sexual and reproductive rights, notably through the strict regulation of the use of the conscientious objection, through the provision of scientifically-accurate comprehensive sexual education in all schools, through subsidising emergency contraception and everyday contraception for women and girls.

To the U.N. Committee on the Rights of the Child, to the U.N. Committee on Economic, Social, and Cultural Rights:

- Urge the Polish government to ensure LGBT+ students enjoy their right to education in a safe environment, free from bullying, violence, social exclusion, or other forms of discriminatory and degrading treatment related to sexual orientation, gender identity, or expression. To that end, urge the Polish government to have mandatory equality education for all in schools, in particular;
- Urge the Polish government to ensure the full enjoyment of all of LGBT+ persons' economic, social, and cultural rights, under all circumstances, in particular their right not be discriminated against on the basis of their sexual orientation, gender identity, or gender expression.

To the Government of the Republic of Poland:

- Ensure full compliance with the principles of respect for democracy, the rule of law and human rights, enshrined in Article 2 TEU and recognised as the three pillars on which the Council of Europe's system for human rights protection is founded; and
- In particular, ensure that any institutional and legal change fully respects and does not weaken the principle of separation of powers among independent institutions and a functioning system of checks and balances, as well as the principle of equality, essential elements of democracy and the rule of law; and
- To this end, fully and swiftly implement the recommendations and decisions of regional and international courts and mechanisms, as well as the decisions of the Polish Constitutional Tribunal in order to comply with these principles; and
- Ensure any legislative process is conducted in a democratic, transparent and accountable manner, which provides for a reasonable time for genuine political debate between parliamentary forces and ensures stakeholder participation.

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REPORT INTRODUCTION



Plenary session of Sejm (lower house) in Warsaw, Poland on 8 December 2017.
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“The rule of law crisis ultimately means lowering the bar for the protection of human rights.”⁵

The Law and Justice party (*Prawo i Sprawiedliwość*, hereafter “PiS”) came into power following Poland’s parliamentary elections in October 2015. Since then, the country has known a drastic democratic backsliding, as PiS started to implement its anti-democratic agenda thanks to a majority in the Sejm.

What later came to be known as the Polish “constitutional crisis” severely undermined Poland’s check and balances through what can be described in no other way than a court-packing scheme⁶ by the current government, which appointed several judges unconstitutionally. Through amendments rushed through the Sejm, the current government has awarded itself the right to verify the Constitutional Tribunal’s judgements and to refuse to acknowledge and execute them. This year, after two years of refusing to publish several judgments of the Constitutional Tribunal, which the Executive disagrees with,⁷ the Prime Minister’s Office finally published them. However, the publication does not have any further consequences since it was accompanied by the notion, added by the Government and not known to the Polish legal system, that the judgments have been made “in violation of the law.” The constitutional crisis in Poland raised serious issues regarding the rule of law in the country as it seriously undermined the independence of the judiciary and the guarantee of constitutional justice.

The government then proceeded to implement a large-scale judicial reform through three highly controversial Acts. The Act amending the Act on the National Council of the Judiciary⁸ terminates the mandate for all judges sitting on the Council and ensures new ones are politically-appointed. The Act

5. Interview with members of the Polish Bar Association, Wednesday 21 June 2017, in Warsaw, Poland.

6. Marcin Maczak, “Poland: From Paradigm to Pariah? Polish Constitutional crisis – facts and interpretations,” March 8, 2018.

7. Starting from Constitutional Tribunal, Judgment 47/15, March 9, 2016, unpublished, until all December 2016 judgments.

8. Act amending the Act on the National Council of the Judiciary.

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amending the Act on the Supreme Court⁹ introduces political supervision of the Supreme Court by forcing approximately 40% of sitting judges to retire and allows for the General Prosecutor to further appeal final judgments. The Act on the Organisation of Ordinary Courts¹⁰ increases the powers of the Ministry of Justice, who is thereby responsible for deciding on the number of presidents and deputy presidents of courts of appeal, regional, and district courts, as well of their appointments and dismissals. The amendments worryingly increase political supervision over these key players in Polish democracy,¹¹ an alarming trend for the protection of human rights in the country as “all rights are fictional without an independent judiciary.”¹² As clearly stated by Dr. Hannah Machińska: “[Poland] face[s] deep violations of human rights, democracy, and the rule of law. And by deep I mean it will not be possible to reverse the situation.”¹³

This resulted in the European Court of Justice voicing concerns as to whether Poland can even fulfil the right to a fair trial to the standard required among EU member States in the context of an extradition request.¹⁴

These changes have been accompanied by an outright unwillingness of the current government to dialogue with the various international and regional human rights bodies, by notably deliberately passing Acts before the Council of Europe’s Venice Commission issued its opinions. In this context, these developments, among others such as a retrogression on women’s sexual and reproductive rights and the shrinking space for civil society in the country, have led the European Commission to trigger the Art. 7(1) procedure of the Treaty on European Union¹⁵ in November 2017,¹⁶ reserved to member States which present a clear risk of a serious breach of the EU’s fundamental values.¹⁷

The degradation of the rule of law in Poland has reverberating consequences regarding the rights of the most stigmatised, in particular LGBT+ persons’ rights and women’s sexual and reproductive rights, who suffer from the creation of a so-called “illiberal democracy” in Poland, mirroring Hungary’s, and of the growing deference given to the Catholic Church. As democratic checks and balances are no longer ensured and all this is taking place against a background of rapidly and drastically shrinking space for civil society organisations, notably those advocating for minority rights, women and LGBT+ persons are left with no voice. As the Polish Society of Anti-discrimination Law said: “we cannot separate the issue of the rule of law crisis from the situation of NGOs and the persons whose interests they represent, because once courts will be destroyed, NGOs will not be able to fight for individuals’ rights.”¹⁸

The findings of this report leave no room for doubt regarding the existence of a clear and serious risk of a systemic breach of the EU’s fundamental values, notably the rule of law, in Poland, and therefore beg the immediate triggering of the Art. 7(1) TEU procedure¹⁹ by the Council.

9. Act amending the Act on the Supreme Court, Art. 36.

10. Act on the Organisation of Ordinary Courts, Arts. 19 to 179.

11. The Constitutional Tribunal, ordinary courts, the National Council of the Judiciary, and soon, the Supreme Court.

12. Interview with members of the Polish Bar Association, Wednesday 21 June 2017, in Warsaw, Poland.

13. Interview with Dr. Hannah Machińska, Monday 19 June 2017, in Warsaw, Poland.

14. European Court of Justice, Preliminary Ruling, Case C-216/18, 25 July 2018.

15. For more information on Art. 7 TEU, see the Annex of this report.

16. European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)).

17. As laid out in Art. 2 of the Treaty on European Union.

18. Interview with members of PSAL, Monday 19 June in Warsaw, Poland.

19. For more information on Art. 7 TEU, see the Annex of this report.

PART I - A 2018 REALITY CHECK: SERIOUS BACKTRACKING ON WOMEN'S SEXUAL AND RE- PRODUCTIVE RIGHTS



Protesters with clothes hanger pictures which symbolizes illegal abortion are seen in Gdansk, Poland on 23 March 2018. Over 1000 people - woman and men protest against plans to tighten Poland's already-strict abortion laws.

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Introduction

Over the last twenty years, international and European human rights norms have evolved significantly to recognise the denial of safe abortion services as a human right violation. Laws, policies, and practices that introduce new restrictions on women's exercise of their human rights, including their right to health, or that erect new barriers to women's access to health services – including legal and safe abortion services – can hardly be considered compliant with international human rights law and standards.²⁰

Under international human rights law, sexual and reproductive rights are principally protected as a component of the right to the highest attainable standard of physical and mental health. This right indeed encompasses several freedoms and entitlements, among which are sexual and reproductive rights, as outlined by the U.N. Committee Economic, Social and Cultural Rights (hereafter "CESCR") in its General Comment No. 14.²¹ The right to health – and thus reproductive rights²² – contains four interrelated and essential elements requiring that health facilities, goods, and services be available, accessible, acceptable, and of good quality (also known as the AAAQ framework).²³ While the right to health is one which abides by the principle of progressive realisation, States must fulfil minimum core obligations immediately upon ratifying the International Covenant on Economic, Social and Cultural Rights (hereafter "ICESCR"), regardless of resource constraints. These immediate obligations include: the prohibition of discrimination based on gender in the provision of health services,²⁴ the prohibition of retrogressive measures,²⁵ and the obligation to provide essential medicines such as short- and long-term contraceptives, emergency contraception, and drugs for maternal health care and management of incomplete abortion and miscarriage.²⁶

While Poland ratified most international and European human rights instruments (ICCPR, ICESCR, CEDAW, CRC, CAT, ECHR, the European Social Charter),²⁷ it still fails to ensure the adequate implementation of the obligations that derive from them. Since 1993, human rights treaty bodies and institutions have closely scrutinised the situation of access to legal and safe abortion in Poland,²⁸ and have consistently expressed deep concerns about the severe consequences of the country's restrictive

20. U.N. Committee on Economic, Social and Cultural Rights (hereafter "CESCR"), General Comment No. 3 on the Nature of States Parties' Obligations (Art. 2, para. 1), para. 9, U.N. Doc. E/1991/23 (1990); U.N. Commission on Human Rights, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 72, U.N. Doc. E/CN.4/1987/17 (1987); CESCR, General Comment 14 on the Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (2000); CESCR, General Comment 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social, and Cultural Rights), U.N. Doc. E/C.12/GC/22 (2016); U.N. Committee against Torture (hereafter "CAT"), *Final Observations on Peru*, U.N. Doc. CAT/C/PER/CO/5-6, § 15. To go further, see: Johanna B. Fine, JD, MIA, Katherine Mayall, JD, and Lilian Sepúlveda, JD, *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, Leah Hoctor, Adriana Lamačková, *Mandatory waiting periods and biased abortion counselling in Central and Eastern Europe*, International Journal of Gynecology & Obstetrics, August 2017.

21. CESCR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), para. 8, U.N. Doc. E/C.12/2000/4: "the right to health is not to be understood as a right to be **healthy**. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom."

22. CESCR, General Comment 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social, and Cultural Rights), para. 39, U.N. Doc. E/C.12/GC/22 (2016)

23. CESCR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), para. 12, U.N. Doc. E/C.12/2000/4.

24. CESCR, General Comment 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social, and Cultural Rights), para. 43(a), U.N. Doc. E/C.12/GC/22 (2016); U.N. Convention on the Elimination of all forms of Discrimination against Women (hereafter "CEDAW"), Art. 12; U.N. Committee on the Elimination of all forms of Discrimination Against Women (hereafter "CEDAW Committee"), General Recommendation No. 24 on Article 12 of the Convention (Women and Health), para. 2, U.N. Doc. A/54/38/Rev.1, chap. I (1999); U.N. Committee on the Rights of the Child (hereafter "CRC Committee"), CRC Committee, General Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health, (2013), para. 8, U.N. Doc. CRC/C/GC/15 (2013).

25. CESCR, General Comment 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social, and Cultural Rights), para. 38, U.N. Doc. E/C.12/GC/22 (2016).

26. In accordance with the WHO Model List of Essential Medicines. See: CESCR, General Comment 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social, and Cultural Rights), para. 49(g), U.N. Doc. E/C.12/GC/22 (2016); CESCR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), paras. 12(a), 43 (d), U.N. Doc. E/C.12/2000/4; CRC Committee, General Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health, para. 37, U.N. Doc. CRC/C/GC/15 (2013).

27. International Covenant on Civil and Political Rights (1977); International Covenant on Economic, Social and Cultural Rights (1977); CEDAW (1980); U.N. Convention on the Rights of the Child (hereafter "CRC") (1991); U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter "Convention against Torture") (1987); European Convention for the protection of human rights and fundamental freedoms (hereafter "ECHR") (1993); European Social Charter of 1961 (1997).

28. U.N. Human Rights Committee (1999, 2004, 2010, 2016), CEDAW Committee (2007) as well as CESCR (1998, 2002, 2009), CRC Committee (2002), U.N. Special Rapporteur on the Right to Health (2010), the European Court of Human Rights (cases of: *Alicja Tysiac*, 2006; *R.R.*, 2011; *P and S.*, 2012) and Commissioner for Human Rights of the Council of Europe (2007 + 2016).

abortion legislation on the life and health of women.²⁹

These apprehensions have increased over the past three years, since the governing PiS party came into power in October 2015 and started implementing its conservative, anti-democratic agenda which favours restrictions on human rights and women's sexual and reproductive rights more specifically.³⁰ However, the Polish government has so far disregarded most of the recommendations made by international organisations and bodies on the access to legal and safe abortion and even took further retrogressive measures.

CHAPTER 1 - AVAILABILITY: RETROGRESSIVE LEGISLATIVE MEASURES MAKE ABORTION ONLY AVAILABLE IN VERY LIMITED CIRCUMSTANCES

I. International legal standards on the availability of abortion services

Under international and European human rights law, Poland has the obligation to ensure legal abortion services are available, especially for teenagers, without third-party authorisations, and it must establish an effective mechanism capable of determining whether the conditions for obtaining a legal abortion are met. If one of these requirements is not fulfilled, abortion services cannot be deemed available in the country. It is the case in Poland.

A) Legal and safe abortion services shall be available

Under the AAAQ framework, States have the obligation to ensure the availability of legal and safe abortion services. The U.N. Committee on the Rights of the Child (hereafter "CRC") in particular recommended that States ensure access to safe abortion and post-abortion care services to girls "irrespective of whether abortion itself is legal."³¹

As underlined on several occasions by the U.N. Human Rights Committee, the prohibition and criminalisation of abortion violates women's rights to be free from cruel, inhuman, or degrading treatment, and to privacy. Indeed, the inability to receive care from trusted health professionals in one's own country and the financial, psychological, and physical burdens imposed on someone having to travel abroad to access legal and safe abortion care cause a great deal of mental suffering, attributable to the State, which can amount to cruel, inhuman, or degrading treatment.³² Therefore, no State shall prohibit abortion, even if this entails modifying the State's Constitution.³³

The European Committee on Social Rights (hereafter the "ECSR") also issued decisions on the subject.

29. U.N. Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Poland*, U.N. Doc. A/HRC/26/14, see recommendations 120.129, 120.131, 120.132, 120.134, 120.136, 18 July 2017; U.N. Human Rights Committee, *Concluding Observations: Poland*, para. 8, U.N. Doc. CCPR/CO/82/POL, 23 November 2016; CESCR, *Concluding Observations: Poland*, paras. 46-47, U.N. Doc. E/C.12/POL/CO/6, 20 October 2016; CRC Committee, *Concluding Observations: Poland*, paras. 38(c) and (d) and 39(b) and (c), U.N. Doc. CRC/C/POL/CO/3-4, 30 October 2015; CEDAW Committee, *Concluding Observations: Poland*, paras. 36 and 37(a), (b), and (c), U.N. Doc. CEDAW/C/POL/CO/7-8, 14 November 2014; CAT, *Concluding Observations: Poland*, para. 23, U.N. Doc. CAT/C/POL/CO/5-6, 23 December 2013; U.N. Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: mission to Poland*, U.N. Doc. A/HRC/14/20/Add.3, 20 May 2010.

30. U.N. Human Rights Committee, *Concluding observations on the seventh periodic report of Poland*, 23 November 2016, U.N. Doc. CCPR/C/POL/CO/7; CoE Commissioner for Human Rights, *Report by Nils Muižnieks following his visit to Poland from 9 to 12 February 2016*, Doc. CommDH(2016)23, 2016; CoE Parliamentary Assembly, *Reproductive health and women's rights in Poland*, Written declaration No. 604, Doc. 14035, 11 July 2016; European Parliament, *Women's rights in Poland: MEPs checked the situation in the country*, 24 May 2017; European Parliament, *Rule of law and democracy in Poland at risk: Parliament ready for next steps*, 15 November 2017; CoE Commissioner for Human Rights, *Commissioner urges Poland's Parliament to reject bill which restricts access to abortion care*, 23 March 2018; CoE Commissioner for Human Rights, *Keynote speech by Nils Muižnieks Commissioner for Human Rights of the Council of Europe at the First Congress on Human Rights on 8-9 December 2017 organised by the Polish Ombudsman in Warsaw, Poland*, Doc. CommDH/Speech(2017)8, December 2017; CoE Commissioner for Human Rights, *Commissioner concerned about law undermining the independence of the judiciary in Poland*, 3 April 2017; CoE Commissioner for Human Rights, *Poland: slow down and consult on legislation to avoid human-rights backsliding*, 12 February 2016; European Council, *Statement by President Donald Tusk on the situation in Poland*, Doc. 493/17, 20 July 2017. To be noted: this list is non-exhaustive.

31. CRC Committee, General Observation n°15 (article 24), para. 70, U.N. Doc. CRC/C/GC/15, 17 April 2013.

32. *Mellet v. Ireland*, Human Rights Committee, Communication No. 2324/2013, paras. 7.6, 7.7, and 7.8, U.N. Doc. CCPR/C/116/2324/2013 (2016).

33. *Whelan v. Ireland*, Human Rights Committee, Communication No. 2425/2014, paras. 7.7, 7.8, 7.9, and 7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (2017).

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In 2015, in *Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden*,³⁴ the ECSR indeed firmly rejected attempts to interpret the European Social Charter as providing protection to foetal life. Instead, the ECSR confirmed that Sweden's abortion laws and policies, offering heightened protection to women's sexual and reproductive rights, were fully compliant with Art. 11 of the European Social Charter.

In order for States to comply with their international obligations, they must also abolish legal procedural barriers to safe abortion services such as third-party authorisation requirements from spouses, judges, parents, guardians, or health authorities for example.³⁵

B) States shall abolish legal procedural barriers to safe abortion services

This has been recommended by every international human rights bodies: the U.N. Committee on the Elimination of All forms of Discrimination against Women³⁶ (hereafter the "CEDAW Committee"), the CRC Committee,³⁷ the U.N. Committee against Torture,³⁸ the U.N. Committee on the Rights of Persons with Disabilities³⁹ (hereafter the "CRPD Committee"), the U.N. Human Rights Committee,⁴⁰ the CESCR,⁴¹ the World Health Organisation⁴² (hereafter the "WHO"), and the Council of Europe⁴³ (hereafter the "CoE"). All these bodies treat third-party authorisation requirements as forms of discrimination against women and barriers to women's access to reproductive health services.

C) States shall establish a mechanism to determine whether the conditions for legal abortion are met in individual cases

The European Court of Human Rights (hereafter "ECtHR") has noted that in member States (e.g. Ireland) where legal and safe abortion is only allowed in limited cases such as a threat to the woman's health or life, therefore requiring a doctor's approval, the "uncertainty surrounding the process of establishing whether a woman's pregnancy pose[s] a threat to her life and the threat of criminal prosecution [has] a 'significant chilling' effect both on doctors and the women concerned."⁴⁴ This serious chilling effect was also recognised by the ECtHR in *Tysiact v. Poland*,⁴⁵ where the Court found Poland had violated Art. 8 of the European Convention on Human Rights (hereafter "ECHR") as the applicant had been denied access to an effective mechanism capable of determining whether the conditions for obtaining a legal and safe abortion had been met. The Court urged Poland to instate procedures to ensure that women have effective access to legal and safe abortion, including an appeals mechanism allowing women to challenge a doctor's potential refusal to authorise an abortion. The Court explicitly called for the mechanism to consist of (1) an independent body, (2) that takes the views of the woman into consideration and (3) issues decisions in writing (4) within a reasonable period of time.⁴⁶

II. Poland's violations of its core obligations under the ICESCR

A) The 1993 Family Planning Act: a retrogressive legislative measure

In Poland, abortion is only legal in three very limited exceptions, thereby not fulfilling completely the

34. European Committee on Social Rights, *Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden* (2015) No. 99/2013.

35. CEDAW Committee, *Concluding Observations on Kuwait*, UN Doc. CEDAW/C/KWT/CO/3-4. 2011 para. 43(b), *Concluding Observations on Hungary*, UN Doc. CEDAW/C/HUN/CO/7-8. 2013 paras. 30-31.

36. CEDAW, General Recommendation No. 33 on women's access to justice, (61 st Sess., 2015), para 25(c)), U.N. Doc. CEDAW/C/GC/33 (2015); CEDAW Committee, *Concluding Observations: Indonesia*, paras. 41-2, U.N. Doc. CEDAW/C/IDN/CO/6-7 (2012); *Cook Islands*, para. 35, U.N. Doc. CEDAW/C/COK/CO/1 (2007); *Burkina Faso*, para. 38, U.N. Doc. CEDAW/C/BFA/CO/6 (2010); *Timor-Leste*, para. 31(a), U.N. Doc. CEDAW/C/TLS/CO/2-3 (2015).

37. CRC Committee, General Comment No. 15: On the right of the child to the enjoyment of the highest attainable standard of health, para. 31, U.N. Doc. CRC/C/GC/15 (2013).

38. CAT, *Concluding Observations on Bolivia*, para. 23, U.N. Doc. CAT/C/BOL/CO/2 (2013).

39. CRPD Committee, General Comment No. 1: Article 12: Equal recognition before the law, (11 th Sess., 2014), para. 35, U.N. Doc. CRPD/C/GC/1 (2014); CRPD Committee, General Comment No. 3 on women and girls with disabilities, para. 44, U.N. Doc. CRPD/C/GC/3 (2016).

40. U.N. Human Rights Committee, *Concluding Observations on Bolivia*, para. 9(b), U.N. Doc. CCPR/C/BOL/CO/3 (2013).

41. CESCR, General Comment No. 14 on The Right to the Highest Attainable Standard of Health. para. 41, U.N. Doc. E/C.12/2000/4 (2016).

42. World Health Organisation, *Safe abortion: technical and policy guidance for health systems*, 2012.

43. CoE Commissioner for Human Rights, *Issue paper – Women's sexual and reproductive health and rights in Europe*, December 2017, The Commissioner's recommendations, p. 11.

44. ECtHR, *A., B. and C. v. Ireland* (Application no. 25579/05), 16 December 2010, para. 254.

45. ECtHR, *Tysiact v. Poland* (Application n°5410/03), 2007.

46. ECtHR, *Tysiact v. Poland* (Application n°5410/03), paras. 117-118, 2007.

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availability requirement.

After democratic political changes in 1989, reforms limiting women's right to access legal and safe abortion were introduced, making Poland's anti-abortion legislation one of the most restrictive in Europe. This situation has resulted from the adoption of the 1993 Family Planning Act or the so-called "compromise" which, in the post-communist period, the government conceded to the Catholic Church.⁴⁷ Prior to the 1993 Act, women were legally entitled to access safe abortion services upon request. About 500,000 legal and safe abortions a year were then reported, and more than 97% of the women said they were doing it for socio-economic reasons.⁴⁸ Nowadays, women's organisations estimate approximately 200,000 clandestine and unsafe abortions are performed each year in Poland,⁴⁹ while the Polish government publishes statistics showing only 1,000 women undergo safe and legal abortions per year.⁵⁰ The 1993 Act is thus in itself a retrogressive legislative measure, entailing an outright violation of Art. 2(1) of the ICESCR.

As members of the Federation for Women and Family Planning (hereafter the "FWFP") rightfully pointed out, the very piece of legislation governing abortion in Poland was "a compromise between politicians and the Catholic Church; *not* a compromise to which women participated."⁵¹ At that time, the only way for Polish politicians to repay the Catholic Church for their contribution to the solidarity movement (Solidarnosc) was to trade on women's sexual and reproductive rights. Therefore, sexual and reproductive rights in Poland are, and have since then been, "a political rather than an ideological problem . . . because politicians believe their career depends on the Church's support."⁵²

While Art. 38 of the Polish Constitution defends the "legal protection of the life of every human being,"⁵³ the 1993 Act goes further by clearly recognising a right to life that includes the prenatal phase.⁵⁴ This anti-choice interpretation of Art. 38 of the Constitution has been endorsed by the Constitutional Tribunal in its judgement of 29 May 1997,⁵⁵ when it struck down a 1996 amendment to the abortion law allowing abortion for "social reasons." The Tribunal stated that, as a democratic State under the rule of law, Poland protects each person's fundamental right to life, from beginning to end – and it is not sufficient to maintain that unborn babies are not persons.⁵⁶

The current Polish government's official position on the subject is also apparent from its comments to the draft General Comment on Art. 6 of the ICCPR (on the right to life): "it is undisputable that, from the point of view of science, human life begins at conception... Protection of every child must be recognized regardless of age, including gestational age."⁵⁷

The 1993 Act as it stands today limits the possibility to seek, and thus the availability of abortion services to three exceptional circumstances:⁵⁸

- When the pregnancy poses a threat to the life or health of the woman, abortion is permitted at any stage of the pregnancy but – except in case of emergency – is subjected to the diagnosis of two doctors other than the one performing the abortion;
- When there is a high probability of a severe and irreversible foetal impairment, abortion is permitted after a confirmed diagnosis of two doctors other than the one undertaking the act and until viability of the foetus;
- When the pregnancy is the result of an unlawful act, such as rape or incest, abortion is permitted during the first 12 weeks. In this particular instance, a certificate from the public prosecutor is required to access the medical procedure.

47. Humanity in Action, *A Dangerous Compromise: The Battle of Reproductive Rights in Poland*, 2008.

48. The Guardian, "How Poland's far-right government is pushing abortion underground," 30 November 2017, <<https://www.theguardian.com/news/2017/nov/30/how-polands-far-right-government-is-pushing-abortion-underground>> (last visited 12 July 2018).

49. ASTRA Network, *Access to safe and legal abortion : a European perspective*, 2016.

50. Wm. Robert Johnston, *Historical abortion statistics, Poland*, 2018.

51. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

52. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

53. Constitution of the Republic of Poland (Dziennik Ustaw of 16 July, 1997, No. 78, item 483) Personal Freedoms and Rights, Art. 38, "The Republic of Poland shall ensure the legal protection of the life of every human being."

54. 1993 Family Planning Act, Art. 1.

55. Ruling K 26 96 of the Constitutional Tribunal, 28 May 1997, Poland.

56. Ruling K 26 96 of the Constitutional Tribunal, 28 May 1997, Poland.

57. U.N. Office of the High Commissioner for Human Rights, *Remarks of Poland to the General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights on the right to life*, p. 1.

58. 1993 Family Planning Act, Art. 4.

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B) Third party authorisations, and their difficulty to be challenged, render the 1993 Act even stricter in practice

It must be noted that in all three exceptions, the 1993 Act provides for the intervention of third-parties for women to exercise their right to choose, contrary to international human rights standards on the matter, as mentioned in **Section I. B) States shall abolish legal procedural barriers to safe abortion services**. This is combined with a criminal provision stating that if a doctor or anyone else assists a woman in having an abortion besides the three exceptions, including by providing transport, advice or information, they face a 3-year imprisonment sentence.⁵⁹ However, the pregnant woman is exempt from criminal liability under the current framework.⁶⁰

This punitive and stigmatising environment, put in place by the 1993 Act and anti-abortion legislative arsenal and discourse which has developed in Poland over the past decade, has created a chilling effect, even for medical professionals, who often invoke the “conscience clause” to escape their medical duty to perform abortions when absolutely necessary for a woman’s life and health. This led institutions such as the ECtHR to condemn the harmful health implications and serious human rights violations caused by abortion stigma.⁶¹

However, in practice, it is extremely difficult to challenge a doctor’s opinion, therefore translating into women being unable to exercise their right to choose in Poland, even in the limited available circumstances. Indeed, following the *Tysi*ac ECtHR judgment, Poland adopted the 2008 Act on the Protection of Patient Rights, which allows patients to challenge their doctor’s decision on the provision of healthcare, including abortion. The mechanism therefore can serve to determine whether the conditions for legal abortion have been met. The patient may file an administrative “appeal”⁶² with a Medical Commission (composed of three doctors appointed by the Ombudsperson for Patients’ Rights⁶³) within 30 days following the emission of the doctor’s opinion. The Commission must then deliver an administrative reasoned decision, within another 30 days. Hearings are not automatic and the decisions of the Commission cannot be further “appealed.”

The U.N. Special Rapporteur on the Highest Attainable Standard of Health has criticised the new mechanism, noting that “a panel composed exclusively of medical professionals has an inbuilt structural bias, affecting its impartiality.”⁶⁴ Furthermore, because an abortion can only be undergone during the first 12 weeks of pregnancy in two of the three exceptions provided by the 1993 Act, a 30-day period to issue an opinion is excessive and undermines women’s legal right to access abortion in the end. Because this procedure is an administrative one, no obligation to provide applicants with legal advice exists. This is a further limit for women with restricted financial means in lodging their “appeal” before the doctors’ board, especially considering the existing requirement for the patient’s complaint to refer to the article of law that has been violated by the doctor’s opinion. The mechanism therefore discriminates against the poorest women who are forced to seek clandestine and unsafe abortions.

When confronted about allegations of the lack of independence of the Commission, and the inability for women to appeal its decisions, members of the Polish Ministry of Health remained vague: “Decisions of the Commission cannot be challenged before court, however patients can always go to court. The Ombudsperson is supposed to support all patients, including women who face decisions of termination of

59. Polish Penal Code, Arts. 18, and 152 to 154.

60. 1993 Family Planning Act, Art. 149a §2.

61. See CoE Commissioner for Human Rights, *Women’s sexual and reproductive health and rights in Europe*, 2017, p.29: “In the case *P. and S. v. Poland*, the European Court of Human Rights considered the harmful health implications and serious human rights violations caused by abortion stigma in a country with a restrictive abortion law. The Court held that the rights to privacy and bodily integrity under Articles 3 and 8 of the European Convention on Human Rights were violated as a result of repeated failures by the Polish authorities to ensure that the first applicant could access legal abortion services to which she was entitled under domestic law.”

62. Act of November 6, 2008 on Patient Rights and the Patient Rights Ombudsman, Chapter 8 - The Patient’s Right to File an Objection to a Doctor’s Opinion or Ruling, Arts. 31 and 32.

63. The Ombudsperson for Patient’s Rights was established by the Act of 6 November 2008 on Patient Rights and the Patient Rights Ombudsman. The Act regulates health care providers (public and non-public)’s obligations as well as patients’ rights such as: right to health services, to obtain information, to confidentiality of patient information, to consent to the provisions of health services, to respect privacy and dignity of the patients, to object to the doctor’s opinion or decision, etc. The Ombudsperson is a new central public administrative body which has jurisdiction to protect these rights.

64. U.N. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Report on the Rapporteur’s Mission to Poland*, para. 45, U.N. Doc. A/HRC/14/20/Add.3 (2010).

pregnancy.”⁶⁵ Despite the Ministry’s affirmations, the fact-finding team was told that the Ombudsperson for Patient’s Rights had actually recently been replaced because she was being “too helpful in these cases.”⁶⁶ This testifies of the current Polish government’s desire for this mechanism to not be effective, but only further delay women’s claims so as to prevent their legal access to abortion. This is illustrative of the current government’s attempts to further restrict women’s already slim right to choose, notably through replacing persons whose actions are not reflective of the government’s orientations.

Finally, in the case the Commission issues a positive opinion regarding a woman’s access to abortion, the 2008 Act does not contain any enforceability mechanism guaranteeing her effective access to the granted lawful abortion. For these reasons, the Committee of Ministers overseeing the implementation of judgments of the ECtHR is, to date, not satisfied with the new law, as it expressed again in its *R.R. v. Poland* judgment⁶⁷ in which it ruled Poland had violated the ECHR due to the lack of effective mechanism to challenge a doctor’s opinion. The current mechanism indeed is not (1) an independent body, (2) only partially takes the views of the woman into consideration (since hearings are not automatic) and (3) does not issue decisions within a reasonable period of time, as required *Tysiac*.⁶⁸

Nevertheless the Polish Ministry of Health and the Ombudsperson for Patients’ Rights have said they do not believe the mechanism is faulty and tend to state that not using this mechanism is due to the fact that there is no need to use it. The Ministry of Health expressly stated that “the 2008 Act provides the possibility to object to a doctor’s refusal, as required by the *Tysiac* ECtHR judgment. We consider mechanism as effective.”⁶⁹ Moreover, in June 2017, a deputy speaker of the Senate opened the conference on the implementation of ECtHR rulings by saying he was “strongly against ECtHR rulings in cases of abortion . . . which interfere with the sovereign right of Poland,”⁷⁰ thereby clearly indicating the disregard and lack of will of the current government to comply with ECtHR rulings on the subject.

Poland’s anti-abortion legislation is thus strict in the sense that legal and safe abortion is allowed in limited cases, but is made even stricter by introducing third party authorisation before women can exercise their right to choose. Regrettably, the Polish Ministry of Health neither seem to be planning to amend the 2008 nor the 1993 Act, as it considers “it is important for the State to [have a doctor] state that termination can be executed [in a specific case] . . . and it is important that it be stated by different doctors, other than the one who carries out [the abortion].”⁷¹

As a result, officially only 600 to 1,000 legal abortions are practiced each year in Poland, among 10 millions of women of reproductive age. However, according to a survey from the Public Opinion Research Center (CBOS) and the Federation for Women and Family Planning (FWFP), the actual figures, including clandestine abortions, would rather look closer to 200,000 cases a year.⁷² The gap between official statistics and data collected by civil society is significant and suggests a discrepancy between the reality and how it is depicted by official sources. As an illustration of the current government’s official stance on the issue, Member of Parliament Joanna Scheuring-Wielgus explained that, as Poland was getting ready to celebrate the 100th anniversary of women’s right to vote in the country, in 2018, Polish authorities “agreed to make this year the year of women’s rights, only under the condition that no mention be made alleging there were issues with women’s rights in Poland.”⁷³

C) Further retrogressive legislative measures in the making

Multiple attempts have been made to further restrict cases of legal abortion, through draft legislative proposals in 2011, 2013, 2015, 2016, 2017, and 2018 that contained total or near total bans on abortion, which were defeated by massive public protests. These attempts have intensified since the 2015 parliamentary elections which brought ultra-conservative ruling party PiS to power.

65. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

66. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

67. ECtHR, *R.R. v. Poland*, (Application No. 27617/04), 2011.

68. ECtHR, *Tysiac v. Poland*, (Application No. 5410/03^{*}, paras. 117-118, 2007.

69. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

70. Interview with Hannah Machińska, former Director of the Office of the Council of Europe in Poland, and current lawyer and Professor at the University of Warsaw, Monday 19 June 2017, in Warsaw, Poland.

71. Interview with the members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

72. ASTRA Network, *Access to safe and legal abortion : a European perspective*, 2016.

73. Interview with MP Joanna Scheuring-Wielgus, Tuesday 20 June 2017, in Warsaw, Poland.

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Not long after PiS won the October 2015 elections, a draft bill was indeed tabled, which proposed to introduce a near-total ban on abortion and sought to criminalise women and girls who underwent an abortion as well as those assisting or encouraging it.⁷⁴ The proposal, although a supposed citizens' initiative, was in fact tacitly supported by the ruling party, and passed the first stages of parliamentary scrutiny. The context in which the bill was proposed and started to be passed, and in particular the fact that it proposed to criminalise women gave rise to mass protests – which became known as the **Czarny Protest** or “the Black Protest”⁷⁵ – all over the country, including an unprecedented women's strike and widespread international solidarity. As a result, the Parliament backtracked on its decision and rejected the bill in October 2016.⁷⁶

However, the attempts to further restrict women's sexual and reproductive rights, especially regarding abortion, and the debate around the criminalisation of abortion have far from died down, especially since the current government has indicated its support in favour of greater restrictions on abortion, and other sexual and reproductive rights, in many instances.⁷⁷ For instance, in October 2017, in its remarks to the General Comment No. 36 on article 6 of the ICCPR, the Polish government strongly insisted on the protection of human life from conception.⁷⁸

This positioning has encouraged and created fertile ground for new anti-abortion initiatives, which have proliferated over the past two years. On 27 October 2017, a group of parliamentarians – mainly from the PiS party – submitted a motion to the Constitutional Tribunal questioning the constitutionality of the 1993 Family Planning Act's provisions related to access to abortion in case of a severe and irreversible foetal impairment. A month later, on 30 November 2017, the “Stop Abortion Civic Committee” submitted a draft law, widely supported by the Polish Catholic Church, bishops,⁷⁹ and high level politicians such as Prime Minister Szydło, President Duda, PiS leader Kaczyński, and PiS-affiliated Science Minister and Deputy Justice Minister.⁸⁰ The draft bill gathered 830,000 signatures⁸¹ between September and November 2017 to ban what it referred to as “eugenic abortion” – abortions until now legally carried out to eliminate potentially defective fetuses.

These heightened threats on women's sexual and reproductive rights have sparked important mobilisation from civil society, which developed new legislative proposals to counteract this restrictive trend. In October 2017, the “Save Women Civic Committee” thus collected almost 500,000 signatures for its bill on women's rights and conscious parenthood.⁸² The draft bill specifically provided for:

- Restoring women's reproductive rights, including the woman's right to legal and safe abortion, in all circumstances, until the end of the 12th week of pregnancy;
- Introducing comprehensive sexual education in schools;
- Providing free and easy access to contraceptives;
- Restoring access to emergency contraception on demand;
- Regulating the use of conscience clause by gynaecologists.

The PiS party had promised in its election campaign that the bill would be sent to further proceedings. However, it was not. The liberalising draft bill was rejected by Polish MPs on 10 January 2018, in part

74. Citizens' proposal on amendments to the 1993 Family Planning Act, Human Embryo Protection and Conditions of Permissibility of Abortion of 7 January 1993 and the Penal Code of 6 June 1997; **See also**: Center for Reproductive Rights & others, “Supplemental information on Poland for the Periodic Review by the Human Rights Committee at its 118th Session,” 22 September 2016.

75. Great Coalition for Equality and Choice, *My #BlackProtest*, 2017.

76. Reuters, Polish “Parliament rejects near-total abortion ban after protests,” 6 October 2016.

77. Radio Poland, “President says abortion laws are abused in Poland,” 7 November 2017: “[President] Duda said removing deformed and seriously ill fetuses was “eugenic abortion”, adding that “decidedly tougher legal solutions” needed to be introduced.” **See also**: Amnesty International, “Submission for the UPR 27th session, Poland: dismantling rule of law?,” April/May 2017.

78. U.N. Office of the High Commissioner for Human Rights, *Remarks of Poland to the General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights on the right to life*, p. 1.

79. On 8 November 2017, the Committee of Polish bishops released a statement asserting the right to life of the unborn child and putting the committee's weight behind the campaign for this restrictive bill: JI Press Agency, Polish Bishops' Conference Presidium: Instead of Abortion – Adoption of Children; Everyone has the right to life, 8 November 2017.

80. Radio Poland, “President says abortion laws are abused in Poland,” 7 November 2017.

81. Federation for Women and Family Planning, “The draft law penalizing abortion in case of foetal impairment submitted to the Parliament,” November 2017.

82. Federation for Women and Family Planning, “Save Women' bill with 500 000 signatures submitted to the Polish Parliament,” October 2017.

due to high absenteeism from MPs of the opposition.⁸³ This sparked nationwide protests.⁸⁴ In parallel, the “Stop Abortion”⁸⁵ bill was voted in and put forth to be discussed in the Parliamentary Commission of Social Politics and Family on 10 January 2018.

The “Stop Abortion” bill was again debated in March 2018, but was again temporarily defeated by massive public protests following which the Sejm had decided the proposal would not be tabled in the coming months. However, in June 2018, the Sejm’s Social Policy and Family Committee examined the “Stop Abortion” bill once more. If adopted, the bill would impose a near total ban on abortion, as it purports to amend the 1993 Family Planning Act by prohibiting abortion in the event of a severe and irreversible foetal impairment, a ground on which 98% of legal abortion procedures are accessed in Poland.⁸⁶ The other two grounds on which abortion is permitted account for only 2% of all legal and safe abortions granted because of the many hurdles faced by women whose pregnancy is the result of a crime (rape or incest) or whose pregnancy is a threat to their life. These hurdles are in part due to the need for numerous third party authorisations – from doctors or judges –, the margin of appreciation granted, and their invoking the conscientious objection in a quasi-systematic way, or their refusal to certify the conditions for legal and safe abortions are met for fear of being criminalised for having aided a woman to undergo an illegal abortion. The passing of this bill would violate Poland’s international human rights commitments, starting with, once more, the prohibition of non-retrogressive measures under the ICESCR.⁸⁷

Several international and European institutions have expressly called on Poland to reject any draft legislation further retrogressing on women’s sexual and reproductive rights. For instance, at the United Nations level, the U.N. Working Group on the issue of discrimination against women in law and in practice warned Poland that “forced continuation of pregnancy *in any circumstance* violates a person’s human rights.”⁸⁸ At the European Union level, the European Parliament (hereafter, the “EP”), in its resolution of 15 November 2017, specifically “strongly criticise[d] any legislative proposal that would prohibit abortion in cases of severe or fatal foetal impairment,”⁸⁹ which was one of the contributing factors to the EP finding the situation in Poland represented a clear risk of a serious breach of the EU’s founding values as enshrined in Art. 2 of the Treaty on European Union (hereafter “TEU”), and warranted the triggering of the article 7(1) TEU procedure.

For MP Joana Scheuring-Wielgus, “these past 18 months [in particular] have been a huge step back, in comparison with 1993. We see everything that’s happening as an attempt by the current government to create a religious state.”⁹⁰ She therefore believes that “what happened last autumn – introducing a stricter bill, defeated by massive protests – was not a one-time event, but the beginning of a process for change.”⁹¹ Many interviewees indeed expressed their fear that “at least some restrictions to the current legislation will take place in this term of Parliament . . . [as] PiS will have to do something in that sense for their supporters.”⁹² However, these allegations have been denied by the Polish Ministry of Health, stating that “so far, the provisions have not been changed . . . and there are no plans from the government to change these laws.”⁹³ However, the Ministry did underline that “when a proposal is

83. Federation for Women and Family Planning, “Conformism, contempt & conceit – voting on abortion-related bills in the Polish Parliament,” 10 January 2018.

84. The Independent, “Poland abortion ban: Thousands of women take to streets across country to demand reproductive rights,” 17 January 2018.

85. “Zatrzymaj Aborcję” [see: <https://zatrzymajaborcje.pl/>](https://zatrzymajaborcje.pl/) (last visited 12 August 2018).

86. Federation for Women and Family Planning, “Barbarian anti-abortion bill back in the fundamentalists’ game. Reactions,” July 2018. The other two grounds on which abortion is permitted account for only 2% of all legal and safe abortions granted because of the many hurdles faced by women whose pregnancy is the result of a crime (rape or incest) or whose pregnancy is a threat to their life. These hurdles are in part due to the need for numerous third party authorisations – from doctors or judges –, the margin of appreciation granted, and their invoking the conscientious objection in a quasi-systematic way or their refusal to certify the conditions for legal and safe abortions are met for fear of being criminalised for having aided a woman to undergo an illegal abortion.

87. As stems from the principle of progressive realisation of Art. 2(1) ICESCR; **See** CESCR, General Comment No. 3, para. 9, U.N. Doc. E/1991/23.

88. U.N. Working Group on the issue of discrimination against women in law and in practice, “Poland must not further restrict sexual and reproductive health and rights, say UN experts,” 22 March 2018 (emphasis added).

89. European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)), para. 13.

90. Interview with MP Joanna Scheuring-Wielgus, Tuesday 20 June 2017, in Warsaw, Poland.

91. Interview with MP Joanna Scheuring-Wielgus, Tuesday 20 June 2017, in Warsaw, Poland.

92. Interview with Wanda Nowicka, former deputy speaker, Monday 19 June 2017, in Warsaw, Poland; Interview with members of the Helsinki Foundation for Human Rights, Tuesday 20 June 2017, in Warsaw, Poland.

93. Interview with the members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

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submitted, the government will have to take a stance.”⁹⁴

Legal availability of abortion services is therefore very limited in Poland – limitations which are further exacerbated by additional legal requirements such as third-party authorisations and the lack of an existing mechanism to determine whether the conditions have been met for legal abortion. Taking place in a strong and stigmatising anti-abortion environment, the Polish legal framework on abortion is therefore not sufficient to fulfil the availability requirement of the AAAQ framework. Even more so, it is in direct and outright violation of Poland’s international human rights standards, being the result of retrogressive legislative measures.

CHAPTER 2 - ACCESSIBILITY: DE FACTO INACCESSIBILITY OF SEXUAL AND REPRODUCTIVE RIGHTS SERVICES

Under the AAAQ framework, when abortion is legal under domestic law, it must be accessible in practice.⁹⁵ This entails physical, informational, and economic accessibility. Denial of access to legal abortion services can amount to violations of the rights to health, privacy, non-discrimination and freedom from cruel, inhumane and degrading treatment.

I. Effective physical accessibility seriously hindered

A) International legal standards on the physical accessibility of sexual and reproductive services, and the regulation of the conscientious objection

1) Standards regarding the physical accessibility of abortion services

Physical accessibility is guaranteed when a sufficient number of health facilities providing these services exist throughout the country, implying that women do not have to travel long distances receive these services.⁹⁶

Physical accessibility is often drastically reduced by the legality of the use of the conscientious objection by medical practitioners. States providing for the use of the conscientious objection by healthcare personnel must therefore adequately regulate its practice to ensure that it does not limit women’s access to sexual and reproductive health services.⁹⁷ They must ensure a respectful, timely, and systematic referral is made by the objector to an alternative healthcare provider in the same hospital, and ensure that the practice is solely personal, not institutional.⁹⁸

While freedom of thought, conscience, and religion is protected under Art. 9 of the ECHR, the ECtHR has explicitly stated that Art. 9 of the ECHR did not encompass “each and every act or form of behaviour motivated or inspired by a religion or belief.”⁹⁹

The ECSR has also found that a member State was in breach of Art. 11 of the European Social Charter protecting the right to health, and of the principle of non-discrimination, when the use of the conscientious objection in the State meant that entire regions were scrapped off of doctors willing and able to perform abortion services.¹⁰⁰ In *International Planned Parenthood Federation European Network*

94. Interview with the members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

95. CESCR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), para. 12(b), U.N. Doc. E/C.12/2000/4.

96. CESCR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), para. 12(b), U.N. Doc. E/C.12/2000/4; CEDAW Committee, General Recommendation No. 24 on Article 12 of the Convention (Women and Health), paras. 21 and 25, U.N. Doc. A/54/38/Rev.1, chap. I (1999).

97. CESCR, General Comment No. 22, para. 43, U.N. Doc. E/C.12/GC/22, (2016).

98. CESCR, General Comment No. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, para. 21, U.N. Doc. CESCR/C.12/GC/24 (2017); CESCR, *Concluding Observations on Poland*, paras. 46-7, U.N. Doc. E/C.12/POL/CO/6 (2016); CEDAW Committee, *Concluding Observations Poland*, para. 36-7, U.N. Doc. CEDAW/C/POL/CO/7-8 (2014); *Slovakia*, para. 30-31, U.N. Doc. CEDAW/C/SVK/CO/5-6 (2015); U.N. Human Rights Committee, *Concluding Observations on Columbia*, paras. 20-21, U.N. Doc. CCPR/C/COL/CO/7 (2016).

99. ECtHR, *Pichon and Sajous v. France*, (Application No. 49853/99), 2001.

100. European Committee on Social Rights (hereafter “ECSR”), *International Planned Parenthood Federation European Network v. Italy*, (2014) No. 87/2012

*v. Italy*¹⁰¹ in particular, it found that Italy could in practice only guarantee the right to health for women who could afford to travel from hospital to hospital or from one region to another, thereby resulting in discrimination on the basis of women's economic and social capacities.

In 2015, the ECSR clearly stated that the conscientious objection could not be used by healthcare providers to refuse to provide abortion services under Art. 11 of the European Social Charter, by rejecting such claims by the Federation of Catholic Family Associations in Europe.¹⁰² The Committee unambiguously confirmed that states are not obligated to recognise or protect any right of health professionals to refuse care on grounds of personal conscience under Art. 11 of the Charter.

The ECSR finally went further in *Confederazione Generale Italiana del Lavoro v. Italy* when it also found a violation of the right to work,¹⁰³ and the right to dignity in work,¹⁰⁴ resulting from the State's inability to adequately address the burdensome workload on non-objecting doctors caused by the high percentage of objecting doctors in some areas of Italy.

Finally, it must be noted that while the Council of Europe (CoE) adopted a controversial resolution on the right to institutional conscientious objection in lawful medical care in 2010,¹⁰⁵ it has since been nullified by the CoE, notably the CoE's Commissioner for Human Rights, clearly indicating that "this view is contrary to the repeated recommendations of international human rights mechanisms that have consistently held that institutions may not be allowed to refuse to provide sexual and reproductive health care on grounds of conscience."¹⁰⁶

2) Standards regarding the physical accessibility of contraception

Furthermore, the ECtHR cut short any attempts at widening the use of the conscientious objection when it deemed inadmissible a complaint alleging that pharmacists had a right to use the conscientious objection under Art. 9 of the ECHR to refuse to sell contraceptives. The ECtHR expressly stated that: "as long as the sale of contraceptives is legal and occurs on medical prescription nowhere other than in a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others as justification for their refusal to sell such products."¹⁰⁷

Finally, it must be recalled that the obligation to provide essential medicines such as short-and long-term contraceptives, emergency contraception, and drugs for maternal health care and management of incomplete abortion and miscarriage is a minimum core obligation under the ICESCR,¹⁰⁸ which States must fulfil immediately upon ratification.

B) In Poland, "abortion when legal is not accessible."¹⁰⁹

1) Abusive use of the conscientious objection

The physical accessibility requirement is not fulfilled in Poland, mainly due to abusive use of the conscientious objection, which is invoked institutionally by hospitals rather than by doctors on a case-by-case basis, without referring patients to other doctors willing and able to perform abortion services. The reasoning behind these refusals is that it would undermine the effect of the conscience clause since women would still be able to undergo an abortion, indirectly allowed by the referral. A majority of hospitals go as far as labelling abortions as murders and women seeking them as assassins; "we are hospitals which do not perform murders."¹¹⁰ This results in entire regions of Poland being scrapped off

101. ECSR, *International Planned Parenthood Federation European Network v. Italy*, (2014) No. 87/2012.

102. ECSR, *Federation of Catholic Family Associations in Europe (FAFCE) v. Sweden* (2015) No. 99/2013.

103. ECSR, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy* (2016) No. 91/2013, paras. 214-246.

104. ECSR, *Confederazione Generale Italiana del Lavoro (CGIL) v. Italy* (2016) No. 91/2013, paras. 282-298.

105. Council of Europe, Resolution 1763, 2010, especially para. 1: "No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason."

106. Council of Europe's Commissioner for Human Rights, *Issue paper – Women's sexual and reproductive health and rights in Europe*, December 2017, The Commissioner's recommendations, p. 60.

107. ECtHR, *Pichon and Sajous v. France*, (Application No. 49853/99), 2001.

108. In accordance with the WHO Model List of Essential Medicines. See CESCR, General Comment No. 22, para. 49(g), U.N. Doc. E/C.12/GC/22, (2016); CESCR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), paras. 12(a) and 43(d), U.N. Doc. E/C.12/2000/4; CRC Committee, General Comment No. 15 On the right of the child to the enjoyment of the highest attainable standard of health, U.N. Doc. CRC/C/GC/15 (2013).

109. Interview with the STER Foundation, Monday 19 June 2017, in Warsaw, Poland.

110. Interview with Wanda Nowicka, former deputy speaker, Monday 19 June 2017, in Warsaw, Poland.

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of any single doctor willing and able to perform legal abortion services,¹¹¹ even in those limited cases provided for by the 1993 Act. Therefore “even legal abortion is not accessible.”¹¹² Indeed, officially only 600 to 1,000 legal abortions are performed every year in Poland, out of more than 10 million women of reproductive age. However, women’s organisations estimate approximately 200,000 clandestine and unsafe abortions are performed each year.¹¹³ In practice, the State therefore fails to provide women with the services they are entitled to: “de facto, there is no access to legal abortion . . . The [1993] law is dead in that sense.”¹¹⁴

The only regulation which helped ensure women’s access to legal and safe abortion services was that of 13 May 2005. The regulation obliged hospitals to subcontract services for which its doctors invoked the conscience clause. While this regulation was not fully in line with international standards, according to which every hospital should hire at least one professional willing and able to perform safe abortions, it was a start in improving women’s access to safe and legal abortion by at least designating an alternative healthcare provider willing and able to do so, even if in another hospital. The regulation was however repealed by the Minister of Health on 13 May 2008.

The so-called “conscience clause” is provided for in Art. 39 of the 1996 Medical Profession Act under which doctors may refuse to perform an abortion on the ground that it conflicts with their beliefs or personal values. This right can be invoked, subject to three conditions:

- 1) the doctor is obliged to indicate real possibilities of obtaining the service from another doctor, or another medical institution; and
- 2) the doctor shall justify his/her decision; and
- 3) the doctor shall mention the refusal in the patient’s medical documentation.

However, in October 2015, the Polish Constitutional Tribunal ruled against the referral obligation¹¹⁵ after the National Board of Doctors filed a complaint stating that Art. 39 contravened their right to freedom of thought, conscience, and religion protected by the Polish constitution.¹¹⁶ In the same ruling, the Tribunal declared also unconstitutional the obligation for objectors to provide abortion services in “urgent cases requiring immediate treatment” – to which the “conscience clause” did not previously apply – and thus further limited women’s right to access legal and safe abortion services in cases where their health is at immediate risk. This directly goes against the infamous *Z. v. Poland* ECtHR case¹¹⁷ in which Z’s daughter began experiencing ulcerative colitis while being pregnant (the pregnancy was wanted). While ulcerative colitis is not caused by pregnancy, doctors disregarded all international and medical standards and refused to treat her for the ulcerative colitis, invoking their right to conscientiously object to provide her with medicine which they feared could damage the foetus. This led to Z’s daughter’s health gradually worsening to the point of her life being in immediate danger, which led to a miscarriage, and her subsequent, preventable death.

The Constitutional Tribunal, in its October 2015 judgment, determined that Parliament should put in place other mechanisms by which women can access information about where they can obtain abortion services but it appears that the Minister for Health does not intend to pursue this instruction.¹¹⁸

It must be noted that the fact that the National Board of Doctors filed such a complaint in favour of more

111. Interview with the STER Foundation, Monday 19 June 2017, in Warsaw, Poland.

112. Interview with the STER Foundation, Monday 19 June 2017, in Warsaw, Poland.

113. ASTRA Network, *Access to safe and legal abortion : a European perspective*, 2016.

114. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

115. Polish Constitutional Tribunal Ref. Act K 12/14 Journal of Laws 2015, item 1633, 7 October 2015.

116. Constitution of the Republic of Poland, Art. 53:

“1. Freedom of conscience and religion shall be ensured to everyone.

1. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching. Freedom of religion shall also include possession of sanctuaries and other places of worship for the satisfaction of the needs of believers as well as the right of individuals, wherever they may be, to benefit from religious services.

2. Parents shall have the right to ensure their children a moral and religious upbringing and teaching in accordance with their convictions. The provisions of Article 48, para. 1 shall apply as appropriate.

3. The religion of a church or other legally recognized religious organisation may be taught in schools, but other peoples’ freedom of religion and conscience shall not be infringed thereby.

4. The freedom to publicly express religion may be limited only by means of statute and only where this is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others.

5. No one shall be compelled to participate or not participate in religious practices.

6. No one may be compelled by organs of public authority to disclose his philosophy of life, religious convictions or belief.”

117. ECtHR, *Z. v. Poland*, App. No. 46123/08 (2008).

118. Center for Reproductive Rights and others, “Supplemental information on Poland for the Periodic Review by the Human Rights Committee at its 118th Session”, 22 September 2016. *See also*: CoE Commissioner for Human Rights, *Issue paper – Women’s sexual and reproductive health and rights in Europe*, December 2017, The Commissioner’s recommendations, p. 23.

restrictions on abortion is especially alarming as the body is entrusted with conducting disciplinary proceedings against doctors who may have acted unlawfully in refusing care on grounds of conscience. This thus calls all into question its impartiality.

Civil society organisations have noted that this ruling by the Constitutional Tribunal was “a good excuse to take a few steps back [regarding sexual and reproductive rights].”¹¹⁹ By widening the scope of the conscientious objection and suppressing the obligation to refer the patient to another doctor, willing and able to perform abortion services, the Constitutional Tribunal indeed seriously undermined the effectivity of the 1993 Act, and women’s access to their legitimate right to abortion. A woman faced with an unwanted pregnancy, who falls within the scope of the exceptions of the 1993 Act and is therefore legally entitled to the provision of a legal and safe abortion, will have to search, on her own, for an hospital in which there would be a doctor willing and able to provide her with such service. Taking into account the quasi-total lack of information surrounding legal and safe abortion services and healthcare providing willing and able to provide them, this may result in further delaying the woman’s legal right to a safe abortion, or make it impossible.

2) Most conscientious objections are not genuine

There therefore exists a legal authorisation not to perform abortions if this is contrary to one’s religious beliefs, even in cases where the woman’s health is at immediate risk. At the same time, there lacks an independent mechanism capable of determining whether the conditions for obtaining a legal abortion are met. The combination of these elements further fuels doctors’ fear of prosecution for performing illegal abortion and results in some doctors refusing to perform abortions altogether, and even refusing to certify a woman needs an abortion in a specific case, unless it is 100% certain she will not survive birth. Members of the FWFP recounted stories of women who “were praying gynaecologists on their knees in hospitals ‘please help us,’ as they did not want to carry to term a foetus which had serious damages and were not even sure it would survive pregnancy. And nothing.”¹²⁰

The Polish Ministry of Health denied this situation was happening, clearly saying: “the conscientious objection enables doctors to refuse the performance of a medical treatment when it is contrary to his/ her own conscience. There is an exception for when the refusal could lead to severe damage or the endangerment of the life of the patient. Then, the doctor **cannot** invoke the conscientious objection.”¹²¹

It seems that the current standard for a chance that doctors agree to perform an abortion is thus an imminent threat to the woman’s life. There is currently no definition of what that threat can entail; for instance, whether mental health is included. When questioned on the inclusion of mental health, the Polish Ministry of Health simply stated “the provisions do not say.”¹²² Yet, it seems that a threat to a woman’s life should take into account not only the physical aspects of the threat, but also the mental ones, whereby being forced to carry an unwanted pregnancy to term can lead to grave mental suffering and even to suicide. This is illustrated by one of the stories the FWFP shared:

“There was a young girl who stood on the verge of a window of the 10th floor of a building and said that if she did not receive any help [in undergoing an abortion], she would jump. She had depression, for which she had a psychiatric treatment. She had attempted to commit suicide on several occasions and had a certificate from a psychiatrist. She went to a public hospital in Warsaw and they told her she could not get an abortion unless she could document that threat to her life. She wanted to jump under the metro.”¹²³

Eventually, with the assistance of the FWFP, the girl obtained the necessary certificate. However, for one successful story, members of the FWFP had dozens of failed attempts to share, all due to the considerable chilling effect caused by the possibility of doctors being prosecuted for having been “too lenient” in their evaluation of a threat to a woman’s life, and performing an abortion.

“This fear [of prosecution] by doctors is justified,” said members of the Polish Bar Association. “While there are few statistics on prosecutions of doctors [on these grounds], these statistics are not a good

119. Interview with members of the Helsinki Foundation for Human Rights, Tuesday 20 June 2017, in Warsaw, Poland.

120. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

121. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland (emphasis added).

122. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

123. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

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indicator of the problem because of course there are so few legal abortions – and most are performed illegally.”¹²⁴ As members of the STER Foundation remarked: “the main reason [for the lack of doctors willing and able to perform abortion, and thus for the lack of physical accessibility of abortion services] is peer pressure.”¹²⁵ They explained that pressure was so intense that even doctors expected and wanted women’s rights organisations to campaign for more flexible abortion laws.¹²⁶

As a result of these policies, conscientious objections to perform abortions are often not genuine. “Doctors frequently invoke the conscientious objection as a precaution rather than pure convictions.”¹²⁷ The strong pressure from the Catholic hierarchy is apparent and a determining factor in how Poland has dealt with women’s sexual and reproductive rights since 1993. In March 2014, almost 4,000 Polish doctors signed a “Declaration of Faith of Catholic doctors and medical students regarding human sexuality and fertility,” a non-official document in which they declared that they would not provide abortions and birth control.¹²⁸ While these doctors represent only 1% of the profession, this initiative is a testimony of the influence of the Catholic religion on sexual and reproductive health and rights services in Poland.

Moreover, as the 1996 Medical Profession Act does not explicitly state that only medical professionals can conscientiously object, Polish medical institutions interpreted this provision more broadly, making the conscientious objection a hospital-wide policy.¹²⁹ Doctors, but also gynaecologists, anaesthesiologists and auxiliary medical personnel must then comply with such policy, even if this may not reflect their personal beliefs. The Polish Ministry of Health denied this was a practice, stating the conscientious objection was a “very individual provision which can be called upon only by doctors.”¹³⁰

The institutional use of the conscientious objection may also be the result of pressure exerted on hospitals by the National Health Fund not to perform abortions: hospitals invoke the conscientious objection as an institution, being afraid that would lose funding if they did not.¹³¹ This results in legal abortion services being physically inaccessible to many. Members of the FWFP for instance mentioned the case of a young couple who was expecting a second child, but found out the foetus was severely damaged. “They finally were able to access legal abortion in the country, but had to go 500 kilometers away from the place they were living. And they were treated horribly.”¹³²

Abortion services are not accessible either in the entire region of *Podkarpackie Voivodship* in southern Poland,¹³³ something which was seen as a “huge victory” by the Catholic Church.¹³⁴ The physical inaccessibility of abortion services is also something which the Polish Ministry of Health denied was a common practice, stating “if there is no possibility to perform an abortion in a certain clinic, another one will perform it.”¹³⁵

Unfortunately, the situation is not likely to improve under the current government. Indeed, members of the FWFP explained that the head of the group tasked with issuing standards on pregnant women within the Ministry of Health, Dr. Chazan, who himself used to perform abortions in the 1980s and 1990s as a gynaecologist, is now among the fiercest anti-abortionists. “He makes strong use of the conscientious objection: he refused a woman legal abortion even though her foetus had serious brain damage, and forced her to have the baby.”¹³⁶ The baby lived for one week in terrible suffering before passing away.¹³⁷ Moreover, the Polish Ministry of Health expressly said: “we consider this a very individual situation so, [we do not see any] point in issuing guidelines [on the use of the conscientious objection] that could

124. Interview with members of the Polish Bar Association, Wednesday 21 June 2017, in Warsaw, Poland.

125. Interview with members of the STER Foundation, Monday 19 June 2017, in Warsaw, Poland.

126. Interview with members of the STER Foundation, Monday 19 June 2017, in Warsaw, Poland.

127. Interview with members of the STER Foundation, Monday 19 June 2017, in Warsaw, Poland.

128. Interview with members of the STER Foundation, Monday 19 June 2017, in Warsaw, Poland.

129. Center for Reproductive Rights and others, “Supplemental information on Poland for the Periodic Review by the Human Rights Committee at its 118th Session”, 22 September 2016.

130. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

131. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

132. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

133. Poland’s Commissioner for Human Rights, “Report on measures taken by the Republic of Poland to implement the provisions of the International Covenant on Civil and Political Rights in the years 2008-2015”, 6 October 2016.

134. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

135. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

136. For more information on the case, see: *Gazeta Prawna*, *Rodzice dziecka, ktorym prof. Chazan odmowil aborcji: Po urodzeniu lekarze bali nam sie je pokazac*, 19 June 2015.

137. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

limit doctors or provide a liberal framework. Any such guidelines could lead to limitations of the rights of doctors."¹³⁸

3) Worrying attempts to expand the conscientious objection to other medical professions

Though the situation was dire before PiS came into power, many indications point to more deteriorations to come. Worrying declarations from the Polish Ministry of Health such as "the conscientious objection does not only regard abortion, it is a very general one"¹³⁹ could imply the current government would be open to widening even more the use of the conscientious objection, for instance to the sale of contraceptives. Civil society organisations have expressed their concerns that since the 2015 elections, the pressure to broaden the conscientious objection has alarmingly increased.¹⁴⁰

Recently, attempts have indeed been made to expand the right to conscientious objections to other professions such as pharmacists, when selling contraceptives.¹⁴¹ *Ordo Iuris*, an anti-choice, radical which proposes many radical legal solutions to the Government, is classified as a sect in Brazil, and has connections with *Opus Dei*, is indeed currently gathering signatures under a petition in connection to its newest idea to broaden the scope of the conscientious objection. The Association of Catholic Pharmacists recently submitted a complaint in that sense, alleging pharmacists were discriminated against as they could not invoke the conscientious objection, contrary to doctors.¹⁴² When interviewed on the subject, members of the Association of Catholic Pharmacists explained: "our goal is not to have special rights for **Catholic** pharmacists. We want the right to act according to our conscience, regardless of whether this conscience is [based on] religio[n] or not."¹⁴³ They claimed their convictions are based on "medical knowledge" about contraceptives:

"The notice says that this medication causes the death of the embryo. We consider the embryo to be a person. We would only be opposed to medications aimed at stopping life. Emergency contraception stops life because science says there is the possibility it might stop life . . . We would like to have the right to refuse to sell such thing . . . I would not advise anyone to use contraceptive."¹⁴⁴

Members of the Association of Catholic Pharmacists denied that authorising pharmacists to conscientiously object to selling some medicines would result in a lack of physical access to contraception in the country (as is currently the case for abortion services). A member of the association told FIDH: "There would be no such thing as a lack of access, because many pharmacies are around. About 15% of pharmacists requested this conscientious objection. The other 85% will still be willing to sell."¹⁴⁵ They expressed their strong hope that the bill submitted to expand the conscientious objection to pharmacists will be passed.¹⁴⁶

However, pharmacies already – illegally – make use of the conscientious objection, especially in small towns, where there is a strong influence of the Catholic Church.¹⁴⁷ Members of the FWFP explained that "some pharmacies in these towns display signs stating 'we do not sell contraception' on their door."¹⁴⁸ While the FWFP alerted the authorities regarding this practice, they "receive[d] an answer from the general inspector saying this was indeed not legal and they would investigate . . . But nothing changed. The Polish Commissioner for Human Rights also wrote many letters. But still nothing."¹⁴⁹ When explicitly asked about these practices of pharmacies, the Polish Ministry of Health stated: "We have heard this too, but only in the media. We have never seen it. If we learned that this was happening, we would ask the inspectorate to investigate this because it would be illegal."¹⁵⁰

138. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

139. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

140. Interview with members of the Helsinki Foundation for Human Rights, Tuesday 20 June 2017, in Warsaw, Poland.

141. Mamadu, *Ordo Iuris wpadło na "genialny" pomysł ochrony polskich sumień. To nie może się tak skończyć*, 15 July 2018.

142. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

143. Interview with members of the Association of Catholic Pharmacists, Wednesday 21 June 2017, in Warsaw, Poland (emphasis added).

144. Interview with members of the Association of Catholic Pharmacists, Wednesday 21 June 2017, in Warsaw, Poland (emphasis added).

145. Interview with members of the Association of Catholic Pharmacists, Wednesday 21 June 2017, in Warsaw, Poland.

146. Interview with members of the Association of Catholic Pharmacists, Wednesday 21 June 2017, in Warsaw, Poland.

147. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland; Interview with members of the STER Foundation, Monday 19 June 2017, in Warsaw, Poland.

148. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

149. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

150. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

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An even more worrying trend is that recently, non-medical professions have also begun to use the conscientious objection to refuse to perform an act or issue a document which might lead to a woman undergoing an abortion. For instance, judges have objected to issuing a referral on religious grounds to a pregnant woman who reported her pregnancy resulted from a rape.

This distortion of the current 1996 Medical Profession Act makes it even more difficult for women to access abortion, even when legal.

4) Other means used to refuse to perform abortions

Members of the FWFP explained that the conscientious objection is mostly perceived as being used by Catholic doctors, who abide by the Catholic Church's position. However many doctors actually wish to remain "neutral:" "they are afraid to lose patients because women do not want to go to doctors who use the conscientious objection as they are afraid those doctors will not tell them the truth."¹⁵¹ Therefore, many doctors use other means to avoid performing abortions, such as prescribing additional certification or testing, which will delay the performance of abortion services until it is no longer legal: "[for them] the conscientious objection is a last resort."¹⁵²

5) Lack of physical access to contraception

Legal barriers in access to abortion and latest proposals for reforms must be analysed in combination with the existing framework in place to prevent cases of unwanted pregnancies. Under the 1993 Family Planning Act, the Polish legislator indeed recognises "the right of everybody to decide responsibly about having children and to access to information, education, counselling and the means that ensure the enjoyment of this right." In this respect, central and local authorities are obliged to provide "free access to methods and measures for conscious procreation"¹⁵³ among others.

- Emergency contraception

The current government's attempts to restrict women's right to choose have gone far beyond the legislation on abortion. The government was able to have the Act of 25th May 2017 on the change in the Act on medical services financed from a state budget and some other acts adopted thanks to its majority in the Sejm, which came into effect in July 2017. Women over 18 now need a doctor's prescription in order to buy emergency contraception, that prevents pregnancy after unprotected sexual intercourses, and girls under 15 also require parental consent. The justification invoked by PiS for passing this law is its benefit for women's health as this will be the opportunity for women to have a doctor check-up before prescribing the pill.¹⁵⁴ In practice, this regressive legislation has a deterrent effect on women and girls, who may be forced to continue their pregnancy or seek to undergo clandestine and unsafe abortion.

Before the Act was passed, the emergency contraceptive pill EllaOne was available over-the-counter in pharmacies.

Initiatives such as Women on Web,¹⁵⁵ which existed before this law was passed, could potentially help bypass the effects of this 2017 law: they offer online consultations to Polish women by a doctor within the EU to issue a prescription for the morning-after pill. Indeed, according to European regulations,¹⁵⁶ pharmacies in any European country should fill the prescriptions from a European doctor: once Polish women have printed this prescription by a doctor within the EU, they should be able to collect the morning after pill in a Polish pharmacy. In September 2017, another initiative was created, called "Doctors for Women," aimed to create a network of doctors across Poland who, in the event of an emergency situation, would issue a prescription to women.¹⁵⁷ Nevertheless, "access to emergency contraception

151. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

152. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

153. 1993 Family Planning Act, Art. 2.2.

154. Politico, "Polish parliament votes to limit access to the morning after pill," 25 May 2017.

155. See: <<https://www.womenonweb.org/en/get-emergency-contraceptives>> (last visited 12 August 2018).

156. Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare, Art. 11.

157. See: <<https://lekarzekobietom.pl/>> (last visited 12 August 2018).

is almost impossible . . . due to doctors who can refuse to give prescriptions and pharmacies saying they are out of stock.”¹⁵⁸ Moreover, pharmacies are increasingly invoking the conscientious objection, as explained in **Section I.B) 3) Worrying attempts to expand the conscientious objection to other medical professions**. The result seems to have been foreseen by the Polish Parliament, as Dr. Machińska explained: “A journalist asked a Senate speaker, who is also a doctor, what he thought about EllaOne and he replied he would never prescribe it.”¹⁵⁹ Therefore, the new law only legitimises what was common practice before. Moreover, the government has announced, in September 2018, they will start tracking women who have requested or are requesting a prescription on Women on Web and other similar initiatives, by searching through online forums in what appears to be a true witch hunt,¹⁶⁰ therefore rendering it increasingly difficult for women to have access to emergency contraception. This testifies of the current government’s real crackdown on women’s sexual and reproductive rights, and extreme positioning mirroring that of the Catholic Church in the country.

Even in cases where a pharmacy agrees to sell the morning-after pill, if a woman manages somehow to obtain a prescription, this remains a luxury for the wealthy as EllaOne is very expensive, particularly for girls: approximately 128 złotych (30€).¹⁶¹

The *de facto* lack of access to emergency contraception in Poland is extremely worrying considering the fact that rapid take is essential: delayed access to the pill, due to the need to obtain a medical prescription and parental consent for minors, might lead to inefficacy and force women into a situation of unsafe abortions.

- Everyday contraception

Regarding everyday contraception, male and female condoms and vaginal suppositories are available on the market and appear relatively easy to access, except for female condoms which can only be purchased on the Internet.¹⁶²

Birth control pills can only be purchased on the basis of medical prescription, and thus following an appointment with a gynaecologist. This renders birth control pills difficult to obtain as doctors often refuse to issue such prescription, either because they confuse it with an abortion pill or because they conscientiously object (as explained in **Section I. B) 1) Abusive use of the conscientious objection**). For women who manage to obtain a prescription, serious financial limitations still remain as only one birth control pill is subsidised by the State. Birth control pills cost between 10 and 30 złotych (approximately 2 to 7€) per month,¹⁶³ and thus between 120 and 360 złotych (approximately 28 to 83€) per year if a woman has to buy it each month.

Male condoms seem to be available for everyone to purchase, and not overpriced. However, the burden of protection there lays on men most of the time, meaning women retain less control over the consequences of their sexual intercourses and therefore cannot be the only available solution.

- Voluntary contraceptive sterilisation

Voluntary contraceptive sterilisation is illegal for both women and men. A doctor who performs sterilisation, even with a patient’s consent, is subject to criminal prosecution.

The “conscience clause” is gravely abused by Polish medical institutions as a whole. They are often not genuine, going against the very “spirit” of the 1996 Medical Profession Act to “preserve one’s morals” and instead turning it into a legitimisation mechanism for anti-abortion activists, defending the interests of conservative and religious groups. However, “those women who can afford to [who are a very small minority], often do not wait for this [for doctors using the conscientious objection]: they prefer to go abroad.”¹⁶⁴

158. Interview with Dr. Hannah Machińska, Monday 19 June 2017, in Warsaw, Poland.

159. Interview with Dr. Hannah Machińska, Monday 19 June 2017, in Warsaw, Poland.

160. Email exchanges with members of the Polish Society of Anti-discrimination Law, 20 September 2018.

161. A Pole’s average monthly earnings today is 4,256 złotych (around 999€).

162. Federation for Women and Family Planning, “UPR Poland 27th session,” April/May 2017.

163. Gazeta, *Tabletki antykoncepcyjne - nazwy i ceny, rodzaje, działanie Więcej*, 25 January 2018.

164. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

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II. Economic accessibility: abortion: a luxury for the rich

A) International legal standards on the economic accessibility of abortion services

Under the AAAQ framework, States must ensure the economic accessibility of abortion services. This requires that safe abortion services and medicines be affordable for everyone,¹⁶⁵ thus implying that States put in place free or low-cost services and medicines for women who cannot afford them.¹⁶⁶ The CRC Committee has highlighted the fact that economic accessibility entailed the provisions of free sexual and reproductive health services, including access to contraception and safe abortion to adolescents in particular.¹⁶⁷

B) The case of Poland: "Your reproductive rights depend on money"¹⁶⁸

This requirement is not fulfilled in Poland where most women cannot have access to contraception either, or legal and safe abortion services.

1) Contraception

Most women cannot have access to contraception, whether emergency contraception or every day contraception. As previously mentioned, the morning-after pill is only prescribed upon consultation, and with parental consent for girls under 15, and costs approximately 128 złotys (30€), and birth control pills cost between 10 and 30 złotys (approximately 2 to 7€) per month,¹⁶⁹ and thus between 120 and 360 złotys (approximately 28 to 83€) per year if a woman has to buy it each month.

Therefore, only those able to afford the medical consultation and the cost of the pill are able to buy emergency contraception, when doctors and pharmacies agree to prescribe and sell it. The same goes for every day contraception, as for women who manage to obtain a prescription only one birth control pill is subsidised by the State.

2) Abortion

Most women cannot have access to legal and safe abortion services, as they do not fall within the very limited cases authorised by the law, and are thus constrained to seek these services and/or medicine in private clinics, abroad, or on the black market. As a result, only those who have enough financial means to afford these costs can access abortion services.

The cost of illegal abortions performed in so-called Polish "underground" indeed spiked following the passing of the 1993 Act. Today, a woman must pay roughly the equivalent of a Pole's average monthly earnings (4,256 złotys, or around 999€) for illegal termination of a pregnancy by a doctor in a private clinic.¹⁷⁰ Private healthcare providers carry out approximately 150,000 clandestine abortion procedures per year, thus generating about 300 million złotys (around 75 million €) of untaxed, unregistered income.¹⁷¹

For those who cannot afford such services, Women on Web, set up in 2006, sends women Misoprostol and Mifepristone (often from India) to safely terminate a pregnancy at home. However, packages have been increasingly stopped at the border and confiscated when it contained such medicines.¹⁷² And

165. CECSR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), para. 12(b), U.N. Doc. E/C.12/2000/4; CESCR, General Comment No. 22, paras. 45-46, U.N. Doc. E/C.12/GC/22, (2016).

166. CEDAW Committee, General Recommendation No. 24 on Article 12 of the Convention (Women and Health), para. 27, U.N. Doc. A/54/38/Rev.1, chap. I (1999); CEDAW Committee, *Concluding Observations on Hungary*, para. 31(b), U.N. Doc. CEDAW/C/HUN/CO/7-8 (2013); CESCR, *Concluding Observations on Djibouti*, para. 5(e), U.N. Doc. E/C.12/DJI/CO/1-2 (2014); CESCR, *Concluding Observations on Poland*, para. 27, U.N. Doc. E/C.12/POL/CO/5 (2009); CESCR, *Concluding Observations on Armenia*, para. 22(b), U.N. Doc. E/C.12/ARM/CO/2-3 (2014); CRC Committee, *Concluding Observations on Mozambique*, para. 47(c), U.N. Doc. CRC/C/15/Add.172 (2002); Human Rights Committee, *Concluding Observations on the Republic of Moldova*, para. 17(a), U.N. Doc. CCPR/C/MDA/CO/2 (2009); CAT Committee, *Concluding Observations on the Philippines*, paras. 38-39, U.N. Doc. CAT/C/PHL/CO/ (2016).

167. CRC Committee, *Concluding Observations on Latvia*, para. 51, U.N. Doc. CRC/C/LVA/CO/3-5 (2016).

168. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

169. Gazeta, *Tabletki antykoncepcyjne - nazwy i ceny, rodzaje, działanie Więcej*, 25 January 2018.

170. The Guardian, "How Poland's far-right government is pushing abortion underground," 30 November 2017.

171. ASTRA Network, *Access to safe and legal abortion: a European perspective*, 2016.

172. The Guardian, "How Poland's far-right government is pushing abortion underground," 30 November 2017.

because Women on Web is unavailable in some regions, and some women cannot afford to wait for the package's delivery, many turn to black market supposed "abortion pills," which can be extremely dangerous.¹⁷³ Because of the highly stigmatising environment in Poland, those who buy such pills on the black market fear consulting a doctor in case of complications, thus further putting their lives and health at risk.

Over the last five years, the abortion underground has been deeply hidden and increasingly expensive, causing women who can afford to, to choose instead to travel abroad to neighbouring countries (Slovakia, Czech Republic, Germany, etc.) where services are provided in Polish and abortion is safe and legal.¹⁷⁴ The 2010 Hearing on Abortion Tourism in the Polish Parliament¹⁷⁵ revealed this phenomenon to the public as a very common practice. It is estimated that up to 200,000 women cross the border to undergo safe and legal abortions every year.¹⁷⁶

It must also be noted that there is no family planning in Poland.¹⁷⁷

As members of the FWFP summarised: "[In Poland,] your reproductive rights depend on money – if you have money you can buy your rights."¹⁷⁸ Those who cannot afford to seek care in private clinics or to travel abroad, have to resort to purchasing untrustworthy services or medicine on the black market and to carrying out very risky methods provided by untrained persons or the women themselves – "coat-hangers are the only options left for thousands of women and girls."¹⁷⁹

Women's access to abortion in those cases where it is considered illegal varies therefore greatly depending on their financial means. The poorest will often be the most geographically isolated ones, without recourse to information on safe abortion at home or elsewhere, who will thus resort to extremely dangerous procedures in order to terminate a pregnancy. This lack of information starts at school, where no comprehensive sexual education is dispensed – which thus appears to be an institutionalised policy aiming at denying information to women and girls.

III. Informational accessibility

A) International legal standards on the informational accessibility regarding sexual and reproductive health

Under the AAAQ framework, informational accessibility finally imposes on States to guarantee the access of everyone to comprehensive, age-appropriate, unbiased, and scientifically accurate sexuality education.¹⁸⁰ In that sense, and as explained in *Part II. Chapter 3 Biased education for all, and unsafe environment for LGBT+ students*, the CESCR requires States to "provide age-appropriate, evidence-based, scientifically accurate, comprehensive sexual education for all on sexual and reproductive health,"¹⁸¹ including to "adolescents and youth" on "all aspects of sexual and reproductive health, including maternal health, contraceptives, family planning, sexually transmitted infections, HIV prevention, safe abortion and post-abortion care, infertility and fertility options, and reproductive cancer."¹⁸²

These obligations are echoed at the European level by Art. 11 of the European Social Charter which obliges States to provide education "for the promotion of health."¹⁸³ This includes "information and communication about sexuality education . . . among young people." Therefore, not providing information and education on this topic to adolescents and youth can be considered as a violation of the Charter. Moreover, as stated by the ECSR in *Interights v. Croatia*, States have an "obligation to ensure through the

173. The Guardian, "How Poland's far-right government is pushing abortion underground," 30 November 2017.

174. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

175. Federation for Women and Family Planning, "Public Hearing: Abortion Tourism of the Polish Women" 26 August 2010.

176. Polish informal coalition for the CCPR for consideration of the UN Human Rights Committee in reference to the session no 118, "Alternative report to the ICCPR," 21 July 2016.

177. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

178. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

179. EU Observer by Malin Bjork, "EU's 'old men' must pressure Poland on abortion rights," 15 January 2018.

180. CEDAW Committee, *Concluding Observations on Italy*, para. 36, U.N. Doc. CEDAW/C/ITA/CO/7 (2017); CEDAW Committee, *Concluding Observations on Nigeria*, paras. 33-34, U.N. Doc. CEDAW/C/NGA/CO/7-8 (2017); CEDAW Committee, *Concluding Observations on Ireland*, para. 39 (c), U.N. Doc. CEDAW/C/IRL/CO/6-7 (2017); CRC Committee, *Concluding Observations on Antigua and Barbuda*, para. 45(a), U.N. Doc. CRC/C/ATG/CO/2-4 (2017); CESCR, *Concluding Observations on Benin*, para. 42, U.N. Doc. E/C.12/1/Add.78 (2002).

181. CESCR, General Comment No. 22, para. 47, U.N. Doc. E/C.12/GC/22, (2016).

182. CESCR, General Comment No. 22, para. 18, U.N. Doc. E/C.12/GC/22, (2016).

183. European Social Charter (revised), Art. 11.

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domestic legal system that state-approved sexual and reproductive health education is objective and non-discriminatory.”¹⁸⁴

At the European Union level, sexuality education is within the competence of the EU as part of public health, as defined in Art. 168 of the Treaty on the functioning of the EU.¹⁸⁵

B) Lack of accessible scientifically-accurate information on sexual and reproductive rights

The requirement of informational accessibility regarding sexual and reproductive rights is not fulfilled in Poland where comprehensive sexual education, when provided, is not in line with current scientific standards, and is very often permeated with religious views. The Polish government’s official position on the subject is apparent from its comments to the draft General Comment on Art. 6 of the ICCPR (on the right to life) where it called to include the following paragraph: “(...) to ensure access for women and men and in particular, adolescents, to information and education about reproductive options and to a wide range of contraceptive methods. At the same time, States Parties should have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.”¹⁸⁶

Recent developments indicate that grave steps back were undertaken since the current government came into power, going as far as questioning whether sexual education should even be provided and mandatory for all. This was recently further proven by the 2017 education reform, which PiS rushed through the Sejm, and which was implemented for the 2017/2018 academic year. The reform suppresses instruction on contraceptive methods in the sexual education curriculum in biology class.¹⁸⁷

1) Non-scientifically accurate information provided in schools

While Art. 4(1) of 1993 Family Planning Act provides an obligation for central and local authorities to ensure that sexual education is part of school curricula,¹⁸⁸ the implementation of such obligation and its compatibility with international evidence-based standards on comprehensive sexual education has been questioned over the years by several human rights institutions. The CRC Committee for instance has especially expressed concerns that the family life education course in schools does not provide comprehensive, age-appropriate education on sexual and reproductive health.¹⁸⁹ Indeed, the controversial Preparation for Family Life textbook from series “*Road to Adulthood*” edited by Teresa Król, contain information such as:

- “The first sexual partner, even if accidental, will become the model with which you will compare your later husband. That is why boys prefer for their wife to be a girl who has not tried sex before.” (p. 96)
- “The girl should realise that she would pay more than a boy for making a wrong choice, because there is no equality in nature.” (p. 97)
- “The effectiveness [of condoms] of preventing pregnancy is not very high. There are often technical defects. It can leak, burst, or slip.” (p. 156)
- “In the group of people using natural methods of family planning the ‘sexual boredom’ is less frequent, and the rate of marriage disintegration is significantly lower.” (p. 176)

These statements promote sexist and damaging stereotypes regarding women’s inferior place in society, who should preserve themselves for the man they will marry, and thus are not on an equal

184. ECSR, *International Centre for the Legal Protection of Human Rights (Interights) v. Croatia*, Complaint No. 45/2007, 30 March 2009.

185. Treaty on the Functioning of the European Union (hereafter “TFEU”), Art. 168: “Union action, which shall complement national policies, shall be directed towards improving public health [and] preventing [...] diseases [...]. Such action shall cover the fight against the major health scourges, [...] their transmission and their prevention, as well as health information and education [...]”

186. U.N. Office of the High Commissioner for Human Rights, *Remarks of Poland to the General Comment No 36 on article 6 of the International Covenant on Civil and Political Rights on the right to life*, p. 5.

187. Deutsche Welle, “Poland education reform to slash thousands of teachers’ jobs,” 2 September 2017.

188. 1993 Family Planning Act, Art. 4(1): “Courses on the sexual life of an individual, principles of conscious and responsible parenthood, the value of the family, life in the prenatal phase, as well as on methods and measures of conscious procreation shall be introduced into school curricula.”

189. CRC Committee, *Concluding observations on the combined third and fourth periodic reports of Poland*, para. 39, U.N. Doc. CRC/C/POL/CO/3-4 (2015); CoE Commissioner for Human Rights, *Report by Nils Muižnieks following his visit to Poland from 9 to 12 February 2016*, Doc. CommDH(2016)23, 2016, p.22: “Although it is critical that comprehensive sexuality education be provided as part of mandatory school curricula, in some member states, such as Bulgaria, Lithuania, Poland and Romania, sexuality education either remains voluntary or policies allow children to be withdrawn from classes.”

footing as men. They also dissuade boys and girls from having recourse to contraceptive methods scientifically-proven to be efficient, to the benefit of unprotected sex, which they encourage to use as a tool for women to preserve the health of their marriage – which appears to be their sole responsibility. They testify of a dramatic double standard in the way girls and boys are educated when it comes to gender roles in society, and which are in complete violation of international standards on the equality between women and men, and Poland's own Constitution.¹⁹⁰

a) The Catholic Church's firm control over comprehensive sexual education

As explained in *Part II chapter 1. III.D. Barriers to scientifically accurate education on sexual and equal rights*: "The State ignored the whole issue [of sexual education] and let it be taken over by the Catholic Church."¹⁹¹ Although there used to be an explicit obligation for schools to carry out anti-discrimination education, under the Act of 7 September 1991 on the system of education,¹⁹² this has been repealed by the current PiS-led government as soon as they came into power. The government proceeded to enact an educational reform, which, among others, got rid of this explicit obligation, replacing it with a broader sounding wording, alluding to the fact that schools should "take action to shape students' attitudes and respect for social norms . . . including openness and tolerance."¹⁹³ This is illustrative of the current government's institutional policy not to promote equality and prevent discriminatory attitudes within Polish society, and is coupled with the fact that school staff lack knowledge and are not given an opportunity to train themselves on those issues.

Another striking example is the lack of reaction from the Ministry of Education in the face of Catholic associations of parents and teachers vehemently lobbying against any type of progressive sexual education. These associations have created websites where parents can sign saying they do not want their children to be provided with sexual education, and instead give their approval for these classes to be spent on preparing children for their final exams. This did not trigger any reaction from the Ministry of Education, despite being contrary to the recent PiS-led education reform.

The Ministry of Health does not either seem concerned by these developments, or by the scientific-accurateness of the content of sexual education courses: "[sexual education] is considered an issue of the Ministry of Education; the Ministry of Health is not consulted. However, the curricula is prepared by experts, so they should be well prepared."¹⁹⁴

All of this results in alleged sexual education being provided in a way which is not compatible with international human rights and human rights education standards. Members of the Transfuzja Foundation and of the Polish Teachers' Union explained that classes on sexual education in primary and secondary schools are non-mandatory and called "Preparation for Family Life," which is part of a different subject called "Knowledge about Society" (civic education).¹⁹⁵ They are permeated with conservative views and promote exclusively a traditional family model coherent with the one promoted by the Catholic Church – most of the time, these classes are taught by priests or catechists, including in public schools. "The best way to prevent pregnancies is a glass of water before or after sex or, even better, instead of sex. That's what we are taught."¹⁹⁶ Members of the Transfuzja Foundation explained these classes were about "saying no to drugs and sex," and that "people don't go to these classes."¹⁹⁷ Sexual education does not improve at university level, where classes on the topic are "optional at best."¹⁹⁸

There are significant discrepancies between the content of Polish manuals on sexual education and relevant regional human rights standards. While the Council of Europe has published such resources

190. Constitution of the Republic of Poland, Art. 33 :

« 1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.

2. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations. »

191. Interview with members of the Polish Teachers' Union, Wednesday 21 June, in Warsaw, Poland.

192. Act of 7 September 1991 on the system of education (Journal of Laws of 2016, item 1943), Art. 21.

193. Interview with members of the Polish Teachers' Union, Wednesday 21 June, in Warsaw, Poland; see Act of 14 December 2016. Educational Law (Journal of Laws of 2017, items 59 and 949), Art. 44.

194. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

195. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland; interview with members of the Polish Teachers' Union, Wednesday 21 June, in Warsaw, Poland.

196. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland.

197. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland.

198. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland.

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– notably Compass and Compasito –, “teachers are afraid to use these manuals,” according to Dr. Machińska.¹⁹⁹ She explained that, “while there is no official position [against the use of these manuals, the authorities exert enough] informal pressure through declarations in the media to prevent teachers from using them.”²⁰⁰

Textbooks used in these courses are thus often inadequate, as they tend to reinforce gender stereotypes and do not appear to be up to scientific standards on sexual orientation. This is due to the significant leeway given to the Church in this area. As members of the Polish Teachers' Union explained, two hours per week are dedicated to religion in school, since kindergarten: “children are indoctrinated from the very beginning.” Because religion teachers are exempt from Ministry of Education rules, the Church decides what is required for them to become teachers. They are then exempt from scrutiny, meaning they are not subject to inspections by national authorities. This is especially problematic regarding sexual education as this is an important area of activity for Church-appointed teachers, who are therefore able to teach classes on this topic, free from any scrutiny, and thus provide children with sexual education utterly incompatible with international human rights law, human rights, and scientific standards.

Moreover, textbooks which are allowed to serve for educational purposes on this topic are not scientifically accurate. Members of the Polish Teachers' Union explained that textbooks on sexual education are written by independent authors for private publishing companies, which need to obtain an authorisation from the Ministry of Education for their textbooks to be accepted and introduced as educational material. The Minister can revise a textbook on his own or appoint someone (from a list) to do so. One member of the Polish Teachers' Union explained: “I have written an article on sexual education myself and at the time there were about 20 names of revisors on the list. 80% of these people were connected to the Catholic Church – often fundamentalists.”²⁰¹ With this system in place, and the fact that publishing companies will do everything possible so that the textbooks they invest in can serve as educational material, “essentially all of our textbooks are revised by a priest.”²⁰²

The Church also does not hesitate to call out and publicly shame teachers who attempt to provide sexual education. Members of the Polish Teachers' Union for instance mentioned the case of a kindergarten teacher who was trying to sensitise kinder-gardeners to gender equality by putting together a play where children would imagine their life as their opposite sex, in order to fight stereotypes. The teacher was called out by a priest during a mass, who accused him of “changing boys into pedophiles and homosexuals.”²⁰³ This happened in a small village where inhabitants know each other, and the headmaster was insulted on the streets and his dismissal required for having “condoned” this programme.

In general information regarding sexual and reproductive rights such as the legal availability of abortion or means of contraception is in particular very difficult to access in the countryside or smaller towns, where the Catholic Church has a significant influence, and women have very little financial means.²⁰⁴

b) Lack of qualified teachers for comprehensive sexual education courses

Teachers mostly appear not to be qualified to teach sexual education.²⁰⁵ Indeed, while teachers can specialise in sexual education, those who do have a hard time finding employment, which deters many from seeking to specialise in this area. The result is that other teachers, often religion ones (catechists) or priests, take on the task of providing sexual education, thus themselves being uneducated on the topic.²⁰⁶ One member of the Transfuzja Foundation indeed recalled: “when I asked questions to the [sexual education] teacher, he didn't know the answer.”²⁰⁷

199. Interview with Hannah Machińska, former Director of the Office of the Council of Europe in Poland, and current lawyer and Professor at the University of Warsaw, Monday 19 June 2017, in Warsaw, Poland.

200. Interview with Hannah Machińska, former Director of the Office of the Council of Europe in Poland, and current lawyer and Professor at the University of Warsaw, Monday 19 June 2017, in Warsaw, Poland.

201. Interview with members of the Polish Teachers' Union, Wednesday 21 June, in Warsaw, Poland.

202. Interview with members of the Polish Teachers' Union, Wednesday 21 June, in Warsaw, Poland.

203. Interview with members of the Polish Teachers' Union, Wednesday 21 June, in Warsaw, Poland.

204. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

205. KARAT Coalition in Consultative Status with the ECOSOC on behalf of CEDAW Coalition of Polish NGOs, “Alternative follow-up information on the steps taken to implement the recommendations indicated in Concluding Observations on the combined 7th and 8th periodic reports of Poland submitted to the UN Committee on Elimination of Discrimination against Women,” 17 January 2017.

206. Interview with members of the Polish Teachers' Union, Wednesday 21 June, in Warsaw, Poland.

207. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland.

To remedy this lack of State-sponsored comprehensive sexual education, civil society organisations have tried to step in to dispense such classes, sometimes on a paid contract. The role of civil society in that regard is crucial, as MP Joanna Scheuring-Wielgus explained: "There has been a deterioration regarding women's rights, LGBT+ rights, and sexual education . . . especially in Polish education. If they come into play it is only through NGOs that are forcing educational activities."²⁰⁸ Indeed, the school curriculum was changed in 1999, which promoted type A sexual education, promoting complete abstinence, and considering non-conforming sexual orientation and gender identity as illnesses. While sexual educators groups such as Ponton have been trying to provide scientifically accurate type C sexual education in schools, type A sexual education is currently on the rise due to the barriers anti-rights group raise in the face of sexual educators groups. In that regard, members of the Helsinki Foundation for Human Rights said that in May 2017, Ordo Iuris had launched a campaign whereby parents can insert the name of a school on a web page and Ordo Iuris will file an access to information request asking the school if some training is provided about LGBT+ rights and gender. "This initiative is aimed at the main sexual educators group, Ponton, who Ordo Iuris is going after now."²⁰⁹

At the time of writing this report, the Minister of Education has implemented the government's plan for redrawing the Polish school system.²¹⁰ The reform was adopted by the Parliament and signed into law by the Polish President in early January 2017,²¹¹ and has been implemented starting the 2017-2018 academic year. As a result, school curricula have undergone substantial reform: the sexual education curriculum in biology class no longer includes instruction on contraceptive methods, and the space reserved in school curricula to anti-discrimination and equality issues has been significantly reduced.

This lack of access to scientifically-accurate information regarding sexual and reproductive rights has reverberating consequences in women's lives, especially in Poland, a country where the current government's stance on sexual and reproductive rights is strongly dependent and almost submitted to the Catholic Church's views on the subject. Lacking knowledge of their rights, and of scientifically-approved and recommended prevention methods, women cannot be expected to provide informed consent when it comes to sexual and reproductive rights.

2) Refusal to provide pre-natal testing

Finally, another alarming example of the lack of women's access to information regarding their sexual and reproductive health and life is the trend among doctors to refuse the performance of prenatal diagnostics. They indeed fear those diagnostics could potentially reveal medical grounds for legal terminations.²¹² This severely restricts women's right to information and their ability to choose whether they do want to interrupt their pregnancy, and therefore the effectivity of their right to terminate a pregnancy in one of the cases foreseen by the 1993 Act.

Such practices led to the landmark ECtHR *R.R. v. Poland*²¹³ judgment, in which the Court ruled that Poland's treatment of women in this context could amount to inhumane and degrading treatment, in violation of Art. 3 of the ECHR. The Court ruled that denying a woman access to prenatal diagnosis because doctors suspected a risk there could be a medical ground for termination, for six weeks, caused unnecessary suffering and prevented the woman from obtaining information about the condition of her foetus. The Court found Poland had violated Arts. 3 and 8 of the ECHR. However, these practices do not seem to have been addressed by the current government, especially given its stance on abortion.

208. Interview with MP Joanna Scheuring-Wielgus, Tuesday 20 June, in Warsaw, Poland.

209. Interview with Helsinki Foundation for Human Rights, Tuesday 20 June, in Warsaw, Poland.

210. Ministry of National Education of the Republic of Poland, *Podsumowanie Ogólnopolskiej Debaty o Edukacji*.

211. European Foundation for the Improvement of Living and Working Conditions, "Poland: Government enacts radical education reform despite opposition," 23 March 2017.

212. Communication of 11 August 2016 to the Human Rights Commissioner, p. 5 <www.rpo.gov.pl/sites/default/files/Odp.%20RPP%2019.8.16%20%282%29.pdf> (last visited 13 July 2018).

213. ECtHR, *R.R. v. Poland* (Application No. 27617/04), 2011.

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CHAPTER 3 - ACCEPTABILITY : INFORMED CONSENT ISSUES

I. International legal standards on the acceptability of sexual and reproductive services

Under the AAAQ framework, the State must ensure sexual and reproductive health services are acceptable, meaning they must respect the rights to confidentiality and informed consent, be culturally appropriate, and be sensitive to gender and life-cycle requirements.²¹⁴ Further, they must be delivered in a way that respects women's dignity and is sensitive to their needs and perspectives.²¹⁵

II. The 4,000 zlotys campaign: serious informed consent issues

As explained in *Section III. B) Lack of accessible scientifically-accurate information on sexual and reproductive rights in Poland*, the lack of accessible scientifically-accurate information on sexual and reproductive rights in Poland is a real barrier to women's full, free, and informed consent when it comes to their rights in that area.

This is further exacerbated by the current government's anti-choice propaganda and what can be described as bribing schemes. Jaroslaw Kaczynski, PiS's leader, has indeed been at the forefront of an outrageous campaign to pass a draft bill further limiting the possibility for women to undergo legal abortions. The draft bill, proposed in March 2018 and later in July 2018, purports to delegalise abortion in cases where there is a high probability of a severe and irreversible foetal impairment. According to him, women should give birth even to children with such severe deformities that they are "condemned to death", so that they can be "baptised, buried, have a name."²¹⁶ As the bill has not yet passed, the government recently created what can essentially be described as a bribing scheme, which offers women a one-off payment of 4,000 zlotys (approximately 925€) for giving birth to such a child, whether dead or alive, instead of terminating the pregnancy.²¹⁷

This deeply disturbing scheme begs serious concerns regarding the informed consent of women being paid this amount of money, especially when the amount offered equates the country's average monthly earnings (4,256 zloty, or around 999€).

CHAPTER 4 - QUALITY : ABUSIVE USE OF THE CONSCIENTIOUS OBJECTION IMPACTS QUALITY OF ABORTION SERVICES

Under the AAAQ framework, health services must be scientifically and medically appropriate, thereby requiring States to ensure the medical personnel possesses the appropriate skills, uses scientifically approved and unexpired drugs, and has sufficient hospital equipment at disposition.²¹⁸ The quality requirement also encompasses the obligation for States to guarantee the availability of such skilled medical personnel able to perform abortions, thereby ensuring the use of the conscientious objection does not interfere with women's access to such services.²¹⁹

As medical practitioners make abusive use of the conscientious objection, whether individually or institutionally, this requirement cannot by essence be fulfilled in Poland. For more information on the use of the conscientious objection in Poland, see *Section I.B) In Poland, "abortion when legal is not accessible."*

214. CECSR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), para. 12(c), U.N. Doc. E/C.12/2000/4; CEDAW Committee, General Recommendation No. 24 on Article 12 of the Convention (Women and Health), para. 22, U.N. Doc. A/54/38/Rev.1, chap. I (1999).

215. CEDAW Committee, General Recommendation No. 24 on Article 12 of the Convention (Women and Health), para. 22, U.N. Doc. A/54/38/Rev.1, chap. I (1999).

216. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

217. The Economist, "Poland's conservatives are pushing one of Europe's toughest abortion laws," 5 April 2018.

218. CECSR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), para. 12(d), U.N. Doc. E/C.12/2000/4.

219. CECSR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), paras. 13, 21, 28, U.N. Doc. E/C.12/2000/4; CEDAW Committee, *Concluding Observations on Slovakia*, para. 29, U.N. Doc. CEDAW/C/SVK/CO/4 (2010); CEDAW Committee, *Concluding Observations on Kuwait*, paras. 30-31, U.N. Doc. CEDAW/C/KWT/CO/3-4 (2013); CEDAW Committee, *Concluding Observations on Poland*, para. 25, U.N. Doc. CEDAW/C/POL/CO/6, (2007).

CHAPTER 5: RESILIENCE IN AN INCREASINGLY SHRINKING SPACE FOR CIVIL SOCIETY

I. “The only thing this government is afraid of is force”²²⁰

Interventions by international and European human rights bodies have been accompanied by a large mobilisation of civil society in Poland and across Europe demanding the 1993 Act be reformed and protesting against proposals to further restrict women’s sexual and reproductive rights. These mobilisations have been crucial in ensuring no further retrogressive legislative measures are adopted on women’s rights, especially in a country where democratic checks and balances have been drastically undermined. As Wanda Nowicka rightfully remarked: “the only thing this government is afraid of is force,”²²¹ as testify the several delayed attempts to introduce a more restrictive anti-abortion framework, due to nationwide protests over the past two years. “This is why they withdrew the abortion bill: because they saw the power of women in the streets.”²²²

The current government is also quite closed off to any demands emanating from civil society organisations, particularly on this subject: “they don’t pay attention to [civil society organisations] because they don’t see them as serious threat. They want to replace this ‘bad’ civil society with their own people.”²²³

Moreover, the enormous citizens’ movement which has taken place since 2016 in favour of women’s sexual and reproductive rights also sparked changes in medical practitioners’ openness about being pro-choice. Indeed, before the protests, about “18 gynaecologists were pro-choice in the whole country, according to data from official agencies such as Okopress,”²²⁴ whereas “more than 40 pro-choice spoke out [after the protests] according to the same agencies.”²²⁵

However, the various mobilisations and initiatives undertaken by Polish civil society are happening in a context of a drastically-shrinking space for women’s rights organisations and activists, which face increasing obstacles in carrying out their work and even encounter direct attacks and threats.²²⁶

II. Shrinking space for women’s rights civil society organisations and activists

Sanctions were taken against teacher participants in the October 2016 protests. As members of the Polish Teachers’ Union recounted:

“We were asked as a union to take part in the October 2016 Black Protest. We simply had to say whether the teachers could leave schools and go to the protests. We replied that we supported their will to take part in the demonstrations, as long as they did not leave kids alone and leave school. It was possible because demonstrations also happened in the afternoon and evening all over Poland. [Those who could not take part in the protest during the day were called to wear black at work to show their support.] Some teachers took pictures with black t-shirts when they were at school, and they wrote on their private Facebook pages [in support of the protest]. Disciplinary commissions exist [for students] to address issues such as beatings at schools or refusal to comply with the headmaster’s orders. And for the first time, teachers were taken before these disciplinary commissions for something they did in their private time. However, because it became a nationwide affair, nobody dared to do anything to these teachers.”²²⁷

MP Joanna Scheuring-Wielgus also said she had been targeted personally because of her involvement in a trial against a priest “who was an icon for the far-right due to his anti-migrant, anti-women

220. Interview with Wanda Nowicka, former deputy speaker, Monday 19 June 2017, in Warsaw, Poland.

221. Interview with Wanda Nowicka, former deputy speaker, Monday 19 June 2017, in Warsaw, Poland.

222. Interview with Wanda Nowicka, former deputy speaker, Monday 19 June 2017, in Warsaw, Poland.

223. Interview with Wanda Nowicka, former deputy speaker, Monday 19 June 2017, in Warsaw, Poland.

224. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

225. Interview with members of the Federation for Women and Family Planning, Wednesday, 21 June 2017, in Warsaw, Poland.

226. The Guardian, “Police raid offices of women’s group in Poland after protests,” 5 October 2017.

227. Interview with members of the Polish Teachers’ Union, Wednesday 21 June, in Warsaw, Poland.

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discourse.”²²⁸ As a result he was expelled from the Church. “I received threats and untrue information was spread about me. All women MPs have been targeted.”²²⁹

Dr. Hannah Machińska also explained how the government is barring access to funding to NGOs working on issues which it considers controversial:

“They are refusing them grants. For instance, the Centre for Women’s Rights, which has been funded annually since 2012, was refused a grant in 2016, and the explanation was that they are dealing with women and are thus discriminating against men who are victims of violence! Many NGOs are blacklisted: it will be impossible for them to receive grants. [They make] everything look apparently transparent and democratic. The government offered a one million złotych grant to one organization which launched a campaign against children going to school at six, saying they have to stay home with mothers: ‘good Catholic mothers stay at home with their children.’”²³⁰

These testimonies are even more worrying considering the 2017 Act on the National Institute of Freedom – Centre for the Development of Civil Society passed by PiS, allowing the government to control the entire distribution process of public funding to NGOs through its “National Institute of Freedom.” Most of this Institute’s board members, including its director, are appointed by the current government, thereby leaving no space for NGO representatives to block decisions by the PiS-appointed majority. Moreover, the vagueness of the law leaves a tremendous margin of appreciation to the board in distributing public funding. In case any doubt remains on the actual aim of the passing of this law, PiS Senator Andrzej Bobko said: “just as the government cannot use public funds to support ‘an organisation whose mission is to promote the flat Earth theory, it also cannot support an organisation that promotes harmful theories regarding sexuality.”²³¹

Recommendations

To the U.N. Committee on the Elimination of all forms of Discrimination against Women, to the U.N. Committee on Economic, Social, and Cultural Rights, to the U.N. Special Rapporteur on the right to the highest attainable standard of physical and mental health, to the U.N. Special Rapporteur on violence against women, including its causes and consequences:

- Urge the Polish government to ensure the legalisation of abortion for women and girls under all circumstances; and
- Clearly voice concerns regarding the current restrictive legislative framework surrounding women and girls’ sexual and reproductive rights and the recent legislative attempts to further restrict them; and
- If deemed necessary, issue a public declaration on the matter; and
- Extend an offer for a country visit to the Polish government on its implementation of the CEDAW and the ICESCR, in particular regarding the situation of women and girls’ sexual and reproductive rights; and
- Urge the Polish government to ensure women have physical, economic, and informational access to sexual and reproductive rights, notably through the strict regulation of the use of the conscientious objection, through the provision of scientifically-accurate comprehensive sexual education in all schools, through subsidising emergency contraception and everyday contraception for women and girls.

To the European Union:

• *To the European Parliament:*

- Reiterate a recommendation to member States and candidate nations in favour of the legalisation of abortion under all circumstances for women and girls, of the decriminalisation for assisting a woman in having an abortion, including by providing transport, advice or information, and of the full respect and guarantee of women and girls’ sexual and reproductive rights under all circumstances; and
- Pass a follow-up resolution to the September 2015 resolution on “empowering girls through

228. Interview with MP Joanna Scheuring-Wielgus, Tuesday 20 June 2017, in Warsaw, Poland.

229. Interview with MP Joanna Scheuring-Wielgus, Tuesday 20 June 2017, in Warsaw, Poland.

230. Interview with Dr. Hannah Machińska, Monday 19 June 2017, in Warsaw, Poland.

231. Siec Obywatelska Watchdog, “Is the National Institute of Freedom a deserved name?,” 4 October 2017.

education in the EU,” indicating that all schools should teach sexuality and anti-discrimination education, that the course should be taught by specialised teachers, not priests or catechists, and on this basis exhort Poland to amend its 2017 education reform, notably regarding sexuality and anti-discrimination education.

• **To the European Agency for Fundamental Rights:**

- Conduct an EU-wide survey on access to women and girls’ sexual and reproductive rights in the EU and follow-up on the implementation of the recommendations published.

To the Council of Europe:

- Follow up on the Commissioner’s recommendations to all Council of Europe member states in the field of women’s sexual and reproductive health and rights, as outlined in the 2017 issue paper on “Women’s sexual and reproductive health and rights in Europe.” In the case of Poland, especially follow up on the following recommendations:
 - to “ensure all women’s access to safe and legal abortion care”
 - to “ensure the provision of comprehensive sexuality education”
 - to “guarantee the affordability, availability, and accessibility of modern contraception”
 - to “ensure that refusals of care by health care workers on grounds of conscience or religion do not endanger women’s timely access to sexual and reproductive health care”
- If deemed necessary, issue a public declaration or resolution on the matter; and
- Officially revoke resolution 1763 (2010) on the right to conscientious objection in lawful medical care; and
- Adopt a new resolution on the right to conscientious objection in lawful medical care, in line with current international and European human rights standards and ensure it does not permit member States to evade their obligation to ensure the effective access to legal abortion services; and
- Urge Poland to use scientifically accurate manuals for comprehensive sexual education courses, such as Compass and Compasito.

To the Polish Parliament:

- Amend the 1993 Family Planning Act so as to ensure legal and safe abortion services are available, under all circumstances, for all women and girls, based on the sole expression of their will to undergo an abortion. This also entails removing from the 1993 Act the recognition of a right to life that includes the prenatal phase. This may also entail modifying the Polish Constitution, notably Art. 38 which affords “legal protection of the life of every human being.” This would *de facto* render Constitutional Tribunal in its judgement of 29 May 1997,²³² stating that as a democratic State under the rule of law, Poland protects each person’s fundamental right to life, from beginning to end – and it is not sufficient to maintain that unborn babies are not persons²³³ – inapplicable; and
- Refrain from adopting legislative measures further retrogressing on women’s sexual and reproductive rights; and
- Amend the 2008 Act on the Protection of Patient Rights to fully implement the *Tysiac v. Poland* ECtHR judgment requiring the establishment of an effective mechanism capable of determining whether the conditions for obtaining a legal abortion are met, and to effectively challenge a doctor’s opinion, pending the legalisation of abortion under all circumstances. To be in line with the ECtHR judgment, the mechanism must consist of (1) an independent body, (2) that takes the views of the woman into consideration and (3) issues decisions in writing (4) within a reasonable period of time; and
- Ensure women are provided access to free legal aid if they wish to lodge a complaint before the aforementioned mechanism; and
- Ensure an enforceability mechanism is put in place, guaranteeing women’s effective access to the granted lawful abortion; and
- Amend the 1993 Family Planning Act so as to suppress the requirement of third-party authorisations for access to services such as health, including sexual and reproductive health, in particular access to legal and safe abortion;²³⁴ and
- Repeal Arts. 18 and 152 to 154 of the Criminal Code, so as to repeal any form of criminalisation of a doctor or anyone else assists a woman in having an abortion, including by providing transport, advice or information; and

232. Ruling K 26 96 of the Constitutional Tribunal, 28 May 1997, Poland.

233. Ruling K 26 96 of the Constitutional Tribunal, 28 May 1997, Poland.

234. As stated in CEDAW, General Recommendation No. 33 on women’s access to justice, (61 st Sess., 2015), para 25(c)), U.N. Doc. CEDAW/C/GC/33 (2015).

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- Guarantee that the use of the conscientious objection does not constitute an obstacle to women and girls' right to access legal and safe abortion services, whether in public or private healthcare facilities, in the cases allowed under the 1993 Family Planning Act; and
 - Enact a clear definition of what constitutes an imminent threat to the woman's life, and ensure it takes into account not only the physical aspects of the threat, but also the mental ones, whereby being forced to carry an unwanted pregnancy to term can lead to grave mental suffering and even to suicide; and
 - Strictly regulate the use of the conscientious objection by amending the 1996 Medical Profession Act to ensure:
 - the use of the conscientious objection remains exceptional;
 - a respectful, timely, and systematic referral is made by the objector to an alternative healthcare provider in the same hospital, and ensure that the practice is solely personal, not institutional. This entails that there be at least one non-objecting doctor in each hospital, whether public or private, willing and able to perform abortions or related sexual and reproductive services such as prenatal testing;
 - objecting professionals have an obligation to provide abortion services in the case where there exist an immediate and urgent threat to the life of the woman;
 - the enactment of a definition regarding a detailed procedure based on strict and precise criteria for doctors' to invoke the conscientious objections: the procedure should be based on deeply-held beliefs, expressed in writing, and should encompass an obligation for the objecting medical professional to deliver a certificate of conscientious objection to patients requesting it;
 - monitoring mechanisms are put in place to ensure doctors invoking the conscientious objection thoroughly respect the above-mentioned procedure;
 - the immediate care for women and girls wishing to undergo a legal and safe abortion, in the cases warranted under the 1993 Family Planning Act, in a reasonable geographical range;
 - Refrain from amending the 1996 Medical Profession Act or from enacting any other act which would expand the use of the conscientious objection to other medical or non-medical professions; and
 - Repeal the Act of 25th May 2017 on the change in the Act on medical services financed from a state budget and some other acts so as to suppress the requirement of having a prescription in order to buy emergency contraception and the parental consent requirement for girls under 15; and
 - Amend the 1993 Family Planning Act so as to ensure legal and safe abortion services are available, under all circumstances, especially for girls; and
 - Amend the 2017 education reform so as to reinstate instruction on contraceptive methods in the sexual education curriculum in biology class and the obligation for schools to ensure anti-discrimination education is provided at school, to all children; and
 - Repeal the 2017 Act on the National Institute of Freedom – Centre for the Development of Civil Society, or amend it so as to ensure the Institute is fully independent from the executive, distributes public funding in a transparent manner, and does not discriminate against NGOs on the basis of the type of activity they conduct.

To the Polish government, in particular the Ministry of Health:

- Ensure women have access to an effective mechanism capable of determining whether the conditions for obtaining a legal abortion are met, and to effectively challenge a doctor's opinion, pending the legalisation of abortion under all circumstances. To be in line with the ECtHR judgment, the mechanism must consist of (1) an independent body, (2) that takes the views of the woman into consideration and (3) issues decisions in writing (4) within a reasonable period of time; and
- Ensure that data is systematically and regularly collected on the number of abortions being performed, whether considered legal or illegal; and
- Take dissuasive disciplinary actions against pharmacists who illegally use the conscientious objection to refuse to sell contraception, including emergency contraception; and
- Raise State subsidies for everyday and emergency contraception, and in particular ensure that girls and women with limited financial means have access to everyday and emergency contraception, notably by providing free sexual and reproductive health services, including contraception and legal and safe abortion, especially for girls, in line with the CRC Committee's recommendations, and
- Ensure essential medicines such as short-and long-term contraceptives, emergency contraception, and drugs for maternal health care and management of incomplete abortion and miscarriage are provided to all women and girls upon request, and free of charge upon demonstration of financial

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- needs, immediately, in line with Poland's minimum core obligation under the ICESCR:²³⁵ and
- Immediately refrain from actions, such as the 4,000 złotys campaign which could tamper with women's free and informed consent regarding their sexual and reproductive health.

To the Polish government, in particular the Ministry of Education of the Republic of Poland:

- Provide systematic and quality trainings, in line with regional and international standards, to teachers on comprehensive sexual education; and
- Integrate scientifically accurate comprehensive sexual education courses in school curricula, in line with Council of Europe standards; and
- Ensure that comprehensive sexual education courses are taught by qualified teachers or non-governmental organisations and not permeated with religious views; and
- Work hand-in-hand with the Ministry of Health to design sexual education curricula; and
- Ensure dissuasive disciplinary actions are taken against medical professionals who illegally refuse to perform prenatal diagnostics.

Conclusion

While the situation of women's sexual and reproductive rights was already worrisome before PiS came into power, it has become dire since October 2015 and the degradation of the rule of law that ensued, combined with increased deference given to the positioning of the Catholic Church on this subject – as apparent from numerous anti-choice declarations and public support to stricter anti-abortion laws by government officials. Over the past three years, several attempts have been made at further restricting women's slim right to abortion through initiatives such as the "Stop Abortion" bill. The scope of the conscientious objection has also been dramatically expanded by the Constitutional Tribunal's ruling, and despite assurances from the Polish Ministry of Health, concerns regarding the passing of a bill introducing the conscientious objection for pharmacists in the near future remain and are legitimate. The current government refuses to implement ECtHR rulings on the subject and is entirely closed off to any discussion based on scientifically-accurate facts on the topic, whether at school when it comes to comprehensive sexual education or in order to bring its current positioning in line with international human rights standards – for instance, regarding the moment life begins. The degradation of the rule of law has had palpable consequences for women and girls in Poland: it has been accompanied by the current government's attempts to render women and girls' sexual and reproductive rights legally unavailable and physically, economically, and informationally inaccessible. All these developments mean that it is currently almost impossible for women to undergo legal and safe abortions in the country, for instance.

235. In accordance with the WHO Model List of Essential Medicines. See CESCR, General Comment No. 22, para. 49(g), U.N. Doc. E/C.12/GC/22, (2016); CESCR, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), paras. 12(a) and 43(d), U.N. Doc. E/C.12/2000/4; CRC Committee, General Comment No. 15 On the right of the child to the enjoyment of the highest attainable standard of health, U.N. Doc. CRC/C/GC/15 (2013).

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PART II - THREE YEARS OF LIBERATION OF ANTI-LGBT+ DIS-COURSE: FROM WORDS TO ACTIONS



A man wears a t-shirt with the altered emblem of Poland during the second LGBT parade in Torun, Polan on September 29, 2018.
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Introduction

Over the past years, international and European human rights norms have evolved to recognise the need for increased protection from discrimination on the basis of sexual orientation, gender identity, or expression. Possessing anti-discrimination provisions which incorporate these three grounds is today a minimum requirement for every State in the fight against discrimination against LGBT+ persons.²³⁶

While Poland ratified most international and European human rights instruments (ICCPR, ICESCR, CEDAW, CRC, CAT, ECHR, the European Social Charter),²³⁷ it still fails to ensure its domestic legal framework is in accordance with the obligations that derive from them. Human rights treaty bodies and institutions have closely scrutinised the situation of LGBT+ persons' rights in Poland, and have consistently expressed concerns regarding the limited legal protection afforded to these persons.²³⁸

These apprehensions have increased over the past three years, since the governing PiS party came into power in October 2015 and started implementing its conservative, anti-democratic agenda which has been accompanied with at least implied validation of anti-LGBT+ discourse and initiatives, and favours “family mainstreaming” rather than what it refers to as “gender ideology.”

However, the Polish government has so far disregarded most of the recommendations made by international organisations and bodies on LGBT+ persons' situation in Poland, and the current context has made civil society organisations and opposition parties increasingly reluctant to propose legislative initiatives aimed at remedying the situation, for fear they could backlash into further retrogressive measures – as happened regarding women's sexual and reproductive rights.

CHAPTER 1: DISCRIMINATION OF PERSONS WITH NON-CONFORMING SEXUAL ORIENTATION, GENDER IDENTITY, OR EXPRESSION IN THEIR ACCESS TO ECONOMIC, SOCIAL, AND CULTURAL RIGHTS

I. General anti-discrimination law

A) The principle of non-discrimination under international human rights law

Non-discrimination is a cornerstone principle of human rights law, which applies to all three of States' primary obligations to respect, protect, and fulfill the human rights of everyone regardless of sexual orientation and gender identity or expression, among others. It is central to every single international human rights instrument, from the U.N. Charter (1945),²³⁹ to the Universal Declaration of Human Rights

236. U.N. Committee on Economic, Social and Cultural Rights (hereafter “CESCR”), General Comment No. 3 on the Nature of States Parties' Obligations (Art. 2, para. 1), para. 9, U.N. Doc. E/1991/23 (1990); U.N. Commission on Human Rights, Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, para. 72, U.N. Doc. E/CN.4/1987/17 (1987); CESCR, General Comment 14 on the Right to the Highest Attainable Standard of Health (Art. 12), U.N. Doc. E/C.12/2000/4 (2000); CESCR, General Comment 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social, and Cultural Rights), U.N. Doc. E/C.12/GC/22 (2016); U.N. Committee against Torture (hereafter “CAT”), *Final Observations on Peru*, U.N. Doc. CAT/C/PER/CO/5-6, § 15. To go further, see: Johanna B. Fine, JD, MIA, Katherine Mayall, JD, and Lilian Sepúlveda, JD, *The Role of International Human Rights Norms in the Liberalization of Abortion Laws Globally*, Leah Hoctor, Adriana Lamačková, *Mandatory waiting periods and biased abortion counselling in Central and Eastern Europe*, International Journal of Gynecology & Obstetrics, August 2017.

237. International Covenant on Civil and Political Rights (1977); International Covenant on Economic, Social and Cultural Rights (1977); CEDAW (1980); U.N. Convention on the Rights of the Child (hereafter “CRC”) (1991); U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter “Convention against Torture”) (1987); European Convention for the protection of human rights and fundamental freedoms (hereafter “ECHR”) (1993); European Social Charter of 1961 (1997).

238. U.N. Human Rights Committee, *Concluding Observations on the seventh periodic report of Poland*, 23 November 2016, U.N. Doc. CCPR/C/POL/CO/7, paras. 13-14; U.N. Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Poland*, U.N. Doc. E/C.12/POL/CO/6, paras. 10-11; European Commission against Racism and Intolerance, “ECRI Report on Poland (fifth monitoring cycle)” adopted on 20 March 2015, published on 9.06.2015; U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Poland, Thirty-sixth session, 11-29 September 2017, Agenda item 6, A/HRC/36/14. To be noted: this list is non-exhaustive.

239. U.N. Charter (26 June 1945) art. 55 (“Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”).

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(UDHR, 1948),²⁴⁰ the International Covenant on Civil and Political Rights (ICCPR, 1966),²⁴¹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).²⁴²

As a State party to the ICCPR since 1977, the Republic of Poland (hereafter “Poland”) has the obligation to enact legislation “prohibit[ing] any discrimination and guarantee[ing] to all persons equal and effective protection against discrimination on any ground” including “sex . . . or other status”²⁴³ in their enjoyment of all civil, political, economic, social, and cultural rights. The references to “sex” under Arts. 2(1) and 26 the ICCPR have been expanded by the U.N. Human Rights Committee as encompassing sexual orientation in *Toonen v. Australia*²⁴⁴ and in many of the Committee’s concluding observations.²⁴⁵

As a State party to the ICESCR since 1977, Poland has the obligation to guarantee that economic, social and cultural rights will be exercised “without discrimination of any kind as to . . . sex . . . or other status,”²⁴⁶ notably through adopting legislation to this effect. The U.N. Committee on Economic, Social and Cultural Rights (hereafter “CESCR”), in its General Comment No. 20, has explicitly indicated that sexual orientation and gender identity were protected grounds under the “other status” clause of Art. 2(2) of the ICESCR.²⁴⁷

To provide States with guidance, human rights experts have elaborated the Yogyakarta Principles²⁴⁸ which flesh out the ways the principle of non-discrimination should be implemented in practice. States should embody the principle of non-discrimination on the basis of sexual orientation and gender identity “in their national constitutions or other appropriate legislation . . . and ensure the effective realisation of [this principle]”²⁴⁹ both in “public and private spheres,”²⁵⁰ taking into account “the manner in which such discrimination may intersect with other forms of discrimination.”²⁵¹ These efforts should be accompanied by State-sponsored educational and training programmes, aimed at “achieving the elimination of prejudicial or discriminatory attitudes or behaviours which are related to the idea of the inferiority or the superiority of any sexual orientation or gender identity or gender expression.”²⁵²

As corollary to these obligations, States must also both prevent and remedy instances of discrimination based on a person’s sexual orientation or gender identity, regardless of who the perpetrator was (a State or non-State actor).²⁵³

240. Universal Declaration of Human Rights (10 December, 1948) art. 2 (“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”).

241. International Covenant on Civil and Political Rights (16 December 1966) arts. 2(1) and 26.

242. International Covenant on Economic, Social and Cultural Rights (16 December 1966) art. 2(2).

243. International Covenant on Civil and Political Rights arts. 2(1) (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”) and 26 (“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

244. U.N. Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992, para. 87 (1994).

245. U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee on Chile*, U.N. Doc. CCPR/C/CHL/CO/5, para. 16, (18 May 2007); see also U.N. Human Rights Committee, *Concluding Observations of Belize in the Absence of a Report*, U.N. Doc. CCPR/C/BLZ/CO/1, para. 13 (26 April 2013); U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee on Jamaica*, U.N. Doc. CCPR/C/JAM/CO/3, para. 8 (17 November 2011); U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee on the Republic of San Marino*, U.N. Doc. CCPR/C/SMR/CO/2, para. 7 (31 July 2008); U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee on Austria*, U.N. Doc. CCPR/C/AUT/CO/4, para. 7 (30 October 2007); U.N. Human Rights Committee, *Concluding Observations of the Human Rights Committee on the United States of America*, U.N. Doc. CCPR/C/USA/CO/3, para. 25 (18 December 2006).

246. International Covenant on Economic, Social and Cultural Rights art. 2(2) (“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

247. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 20, U.N. Doc. E/C.12/GC/20, para. 32 n.25 (July 2009).

248. *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (March 2007) were elaborated by a community of human rights experts in 2006 and complemented by another 10 principles in 2017. They provide guidance as to how pre-existing rights under international human rights law apply to persons with non-conforming sexual orientation or gender identity or expression ; as such, they do not create new rights.

249. Yogyakarta Principle No. 2(a).

250. Yogyakarta Principle No. 2(c).

251. Yogyakarta Principle No. 2(e).

252. Yogyakarta Principle No. 2(f).

253. International Commission of Jurists, “Sexual Orientation, Gender Identity and International Human Rights Law: Practitioners’ Guide No. 4,” at 26 (2009).

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B) The Council of Europe's stance on non-discrimination

The European Convention on Human Rights (ECHR, 1950) also requires States to guarantee the enjoyment of all rights set in the Convention to be “secured without discrimination on any ground such as sex . . . or other status.”²⁵⁴ The European Court of Human Rights (hereafter “ECtHR”) has consistently considered sexual orientation and gender identity²⁵⁵ as protected grounds under the “other status” clause of Art. 14 ECHR²⁵⁶ as it indicated that the list of protected grounds was not exhaustive.²⁵⁷

The European Social Charter (revised) (ESC, 1996), which Poland has not yet ratified but has signed in 2005, also prohibits discrimination on any named ground and “other status” in the enjoyment of the rights laid out in the Charter.²⁵⁸ However, under Art. 18 of the Vienna Convention on the Law of Treaties (1980), as a signatory to the ESC, Poland is obliged to “refrain from acts that would defeat the object and purpose” of the Charter. Poland has ratified the 1961 version of the ESC.

The Council of Europe has since provided explicit protection from discrimination based on sexual orientation and gender identity in other instruments such as the Istanbul Convention on preventing and combating violence against women and domestic violence,²⁵⁹ which Poland has ratified.²⁶⁰

C) The European Union's stance on non-discrimination

The European Union (hereafter “EU”) has a longstanding commitment to promoting equal rights and combating discrimination. As stated in Art. 2 of the Treaty on the European Union (TEU, 1993), the principle of non-discrimination is one of the fundamental values of the EU.

Several EU law instruments afford protection from discrimination on the basis of sexual orientation. Arts. 10 and 19(1) of the Treaty on the Functioning of the European Union (TFEU, 1958) explicitly provide for the EU's obligation not to discriminate on the basis of sexual orientation, and to combat such discrimination. Council Directive 2000/78/EC of 27 November 2000, which establishes a general framework for equal treatment in employment and occupation²⁶¹ (hereafter “the Employment Equality Directive”), is the only Directive which provides for protection against sexual orientation discrimination. Member States must also observe the Charter of Fundamental Rights of the European Union (hereafter “the Charter,” 2012), rendered binding by the Treaty of Lisbon, when acting within the scope of EU law. Under Art. 21 of the Charter, the right not to be discriminated against, including on the basis of sexual orientation, is freestanding.²⁶²

Only a limited explicit protection is afforded to persons with non-conforming gender identity. Explicit protection from discrimination on the ground of gender identity is afforded under Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime.²⁶³ Protection is also afforded insofar as a person intends to undergo or has undergone gender reaffirming surgery, in which case, transgender persons are protected under “sex.”²⁶⁴ Otherwise, gender identity is protected under the EU's general founding principle of equal treatment under Art. 2 TEU.

Under EU equal treatment legislation, member States are required to set up an equality body to provide

254. European Convention on Human Rights (4 November 1950), art. 14.

255. ECtHR, *Identoba and Others v. Georgia* (App. No. 73235/12), 12 May 2015, para. 96; ECtHR, *P.V. v. Spain* (App No. 35159/09), 30 November 2010, para. 30.

256. ECtHR, *Fretté v. France* (App No. 36515/97), 26 February 2002, para. 32; ECtHR, *Salgueiro da Silva Mouta v. Portugal* (Application No. 33290/96), 21 March 2000.

257. ECtHR, *Salgueiro da Silva Mouta v. Portugal* (Application No. 33290/96), 21 March 2000, para. 28.

258. European Social Charter (revised) (1 July 1999), art. E.

259. Council of Europe Convention on preventing and combating violence against women and domestic violence, also known as the “Istanbul Convention” (12 April 2011) art. 4(3).

260. Ratified on May 11, 2011 (Journal of Laws of 2015, item 961).

261. Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

262. Charter of Fundamental Rights of the European Union (26 October 2012) art. 21.

263. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315, 14.11.2012, pp. 57–73, recital 9.

264. Judgment of 30 April 1996, *P. v. S. and Cornwall County Council*, Case C-13/94: “sex encompasses discrimination against an individual because he/she intends to undergo or has undergone gender re-assignment.”

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independent assistance to victims of discrimination. This can be done through designating an existing institution or setting up a new one.

II. Poland's domestic anti-discrimination framework

A) Anti-discrimination legislation not adapted

The right not to be discriminated against is enshrined in Art. 32 of the Polish Constitution,²⁶⁵ which states that "all persons are equal before the law" and prohibits discrimination "in political, social or economic life for any reason whatsoever."

While a general protection from discrimination is afforded at the Polish constitutional level, national laws in practice do not implement the principle of non-discrimination on the basis of sexual orientation or gender identity or expression.

The only piece of legislation which affords extremely limited protection is the 3 December 2010 Act on the implementation of certain European Union's provisions on equal treatment (hereafter the "Equal Treatment Act" or "ETA"). It affords enhanced protection against discrimination on grounds of gender, race, ethnic origin, nationality, religion, denomination, belief, disability, age and sexual orientation.

However, the protection afforded by the ETA varies greatly from one ground to another. The ETA only prohibits discrimination on the ground of sexual orientation in employment under its Art. 8.²⁶⁶ Therefore, the Labour Code prohibits discrimination on the ground of sexual orientation in the traditional labour relations. It also introduces the concepts of direct and indirect discrimination. It should be mentioned, however, that the provisions encompassed within the Labour Code often go unused by victims of discrimination, because of a lack of awareness as to their existence, followed by a high level of mistrust in their effectiveness. Even though employers are responsible for making anti-discrimination legislation available to their employees, it often goes unnoticed since it is neither common nor obligatory to organise anti-discrimination training or seminars. Employees are also often not aware that possible, repressive actions taken by the employer as a response to their demands based on anti-discrimination Labour Code provisions are prohibited, and they thus often choose not to act out of fear of, for instance, losing their jobs.

The Labour Code is the only piece of national legislation which affords any protection to lesbian, gay, and bisexual persons, while discrimination on the ground of race, for instance, is prohibited under the ETA with regards to social security, medical care, education, and employment.²⁶⁷ Therefore, if lesbian, bisexual, and gay persons encounter discrimination in other aspects of life such as healthcare or education, they cannot claim protection under the ETA or any other Polish legislation. The ETA can thus be considered in itself discriminatory in the way it differentiates between categories by failing to offer them equal protection without valid and legitimate justification. For this reason, the Polish Commissioner for Human Rights, Adam Bodnar, filed a motion to the Constitutional Tribunal in March 2016 regarding the ETA,²⁶⁸ questioning its consistency with the Polish Constitution and the equality principle enshrined

265. Constitution of the Republic of Poland, 2 April 1997, as published in *Dziennik Ustaw* No. 78, item 483, art. 32 ("1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. 2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.")

266. Act of 3rd December 2010 on the implementation of some regulations of European Union regarding equal treatment, Art. 8, Journal of Laws of 2010, No. 254, item 1700.

267. Act of 3rd December 2010 on the implementation of some regulations of European Union regarding equal treatment, Arts. 6 to 8, Journal of Laws of 2010, No. 254, item 1700.

268. See U.N. Human Rights Committee, "Report on measures taken by the Republic of Poland to implement the provisions of the International Covenant on Civil and Political Rights in the years 2008-2015, Information provided by the Commissioner for Human Rights of the Republic of Poland (*Rzecznik Praw Obywatelskich*) in accordance with the International Covenant on Civil and Political Rights in connection with consideration of the seventh periodic report of the Republic of Poland covering the period from 15 October 2008 until 31 October 2015," 6 October 2016.

therein.²⁶⁹ However, Adam Bodnar has since withdrawn his motion²⁷⁰ for fear that “the constitutional court would render a judgment . . . [which would] freeze the . . . constitutional interpretation of rights in a way that could be detrimental [to minorities].”²⁷¹ He indicated this was not the first time he had backtracked on strategic suits of the sort (“on cases of political nature”²⁷²) since the independence of the constitutional tribunal had come under attack.

The list of protected grounds is supposed to constitute a closed catalogue which cannot be extended, therefore leaving any person with non-conforming gender identity or expression completely devoid of protection from discrimination in Poland.

Finally, multiple and intersectional discrimination is not clearly defined or protected under the law. While members of the Polish Society of Anti-discrimination Law (hereafter “PSAL,” or “PTPA” in Polish) explained it would be up to the courts to identify this form of discrimination on a case by case basis, they also underlined that no court practice in this field existed, to their best knowledge.

The legal protection against discrimination in Poland cannot therefore be considered sufficient nor effective, in so far as it excludes certain grounds from the protection afforded under the law (gender identity or expression) and fails to afford full and equal protection in every aspect of life for those grounds which it recognises as in need for protection (sexual orientation).

Despite the recommendations made by several international organisations and bodies²⁷³ as well as other States, most recently during the country’s last UPR in September 2017, that efforts be made to further prevent and combat all forms of discrimination, including by amending relevant legislation,²⁷⁴ Poland has so far failed to implement those recommendations and reform its legislation in order to bring it into line with international anti-discrimination standards. The Polish government’s stance, as expressed most recently during the last UPR, indicates that it feels the protection afforded by the State against discrimination, including based on sexual orientation and gender identity, under the current legal framework is sufficient and sees no need to introduce amendments that would extend its scope.²⁷⁵ This public position suggests that no further action will likely be taken in this regard in the near future.

Poland’s current domestic legislation and the unwillingness of the government to amend it is only reflective of this government’s official stance on LGBT+ persons’ rights, which is notably apparent from the debates on the concept “gender” surrounding the adoption of the Council of Europe’s Istanbul Convention on preventing and combating violence against women and domestic violence.²⁷⁶ The Government Plenipotentiary of Equal Treatment has received a draft proposal from the Ministry of Justice on 1 October 2010 calling for Poland’s withdrawal from the Convention. While the initiative was eventually abandoned in January 2017, it sparked virulent debates in Parliament, with many members of the Polish Parliament referring to the Convention as a source of “evil gender ideology . . . aimed at

269. In March 2017 both Parliament and the Prosecutor General submitted their opinions on the complaint asking the CT to drop the case arguing that it did not deal with the law’s constitutionality but with the lack of regulation. The Polish Human Rights Commissioner withdrew the motion in April 2017, allegedly for fear that the CT could use the opportunity to narrow the law’s scope even further. See <https://ipo.trybunal.gov.pl/ipo/Sprawa?pokaz=dokumenty&sygnatura=K%2017/16>. See also European network of legal experts in gender equality and non-discrimination, “Motion of the Ombudsman to the Constitutional Tribunal regarding constitutionality of the ETA discontinued,” 28 July 2017.

270. European network of legal experts in gender equality and non-discrimination, “Motion of the Ombudsman to the Constitutional Tribunal regarding constitutionality of the ETA discontinued,” 28 July 2017.

271. Interview with Adam Bodnar, Polish Commissioner for Human Rights, Wednesday 21 June 2017, in Warsaw, Poland.

272. Interview with Adam Bodnar, Polish Commissioner for Human Rights, Wednesday 21 June 2017, in Warsaw, Poland.

273. See for instance U.N. Human Rights Committee, *Concluding Observations on the seventh periodic report of Poland*, 23 November 2016, U.N. Doc. CCPR/C/POL/CO/7, paras. 13-14; U.N. Committee on Economic, Social and Cultural Rights, *Concluding observations on the sixth periodic report of Poland*, U.N. Doc. E/C.12/POL/CO/6, paras. 10-11; European Commission against Racism and Intolerance, “ECRI Report on Poland (fifth monitoring cycle),” adopted on 20 March 2015, published on 9.06.2015.

274. See recommendations 120.41, 120.43, 120.44, 120.46, 120.48, 120.49, 120.50, U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Poland, Thirty-sixth session, 11-29 September 2017, Agenda item 6, A/HRC/36/14. Regarding discrimination based on sexual orientation and gender identity more specifically, it has been noted that lesbian, gay, bisexual, transgender and intersex persons are not sufficiently protected under national law and Poland has been requested to amend its legislation in order to ensure that discrimination on these grounds is prohibited in all areas, including healthcare, education, social protection and housing. See recommendations 120.49, 120.50, 120.71, 120.76, 120.77, *ibid*.

275. See U.N. Human Rights Council, “National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Poland,” Human Rights Council Working Group on the Universal Periodic Review, Twenty-seventh session, 1-12 May 2017, U.N. Doc. A/HRC/WG.6/27/POL/1, para. 85-91. See also the statement delivered by Minister J. Dziędziczak at the 36th session of the Human Rights Council, Universal Periodic Review, Poland, 22 September 2017; Statement of the Commissioner for Human Rights of the Republic of Poland, 36th Session of the United Nations Human Rights Council, 22 September 2017, Item 6, UPR Outcomes-Poland.

276. Ratified by Poland May 11, 2011 (Journal of Laws of 2015, item 961).

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destroying Polish traditional values²⁷⁷ as they mistakenly understood the Convention as promoting same-sex marriage.²⁷⁸

B) Lack of effective remedy against discrimination for persons with non-conforming sexual orientation, gender identity or expression

1) Clear unwillingness of the Polish Government Plenipotentiary for Equal Treatment to deal with these issues

As part of its obligations under EU law, Poland has to establish an equality body – one at the governmental level and one independent, respectively the Government Plenipotentiary for Equal Treatment (hereafter “GPET”) and the Human Rights Commissioner (the Ombudsman). While it has done so, the GPET lacks financial capacity and has so far proven ineffective in protecting LGBT+ persons from discrimination.

The Government Plenipotentiary for Equal Treatment, was established under the ETA to oversee the ETA’s implementation and the government’s equality and anti-discrimination policies, and is operating within the Prime Minister’s Chancellery. However, the ETA failed to provide adequate resources and a separate budget for the GPET and to set up a structure to facilitate its cooperation with relevant ministries, thus limiting this body’s capacity to carry out its mandate and rendering it ineffective in practice. The situation has worsened since the GPET’s mandate has been extended in 2016 to include civil society development issues. The change, which was not accompanied by an increase in resources, along with staff cuts and the fact that the GPET lost its status as a separate office within the Prime Minister’s Chancellery, further limited this organ’s capacity to fulfill its mandate. Among its functions, as detailed in the ETA, the GPET was expected to submit a National Action Plan for Equal Treatment to orient governmental action in this area and mainstream equality across sectors, while contributing to the fight against discrimination. Although a welcome step, the National Action Plan 2013-2016 did not prove successful. According to the Commissioner for Human Rights²⁷⁹ and civil society organisations, the programme was not used to its full potential and overall failed to have a positive impact. The new programme, which should have been submitted as required under the ETA, has not been presented yet despite the government’s reassurances during the last UPR that it will be a priority for the GPET to plan actions in continuation to the previous one.²⁸⁰ PSAL inquired about the publication of the National Action Plan, and was told “further activity surrounding the creation of a new programme should have been uptaken by the second part of 2017.”²⁸¹ However, no additional answer regarding the publication date of the new plan has been received at the date of publication of this report.

Moreover, the new Plenipotentiary Adam Lipiński, appointed after the October 2015 general elections, has raised serious concerns among civil society as to his aptness for the position and his willingness to promote equality and combat discrimination based on sexual orientation and gender identity more broadly. His soft reactions to increasing attacks against LGBT+ rights organisations over the past two years (see Chapter 2 on ***Hate Crimes and Physical Violence Motivated by Prejudice Against LGBT+ Persons in Poland***) culminated in Adam Lipiński expressly telling the Polish Commissioner for Human Rights that he would not do anything on LGBT+ persons’ rights. He also suggested on several occasions that unequal treatment based on either race or sexual orientation in access to goods and services should not be regulated by law. The GPET has finally declared that gender mainstreaming will no longer be a focus of his office and that he will engage in what he defines as “family mainstreaming” instead. Such statements match those made by other government representatives on these matters and are particularly disquieting at a time when Poland registers a serious increase in both discrimination and crimes motivated by prejudice against lesbian, gay, bisexual, and transgender persons.

277. Newsweek PL, *PiS wypowie Konwencję o zapobieganiu przemocy wobec kobiet?*, 7 December 2016.

278. EU Observer, “Istanbul Convention: clearing away the fog of misconceptions,” 8 March 2018.

279. See U.N. Human Rights Council, “National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Poland,” Human Rights Council Working Group on the Universal Periodic Review, Twenty-seventh session, 1-12 May 2017, U.N. Doc. A/HRC/WG.6/27/POL/1, para. 85-91. See also the statement delivered by Minister J. Dziędziczak at the 36th session of the Human Rights Council, Universal Periodic Review, Poland, 22 September 2017; Statement of the Commissioner for Human Rights of the Republic of Poland, 36th Session of the United Nations Human Rights Council, 22 September 2017, Item 6, UPR Outcomes-Poland.

280. U.N. Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Poland, Group on the Universal Periodic Review, Twenty-seventh session, 1-12 May 2017, A/HRC/WG.6/27/POL/1, para. 148.

281. Email exchanges with the Polish Society of Anti-discrimination Law, 6 July 2018.

2) Attempts to incapacitate the Human Rights Commissioner

The ETA has also extended the Human Rights Commissioner's competences so as to encompass the fight against discrimination and in favour of the right to equal treatment. However, following the 2015 general elections, several measures have been taken to incapacitate his work.

The Human Rights Commissioner, whose role is currently fulfilled by Adam Bodnar, has played a significant role in recent years in promoting equality and non-discrimination, including for LGBT+ persons. However, following the 2015 general elections, the new government substantially reduced the Commissioner's budget thus limiting his capacity to carry out its mandate, including in this area. The Commissioner's budget was indeed of 38,602,000 złotys²⁸² in 2015, following which he applied for an 18% increase in 2016. However, not only was the demand discarded, but the budget was decreased to 35,619,000 złotys,²⁸³ i.e. the same budget that had been allocated to the Commissioner in 2011.²⁸⁴ The budget planned for 2018, after the approval by the Parliament, amounts to 39,433,000 złotys,²⁸⁵ while the Ombudsman had motioned for 42,639,000 złotys.²⁸⁶ The increase (in comparison with 2017) is mostly caused by plans of investments in buildings of the Ombudsman's Office in Warsaw.

The Commissioner's involvement in anti-discrimination work, particularly on LGBT+ rights and gender equality, has been indicated by several sources as the leading argument put forward by the government to support the cuts.²⁸⁷ Both the Commissioner and his deputy responsible for equal treatment have been under fire since 2015 for their anti-discrimination work, especially on LGBT+ rights, to the point where the National Movement gathered signatures from individuals or organisations asking for the Commissioner's dismissal.²⁸⁸ However, the petition was never presented to the Polish Parliament.

While the Commissioner affirmed he tried "not to make too much of an issue" about the funding cuts, he "cannot say there is no fear. Mr. Kaczyński can wake up one day and decide that I speak too much and just find a way to shut me up. I try to do as much as I can but I know the rules of the game."²⁸⁹ At the same time, a recent study by CBOS²⁹⁰ showed about 40% of the Polish population thought positively of the Commissioner's work, the highest percentage in the 30 years of existence of the institution – which is a small assurance for the short-term survival of the Commissioner, according to Adam Bodnar.

The Human Rights Commissioner also deplored the EU's inaction on this front: "the European Commission has concentrated so much efforts on the constitutional tribunal and believed that a dialogue with the government could work, that it failed."²⁹¹ He said while the subject of the constitutional crisis in Poland required attention, the fact that the European Commission directed all efforts and time to this topic allowed PiS implement their anti-democratic agenda on all other fronts, free of concerns. "[The European Commission] did nothing regarding the media . . . [and] all branches of equality law. I am attacked because of my work on LGBT+ rights for instance, and the European Commission does nothing."²⁹² He notably regretted the fact that EU commissioners, upon visits in Poland, did not reach out to his office but rather beat around the bush dealing with judicial cooperation with the Polish Minister of Justice. "In situations of attacks like this one on fundamental EU values, there should be at least a European Commission presence here, evaluations, visits, meetings with the opposition, NGOs, and my office."²⁹³ While Adam Bodnar acknowledged the European Commission alone would not "save

282. 8,777,472.38 euros.

283. 8,099,186.28 euros.

284. U.N. Human Rights Committee, "Report on measures taken by the Republic of Poland to implement the provisions of the International Covenant on Civil and Political Rights in the years 2008-2015," Information provided by the Commissioner for Human Rights of the Republic of Poland in accordance the International Covenant on Civil and Political Rights in connection with the consideration of the seventh periodic report of the Republic of Poland covering the period from 15 October 2008 until 31 October 2015, 6 October 2016.

285. 9,112,066.73 euros.

286. 9,852,900.19 euros.

287. Ministry of Justice of the Republic of Poland, "*Sejmowa Komisja Sprawiedliwości negatywnie zaopiniowała projekt budżetu Rzecznika Praw Obywatelskich na rok 2018 r.*," 24 October 2017.

288. Wiadomości, "*Chcą odwołania Rzecznika. PiS wykorzystuje społeczne oburzenie?*," 22 June 2017. See also U.N. Human Rights Council, Alternative report submitted by the Polish Coalition for Equal Opportunities for consideration of the U.N. Human Rights Council in reference to the Universal Periodic Review, session No 27, Warsaw, 20 September 2016.

289. Interview with Adam Bodnar, Polish Commissioner for Human Rights, Wednesday 21 June 2017, in Warsaw, Poland.

290. CBOS, Opinions about Police, Prosecutor's Office, Courts and Commissioner for Human Rights, 2017-06-20.

291. Interview with Adam Bodnar, Polish Commissioner for Human Rights, Wednesday 21 June 2017, in Warsaw, Poland.

292. Interview with Adam Bodnar, Polish Commissioner for Human Rights, Wednesday 21 June 2017, in Warsaw, Poland.

293. Interview with Adam Bodnar, Polish Commissioner for Human Rights, Wednesday 21 June 2017, in Warsaw, Poland.

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Poland,²⁹⁴ he did emphasize that “intensive dialogue and control by the European Commission [could] be great support to civil society, and the opposition . . . and would [not] create anti-European attitudes.”²⁹⁵

The degradation of the rule of law since PiS came into power has also had palpable consequences for LGBT+ persons, who are being stripped off of any means to make their voices heard and to access justice. This combination of weak legal protection, unwillingness of the national equality body to deal with equality issues, and attempts to incapacitate the last remaining human rights institution results in lesbian, gay, bisexual, and transgender persons not having access to an effective mechanism to enforce their constitutional right to equal treatment and claim protection against violations in practice, as will further be explained in the next sections of this report on the right to education, the right to work, the right to access goods, and the right to health.

III. Biased education for all, and unsafe environment for LGBT+ students

A) Unprotected by law: Polish legal framework on discrimination in education

Under Art. 13(1) of the ICESCR, everyone has the right to education, which shall “be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.”²⁹⁶ This is echoed by Art. 28 of the CRC which recognises “the right of the child to education,”²⁹⁷ to be provided by States “without discrimination of any kind”²⁹⁸ including sexual orientation. For this right to be enjoyed by all, States must protect children “from all forms of violence without discrimination of any kind, including prejudices . . . based on children’s clothing and behaviour.”²⁹⁹ This includes addressing “discrimination against vulnerable or marginalized groups of children,”³⁰⁰ such as “lesbian, gay, transgender, or transsexual”³⁰¹ children by proactively ensuring their equal right to protection. The CRC Committee further elaborated on types of violence which LGBT+ students encounter in the school environment, and which they must be protected from, such as: “all forms of persistent harmful interactions with the child, for example, conveying to children that they are worthless;”³⁰² “insults, name-calling, humiliation, belittling, ridiculing and hurting a child’s feelings;”³⁰³ and “psychological bullying and hazing by adults and other children, including . . . cyberbullying.”³⁰⁴

Of particular relevance to the case of Poland, the CESCR also requires States to “provide age-appropriate, evidence-based, scientifically accurate, comprehensive sexual education for all on sexual and reproductive health,”³⁰⁵ including to “adolescents and youth” on “all aspects of sexual and reproductive health, including maternal health, contraceptives, family planning, sexually transmitted infections, HIV prevention, safe abortion and post-abortion care, infertility and fertility options, and reproductive cancer.”³⁰⁶

These obligations are echoed at the European level by Art. 11 of the ESC which obliges States to provide education “for the promotion of health.”³⁰⁷ This includes “information and communication about sexuality education . . . among young people.” Therefore, not providing information and education on this topic to adolescents and youth can be considered as a violation of the ESC. Moreover, as stated by the European Committee on Social Rights in *Interights v. Croatia*, States have an “obligation to ensure through the domestic legal system that state-approved sexual and reproductive health education is

294. Interview with Adam Bodnar, Polish Commissioner for Human Rights, Wednesday 21 June 2017, in Warsaw, Poland.

295. Interview with Adam Bodnar, Polish Commissioner for Human Rights, Wednesday 21 June 2017, in Warsaw, Poland.

296. International Covenant on Economic, Social and Cultural Rights, Art. 13(1).

297. Convention on the Rights of the Child, Art. 28.

298. Convention on the Rights of the Child, Art. 28.

299. Convention on the Rights of the Child art. 19, and U.N. Committee on the Rights of the Child, General Comment 13, U.N. Doc. CRC/C/GC/13, para. 60 (18 April 2011).

300. U.N. Committee on the Rights of the Child, General Comment 13, U.N. Doc. CRC/C/GC/13, para. 60 (18 April 2011).

301. U.N. Committee on the Rights of the Child, General Comment 13, U.N. Doc. CRC/C/GC/13, para. 60 (18 April 2011).

302. U.N. Committee on the Rights of the Child, General Comment 13, U.N. Doc. CRC/C/GC/13, para. 21 (18 April 2011).

303. U.N. Committee on the Rights of the Child, General Comment 13, U.N. Doc. CRC/C/GC/13, para. 21 (18 April 2011).

304. U.N. Committee on the Rights of the Child, General Comment 13, U.N. Doc. CRC/C/GC/13, para. 21 (18 April 2011).

305. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 22, U.N. Doc. E/C.12/GC/22, para. 47 (2 May 2016).

306. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 22, U.N. Doc. E/C.12/GC/22, para. 18 (2 May 2016).

307. European Social Charter (revised), Art. 11.

objective and non-discriminatory.”³⁰⁸ In this particular case, of relevance to Poland, the Committee found that educational material presenting non-conforming sexual orientation in a manifestly biased, discriminatory and demeaning way constituted a violation of the right to health education in light of the non-discrimination clause of the Charter. It is worth recalling that under Art. 18 of the Vienna Convention on the Law of Treaties (1980), as a signatory to the ESC, Poland is obliged to “refrain from acts that would defeat the object and purpose” of the Charter.

At the European Union level, sexuality education is within the competence of the EU as part of public health, as defined in Art. 168 of the Treaty on the functioning of the EU.³⁰⁹

Yet, as far as education is concerned, there seem to be no legislation or policies in place at the national level to address discrimination and violence against lesbian, gay, bisexual, and transgender persons and ensure their right to equal treatment in education. Neither sexual orientation nor gender identity are protected grounds in this area. As a consequence, LGBT+ persons experience discrimination at a serious level in schools and universities.

B) Bullying at school: no allies for LGBT+ students

According to a survey carried out by PSAL and other civil society organisations, almost 40% of homophobic violence cases and 23.5% of verbal abuse ones occur at school, while 76% students interviewed affirmed that homophobic language was present in their school.³¹⁰ As a result, a mere 12.6% of LGBT+ students “come out” in the school environment, whereas the others prefer to conceal their actual sexual orientation or gender identity.³¹¹ For instance, a member of the Transfuzja Foundation recalled:

“I had stickers on my locker for trans rights and they were destroyed and replaced with one saying ‘trans kills.’ I am very privileged because I was then able to go to a private school that was very open. I know some trans people who went to public schools and couldn’t come out, or when they came out they didn’t feel safe or they had to leave school. People could not take part in proms because girls couldn’t dance together. And I know people who were attacked in the street or yelled at in public spaces.”³¹²

Although no data is available on suicides among young people due to homophobic bullying in schools, LGBT+ students appear to suffer from suicidal thoughts and depression a lot more than their heterosexual peers,³¹³ and members of PSAL recalled the case of a 14 year-old who committed suicide in 2014 after having been a victim of a hate crime at school.³¹⁴ The situation is particularly dire for transgender students, who in some cases are reportedly forced to change school due to the school authorities’ and teachers’ inability or unwillingness to address their situation and the discrimination they face.³¹⁵ Schools authorities indeed often deny having lesbian, gay, bisexual, or transgender students,³¹⁶ and therefore deny these issues are even occurring.

Homophobic, biphobic, and transphobic abuse comes not only from fellow-students, but also from educators and counselors, by disclosing their sexual orientation to their parents without their consent,

308. European Committee on Social Rights, *International Centre for the Legal Protection of Human Rights (Interights) v. Croatia*, Complaint No. 45/2007, 30 March 2009.

309. Treaty on the Functioning of the European Union, Art. 168: “Union action, which shall complement national policies, shall be directed towards improving public health [and] preventing [...] diseases [...]. Such action shall cover the fight against the major health scourges, [...] their transmission and their prevention, as well as health information and education [...]”

310. Polish informal coalition for the CCPR for consideration of the U.N. Human Rights Committee, “Alternative report to the ICCPR”, 21 July 2016. The survey also shows that when it comes to verbal abuse, in 3.5% of cases the offenders are teachers.

311. Polish informal coalition for the CCPR for consideration of the U.N. Human Rights Committee, “Alternative report to the ICCPR”, 21 July 2016.

312. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland.

313. According to a recent study, 49.6% of LGBT teenagers has symptoms of depression and 69.4% has suicidal thoughts. See KPH, “Social Situation of LGBT persons. Report for the years 2015-2016.”

314. Interview with members of PSAL, Monday 19 June in Warsaw, Poland.

315. Transfuzja, Report on Poland, 27th session of the Universal Periodic Review, September 2015.

316. Transfuzja, Report on Poland, 27th session of the Universal Periodic Review, September 2015. **See also** KARAT Coalition in consultative status with the Economic and Social Council of the UN on behalf of CEDAW Coalition of Polish NGOs, Alternative report on the implementation of the CEDAW – Poland, 2014.

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singling them out in class and recommending them therapy.³¹⁷ In some cases, students are also reported to have been almost expelled from schools for posting “homosexual pictures” on social networks.³¹⁸ Moreover, teachers who either show openness to LGBT+ issues and support LGBT+ students or disclose their non-conforming sexual orientation or gender identity themselves also suffer discrimination as a consequence.

While for the first time in December 2017, a school was condemned for failure to counter homophobia following a student's persecution due to his sexual orientation,³¹⁹ these issues should be addressed at the political level to provide an effective response and prevent further incidents, instead of legitimized by current political discourse.

C) At best, lack of action on the part of Polish authorities

Despite some initiatives taken under the National Action Plan for Equal Treatment 2013-2016 in cooperation with NGOs to raise awareness about equality and sexual orientation in schools,³²⁰ no substantial effort has been made by the authorities to either ensure that equality and non-discrimination, including for LGBT+ persons, are integrated in school curricula and adequately addressed in schools, and that teachers receive training on these issues, or to ensure LGBT+ students' safety, by preventing and addressing homophobic violence and other abuse in schools and universities. In fact, the situation has worsened since the education reform concocted by PiS passed in 2017. Prior to the reform, there used to be an explicit obligation for schools to carry out anti-discrimination education, under the Act of 7 September 1991 on the system of education,³²¹ and therefore a mean to hold the State accountable for providing such education. This has been repealed by the current government as soon as they came into power. The government proceeded to enact an educational reform, which, among others, got rid of this explicit obligation, replacing it with a broader sounding wording, alluding to the fact that schools should “take action to shape students' attitudes and respect for social norms . . . including openness and tolerance.”³²²

The authorities now not only remain overall reluctant to take action in this regard but also actively reprimand some schools taking part in initiatives aimed at promoting diversity and countering discrimination and violence based on sexual orientation and gender identity, and in some cases order them to discontinue their activities.

The case of the *Mickiewicz Gymnasium* in Piatkowisko is emblematic.³²³ The school was one of four in Poland which took part in the “Equal schools – without discrimination and violence” project run by the Campaign Against Homophobia (KPH) aimed at improving the way in which discrimination and inequalities were addressed by developing an anti-discrimination strategy and running activities and workshops in this context. One of these activities was a diversity workshop aimed at countering homophobic hate speech. Following the intervention of right-wing media, instigated by the nationalist group National Radical Camp, the mayor intervened requesting the school's headmaster to remove all the materials produced at the workshop from the school. Despite the intervention of the Human Rights Commissioner and several NGOs, the Regional Superintendent on Education reported the headmaster to the Ministry of Education for failure to supervise the pedagogical activities in his school and adapt their content to the students' age.

This in part contributes to LGBT+ students not being offered any information or support which would help them live in accordance with their sexual orientation or gender identity at school.³²⁴

317. Transfuzja, Report on Poland, 27th session of the Universal Periodic Review, September 2015. **See also** KARAT Coalition in consultative status with the Economic and Social Council of the UN on behalf of CEDAW Coalition of Polish NGOs, Alternative report on the implementation of the CEDAW – Poland, 2014.

318. Transfuzja, Report on Poland, 27th session of the Universal Periodic Review, September 2015. **See also** KARAT Coalition in consultative status with the Economic and Social Council of the UN on behalf of CEDAW Coalition of Polish NGOs, Alternative report on the implementation of the CEDAW – Poland, 2014.

319. KPH, “*Sąd orzekł: szkoła musi przeprosić ucznia za homofobię. Pierwszy taki wyrok w Polsce!*,” 13 December 2017.

320. Among these initiatives, the leaflet “Lessons in equality : teaching materials. Talking about sexual orientation and supporting young people at school,” the campaign “Parents, dare to speak up!” addressed to parents of LGBT+ children and the programmes “Equal schools – without discrimination and violence” (2014-2016) and “Equality lessons” (2012-2014), all run by KPH.

321. Act of 7 September 1991 on the system of education (Journal of Laws of 2016, item 1943), Art. 21.

322. Interview with members of the Polish Teachers' Union, Wednesday 21 June, in Warsaw, Poland; see Act of 14 December 2016. Educational Law (Journal of Laws of 2017, items 59 and 949), Art. 44.

323. KPH, submission to the Universal Periodic Review (Third cycle), Poland, 2016.

324. Alternative report to the International Covenant on Civil and Political Rights, submitted by the Polish informal coalition for the CCPR for consideration of the UN Human Rights Committee in reference to the Session No 118, 2016.

D) Barriers to scientifically accurate education on sexual and equal rights: “The State ignored the whole issue [of sexual education] and let it be taken over by the Catholic Church”³²⁵

The reasons why discrimination is so widespread in the education system must be found not only in the insufficient legal protection against discrimination on those grounds in this area. It also has to do with a persistent closure of the Polish educational system towards the issue, which is linked on one hand to very little knowledge among educators about equality and non-discrimination – particularly LGBT+ – issues, and on the other hand to deeply-rooted ideologies and stereotypes related to this group, which the current political climate has indirectly when not overtly encouraged.

Members of the Polish Teachers’ Union explained: “The State ignored the whole issue [of sexual education] and let it be taken over by the Catholic Church.”³²⁶ A striking example is the lack of reaction from the Ministry of Education in the face of Catholic associations of parents and teachers vehemently lobbying against any type of progressive sexual education. These associations have created websites where parents can sign saying they do not want their children to be provided with sexual education, and instead give their approval for these classes to be spent on preparing children for their final exams. This did not trigger any reaction from the Ministry of Education, despite being contrary to the recent PiS-led education reform which stated schools should “take action to shape students’ attitudes and respect for social norms . . . including openness and tolerance.”³²⁷

1) The Catholic Church’s firm control over comprehensive sexual education

All of this results in alleged sexual education being provided in a way which is not compatible with international human rights and human rights education standards. Members of the Transfuzja Foundation and of the Polish Teachers’ Union explained that classes on sexual education in primary and secondary schools are non-mandatory and called “Preparation for Family Life,” which is part of a different subject called “Knowledge about Society” (civic education).³²⁸ They are permeated with conservative views and promote exclusively a traditional family model coherent with the one promoted by the Catholic Church – most of the time, these classes are taught by priests or catechists. “The best way to prevent pregnancies is a glass of water before or after sex or, even better, instead of sex. That’s what we are taught.”³²⁹ Members of the Transfuzja Foundation explained these classes were about “saying no to drugs and sex,” and that “people don’t go to these classes.”³³⁰ Sexual education does not improve at university level, where classes on the topic are “optional at best.”³³¹

There are significant discrepancies between the content of Polish manuals on sexual education and relevant regional human rights standards. While the Council of Europe has published such resources – notably *Compass and Compasito* –, “teachers are afraid to use these manuals,” according to Dr. Machińska.³³² She explained that, “while there is no official position [against the use of these manuals, the authorities exert enough] informal pressure through declarations in the media to prevent teachers from using them.”³³³

Textbooks used in these courses are thus often inadequate, as they tend to reinforce gender stereotypes and do not appear to be up to scientific standards on sexual orientation. This is due to the significant leeway given to the Church in this area. As members of the Polish Teachers’ Union explained, two hours per week are dedicated to religion in school, since kindergarten: “children are indoctrinated from the very

325. Interview with members of the Polish Teachers’ Union, Wednesday 21 June, in Warsaw, Poland.

326. Interview with members of the Polish Teachers’ Union, Wednesday 21 June, in Warsaw, Poland.

327. Interview with members of the Polish Teachers’ Union, Wednesday 21 June, in Warsaw, Poland; see Act of 14 December 2016. Educational Law (Journal of Laws of 2017, items 59 and 949), Art. 44.

328. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland; interview with members of the Polish Teachers’ Union, Wednesday 21 June, in Warsaw, Poland.

329. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland.

330. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland.

331. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland.

332. Interview with Hannah Machińska, former Director of the Office of the Council of Europe in Poland, and current lawyer and Professor at the University of Warsaw, Monday 19 June 2017, in Warsaw, Poland.

333. Interview with Hannah Machińska, former Director of the Office of the Council of Europe in Poland, and current lawyer and Professor at the University of Warsaw, Monday 19 June 2017, in Warsaw, Poland.

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beginning.” Because religion teachers are exempt from Ministry of Education rules, the Church decides what is required for them to become teachers. They are then exempt from scrutiny, meaning they are not subject to inspections by national authorities. This is especially problematic regarding sexual education as this is an important area of activity for Church-appointed teachers, who are therefore able to teach classes on this topic, free from any scrutiny, and thus provide children with sexual education utterly incompatible with international human rights law, human rights, and scientific standards.

Moreover, textbooks which are allowed to serve for educational purposes on this topic are not scientifically accurate. Members of the Polish Teachers’ Union explained that textbooks on sexual education are written by independent authors for private publishing companies, which need to obtain an authorisation from the Ministry of Education for their textbooks to be accepted and introduced as educational material. The Minister can revise a textbook on his own or appoint someone (from a list) to do so. One member of the Polish Teachers’ Union explained: “I have written an article on sexual education myself and at the time there were about 20 names of revisors on the list. 80% of these people were connected to the Catholic Church – often fundamentalists.”³³⁴ With this system in place, and the fact that publishing companies will do everything possible so that the textbooks they invest in can serve as educational material, “essentially all of our textbooks are revised by a priest.”³³⁵

The Church also does not hesitate to call out and publicly shame teachers who attempt to provide sexual education. Members of the Polish Teachers’ Union for instance mentioned the case of a kindergarten teacher who was trying to sensitise kinder-gardeners to gender equality by putting together a play where children would imagine their life as their opposite sex, in order to fight stereotypes. The teacher was called out by a priest during a mass, who accused him of “changing boys into pedophiles and homosexuals.”³³⁶ This happened in a small village where inhabitants know each other, and the headmaster was insulted on the streets and his dismissal required for having “condoned” this programme.

2) Lack of qualified teachers for comprehensive sexual education courses

Although there used to be an explicit obligation for schools to carry out anti-discrimination education, under the Act of 7 September 1991 on the system of education,³³⁷ this has been repealed by the current PiS-led government as soon as they came into power. The government proceeded to enact an educational reform, which, among others, got rid of this explicit obligation, replacing it with a broader sounding wording, alluding to the fact that schools should “take action to shape students’ attitudes and respect for social norms . . . including openness and tolerance.”³³⁸

This is illustrative of the current government’s institutional policy not to promote equality and prevent discriminatory attitudes within Polish society, and is coupled with the fact that school staff lack knowledge and are not given an opportunity to train themselves on those issues. This results in teachers mistaking civic education for anti-discrimination and equality one.

When it comes more specifically to sexual orientation and gender identity, according to the above mentioned survey, over 60% of Polish students stated that sexual orientation issues were not addressed in schools and indeed these remain taboo in most learning facilities in Poland.³³⁹ There therefore appears to be an almost overt willingness of the current government not to educate its youth in favour of tolerance, by not even educating its teachers.

Furthermore, teachers mostly appear not to be qualified to teach sexual education, particularly LGBT+ issues³⁴⁰ and do not receive training on either this or on how to counter homophobic incidents and

334. Interview with members of the Polish Teachers’ Union, Wednesday 21 June, in Warsaw, Poland.

335. Interview with members of the Polish Teachers’ Union, Wednesday 21 June, in Warsaw, Poland.

336. Interview with members of the Polish Teachers’ Union, Wednesday 21 June, in Warsaw, Poland.

337. Act of 7 September 1991 on the system of education (Journal of Laws of 2016, item 1943), Art. 21.

338. Interview with members of the Polish Teachers’ Union, Wednesday 21 June, in Warsaw, Poland; see Act of 14 December 2016. Educational Law (Journal of Laws of 2017, items 59 and 949), Art. 44.

339. Polish informal coalition for the CCPR for consideration of the UN Human Rights Committee, “Alternative report to the ICCPR”, 21 July 2016. The survey also shows that when it comes to verbal abuse, in 3,5% of cases the offenders are teachers.

340. KARAT Coalition in Consultative Status with the ECOSOC on behalf of CEDAW Coalition of Polish NGOs, “Alternative follow-up information on the steps taken to implement the recommendations indicated in Concluding Observations on the combined 7th and 8th periodic reports of Poland submitted to the UN Committee on Elimination of Discrimination against Women”, 17 January 2017.

bullying at school.³⁴¹ Indeed, while teachers can specialise in sexual education, those who do have a hard time finding employment, which deters many from seeking to specialise in this area. The result is that other teachers, often religion teachers (catechists) or priests, take on the task of providing sexual education, thus themselves being uneducated on the topic.³⁴² One member of the Transfuzja Foundation indeed recalled: “when I asked questions to the [sexual education] teacher, he didn’t know the answer.”³⁴³

To remedy this lack of State-sponsored comprehensive sexual education, civil society organisations have tried to step in to dispense such classes, sometimes on a paid contract. The role of civil society in that regard is crucial, as MP Joanna Scheuring-Wielgus explained: “There has been a deterioration regarding women’s rights, LGBT+ rights, and sexual education [since 1993] . . . especially in Polish education. If they come into play it is only through NGOs that are forcing educational activities.”³⁴⁴ Indeed, the school curriculum was changed in 1999, which promoted type A sexual education, promoting complete abstinence, and considering non-conforming sexual orientation and gender identity as illnesses. While sexual educators groups such as Ponton have been trying to provide scientifically accurate type C sexual education in schools, type A sexual education is currently on the rise due to the barriers anti-rights groups raise in the face of sexual educators groups. In that regard, members of the Helsinki Foundation for Human Rights said that in May 2017, Ordo Iuris had launched a campaign whereby parents can insert the name of a school on a web page and Ordo Iuris will file an access to information request asking the school if some training is provided about LGBT+ rights and gender. “This initiative is aimed at the main sexual educators group, Ponton, who Ordo Iuris is going after now.”³⁴⁵

At the time of writing this report, the Minister of Education has implemented the government’s plan for redrawing the Polish school system.³⁴⁶ The reform was adopted by the Parliament and signed into law by the Polish President in early January 2017,³⁴⁷ and has been implemented starting the 2017-2018 academic year. As a result, school curricula have undergone substantial reform: the sexual education curriculum in biology class no longer includes instruction on contraceptive methods, and the space reserved in school curricula to anti-discrimination and equality issues has been significantly reduced. The discrimination and violence faced at school by lesbian, gay, bisexual, and transgender persons does not stop at school but continues in the workplace, as explained in the next chapter of this report.

IV. Right to work hindered

A) Lack of a protective legal framework in line with United Nations standards

In the field of employment, Council Directive 2000/78/EC of 27 November 2000 establishes a general framework for equal treatment in employment and occupation³⁴⁸ (hereafter “the Employment Equality Directive”), and lists sexual orientation as a protected ground.³⁴⁹

While Polish law seems to implement the directive, the latter is itself not compliant with U.N. standards. The right to work is protected under Art. 6 ICESCR, and must be implemented so as to ensure its exercise “on a basis of equality,”³⁵⁰ which includes the prohibition of any discrimination, “including on the grounds of sexual identity or other status”³⁵¹ such as gender identity, as indicated by the CESCR in its General Comment No. 8. The State’s non-discrimination obligation applies “even in times of severe resource constraints” when “disadvantaged and marginalized individuals and groups must be protected by the

341. Alternative report to the International Covenant on Civil and Political Rights, submitted by the Polish informal coalition for the CCPR for consideration of the UN Human Rights Committee in reference to the Session No 118, 2016.

342. Interview with members of the Polish Teachers’ Union, Wednesday 21 June, in Warsaw, Poland.

343. Interview with members of the Transfuzja Foundation, Monday 19 June, in Warsaw, Poland.

344. Interview with MP Joanna Scheuring-Wielgus, Tuesday 20 June, in Warsaw, Poland.

345. Interview with Helsinki Foundation for Human Rights, Tuesday 20 June, in Warsaw, Poland.

346. Ministry of National Education of the Republic of Poland, “*Podsumowanie Ogólnopolskiej Debaty o Edukacji*.”

347. European Foundation for the Improvement of Living and Working Conditions, Poland: Government enacts radical education reform despite opposition, 23 March 2017.

348. Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

349. Council Directive 2000/78/EC of 27 November 2000, Art. 1.

350. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 18, U.N. Doc. E/C.12/GC/18, para. 12 (6 February 2006).

351. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 18, U.N. Doc. E/C.12/GC/18, para. 12 (6 February 2006).

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adoption of relatively low-cost targeted programmes.”³⁵²

Therefore, by not mandating the protection of persons with non-conforming gender identity or expression in the field of employment, the Employment Equality Directive is not in accordance with relevant international human rights standards.

In Polish law, the Employment Equality Directive is implemented through the ETA,³⁵³ which only prohibits discrimination on the ground of one’s sexual orientation in the field of employment. In this sense, while Polish law seems in accordance with European standards, both the latter and Polish legislations are currently falling short of international human rights standards.

The Labour Code prohibits discrimination on the ground of sexual orientation in the traditional labour relations. It also introduces the concepts of direct and indirect discrimination. It should be mentioned, however, that the provisions encompassed within the Labour Code often go unused by victims of discrimination, because of a lack of awareness as to their existence, followed by a high level of mistrust in their effectiveness. Even though employers are responsible for making anti-discrimination legislation available to their employees, it often goes unnoticed since it is neither common nor obligatory to organize anti discrimination training or seminars. Employees are often also not aware that possible, repressive actions taken by the employer as a response to their demands based on anti-discrimination Labour Code provisions are also prohibited, therefore employees often choose not to act out of fear of, for instance, losing their jobs.

This, combined with the inexistence of functioning enforcement mechanisms (see *Chapter 1, section II B) Lack of effective remedy against discrimination for persons with non-conforming sexual orientation, gender identity, or expression*), results not only in transgender persons facing discrimination without any legal protection, but also in lesbian, gay, and bisexual persons not being able to enforce their written right to be protected from such discrimination.

B) Implementing the Employment Equality Directive: legal gaps bear negative consequences

1) Invoking religion to justify discrimination: a legal loophole

A particular issue, of great importance in a country like Poland where the weight of the Church is deeply felt, is that of the interpretation given by the authorities, including at the highest level, of the exception provided for in Art. 4(2) of the Employment Equality Directive for occupational activities within churches and other public or private religious organisations. In these cases, EU law allows member States to differentiate between employees based on their religion or belief when the nature or context in which the activities are to be carried out makes a person’s religion or belief a legitimate occupational requirement. This was first enacted with the case of employees of religious institutions’ in mind; e.g. a church can choose to employ Catholics, a mosque Muslims, etc. Although the Directive clearly states that this provision should be read in accordance with other constitutional and EU principles and obligations and must not be used to excuse discrimination on other grounds, the provision seems to have often been interpreted in a way which allows employers to discriminate against their employees based on their sexual orientation.³⁵⁴

A case brought by PSAL³⁵⁵ concerns a man, who, for four years, had been regularly employed by a church institution to be a speaker at annual events, and was told he would no longer be awarded any further

352. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 18, U.N. Doc. E/C.12/GC/18, para. 12 (6 February 2006).

353. Act of 3rd December, 2010 on the implementation of some regulations of European Union regarding equal treatment, Journal of Laws of 2010, No. 254, item 1700.

354. European Commission, DG Justice, Combating sexual orientation discrimination in the EU, December 2014, p. 64. The Commission notes how this exception has been used for instance to justify the possibility for faith-based schools to discriminate against teachers based on their sexual orientation. The European Committee of Social Rights of the Council of Europe also recommended that Poland collect data regarding discrimination based on sexual orientation in the labour market and provide information on the application of relevant legislation by the courts, as well as on the actions undertaken by Polish authorities to combat this discrimination. The Committee especially referred, in its November 2008 conclusions on Poland, to the Miroslaw Stielatycki’s case, who had been dismissed from his position as director of the National Teacher Training Center for publishing the CoE’s official guide for teachers Compass – Education on Human Rights, which according to the Minister of National Education, included statements which could be regarded as a promotion of homosexuality.

355. Interview with members of PSAL, Monday 19 June 2017, in Warsaw, Poland.

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contract after he posted a message on his social media account saying he supported LGBT+ rights. The church institution denied this was linked to his social media post. Following a lawsuit brought by the man against the church institution, the Court first dismissed the claim, arguing that the Equal Treatment Act allowed churches and other religious organisations to refuse to work with persons whose beliefs are not in line with their own and that therefore the treatment against the employee did not constitute discrimination.³⁵⁶ The decision was however overturned on appeal by the second instance court³⁵⁷ which stated that in this particular case the applicant has suffered discrimination because of his perceived association to LGBT+ rights. The court found that his personal beliefs did not constitute a genuine and determining occupational requirement, thereby rendering the employer's acts discriminatory.

2) Transgender persons in particular face heightened difficulties in accessing employment

Transgender persons' gender expression and legal status are among the main obstacles preventing them from accessing the labour market.³⁵⁸ Rather than breaking down barriers faced by transgender persons in accessing the labour market, the current government introduced new rules (on diplomas and higher education certificates) in 2016, which have further exacerbated transgender persons' difficulties by requiring those having obtained legal gender recognition to deliver the court's judgment and copies of it to the higher education institution, which is under the obligation to issue a new one. The same goes for lower stages of education.³⁵⁹

This results in an additional administrative weight on transgender persons, leaving them unable to certify their education pending the new documents' issuance.

Transgender persons also face obstacles when seeking new employment opportunities, as those who went through legal gender recognition often receive employment certificates indicating their previous legal status. This, in effect, forces them to disclose their status to their new employer, thus breaching their right to privacy, and prevents those who do not want to disclose it from seeking employment.³⁶⁰ As a result, transgender persons face high unemployment levels, but no action has been undertaken by the authorities to address this issue, despite the State's clear immediate obligation under the ICESCR to adopt "relatively low-cost targeted programmes"³⁶¹ to protect disadvantaged and marginalised individuals and groups, even in times of severe resource constraints.

Transgender persons also reportedly suffer from harassment in the workplace, including verbal abuse by both co-workers and managers, and sexual harassment. However, this phenomenon remains quite hidden, as victims do not report incidents both for fear that they would lose employment and due to limited awareness about their rights as employees.³⁶² The only available data are collected by NGOs, whereas the issue remains largely ignored by the authorities.

At EU level, while sexual orientation is only listed as a protected ground in employment, a recent proposal was made to extend this protection to other areas such as accessing goods and services under a so-called "Horizontal Directive,"³⁶³ which is currently being debated in EU institutions. The case of Poland is a perfect example of why this is crucially needed.

V. Attempts to hinder LGBT+ rights organisations to fight for equal access to goods and services

356. Sad Rejonowy in X, 16 December 2016, YZ, PTPA on behalf of YZ v. *Catholic Diocese of H.*, ref. number: I C 1326/15.

357. Sad Okregowy in S, 22 March 2017; reference number: 75/17.

358. TransFuzja, Report on Poland, 27th session of the Universal Periodic Review, September 2015.

359. Email exchanges with the Polish Society of Anti-discrimination Law, 6 July 2018.

360. TransFuzja, Report on Poland, 27th session of the Universal Periodic Review, September 2015. See also KARAT Coalition, Alternative report on the implementation of the Convention for the Elimination of All Forms of Discrimination against women (CEDAW), Poland, September 2014.

361. U.N. Committee on Economic, Social and Cultural Rights, General Comment No. 18, U.N. Doc. E/C.12/GC/18, para. 12 (6 February 2006).

362. KPH, Situation of LGBT Persons in Poland, 2012; KARAT Coalition, Alternative report on the implementation of the Convention for the Elimination of All Forms of Discrimination against women (CEDAW), Poland, September 2014.

363. Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final.

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The Yogyakarta Principle No. 2 elaborates on States' actions with regards to LGBT+ persons' access to goods and services, recommending that States "take appropriate steps to ensure that reasonable accommodation is provided, where needed, in order to promote equality and eliminate discrimination on the basis of sexual orientation, gender identity, gender expression . . . including in access to services."

As regards access to goods and services, no protection is afforded in Polish law against discrimination based on sexual orientation and gender identity in this area. However, LGBT+ persons and the organisations and lawyers representing them used to apply other provisions of domestic law, such as the provision contained in Art. 138 of the Petty Crimes Code³⁶⁴ which sanctions the refusal to sell goods and provide services, to challenge discrimination based on sexual orientation and gender identity in these situations. However, the use of this provision for such purposes has recently been challenged by the Polish authorities at the highest level.

FIDH received information on a case brought by the LGBT Business Forum against a printing company in Lodz, Poland which refused to print a roll-up for the applicant based on their work in favour of LGBT+ rights. Following a motion by the Polish Human Rights Commissioner requesting the police to open an investigation in relation to discrimination in access to services under Art. 138 of the Petty Crimes Code, the Lodz-Widzew District Court fined the company following a simplified procedure. The printing company appealed the decision. At that point, the Minister of Justice, who is now also the Prosecutor General,³⁶⁵ Zbigniew Ziobro, intervened alongside ultra-conservative NGO Ordo Iuris, by issuing a public statement claiming that the court's decision was unfair.³⁶⁶ A new prosecutor was also appointed to the case. The Minister argued that the decision was unconstitutional as it infringed the printing house's and its employees' constitutionally protected rights to freedom of thought, beliefs and views, as well as their economic freedom and freedom of transactions. It also pointed to the fact that the decision put organisations representing sexual minorities in a "privileged position"³⁶⁷ by disregarding an employee's right not to support homosexual content.

Although the first instance court's ruling was eventually upheld on appeal, the Minister announced that he would challenge the decision both before the Supreme Court and the Constitutional Tribunal, questioning the law on minor offences' compatibility with freedom of conscience and economic freedom. The case was also emblematic of the government's position on LGBT+ rights as well as increasing government interference in the courts; functioning whenever sensitive issues are at stake.

The Prosecutor General challenged the court's decision in front of the Supreme Court. The Supreme Court pointed out that freedom of conscience and religious beliefs may justify a refusal to provide a service, however a balance between freedom of conscience and religious beliefs and the prohibition of discrimination should always be struck in the light of the circumstances of the case. According to the court: "When religious beliefs are in obvious contradiction with the features and character of the service, it is allowed to refuse to perform such a service, even if it is in conflict with other values, including constitutional ones, such as the prohibition of discrimination. However, a refusal cannot be justified by individual characteristics of persons for whom this service is to be performed, such as religious denomination, manifested views or sexual preferences."

The Supreme Court pointed out that, in this particular case, the accused printer, in refusing to perform service motivated by his convictions, had no legitimate reason. His task (printing) was purely reproductive (not original) and only involved the performance of purely technical activities. The court also noted that the roll up was an advertising of the foundation containing its logotype. The contents contained in it did not promote behaviors that could be contrary to the values and canons of the Catholic faith. In the court's opinion, the refusal to provide the service would be justified, for example, if the service consisted of creating a specific work that would create a conflict between the artist's values and not if the service consists in performing ordinary technical activities. Justifying the verdict, the judge rapporteur also

364. Law of 20 May 1971 on petty crimes (*Ustawa z dnia 20 maja 1971 r. Kodeks wykroczen*) art. 138 ("Anyone who, being a professional service provider, demands or collects payment higher than that in force, or deliberately refuses to provide that service without just cause, shall be subject to a fine.")

365. Following recent reforms, the two functions have been merged. See Act on the public prosecutor's office (Dz. U. 1 of 15 February 2016 r.).

366. Ministry of Justice of the Republic of Poland, Statement of 26 July 2016: <<https://www.ms.gov.pl/pl/informacje/news,8476,oswiadczenie-ministra-sprawiedliwosci-prokuratora.html>> (last visited 14 July 2018).

367. Ministry of Justice of the Republic of Poland, Statement of 26 July 2016: <<https://www.ms.gov.pl/pl/informacje/news,8476,oswiadczenie-ministra-sprawiedliwosci-prokuratora.html>> (last visited 14 July 2018).

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quoted the content of the ECHR and the Catechism of the Catholic Church, which in paragraph 2357 states that homosexual persons “should be treated with respect, compassion and tenderness” and that “any signs of unjust discrimination should be avoided against them.”

The Minister’s intervention in the case was quite extraordinary, especially when considering the pettiness of the offence, and was rather seen by many³⁶⁸ as an attempt to influence the decisions taken by independent courts on a sensitive matter such as discrimination based on sexual orientation and gender identity in a way that would reflect the government’s stance on these issues. The Minister announced that he would challenge the decision before the Constitutional Tribunal, questioning the law on petty crimes’ compatibility with freedom of conscience and economic freedom. The case was also emblematic of the government’s position on LGBT+ rights as well as increasing government interference in the courts’ functioning whenever sensitive issues are at stake.

It is legitimate to wonder what future proceedings’ outcome will be now that reforms enacted in parallel seriously threaten the courts’ independence, thus risking undermining the last remaining bastion in protecting rights and freedoms, particularly for minority groups such as lesbian, gay, bisexual, and transgender persons, who do not engage the government’s sympathies. As for the outcome of a procedure before the (reformed) Constitutional Tribunal, the latter has already shown its readiness to take decisions which would not displease the political forces in power. The case, and the Minister’s intervention, also prompted conservative groups, such as Ordo Iuris, to submit a petition³⁶⁹ to reform the Petty Crimes Code by deleting the provisions used by civil society organisations and lawyers to challenge discrimination on unprotected grounds in this area.³⁷⁰

VI. Difficulties in accessing healthcare

A) Unprotected by law: Polish legal framework on discrimination in healthcare

Under Art. 12(1) of the ICESCR, States “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”³⁷¹ This provision must be read together with Art. 2(2) of the ICESCR prohibiting discrimination in the enjoyment of the rights contained in the Covenant, including on the basis of sexual orientation or gender identity.

Applied specifically to the situation of LGBT+ persons, the right to health encompasses the right to access the “highest attainable standard of gender reaffirming healthcare, on the basis of an individual’s free, prior, and informed consent,”³⁷² and the fact that this service be provided by the public health system or that the costs are covered or reimbursable under private and public health insurance schemes.³⁷³

A recent study by the European Agency for Fundamental Rights (hereafter “FRA”) has pointed out that in Poland, LGBT+ issues are either overlooked in medical school or presented as a mental illness or sexual behaviour disorder,³⁷⁴ contrary to Council of Europe Recommendation 2010(5).

Although the Polish Constitution provides that everyone shall be entitled to healthcare³⁷⁵ and the authorities declare themselves committed to ensuring equal access to healthcare services for all citizens, without differentiations based on their personal characteristics,³⁷⁶ the reality appears quite different. Sexual orientation and gender identity are not among protected grounds in Polish domestic law, thereby not benefiting from any other protection from discrimination in accessing healthcare than the broadly-worded constitutional provision.

368. See Helsinki Foundation for Human Rights, “Ministry of Justice criticises district court ruling, HFHR comments,” 2 August 2016; Judges Association Iusticia “*Opinia Iustitii w sprawie badania konstytucyjności nadzoru Min. Sprawiedliwości nad sądami*,” 11 November 2016; Rzeczpospolita, “*Drukarze nie mają klauzuli sumienia - rozmowa z Ireną Kamińską*,” 27 July 2016.

369. Ordo Iuris, *Zlikwidujmy komunistyczne relikty w kodeksie wykroczeń*, <<https://www.maszwpływ.pl/zlikwidujmy-komunistyczne-relikty-w-kodeksie-wykroczen-ml2,60,k.html>> (last visited 24 September 2018).

370. On this case, see also European Network of legal experts in gender equality and non-discrimination, Printing house employee found guilty of refusal to print a roll-up for LGBT initiative. Unprecedented reaction of Minister of Justice, 28 July 2017.

371. International Covenant on Economic, Social and Cultural Rights, Art. 12(1).

372. Yogyakarta Principle No. 17 (k).

373. Yogyakarta Principle No. 17 (l).

374. FRA, Professionally speaking: challenges to achieving equality for LGBT people, 2016, p. 73.

375. Polish Constitution of the Republic of Poland art. 68(1).

376. See Viewpoints of the Polish authorities regarding the fifth report on Poland by the European Commission against Racism and Intolerance, Warsaw, 2 June 2015, Appendix to ECRI report on Poland (fifth monitoring cycle), 2015.

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B) Poorly sensitised healthcare personnel generates discriminatory attitudes towards LGBT+ patients

Although generally available at the same conditions as for heterosexual patients, healthcare is not always easily accessible for lesbian, gay, and bisexual persons, and the services offered to them are reported to be often below quality standards.

According to a study mandated by the Polish Human Rights Commissioner³⁷⁷ in 2014, up to 20% of LGBT+ patients face discrimination in the healthcare system. This is echoed by various civil society organisations' reports.³⁷⁸ This is due, to a large extent, to poor knowledge and scarce sensitivity for LGBT+ issues among healthcare professionals,³⁷⁹ which is only a reflection of the lack of knowledge and sensitivity of the highest level Polish officials on the subject. For instance when the investigating team met with members of the Ministry of Health, their knowledge of health issues specific to LGBT+ persons appeared limited to the mere need for prevention activities targeted toward these persons regarding STDs and HIV/AIDS.³⁸⁰ This limited awareness among authorities has implications on how LGBT+-related health issues are addressed in medical schools' curricula. Members of both KPH and Lambda indeed explained that "LGBT+ persons are at best overlooked in medical schools: because no complaints are received from patients, the authorities consider the situation is fine."³⁸¹ Therefore, while high level authorities such as the Ministry of Health affirm that "procedures for healthcare – the whole healthcare package (gynecology, mental health) – is provided to all patients regardless their sex or sexual orientation,"³⁸² they however do not see the need for specific legislative provisions to be enacted or policies to be put in place in order to ensure the protection from LGBT+ persons from healthcare personnel's biased and discriminatory attitudes in practice: "We treat these people as other patients, we do not need special laws."³⁸³ This results in little understanding of LGBT+ issues and not only fuels stereotypes about these persons among medical professionals but also puts LGBT+ patients at risk. Szymon, a transgender man who is a member of the Transfuzja Foundation indeed recalled:

"When I was 17, I was at a psychiatric hospital for a month because I was depressed and wanted to commit suicide. I asked to be called by my [male] name, but they did not accept it. They put me in a room with a girl and had to use the girls' bathroom. This didn't help me in my depression. This hospital sent me to a mental health and neurology clinic saying 'the patient thinks he is transsexual and considers changing her sex,' which was wrong on many levels! [This clinic] gave me a diagnosis of 'disorder undefined.' They would not listen to me."³⁸⁴

The lack of training of medical professionals causes tremendous barriers to transgender persons' access to healthcare in particular, in Poland. A striking example is transgender persons' extremely difficult access to gender reaffirming procedures.

C) "They [doctors] do not educate themselves:"³⁸⁵ an insight into transgender persons' attempt to undertake a gender reaffirming process in Poland

Gender reaffirming procedures are not easily accessible nor affordable in Poland, and their quality appears to be often below scientifically recognised medical standards. This is due in part to the same reasons indicated above which are common to both lesbian, gay, bisexual, and transgender persons and to other factors.

377. Human Rights Commissioner, Equal treatment perceived by non-heterosexual patients in healthcare, 2014. The study points to dignity and privacy rights violations as well as violations of the right to the highest attainable standards of health as the most widespread violations.

378. KPH, Lambda Warszawa, Transfuzja, Social Situation of LGBT in Poland, 2012.

379. Fifth report on Poland by the European Commission against Racism and Intolerance, Warsaw, 2 June 2015, Appendix to ECRI report on Poland (fifth monitoring cycle), 2015; FRA, Professionally speaking: challenges to achieving equality for LGBT people, 2016.

380. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

381. Interview with members of Campaign Against Homophobia and Lambda Warsaw, Thursday 22 June 2017, in Warsaw, Poland.

382. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

383. Interview with members of the Polish Ministry of Health, Thursday 22 June 2017, in Warsaw, Poland.

384. Interview with members of the Transfuzja Foundation, Monday 19 June 2017, in Warsaw, Poland.

385. Interview with members of the Transfuzja Foundation, Monday 19 June 2017, in Warsaw, Poland.

A first obstacle to transgender persons' being able to undergo gender reaffirming procedures is financial. Although some costs related to gender reaffirming procedures are covered by the national healthcare plan, most costs related to medical reaffirmation are not funded by the State. Even hormone therapy, which is mandatory for both transgender men and women in order to obtain legal gender recognition, and which is extremely costly in Poland, is covered only up to 30%, and only applies to hormonal treatment (not to all hormonal drugs),³⁸⁶ which prevents many transgender persons from undergoing the procedure.³⁸⁷ Access to healthcare funds is made even more difficult by the fact that a person must have undergone full genital reaffirming surgery in order to be able to have the costs related to the reaffirmation funded, as the national health insurance is provided based on the patient's assigned gender.³⁸⁸ Cases have also been reported where pharmacists denied reimbursement to a transgender person for medical products linked to the gender towards which they were transitioning when this had not yet been legally recognised.³⁸⁹ Finally, not all drugs are available on the market in Poland, thus some transgender women prefer to travel to Czech Republic to gain access to pills and plasters available there for a much lower price.³⁹⁰

Another obstacle is the limited availability of doctors willing to perform gender reaffirming procedures, and their lack of training on the subject. About ten doctors, scattered around Poland are indeed specialized in gender treatment, as explained the Transfuzja Foundation, "and each and every one of them has something wrong."³⁹¹

Szymon, a transgender man who is a member of the Transfuzja Foundation recalled going to a public hospital, and doctors there having "very old fashioned ways to find out I was transgender: very binary. Also, they only focused on transsexual, not transgender [persons]. [The doctor] would only ask me if I wanted to . . . have a hysterectomy. He pressured me into telling him I would change gender in the next two years . . . because in Poland it's illegal to make someone infertile."³⁹² He mentioned other cases of doctors who provide gender reaffirming services and lack the necessary knowledge to assist their patients properly. "[Those who prescribe hormones] are sexologists, not endocrinologists, so they know nothing about hormones. Transgender persons are extra to their work. The situation is the same whether in public hospitals or private practices."³⁹³ When Szymon went to consult a criminal sexologist, he knew more than the doctor did about the transition process. "They know more than usual doctors because transgender persons keep coming to [see them] to get their hormones. They worked with transgender patients for many years so they think they know everything, [but] their knowledge of transgender issues is very accidental. They don't educate themselves. I feel they are still experimenting."³⁹⁴ For instance, Szymon's doctor, in his care with transgender persons, uses standards which are obsolete. "They are the only ones who give this treatment for free, and they know they are in power. So they don't want to learn."³⁹⁵

Szymon also mentioned several cases of doctors who would take advantage of their patients seeking to undertake a gender reaffirming process – for instance, "one doctor would give you hormones on your first appointment but he takes pictures of patients' genitalia, allegedly for a project he has,"³⁹⁶ another was accused of molesting patients, or some will draw blood and not explain what would be tested. However, given the very limited number of doctors providing these services, nobody wants to risk reporting these doctors, for fear it will cut their access to gender reaffirming procedures.

Even in the face of all these misconducts by doctors, endangering LGBT+ patients' physical and mental integrity, Polish authorities refuse to acknowledge the need for specific training for medical personnel on LGBT+ issues.

D) Lack of interest to train healthcare personnel on LGBT+ issues on the part of Polish

386. Email exchanges with members of the Transfuzja Foundation, June 2018.

387. Transfuzja, Report on Poland, 27th session of the Universal Periodic Review, September 2015.

388. FRA, Professionally speaking: challenges to achieving equality for LGBT people, 2016.

389. KARAT Coalition, Alternative report on the implementation of the Convention for the Elimination of All Forms of Discrimination against women (CEDAW), Poland, September 2014.

390. Email exchanges with members of the Transfuzja Foundation, June 2018.

391. Interview with members of the Transfuzja Foundation, Monday 19 June 2017, in Warsaw, Poland.

392. Interview with members of the Transfuzja Foundation, Monday 19 June 2017, in Warsaw, Poland.

393. Interview with members of the Transfuzja Foundation, Monday 19 June 2017, in Warsaw, Poland.

394. Interview with members of the Transfuzja Foundation, Monday 19 June 2017, in Warsaw, Poland.

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authorities

The authorities have failed to take adequate action to address discrimination against LGBT+ persons in healthcare. Instead, they tend to dismiss or diminish the problem, as much they have done in other areas where this group suffers discrimination. Following the request by LGBT+ rights organisation KPH to the Ministry of Health to recommend that anti-discrimination, particularly regarding LGBT+ issues, be included in medical universities' curricula, the Ministry replied negatively by affirming that medical professionals are already trained adequately on those matters and that in any event medical universities are autonomous and cannot be instructed on how to devise their curricula.³⁹⁷ The response given by the Commissioner for Patients' Rights³⁹⁸ to a KPH offer to cooperate to raise awareness among LGBT+ persons about their rights in the healthcare system was equally negative. Rather than seeing the fact that no cases had been officially reported as a problem in itself that needed to be addressed (because of lack of awareness of one's rights, deterrence, etc.), the Commissioner for Patients' Rights saw this as an indication that there was no need to undertake any action in this regard.

Persons with non-conforming gender identity or expression face issues accessing aforementioned gender reaffirming procedures, and even if they do, another hurdle lies in accessing legal gender recognition procedures.

CHAPTER 2: VERBAL AND PHYSICAL VIOLENCE MOTIVATED BY PREJUDICE AGAINST LGBT+ PERSONS IN POLAND

I. Discrepancy between international and regional human rights obligations and Poland's domestic framework

A) International and European legal standards

1) *Standards regarding hate crimes*

Twelve U.N. organizations recently issued a joint-statement calling on States to incorporate homophobia and transphobia as aggravating factors in hate crime laws, recognising that crimes motivated by prejudice are "underreported and often not properly investigated and prosecuted, leading to widespread impunity and lack of justice, remedies and support for victims."³⁹⁹

This statement echoes regular calls from the Council of Europe, as in the Appendix to the Recommendation CM/Rec(2010)5 which urges member States to "ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator" and to take into account "a bias motive related to sexual orientation or gender identity . . . as an aggravating circumstance."⁴⁰⁰ This implies member States must ensure that law enforcement structures, including the judiciary, be trained so as to be able to identify such crimes and "provide adequate assistance and support to victims and witnesses."⁴⁰¹

Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (hereafter the "Victims' Rights Directive") lays down procedural guarantees for victims of gender-based violence. It expressly encompasses persons with actual or perceived non-conforming sexual orientation, gender identity or expression in its scope, stating "victims of crime should be recognised and treated in a respectful, sensitive and professional manner without

397. KPH, "Social Situation of LGBT persons. Report for the years 2015-2016."

398. The Commissioner (or Ombudsperson) for Patients' Rights is appointed to protect patients' rights defined in the Act on Patients' Rights and the Commissioner for Patients' Rights of 6 November 2008, under the supervision of the Prime Minister of Poland and within the Office of the Patients' Rights. Its activities include dealing with complaints, proposing draft laws on patients' rights, raising awareness among the population on their rights as patients, cooperating with civil society organisations, among others. See <<https://www.rpp.gov.pl/en/about-us/law-regulations/>>.

399. The 12 U.N. organizations include: ILO, OHCHR, UNDP, UNESCO, UNFPA, UNHCR, UNICEF, UNODC, UN Women, WFP, WHO, and UN-AIDS. See UNAIDS ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, 1 (Sept. 2015).

400. Appendix to the Recommendation CM/Rec(2010)5, para. 2.

401. Appendix to the Recommendation CM/Rec(2010)5, para. 3.

discrimination of any kind based on any ground such as . . . gender expression, gender identity, sexual orientation."⁴⁰² It also urges member States to have their law enforcement "take into account the personal characteristics of the victim such as his or her . . . gender identity or expression, . . . sexual orientation . . . [and] the type or nature and the circumstances of the crime such as whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive."⁴⁰³

2) Standards regarding hate speech

While Art. 19 of the ICCPR provides for everyone's freedom of opinion, thought, and expression, Arts. 19(3) and Art. 20 place limitations on this freedom for "the respect of the rights or reputations of others" and to ensure States prohibit by law "any advocacy of . . . hatred that constitutes incitement to discrimination, hostility or violence," respectively. These provisions are intended to allow States to protect persons from being victims of hate speech based on their personal characteristics, such as sexual orientation or gender identity or expression. The UN-backed Rabat Plan of Action elaborates on political leaders' obligations by providing that "political and religious leaders should refrain from using messages of intolerance or expressions which may incite to violence, hostility or discrimination," and "have a crucial role to play in speaking out firmly and promptly against intolerance, discriminatory stereotyping and instances of hate speech."⁴⁰⁴

The Council of Europe also encourages member States to "prohibit and publicly disavow"⁴⁰⁵ hate speech whenever it occurs, calling on them to "raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination."⁴⁰⁶

Art. 10(2) of the ECHR requires States to restrict the exercise of the right to freedom of expression "for the protection of the reputation or rights of others," among others, which the ECtHR has indicated should be interpreted as including hate speech against persons on the basis of their sexual orientation in its 2012 *Vejdeland and Others v. Sweden* landmark decision. In that sense, the ECtHR has also consistently stressed that discrimination based on sexual orientation "is as serious as discrimination based on 'race, origin or colour."⁴⁰⁷ Hate speech and hate crimes against persons on the basis of their sexual orientation or gender identity or expression encompass "insulting, holding up to ridicule or slandering [these] specific groups of the population,"⁴⁰⁸ which the Court considers "sufficient for the authorities to favour combating [hate] speech in the face of freedom of expression exercised in an irresponsible manner."⁴⁰⁹ This is further backed by the European Commission against Racism and Intolerance's General Policy Recommendation No. 15 on combating hate speech, which expressly considers hate speech to be understood as "the advocacy, promotion or incitement, in any form, of the denigration, hatred or vilification of a person or group of persons, as well as any harassment, insult, negative stereotyping, stigmatization or threat in respect of such a person or group of persons and the justification of all the preceding types of expression, on the ground of . . . gender identity, sexual orientation."⁴¹⁰

B) Unprotected by law: Polish legal framework on hate crimes and speech

1) Lack of implementation of EU law

In November 2014, the Polish Parliament adopted the Law on the Protection and Assistance for Victims and Witnesses, with a view to implement the EU Victims' Rights Directive into national legislation.

402. Preamble to the Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, para. 9.

403. Preamble to the Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, para. 56.

404. Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred, para. 36, U.N. Doc. A/HRC/22/17/Add., 11 January 2013.

405. Appendix to the Recommendation CM/Rec(2010)5, para. 6.

406. Appendix to the Recommendation CM/Rec(2010)5, para. 7.

407. ECtHR, *Smith and Grady v. the United Kingdom* (App Nos. 33985/96 and 33986/96), para. 97; ECtHR, *Vejdeland and Others v. Sweden* (App No. 1813/07), 9 May 2012, para. 55.

408. ECtHR, *Féret v. Belgium* (App No. 15615/07), para. 73, 16 July 2009; ECtHR, *Vejdeland and Others v. Sweden* (App. No. 1813/07), 9 May 2012, para. 55.

409. ECtHR, *Féret v. Belgium* (App No. 15615/07), para. 73, 16 July 2009; ECtHR, *Vejdeland and Others v. Sweden* (App. No. 1813/07), 9 May 2012, para. 55.

410. ECRI General Policy Recommendation No. 15 on Combating Hate Speech, 8 December 2015.

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However, the 2014 Act fails to implement the directive by *de facto* excluding homophobic, biphobic, and transphobic crimes' victims from its scope and from the specific protection and support that are required for them. As these crimes are not legally recognised as hate crimes, their victims cannot benefit from the enhanced protection afforded to their victims under the directive.

2) Insufficient protection against crimes motivated by prejudice in the Criminal Code

The legal protection afforded to lesbian, gay, bisexual, transgender persons against crimes motivated by prejudice is insufficient in Poland. While the 1997 Polish Criminal Code (CC) explicitly recognises and sanctions criminal acts motivated by the victim's race, ethnicity, nationality and religion, other groups including persons with non-conforming sexual orientation or gender identity or expression, are not protected against hate crimes.

The Criminal Code recognises violence and threats thereof motivated by race, ethnicity, religion, nationality and political affiliation as a specific offence, which is punished with a 3 months to 5 year imprisonment (Arts. 119 and 257 CC). Incitement to violence on the same grounds and incitement to hatred against persons protected under these grounds are also recognised as stand-alone offences (Art. 126a CC and Art. 256 CC).

However, sexual orientation and gender identity or expression not being included in the Criminal Code, crimes motivated by these characteristics are not treated in the same manner and their victims do not benefit from the same protection. As a result, crimes motivated by prejudice against LGBT+ persons are not investigated and prosecuted as hate crimes but as common crimes. Categorising a crime as "common" rather than "motivated by prejudice" carries the consequence that these crimes attract lower penalties than crimes motivated by prejudice against protected grounds. All corollary crimes such as threats of violence or incitement to hatred against persons with non-conforming sexual orientation or gender identity or expression, are thus not considered criminal offences either. As a result, the specific needs of victims of homophobic, biphobic, or transphobic crimes are not taken into account throughout the criminal proceedings either.

The Criminal Code does include general rules providing courts shall take into account the crime's motive when sentencing the perpetrator and determining the penalty to be inflicted upon them (Arts. 53 and 115 CC), and some criminal offences provisions do include reference to aggravating factors which – when ascertained – would entail higher penalties. However, neither refer to bias motivation as such.⁴¹¹ While the government claims this provides courts with flexibility in taking into account "today's fast-changing reality" and emerging "discriminatory trends,"⁴¹² this legislative gap in fact results in an insufficient protection against crimes motivated by non-listed prejudice, which is largely reliant on the courts' interpretation in a specific case. Leaving the detection and consideration for the homophobic, biphobic, or transphobic motive of a crime solely to the courts' interpretation seems particularly risky in current times. Indeed, recent legislative reforms enacted by the government over the months preceding this report's publication have attracted severe criticism in Poland and internationally for their potential to undermine courts' capacity to remain independent from undue political influence.⁴¹³ Concerns increase when looking at the current political climate and the government's own homophobic statements and official stance on LGBT+ rights more broadly.

3) Failed attempts to amend the Criminal Code

411. Lambda Warsaw, Association for Legal Intervention, "The Diversity Workshop, Joint Submission to the Universal Periodic Review (Third Cycle) - Poland," 8 September 2016.

412. U.N. Human Rights Council, National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21, Poland, Human Rights Council, Working Group on the Universal Periodic Review, 27th session, 1-12 May 2017, U.N. Doc. A/HRC/WG.6/27/POL/1.

413. Human Rights Watch, "Eroding Checks and Balances, Rule of Law and Human Rights under Attack in Poland," 24 October 2017; Helsinki Foundation for Human Rights, "the Constitutional Crisis in Poland 2015-2016," 11 August 2016; Venice Commission, "Opinion 860/2016 on the Act on the Constitutional Tribunal" Doc. CDL-AD(2016)026, 14 October 2016; European Commission, "Rule of law: European Commission acts to defend judicial independence in Poland," 20 December 2017; Polish Commission of Human Rights, "A fully independent and efficient Constitutional Tribunal guarantees the existence of the real rights and freedoms of citizens in Poland – speech of Adam Bodnar, the Commissioner for Human Rights before the Constitutional Tribunal on 8 March 2016."

Despite repeated recommendations by both national⁴¹⁴ and international organisations and bodies⁴¹⁵ to amend the law by adding sexual orientation and gender identity to the protected grounds against hate crime and speech, and the government's stated commitment to implementing them, to date the legislation remains unchanged.⁴¹⁶ Several proposals for amendment to the Criminal Code have been submitted to Parliament in recent years. Both the first (Bill No 340) and the second (Bill No 2357) bill, introduced respectively by the Palikot Movement in 2012 and the Democratic Left Alliance in 2014, aimed at extending the legislation's scope by adding several grounds, including sexual orientation and gender identity, to the list contained in the hate crimes (Art. 119), hate speech (Art. 256) and threats (Art. 257) provisions in the Criminal Code. The third one, presented by the then ruling party Civic Platform (Bill No 1078) in 2013, aimed at extending protection against hate crimes and incitement to hatred by adding the vague term "natural or acquired personal characteristics or beliefs" to the existing grounds which would grant greater protection. While purporting to extend the protection afforded by the existing provisions, the bill failed to mention any specific characteristics, including sexual orientation and gender identity, thus leaving uncertainty regarding the provisions' scope.

Despite initial oppositions, based on the argument that the existing legal framework already offered sufficient protection against hate speech and violence,⁴¹⁷ and amidst homophobic statements made notably by current ruling party PiS' representatives during the parliamentary debates⁴¹⁸ and in media, the government seemed to finally lean towards an amendment which would have extended the protection against hate crimes and speech to other categories, including sexual orientation and gender identity.⁴¹⁹

However, the general reluctance to push forward reforms caused delays in the legislative process which resulted in the parliament's failure to pass the bills before the October 2015 general elections. This killed the process since, as the parliamentary term came to an end, so did the discussions over the draft amendments which were then abandoned. Following the elections, the new conservative government has expressed no intention to submit new proposals for amendments to the Criminal Code which would extend the hate crime and speech provisions' scope so as to include other grounds for protection.⁴²⁰ On the contrary, both PiS' leader Kaczynski and other government representatives have clearly stated their intention not to introduce changes to the legislation.⁴²¹ A new amendment presented by opposition party *Nowoczesna* in 2016, similar to the one proposed with Bill No 340, was struck down by the Polish parliament in October 2016 after receiving a negative opinion from the government and the National Prosecutor's Office.⁴²²

Following the 2017 Universal Periodic Review session, Poland was recommended to broaden its Criminal Code provisions on hate crimes by criminalising hate crimes on the grounds of age, disability, sexual orientation, and gender identity, while taking the measures necessary to combat discrimination based

414. Letter of the Human Rights Commissioner to the Minister of Justice. See also Summary of the Report on the Activity of the Ombudsman in Poland 2015, July 2016; Summary of the Report on the Activity of the Ombudsman in Poland 2016, July 2017.

415. U.N. Human Rights Committee, *Concluding Observations on the seventh periodic report of Poland*, 23 November 2016, U.N. Doc. CCPR/C/POL/CO/7, paras. 13-14; U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review – Poland, U.N. Doc. A/HRC/36/14, recommendation 120.49, 18 July 2017, not accepted by Poland which responded "we accept recommendations to prohibit discrimination and to ensure equal treatment but we do not see need to amend law."; U.N. Committee against Torture, *Concluding observations on the combined fifth and sixth periodic reports of Poland*, 23 December 2013, U.N. Doc. CAT/C/POL/CO/5-6, para. 25; European Commission against Racism and Intolerance, Report on Poland (fifth monitoring cycle), Doc. CRI(2015)20, 9 June 2015, paras. 26 and 99.

416. See also Lambda Warsaw, Association for Legal Intervention, "The Diversity Workshop, Joint Submission to the Universal Periodic Review (Third Cycle) - Poland", 8 September 2016.

417. See also Universal Periodic Review Mid-Term Progress Report by Poland, Human Rights Council 25th session, 2014.

418. LGBT+ rights in Poland. Report from research on the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, 1st ed, Warsaw, KPH, 2012. See also Krystyna Pawłowicz, PiS member of Parliament, who was quoted by media saying that "the government continues to introduce a sick ideology of gender, which promotes sexual pathologies."

419. See letter by the then Minister of Justice, Cezary Grabarczyk to the then Government Plenipotentiary for Equal Treatment, 20 February 2015; See also United Nations Human Rights Council, Seventh periodic reports of State parties due in 2015, Poland.

420. U.N. Human Rights Committee, Alternative report to the International Covenant on Civil and Political Rights, submitted by the Polish informal coalition for the CCPR for consideration of the UN Human Rights Committee in reference to the session No 118, Warsaw, 21 July 2016.

421. The new Minister of Justice appointed after the October 2015 general elections explicitly affirmed that he saw no need to introduce changes to the Criminal Code in this area. See Paweł Kosmiński, *Ziobro Wstrzymuje Prace Nad Karaniem Za Mowę Nienawisci. KPH Zachęca Do Wysłania Listów: Ministerstwo Ingoruje Fakty, Wyborcza.pl*, 26 January 2016. PiS leader Jarosław Kaczyński also confirmed his government's intention not to introduce such changes to the legislation.

422. At this occasion, the Prosecutor General argued in a written statement that the term sexual orientation included in the proposal was unclear and might include paedophilia. See Lambda Warsaw, Legal Intervention Association, Diversity Workshop Association, Poland is dismantling the hate crime policy, warn civil society groups, November 2016.

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on race, sex, nationality, ethnicity, religion or any other grounds.⁴²³ The government officially accepted the recommendation. The Polish Society of Anti-discrimination Law reached out, in September of 2017, to the Ministry of Justice, as a civil society organisation, to inquire after the steps that were to be taken in order to implement the said recommendation. The answer provided in March of 2018, by the Ministry of Justice, explicitly stated that the above is not viewed as important nor crucial in terms of current social needs or with regards to the needs of the justice system or of international organisations.⁴²⁴

4) Reforms: sexual orientation, gender identity or expression considerations left behind

Denying the hate crime qualification to these crimes has resulted in law enforcement's response to homophobic, biphobic, and transphobic crimes not being taken into account in any recent reform undertaken by Polish authorities following recommendations by international organisations and human rights protection mechanisms so far. The reforms included new mechanisms set up to address violence and incitement to hatred on racial and xenophobic grounds, such as specialised structures within the police, the Ministry of Interior and the Prosecutor's Office, specialised trainings for investigators and prosecutors and guidelines for prosecutors on investigating and collecting data on hate crimes (focusing solely on racists and xenophobic ones). These reforms overall strengthened the institutional response to racist and xenophobic speech and violence.⁴²⁵ However only 5% of hate crimes get reported.⁴²⁶

However, homophobic, biphobic, and transphobic hate crimes, as well as hate crimes against other unprotected categories, have been excluded from these positive developments,⁴²⁷ leaving their victims further unprotected and hampering progress towards an effective strategy to prevent and address them.

As a consequence of the legal, judicial, and training gap there is in protecting victims of crimes motivated by anti-LGBT+ prejudice, law enforcement fails to systematically collect data on homophobic, biphobic, and transphobic hate crimes.

II. Lack of data collection: root causes and rippling effects

The failure to systematically collect data on these homophobic, biphobic, and transphobic hate crimes especially results in their actual scale remaining largely unknown to the authorities and in the latter failing to see the need to reform and strengthen the protection framework to better respond to these crimes.⁴²⁸

423. U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review, Poland, Thirty-sixth session, 11-29 September 2017, Agenda item 6, A/HRC/36/14, recommendations 120.72, 120.73, 120.74, 120.77.

424. Email exchanges with members of PSAL, 21 September 2018.

425. Amnesty International, Targeted by hate, forgotten by law, Lack of a coherent response to hate crimes in Poland, EUR 37//2147/2015, 2015. See also OSCE ODIHR, Hate Crime Reporting, 2014.

426. Commissioner for Human Rights of Poland, Summary of the Report on the Activity of the Commissioner for Human Rights in 2017, with Comments on the Observance of Human and Civil Rights and Freedoms, 2018, in Commissioner for Human Rights Bulletin 2018, No. 2.

427. The only mechanism that applies also to crimes committed based on the victim's sexual orientation or gender identity was the Human Rights Monitoring Team within the Ministry of the Interior. This mechanism, set up in 2004 to monitor and collect data about investigations of racist and xenophobic hate crimes and allegations of offences committed by the police and border guards, saw its remit extended in 2011 to cover homophobic and transphobic hate crimes. However, the Working Group on Countering Hate Crimes (hereafter "WG"), a platform established by the Human Rights Monitoring Team in late 2015 to facilitate discussion and consultation with stakeholders, failed to deliver. The first WG's subgroup on hate speech's meeting was called for several months after the WG's constitution (July 2016), subsequently called off and no further meetings were scheduled since. In September 2016, the Human Rights Monitoring Team itself saw its staff reduced by one third, which reduced its capacity to carry out its mandate. It was eventually dissolved in November 2016 and its tasks were transferred to the Division for the European Migration Network and Anti-Trafficking. See Lambda Warsaw, Legal Intervention Association, Diversity Workshop Association, Poland is dismantling the hate crime policy, warn civil society groups, November 2016; Lambda Warsaw, Association for Legal Intervention, The Diversity Workshop, Poland is dismantling the hate crime policy, warn civil society groups, November 2016. As for the Council for Counteracting Racial Discrimination, Xenophobia and related Intolerance, another body set up in 2013 to address these issues, this was also dissolved by PM Beata Szydło in early 2016. See U.N. Human Rights Committee, Report on measures taken by the Republic of Poland to implement the provisions of the International Covenant on Civil and Political Rights in the years 2008-2015, Information provided by the Commissioner for Human Rights of the Republic of Poland (*Rzeczniczka Praw Obywatelskich*) in accordance with the International Covenant on Civil and Political Rights in connection with the consideration of the seventh periodic report of the Republic of Poland covering the period from 15 October 2008 until 31 October 2015, 6 October 2016; Lambda Warsaw, Legal Intervention Association, Diversity Workshop Association, Poland is dismantling the hate crime policy, warn civil society groups, November 2016; Amnesty International, Poland: submission to the United Nations Human Rights Committee, 118th session, 17 October-4 November 2016; Poland: dismantling the Rule of Law, Amnesty International submission for the UN Universal Periodic Review, 27th session of the UPR Working Group, April/May 2017. Although the Council's action to protect LGBT people was almost non-existent, following its dissolution there is no public institution mandated with countering homophobic, biphobic and transphobic discrimination and violence. See Alternative report to the International Covenant on Civil and Political Rights, submitted by the Polish informal coalition for the CCPR for consideration of the U.N. Human Rights Committee in reference to the Session No 118, Warsaw, 21 July 2016.

428. Amnesty International, Poland: submission to the United Nations Human Rights Committee, 118th session, 17 October-4 November 2016; Poland: dismantling the Rule of Law, Amnesty International submission for the UN Universal Periodic Review, 27th session of the UPR Working Group, April/May 2017.

Indeed, while, in theory, the Police and Ministry of Interior are collecting hate crime data on a working definition including crimes based on sex, gender identity and sexual orientation, which constitutes a step forward, this was not followed by training for all police officers. Therefore, front-line or even investigating officers are often not aware of the fact that the homophobic, biphobic, or transphobic motivation can be recorded in the system.⁴²⁹ At the same time, the National Prosecutor's Office and Ministry of Justice have no working definition of hate crimes, meaning they collect data based on the Criminal Code definition of hate crime, not encompassing crimes motivated by prejudice against persons with non-conforming sexual orientation or gender identity. This lack of coordination in the data collection systems, together with the apparent political unwillingness to collect data on the topic does not help to have reliable and probing statistics, and therefore goes in favour of PiS' argument that "Polish law provides sufficient protection against hate crimes."

This is particularly alarming when comparing data collected by Poland and data collected by civil society organisations or human rights bodies. The latter indeed show that over the past few years, violence – both physical and verbal – against LGBT+ persons and organisations working to protect and advance their rights has significantly increased. While Poland regularly reports hate crime data to the OSCE's Office for Democratic Institutions and Human Rights (hereafter "ODIHR"), the official information provided by the Polish government does not include any data on hate crimes against LGBT+ persons.⁴³⁰ The very low numbers of cases reported by the Polish government (0 in 2015) is surprising when considering the studies conducted and data collected by third-parties over the same period (2010 to 2016). For instance, in 2015 civil society information to the ODIHR counted 16 violent attacks against LGBT+ persons, 1 threat of attack and 2 attacks against LGBT+ persons' property.⁴³¹ In 2016, a survey by the Polish Human Rights Commissioner conducted on 11 144 LGBT+ persons revealed that 1 in 8 experienced physical violence during the 2 years prior to the survey, all experienced psychological violence including hate speech, 60% experienced physical violence, and 1 in 3 experienced sexual violence.⁴³²

Furthermore, lack of training and therefore low awareness among the authorities on how to respond to these crimes is also an obstacle to preventing and fighting them effectively.

The Director of the National Prosecutor's Office, Bogdan Karp, however affirmed that "since 2004 hate crimes have been a crucial issue from the viewpoint of [my] office, and this continues,"⁴³³ without specifying whether "hate crimes" encompassed crimes motivated by a person's sexual orientation or gender identity in these trainings. He explained that the National School for the Prosecution and the Judiciary, created in 2010, had the task of training both assistant judges and prosecutors, and to provide "general and systematic training" to prosecutor and judges in different areas. Bogdan Karp affirmed having himself conducted three series of trainings, two of them in relation to hate crimes and hate speech, and another led by the GPET. Given the GPET's overt stance on LGBT+ rights, one can therefore easily imagine these trainings did not encompass sexual orientation and gender identity or expression. While Bogdan Karp recognises the value of these trainings, he admits they were "not as good as [he] would have thought," but this was only "due to technical issues," in his opinion (the video-conference was not functioning properly).⁴³⁴

While NGOs such as KPH and Lambda acknowledge there have been some improvements in law enforcement's ability to spot homophobic, biphobic, and transphobic crimes thanks to trainings from the OSCE's ODIHR, they regretted: "when it comes to how these trainings [reflect on law enforcement practice], the developments are not great."⁴³⁵ A former KPH member explained that when she was

429. Lambda Warszawa, "Hate crime in Poland 2012-2016."

430. OSCE ODIHR, "Report on hate crime", 2015.

431. ILGA-Europe and KPH reported 5 physical assaults, including 1 carried out by a group, and 1 threat against a lesbian woman and her partner. ILGA-Europe, Lambda Warsaw, and the Never Again Association reported 2 physical assaults, and 1 incident in which two groups clashed during the Equality Parade. ILGA-Europe and Lambda Warsaw also reported 7 physical assaults, 2 of which were carried out by groups; and 1 incident of damage to property. The Never Again Association reported 1 additional incident of physical assault carried out by a group that caused serious injuries, 1 incident of threats and 1 homophobic graffiti.

432. Poland's Commissioner for Human Rights, "Report on measures taken by the Republic of Poland to implement the provisions of the International Covenant on Civil and Political Rights in the years 2008-2015", 6 October 2016.

433. Interview with the Director of the National Prosecutor's Office, Bogdan Karp, Friday 23 June 2017, in Warsaw, Poland.

434. Interview with the Director of the National Prosecutor's Office, Bogdan Karp, Friday 23 June 2017, in Warsaw, Poland.

435. Interview with KPH and Lambda, Thursday 22 June 2017, in Warsaw, Poland.

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working for KPH, which delivers such trainings, “it was difficult just to get 20 police officers trained.”⁴³⁶ Despite the possibility for police officers to mark a crime down as biased, only 12 cases were recorded in 2016 according to these NGOs, while the rate of hate crimes against LGBT+ persons are much higher: 20% of lesbian, gay, and bisexual persons and 40% of transgender persons are attacked in reality.⁴³⁷

When law enforcement fails to properly record a crime as motivated by a homophobic, biphobic, or transphobic prejudice, this has reverberating consequences throughout the entire judicial process. As members of KPH and Lambda explained: “the [anti-LGBT+] motivation is never taken into account. The crime is investigated because it is a crime, but not for its [anti-LGBT+] motivation. And because the motivation is not investigated from the very beginning, it is very hard for the prosecutor and courts to address it.”⁴³⁸ They mentioned several cases where the homophobic motivation was obvious but was still not mentioned by the police officer who took the complaint and thus was not taken into account by the court. They appealed to have the motivation included in the court’s decision, but the appeal failed and the case is now pending before the ECtHR.⁴³⁹

To this day, no effective measures seem to have been taken to combat hate crimes against LGBT+ persons: insufficient work has been done to ensure the collection of reliable data, training and information is still widely provided by NGOs, the legal arsenal is not adapted to hold accountable and dissuade offenders and 90% of victims are deterred from reporting the issues due to fear of homophobic, biphobic, or transphobic reactions of officers.⁴⁴⁰

III. “An atmosphere of complacent approval”⁴⁴¹

The lack of protection against hate speech and crimes for persons with non-conforming sexual orientation or gender identity or expression and persons advocating for their rights is heightened by the government’s response to these attacks. Members of the Bar Association explained “the government creates an atmosphere which encourages these crimes. This is what nationalists needed to know this was their time. [The government creates an] atmosphere of complacent, passive approval.”⁴⁴² This atmosphere is a result of both homophobic, biphobic, and transphobic hate speech by authorities themselves, and of their lack of reaction in the face of increased attacks against NGOs advocating for lesbian, gay, bisexual, and transgender persons’ rights.

Here are a few examples of hate speech by public officials against LGBT+ individuals:

“In Poznan, another [equality] parade of sodomites who try to impose their interpretation of civil rights and obligations on others. It was important that the tram drivers did not agree that their trams would have homosexual flags.” - Minister of Defense Mariusz Błaszczak on the equality parade in Poznan (August 2018).

“Dressing the national sign [the eagle] in rainbow colors constitutes a criminal act, since it is a defamatory action, insulting and desecrating a national symbol” - Minister of Interior Affairs Joachim Brudziński on the equality parade in Częstochowa (July 2018).

“M.Rosa [a Nowoczesna MP] said that same-sex couples have the right to love and start families. But, it’s not love through the anus, but an illness. And a family should bear children, and your ‘couples’ do not.” - MP Krysytyna Pawłowicz (PiS) after Nowoczesna filed a draft bill to recognize same-sex partnerships (April 2018).

Dr. Hannah Machińska, former Director of the Office of the Council of Europe in Poland, and current lawyer and Professor at the University of Warsaw, indeed explained: “the dominating tone of the general rhetoric used by Polish authorities is hate speech against different minorities . . . including LGBT+”

436. Interview with Transfuzja, Monday 19 June 2017, in Warsaw, Poland.

437. Interview with KPH and Lambda, Thursday 22 June 2017, in Warsaw, Poland.

438. Interview with KPH and Lambda, Thursday 22 June 2017, in Warsaw, Poland.

439. Interview with KPH and Lambda, Thursday 22 June 2017, in Warsaw, Poland.

440. Polish informal coalition for the CCPR for consideration of the U.N. Human Rights Committee, “Alternative report to the ICCPR”, 21 July 2016.

441. Interview with the Bar Association, Wednesday 21 June 2017, in Warsaw, Poland.

442. Interview with the Bar Association, Wednesday 21 June 2017, in Warsaw, Poland.

persons.⁴⁴³ According to Dr. Machińska, this hate speech fuels further extremism, notably among Polish youth, who “follow the message coming from PiS through their foundations and organisations [GONGOs]. And the message is quite clear: you have to follow PiS.”⁴⁴⁴ As a result, Dr. Machińska said Poland experienced increased numbers of “incidents” against LGBT+ students at university, among others, which is only the consequence of a “shift in ideas among students [who are] increasingly right oriented – in favour of a ban on abortion, against LGBT+ persons . . . and more and more anti-EU.”⁴⁴⁵ She sent some of these right-wing organisations a letter urging them to introduce a “principle of equal rights” in their rules, but the organisations said no. “Very soon the situation will be dramatic.”⁴⁴⁶

Hate speech by public officials is coupled with authorities’ lack of reaction to attacks against NGOs advocating for LGBT+ rights. All of the members of such organisations interviewed said there had been a significant increase in attacks against NGOs dealing with LGBT+ persons’ rights since 2015.⁴⁴⁷ In almost all cases, the bias motive underlining the attacks was evident but investigations were discontinued due to the impossibility to identify the perpetrators and the authorities failed to firmly and publicly condemn them as well as their homophobic motive. For instance, KPH’s headquarters in Warsaw and offices in Poznań were repeatedly and recently attacked without an official condemnation from politicians and without an effective investigation carried out, according to their colleagues at the Helsinki Foundation for Human Rights.⁴⁴⁸ They also mentioned the State’s smear campaigns against certain NGOs such as KPH or Transfuzja.⁴⁴⁹ “[The authorities] have a Nazi perspective: eliminating Transfuzja is like ‘cleaning the nation.’ If they could get rid of us, LGBT+ organisations, they would. . . . The same thing happened against KPH: attacks against KPH were nationwide. They want to make them invisible, get rid of the organisation.”⁴⁵⁰ KPH was indeed attacked around 4 times in 2016 by far-right groups and now have to have 24/7 security at the office.⁴⁵¹ Members of the Transfuzja Foundation explained that while they had not themselves been victims of any attacks, they were sharing a building with a far-right group and “there were situations where they were screaming ‘kill the faggots!’”⁴⁵² While members of the Transfuzja Foundation found there were few incidents before the elections, they noticed “the situation changed after the elections: people are now screaming or laughing at people we assist. PiS elections liberated homophobic feelings.”⁴⁵³ One member for instance recalled being on the metro with her transgender friends “and some were mocked and spit at.”⁴⁵⁴ These increased instances of hate speech and crimes towards NGOs advocating for LGBT+ rights come at a time of heightened pressure and administrative weight put on such NGOs. Members of PSAL explained: “as an NGO we are now wasting our time being overly careful in following all provisions, securing all documents, checking our finances. We do not need the police to come to our house at 6 am.”⁴⁵⁵

Under the current context, where anti-LGBT+ hate speech also comes from the State, which attempts to enroll Polish youth in its homophobic, biphobic, and transphobic crusade, all the while remaining completely passive in the face of attacks against NGOs advocating for LGBT+ rights and actively passing laws aimed at preventing them from working, a PSAL member said: “I am afraid, of course. I am sure that in the next 2 or 3 years we will have anti-LGBT+ propaganda laws as in Russia. . . . I am scared of what could happen next.”⁴⁵⁶

Because of the lack of protection afforded to individuals with non-conforming sexual orientation, gender

443. Interview with Hannah Machińska, former Director of the Office of the Council of Europe in Poland, and current lawyer and Professor at the University of Warsaw, Monday 19 June 2017, in Warsaw, Poland.

444. Interview with Hannah Machińska, former Director of the Office of the Council of Europe in Poland, and current lawyer and Professor at the University of Warsaw, Monday 19 June 2017, in Warsaw, Poland.

445. Interview with Hannah Machińska, former Director of the Office of the Council of Europe in Poland, and current lawyer and Professor at the University of Warsaw, Monday 19 June 2017, in Warsaw, Poland.

446. Interview with Hannah Machińska, former Director of the Office of the Council of Europe in Poland, and current lawyer and Professor at the University of Warsaw, Monday 19 June 2017, in Warsaw, Poland.

447. Interview with Transfuzja, Monday 19 June 2017, in Warsaw, Poland; Interview with PSAL, Tuesday 20 June 2017, in Warsaw, Poland; Interview with the Helsinki Foundation for Human Rights, Tuesday 20 June 2017, in Warsaw, Poland; Interview with the Bar Association, Wednesday 21 June 2017, in Warsaw, Poland.

448. Interview with the Helsinki Foundation for Human Rights, Tuesday 20 June 2017, in Warsaw, Poland.

449. Interview with the Helsinki Foundation for Human Rights, Tuesday 20 June 2017, in Warsaw, Poland.

450. Interview with Transfuzja, Monday 19 June 2017, in Warsaw, Poland.

451. Interview with Transfuzja, Monday 19 June 2017, in Warsaw, Poland.

452. Interview with Transfuzja, Monday 19 June 2017, in Warsaw, Poland.

453. Interview with Transfuzja, Monday 19 June 2017, in Warsaw, Poland.

454. Interview with Transfuzja, Monday 19 June 2017, in Warsaw, Poland.

455. Interview with PSAL, Tuesday 20 June 2017, in Warsaw, Poland.

456. Interview with PSAL, Tuesday 20 June 2017, in Warsaw, Poland.

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identity, or expression, discrimination and violence through the form of hate crimes and hate speech is pervasive in all aspects of these persons' lives, in almost utter impunity.

CHAPTER 3: DIFFICULTIES TO EXIST DE JURE

I. Lack of legal gender recognition procedures

A) International and regional human rights standards on gender recognition

Under Art. 16 of the ICCPR, "everyone shall have the right to recognition everywhere as a person before the law."⁴⁵⁷ Applied to transgender persons, this is understood to mean the right to one's legal gender recognition. This has been further elaborated upon by the ECtHR, which has confirmed the obligation of member States to enable legal gender recognition in their domestic legal framework⁴⁵⁸ and ruled that a State's failure to change the birth certificate of someone having undergone gender reaffirming procedures amounts to a violation of Art. 8 of the ECHR.⁴⁵⁹

1) Prior requirements

The Council of Europe has stated on multiple occasions that the conditions for legal gender recognition, such as requirements of physical changes, must be regularly reviewed⁴⁶⁰ "having regard to scientific and societal developments"⁴⁶¹ and has flagged abusive, and thus prohibited, prior requirements (the list is not exhaustive): "irreversible sterilisation, hormonal treatment, preliminary surgical procedures and sometimes proof of the person's ability to live for a long period of time in the new gender (so called "real-life experience")."⁴⁶² The criteria must not be arbitrary, and individuals must be able to fulfil them, in practice (e.g. services must be available).⁴⁶³ As noted by the Council of Europe, "a clear trend can be observed among states in Europe that are moving from compulsory medical requirements towards procedures based on self-determination."⁴⁶⁴ This culminated in the ECtHR finding that requiring "a sterilising operation or medical treatment resulting in a very high probability of infertility, amounts to a breach by the . . . State of its positive obligation to guarantee the right . . . to respect for . . . private life."⁴⁶⁵ Thus, member States cannot demand from a person seeking legal gender recognition to undergo any medical treatment that would most likely result in sterility.

2) Effects of recognition

Council of Europe bodies have consistently recommended that States remove any restrictions preventing transgender persons from remaining in an existing marriage after the legal recognition of their gender.⁴⁶⁶ The ECtHR also ruled there was "no justification for barring transsexual[s] from enjoying the right to marry under any circumstances."⁴⁶⁷

The Parliamentary Assembly of the Council of Europe has also adopted a resolution calling on States to "ensure that spouses or children do not lose certain rights" following legal gender recognition.⁴⁶⁸

B) Polish legal framework on gender recognition: a "traumatic experience"⁴⁶⁹

1) Gatekeeping procedures restricting access to legal gender recognition

457. International Covenant on Civil and Political Rights, Art. 16.

458. ECtHR, *Hämäläinen v. Finland* [GC] (App. No. 37359/09), 16 July 2014.

459. ECtHR, *B. v. France* (App. No. 13343/87), 1992; ECtHR, *Goodwin v. the United Kingdom and I. v. the United Kingdom* (App. Nos. 28957/95 and 25680/94) 2002.

460. Council of Europe adopted Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, para. 20.

461. ECtHR, *Goodwin v. the United Kingdom and I. v. the United Kingdom* (App. Nos. 28957/95 and 25680/94), 2002.

462. Explanatory Memorandum to CM/Rec(2010)5, see section IV. Right to respect for private and family life.

463. Council of Europe, Protecting Human Rights of Transgender Persons: A short guide to legal gender recognition (2015).

464. Council of Europe, Protecting Human Rights of Transgender Persons: A short guide to legal gender recognition (2015).

465. ECtHR, *Affaire A.P., Garçon et Nicot c. France* (Apps Nos. 79885/12, 52471/13 and 52596/13), 6 April 2017.

466. Thomas Hammarberg, "Human rights and gender identity", CommDH/IssuePaper(2009)2, pp. 22-23, 45.

467. ECtHR, *Goodwin v. the United Kingdom and I. v. the United Kingdom* (App. Nos. 28957/95 and 25680/94), 2002.

468. PACE resolution Resolution 2048 (2015) Discrimination against transgender people in Europe, para. 6.2.

469. Interview with members of the Polish Bar Association, Wednesday 21 June 2017, in Warsaw, Poland.

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There is no law specific to gender recognition in Poland. The procedure which a person who intends to undergo gender recognition has to go through currently requires that the person brings an action against his or her parents under Art. 189 Polish Civil Procedure Code, on ground that they wrongly indicated the child's gender at birth. "This is a particularly traumatic experience for transgender persons, especially when their parents do not agree with it."⁴⁷⁰

Prior requirements exist, that are particularly heavy, to change one's gender. First, a transsexual diagnosis must be obtained, and is often accompanied by a "real life test," whereby the individual has to live full-time as their preferred gender, without being prescribed any hormonal treatment or having one's legal status altered, for a duration that can last up to two years. This is extremely problematic given the numerous instances of discrimination and violence faced by transgender persons in all areas of life in Poland. Members of the Transfuzja Foundation mentioned cases of persons forced to submit to the real life test had been fired.⁴⁷¹

There are also non-medical requirements to be fulfilled in order for a person to obtain legal gender recognition. Married individuals must divorce their partner before obtaining gender recognition as Polish law does not recognise same-sex unions. This further complicates the process, and denies transgender persons and their partners who wish to remain in a relationship the possibility to do so. As for transgender persons' rights as parents, these are not safeguarded under Polish law. Transgender persons who are a child's sole guardian must wait until the child is of age before being able to undergo gender reaffirming procedures and/or obtain legal gender recognition. When there is another parent, the child's custody is automatically transferred to that parent, which often prompts transgender parents to restrain themselves from undergoing the procedure for fear of their parental rights being restricted.⁴⁷²

The situation has slightly improved following a Warsaw court's 2016 decision⁴⁷³ to authorise persons who had undergone gender reaffirming procedures abroad to have their gender legally recognised in Poland without having to undergo medical evaluation, to file a suit against their parents, etc. However, this only improves transgender persons' situation in Poland for those who have the financial means to undergo gender reaffirming procedures abroad. A new piece of legislation specifically on legal gender recognition, affording the same rights to transgender persons' having undergone the procedures in Poland, is thus necessary.

2) *The failed Gender Accordance Act*

Despite efforts made to introduce a law which would regulate gender recognition, the Gender Accordance Act (*Poselski projekt ustawy o uzgodnieniu płci*),⁴⁷⁴ presented in 2012 by the first Polish transgender MP Anna Grodzka (from the Your Movement opposition party) was eventually prevented from entering into force in October 2015 by a veto imposed by Polish President (and current ruling party PiS' member) Duda and the Parliament's failure to vote again on the draft law following the veto, which resulted in the latter being upheld. The proposal, which aimed at introducing a formal procedure for gender recognition and resulted from a very close collaboration between some parliamentary forces and civil society organisations, simplified the criteria for legal gender recognition.⁴⁷⁵ The draft Gender Accordance Act, as it resulted from the discussions and negotiations among political groups in parliament, was not fully in line with international standards as it notably required that a special identity document be issued to person in transition,⁴⁷⁶ and was elaborated mainly in consultation with sexologists, without

470. Interview with members of the Polish Bar Association, Wednesday 21 June 2017, in Warsaw, Poland.

471. Interview with Transfuzja, Monday 19 June 2017, in Warsaw, Poland.

472. European Union Agency for Fundamental Rights (FRA), Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU, Comparative legal analysis, Update 2015 (December 2015).

473. Transfuzja, "Groundbreaking Court Decision in Poland on Gender Recognition Abroad," 21 June 2016.

474. <<http://orka.sejm.gov.pl/Druki7ka.nsf/0/AA0CB1BCA4CE5088C1257B8F00361E90/%24File/1469.pdf>> (in Polish); for a version in English see Transfuzja, "Gender Accordance Act DRAFT," <http://transfuzja.org/en/artykuly/gender_recognition_in_poland/the_gender_accordance_act_draft.htm>.

475. The draft Gender Accordance Act requested that the applicant be a Polish citizens ; that he or she is over 18 or, for transgender persons, over 13, that they have their legal guardian or the guardianship court's approval ; that he or she is not married and presents two supporting medical opinions stating that their gender identity durably differs from their legal gender, to be submitted to a regional court for examination. KARAT Coalition, cit. See also ILGA-Europe, Annual Review, 2016.

476. Yogyakarta Principle No. 3 (e); Center for American Progress, "ID Accurately Reflecting One's Gender Identity Is a Human Right," 18 December 2012.

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consulting human rights organisations and experts.⁴⁷⁷ However, it would have represented a significant step towards recognising transgender persons' rights in Poland. Szymon, a member of the Transfuzja Foundation, expressed the frustration many transgender persons face, and the hopes this legislative proposal had brought: "My parents are not supportive and I don't want to sue them, so the law was the only opportunity for me to maintain the very feeble relationship we have. But now this possibility is dead."⁴⁷⁸

Following conservative PiS party's rise to power in October 2015, NGOs and activists advocating for transgender persons' rights fear that any hope that another legislative initiative could be presented and passed might be lost.⁴⁷⁹ They also fear that another proposal would end up in a retrogression on transgender persons' few rights.⁴⁸⁰ With intensified attacks against the rights of persons with non-conforming sexual orientation or gender identity since that date, LGBT+ persons and activists are losing hope that the situation will improve. Szymon said:

"There were elections in 2015. At the 2016 pride, I could hear that people were angry, were loud, and wanted to show the government we are still here. In 2017, I could feel that people were scared. Scared of an attack of some sort. This year's [2017] pride was much smaller, the route was shorter; and everyone could see that there were more difficulties when it came to making this pride happen and making it a happy event. This exemplifies how much society has changed over these past two years. I'm scared we are going to get used to it. We also lost hope about the law in the past couple of years. There is no chance that the law would pass during this term."⁴⁸¹

II. No rights for same-sex families

A) Council of Europe and European Union standards

The ECtHR has stated very clearly in *Oliari and others v. Italy* that the fact that no marriage or civil partnership was available to same-sex couples in committed relationships in a member State was a violation of Art. 8 of the ECHR.

Recently, in *Coman and others v. Romania*,⁴⁸² the CJEU also made it clear that EU member States are now obliged to recognise same-sex marriages concluded lawfully in the EU, irrespective of whether they have opened marriage to same-sex couples in their own territory. Because of the EU's principle of supremacy, which provides that EU law prevails "even over constitutional provisions of a member State . . . in case there is a conflict between the two,"⁴⁸³ *Coman* thus requires that even member States that have a constitutional ban on same-sex marriage recognise such marriages in these situations. A member State "cannot rely on its national law as justification for refusing to recognise in its territory, for the sole purpose of granting a derived right of residence to a third-country national, a marriage concluded by that national with a Union citizen of the same sex in another Member State in accordance with the law of that state."

B) Poland's legal void surrounding same-sex relationships

Art. 18 of the Polish Constitution refers to marriage as the "relationship of a man and a woman."⁴⁸⁴ As such, no mechanism exists for same-sex couples to marry or register their partnership. Despite

477. KARAT Coalition, Alternative report on the implementation of the Convention for the Elimination of All Forms of Discrimination against women (CEDAW), Poland, September 2014.

478. Interview with members of the Transfuzja Foundation, Monday 19 June 2017, in Warsaw, Poland.

479. PiS leader Kaczynski has been reported to have said in relation to gender reaffirming at a rally which took place before the October 2015 elections that this was "an attack on the family." ILGA-Europe, Annual Review, 2016.

480. Interview with members of the Transfuzja Foundation, Monday 19 June 2017, in Warsaw, Poland.

481. Interview with members of the Transfuzja Foundation, Monday 19 June 2017, in Warsaw, Poland.

482. CJEU, *Relu Adrian Coman and Others v. Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, C-673/16, 5 June 2018.

483. CJEU, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* (1970).

484. Constitution of the Republic of Poland art. 18 ("Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.").

numerous recommendations made by international organisations and bodies⁴⁸⁵ and intensive advocacy by civil society organisations, the government has so far refused to introduce legal measures which would enable same sex couples to formalise their relationship.

Under the previous parliamentary term, several attempts were made at introducing civil unions into the Polish legal system, which would have the consequence of ensuring equality for same-sex couples in areas such as social security, inheritance and taxes. However, these initiatives were not successful as all three bills that were submitted to parliament during the previous term were struck down.

A new proposal was submitted to Parliament by opposition party *Nowoczesna* in 2016 but eventually met the same fate. Now, the current government has made clear that it has no plans to legalise same-sex relationships by amending the law so as to allow for either marriage or civil partnerships for same-sex couples.⁴⁸⁶

What is more, same-sex partners wishing to marry or register a civil partnership in another country also face obstacles in obtaining the necessary administrative documents.

Indeed, the old Law on Civil Status required a person applying for a civil marital status certificate to state the name and surname of future spouse. If the civil servant identified the future spouse as someone from the same sex as the applicant, he/she refused to issue the civil status certificate. The amended version of the Law on Civil Status now establishes two methods through which someone can obtain a civil status certificate. The first is Art. 49 of the law, whereby a civil marital status can be requested by anyone without specifying the purpose of its usage. The second is Art. 83 of the law, whereby a certificate can be requested to confirm the applicants' legal right to get married abroad. However, for this certificate to be obtained, applicants must specify their name, surname, and sex as well as those of the future spouse, and if they are a same-sex couple, their application is refused.⁴⁸⁷ The applicant wishing to marry or enter a civil union abroad must go through this specific Art. 83 procedure, rather than use the universal Art. 49 certificate. Because of the current definition of marriage in the Polish Constitution, applicants almost always see their request refused when it appears from the application that the document will be used to marry or form a union with a person of the same sex.⁴⁸⁸ The refusal is issued on the ground that, as Polish law does not recognise same-sex relationships, the applicant is not eligible to obtain a marital status certificate for this purpose.

Following the amendment of the law, members of KPH and Lambda said the General Prosecutor had sent a letter to all regional prosecutors asking them to register instances of Polish citizens trying to have their civil status amended so as to show they had gotten married or into a civil partnership abroad. "This was definitely made to scare lesbian, gay, and bisexual persons and send a clear sign to civil servants working at the registry offices that it was not acceptable to give out these certificates. It also made us feel as though the government was making a list of people, to have access to this data. We know of some prosecutors who have sent out these letters to civil registry offices in their area."⁴⁸⁹

The amended Law on Civil Status thus perpetuates discrimination against same-sex couples.⁴⁹⁰

485. U.N. Human Rights Committee, *Concluding Observations on the seventh periodic report of Poland*, 23 November 2016, U.N. Doc. CCPR/C/POL/CO/7, para. 16(e); U.N. Human Rights Council, Report of the Working Group on the Universal Periodic Review – Poland, U.N. Doc. A/HRC/36/14, recommendation 120.75, 18 July 2017, not accepted by Poland.

486. This was recently confirmed by government representatives during Poland's third Universal Periodic Review in 2017. Statement delivered by Min. J. Dziejczak at the 36th session of the Human Rights Council, Universal Periodic Review, Poland, 22 September 2017. Previously, President A. Duda, from the same PiS ruling party, had also declared earlier in 2017 that the Polish Constitution "clearly and expressly" defined marriage as a union between a man and a woman and expressed doubts that the government would ever agree to any amendment to the Constitution in this area, or to opening to "an interpretation of marriage that could include other genders." See *TheNews*, Polish President rules out gay marriage, *Polske Radio Dla Zagranicy*, 25 January 2017.

487. Polish informal coalition for the CCPR for consideration of the UN Human Rights Committee, "Alternative report to the ICCPR", 21 July 2016.

488. *See also* European Commission against Racism and Intolerance, ECRI Report on Poland (fifth monitoring cycle), adopted on 20 March 2015, published on 9 June 2015.

489. Interview with members of KPH and Lambda, Thursday 22 June 2017, in Warsaw, Poland.

490. Some couples who were refused civil status certificates have challenged the decisions in Polish courts by bringing an action against the registry office which refused to issue the requested document. ILGA-Europe, Annual Review, 2016. The Commissioner for Human Rights intervened in a case in 2016, arguing that, although Polish law indeed made it impossible to issue the certificate, the national law would be contrary to Poland's obligations under EU law and the EU Fundamental Rights Charter, as well as the European Convention for Human Rights and Fundamental Freedoms (ECHR). He therefore filed an application asking for a prejudicial question to the Court of Justice of the European Union (CJEU) about the interpretation of EU law in this case. However, the Court dismissed the Commissioner's request as well as the applicant's appeal. Summary of the Report on the Activity of the Ombudsman in Poland, July 2016.

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However, given the recent *Coman* judgment, Poland now has the obligation to reform this system so as to comply with the judgment.

Same-sex couples also face difficulties when attempting to change their surname to their partner's. Indeed, the Law on the Changes of Names and Surnames states that such change must be justified by an "important reason," and when the reason is being in same sex relationship, applicants see their application rejected to the motive that "same-sex partnership is not legal in Poland."⁴⁹¹

Despite a restrictive legal framework, some positive developments have taken place though, thanks to the decisions issued by some courts in specific cases which went towards ensuring equal rights to same sex-couples across areas and paved the way to a more progressive interpretation of existing laws.⁴⁹² Among those, the Supreme Administrative Court's decision in September 2016 asking the Ministry of Interior to re-examine a same-sex couple's decision to buy property together, which was refused on ground that their partnership was not proof of one of the applicants' connection to the country. The court ruled that the connection with Poland should not be defined only in relation to marriages and unions with different-sex partners, thus opening to a more progressive interpretation of relevant provisions in Polish law. Earlier that year, the Polish Supreme Court held that the difference in sex of persons living in such a relationship with another person where spiritual, physical and economical bonds exist between them is not a condition for determining their living in common cohabitation, included in the definition of the next to kin in Article 115(1) of the Polish Penal Code and that therefore same-sex couples living together can refuse to testify against each other in criminal proceedings.

While the road to same-sex marriage or civil unions in Poland still seems long, so does the road to the recognition of same-sex parents.

C) Children of same-sex parents impacted

Polish citizens who married or entered into a civil partnership with a person of the same sex abroad also face obstacles when applying for a birth certificate for their children born outside Poland. In these cases, the authorities refuse to transcribe birth certificates issued abroad when the latter indicate as parents two persons from the same sex, on ground that this would violate Polish law which does not recognise same-sex relationships. As birth certificates' transcription is necessary in order to exercise citizens' rights in Poland, the refusal to transcribe the certificates prevents children born from same-sex couples from exercising their rights as Polish citizens, thus discriminating against both children and their parents.

A famous case concerned Katherina M., a British citizen, and Zofia M., a Polish citizen, who entered into a civil partnership in the United Kingdom and had a daughter, Maria M. When Zofia M. tried to have her daughter's British birth certificate transcribed at the registry office in Lodz, Poland, in 2011, the transcription was denied. The reason given by the registry office for not transcribing the certificate was that this would violate Polish law, which does not recognise same-sex partnerships but rather promotes a traditional family model. Despite Zofia's decision to legally challenge the refusal up to the highest level, the Supreme Administrative Court, all instances upheld the registry office's decision.⁴⁹³ The applicants brought the case to the ECtHR, before which a decision is pending.

The Commissioner for Human Rights criticised this practice and the system which is discriminatory and violates the right to equal treatment and requested the Minister of Interior to look into how this could be modified so that children born abroad from same sex parents can have their rights as Polish citizens' duly recognised.⁴⁹⁴

491. KPH, "Social Situation of LGBT persons. Report for the years 2015-2016"; Alternative Report to the International Covenant on Civil and Political Rights, submitted by the Polish informal coalition for the CCPR for consideration of the UN Human Rights Committee in referene to the session No 118, Warsaw, 21 July 2016.

492. ILGA-Europe, Annual Review, 2017. See also European network of legal experts in gender equality and non-discrimination, Landmark decision of the Supreme Court regarding rights of same sex partners in criminal law, 24 March 2016.

493. KPH, "Social Situation of LGBT persons. Report for the years 2015-2016"; Alternative Report to the International Covenant on Civil and Political Rights, submitted by the Polish informal coalition for the CCPR for consideration of the UN Human Rights Committee in referene to the session No 118, Warsaw, 21 July 2016.

494. Summary of the Report on the Activity of the Commissioner for Human Rights in 2016.

Recommendations

To the U.N. Committee on the Rights of the Child, to the U.N. Committee on Economic, Social, and Cultural Rights, to the U.N. Independent Expert on Sexual Orientation, Gender Identity:

- Clearly voice concerns regarding the current limited protection from discrimination on the ground of sexual orientation, gender identity, and expression, and the apparent lack of political will to enhance such protection; and
- If deemed necessary, issue a public declaration on the matter; and
- Extend an offer for a country visit to the Polish government on its implementation of the CRC and the ICESCR, in particular regarding the situation of LGBT+ persons' rights; and
- Urge the Polish government to ensure LGBT+ students enjoy their right to education in a safe environment, free from bullying, violence, social exclusion, or other forms of discriminatory and degrading treatment related to sexual orientation, gender identity, or expression. To that end, urge the Polish government to have mandatory equality education for all in schools, in particular;
- Urge the Polish government to suppress prior requirements for legal gender recognition such as proof of infertility, gender reaffirming surgery, hormonal treatment, or the "real-life test."

To the U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, to the U.N. Committee against Torture, to the U.N. Independent Expert on Sexual Orientation, Gender Identity:

- Clearly voice concerns regarding the current anti-LGBT+ discourse by some public figures, on public platforms; and
- If deemed necessary, issue a public declaration on the matter; and
- Extend an offer for a country visit to the Polish government on its implementation of the CAT, in particular regarding the situation of LGBT+ persons' rights

To the European Union:

• To the European Parliament:

- Amend the Employment Equality Directive so as to include gender identity and expression among protected grounds, as recommended by United Nations standards; and
- Issue a public declaration or guidelines clearly specifying to member States that the exception provided for in Art. 4(2) of the Employment Equality Directive for occupational activities within churches and other public or private religious organisations cannot not serve to allow employers to discriminate against their employees based on their sexual orientation or gender identity or expression; and
- Reiterate a recommendation to the European Commission, member States, and candidate nations, once again firmly underlining the importance of a continuous assessment of the implementation of the "Guidelines to Promote and Protect the Enjoyment of all Human Rights by LGBTI Persons" by using clear benchmarks; and
- Keep on taking into account the work of the European Parliament's Intergroup on LGBTI Rights, notably on freedom of movement for same-sex couples;
- Follow up on the January 2018 resolution on protection and non-discrimination with regard to minorities in the EU Member States, notably on the strong recommendation made to the European Commission to "ensure that member States correctly implement the Free Movement Directive, consistently respecting, inter alia, the provisions related to family members and prohibiting discrimination on any grounds."

• To the European Commission:

- Focus on LGBT+ persons' economic, social, and cultural rights, and on anti-LGBT+ hate speech and crime, as part of the yearly report on progress with regard to its List of actions to advance LGBTI equality; and
- Start infringement proceedings on the Law on the Protection and Assistance for Victims and Witnesses, for failure to fully implement the EU Victims' Rights Directive into national legislation by de facto excluding homophobic, biphobic, and transphobic crimes' victims from its scope and from the specific protection and support that are required for them; and
- As guardian of the treaties, ensure member States, including Poland, fully comply with the Court of Justice of the European Union's *Coman and others v. Romania* judgment, by recognising same-sex marriages concluded lawfully in the EU, irrespective of whether they have opened marriage to same-sex couples in their own territory; and

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-
- If necessary, start infringement proceedings to ensure compliance.
 - **To the European Agency for Fundamental Rights:**
 - Follow up on the recommendations set out in the 2015 update to the comparative legal analysis on the “Protection against discrimination on grounds of sexual orientation, gender identity and sex characteristics in the EU.” In the case of Poland, especially follow up on the following recommendations:
 - o to “take measures to ensure respect for gender non-conformity and facilitate access to gender reassignment surgery when requested”
 - o to “review their procedures for gender identity recognition with a view to making them clear and easy to fulfil, avoiding prerequisites such as genital surgery – which can lead to sterilisation – and/or forced or automatic divorces”
 - o to “ensure that LGBTI people, in particular, are fully informed of their rights [in the workplace], that discrimination victims are encouraged to lodge formal complaints, and that they are supported in doing so”
 - o to “ban discrimination based on sexual orientation beyond the employment sphere, including some or all areas covered by the Racial Equality Directive”
 - o to “provide training and developing guidelines/ handbooks for the police, prosecutors and judges on how to assist/support individuals who become victims of hate crime because of perceptions of their sexual orientation and/or gender identity”
 - o to “ensure that relevant quantitative data, in the form of regular surveys and official data recorded by authorities, are gathered and analysed in order to monitor discrimination and criminal victimisation based on sexual orientation, gender identity and sex characteristics”
 - o to “ensure the equal protection of rights of LGBTI people in relevant areas of EU law, in particular employment-related partner benefits, free movement of EU citizens and family reunification of refugees and third-country nationals, by explicitly incorporating same-sex partners – whether married, registered, or in a de facto union – into the definition of “family member”

To the Council of Europe:

- Extend an offer for a country-visit to Poland aimed at pursuing a direct dialogue with the authorities and looking into the situation of LGBT+ persons’ rights, and publish a report containing conclusions and relevant recommendations to help redress shortcomings; and
 - Follow up on the recommendations set out in the 2011 paper on “Discrimination on grounds of sexual orientation and gender identity in Europe.” In the case of Poland, especially follow up on the following recommendations:
 - “Grant legal recognition for the preferred gender of transgender persons and develop expeditious and transparent procedures for changing the name and sex of a transgender person on birth certificates, civil registers, identity cards, passports, educational certificates and other similar documents”
 - “Abolish sterilisation and other compulsory medical treatment which may seriously impair the autonomy, health or well-being of the individual, as necessary requirements for the legal recognition of a transgender person’s preferred gender”
 - “Remove the requirement of being unmarried, or divorce for already married persons, as a necessary condition for the legal recognition of a transgender person’s preferred gender”
 - “Enact legislation recognising same-sex partnerships by granting such partnerships the same rights and benefits as different-sex partnerships or marriage, for example in the areas of social security, employment and pension benefits, freedom of movement, family reunification, parental rights and inheritance”
 - Urge the Polish government to use scientifically-accurate manuals for comprehensive sexual education courses, such as Compass and Compasito; and
 - Urge the Polish government to take into account the bias motive related to sexual orientation or gender identity as an aggravating circumstance. This implies member States must ensure that law enforcement structures, including the judiciary, be trained so as to be able to identify such crimes and provide adequate assistance and support to victims and witnesses; and
 - Encourages member States to prohibit and publicly disavow hate speech whenever it occurs, calling on them to raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination; and
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- If deemed necessary, issue a public declaration or resolution on the matters.
 - **To the Parliamentary Assembly:**
 - Adopt the upcoming report on “private and family life: achieving equality regardless of sexual orientation”

To the Government of the Republic of Poland in general:

- Increase the financial resources of the Human Rights Commissioner; and
- Refrain from exerting informal pressure through declarations in the media to prevent teachers from using scientifically-accurate comprehensive sexual education manuals such as Compass and Compasito; and
- More generally, refrain from public declarations, either in the media or online, containing discriminatory statement against persons with non-conforming sexual orientation, gender identity, or expression; and
- In line with Council of Europe and United Nations standards, refrain from derogatory comments towards LGBT+ persons and organisations advocating for their rights, and publicly condemn attacks against LGBT+ persons and organisations advocating for their rights.

To the Ministry of Justice of the Republic of Poland:

- Refrain from making abusive and arbitrary use of the power to intervene in cases so as to prevent the advancement of LGBT+ rights; and
- Ensure the bias motive related to sexual orientation or gender identity is taken into account as an aggravating circumstance from the start of the investigation. This implies law enforcement structures, including the judiciary, be trained so as to be able to identify such crimes and provide adequate assistance and support to victims and witnesses; and
- Together with the Ministry of Interior, adopt working definition of hate crimes which includes crimes motivated by prejudice against non-conforming sexual orientation, gender identity, or expression, notably with the view of regularly collecting data on these crimes; and
- Ensure prosecutors and judges are trained to use this harmonised data collection system on hate crimes.

To the Ministry of Interior of the Republic of Poland:

- Together with the Ministry of Justice, adopt working definition of hate crimes which includes crimes motivated by prejudice against non-conforming sexual orientation, gender identity, or expression, notably with the view of regularly collecting data on these crimes; and
- Ensure law enforcement agents are systematically trained to use this harmonised data collection system on hate crimes, as well as on LGBT+ rights issues such as crimes motivated by prejudice.

To the Ministry of Labour of the Republic of Poland:

- Regularly collect data on discrimination based on sexual orientation, gender identity, and expression in the workplace and on the labour market and make them publicly available; and
- Ensure dissuasive disciplinary actions are taken against employees or employers who have discriminatory attitudes in particular towards LGBT+ employees in the workplace; and
- Amend the 2016 rules on diplomas so that they do not constitute further obstacles preventing transgender persons from accessing the labour market, notably by suppressing the requirement for transgender persons having obtained legal gender recognition to deliver the court’s judgment and copies of it to the education institution they attended, for it to issue a new diploma; and
- Conduct country-wide awareness-raising campaigns on LGBT+ persons’ rights in the workplace.

To the Ministry of Education of the Republic of Poland:

- Provide systematic training to teachers on comprehensive sexual education and anti-discrimination issues; and
- Integrate scientifically-accurate comprehensive sexual education courses in school curricula, in line with Council of Europe standards;
- Ensure that comprehensive sexual education courses are taught by qualified teachers or non-governmental organisations and not permeated with religious views;
- Ensure religion teachers, appointed by the Church, are subject to scrutiny (and thus inspections) in their classroom; and
- Enact clear anti-bullying and equality policies in schools; and
- Ensure dissuasive disciplinary actions are taken against teachers who have discriminatory attitudes in particular towards LGBT+ students and teachers at school; and

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- Urge medical universities to amend medical schools' curricula so as to incorporate systematic equality education and systematic training on LGBT+ issues to healthcare personnel, notably on gender reaffirming procedures; and
 - Refrain from calling out and publicly shaming teachers who attempt to provide scientifically-accurate sexual education at school.

To the Ministry of Health of the Republic of Poland:

- Urge medical universities to amend medical schools' curricula so as to incorporate systematic equality education and systematic training on LGBT+ issues to healthcare personnel, notably on gender reaffirming procedures; and
- Ensure hormone therapy and gender reaffirming procedures are accessible to any person expressing a wish to undertake them, and that they be free of charge upon demonstration of financial need; and
- Suppress the current requirement that someone must have undergone full genital reaffirming surgery in order to be able to have the costs related to the reaffirmation funded.

To the Polish Parliament:

- Refrain from revoking Art. 138 of the Petty Crimes Code to prevent LGBT+ rights' advancements on this basis, or enact legislation filling the gap left by the revocation of such provision, allowing LGBT+ persons to advocate for their right not to be discriminated against in accessing goods and services; and
- Amend the Equal Treatment Act so as to revoke the provision stating the list of protected grounds constitutes a closed catalogue, include gender identity among the protected grounds in all areas of life, included in employment, in line with EU law obligations on the matter; and
- Amend the Equal Treatment Act so as to prevent the abusive use of the "religious organisations" exception of Art. 4(2) of the Employment Equality Directive, to justify employers discriminating against their employees based on their sexual orientation or gender identity or expression; and
- Amend the Act on the Protection and Assistance for Victims and Witnesses so as to include homophobic, biphobic, and transphobic crime victims in its scope; and
- Amend the Criminal Code so that hate crimes against lesbian, gay, bisexual, and transgender persons and corollary offences be recognised as motivated by prejudice instead of common crimes, and tried and sanctioned as such; and
- Enact a law providing same-sex couples with the possibility to have their relationship officially recognised, whether through marriage or civil union; and
- Remove any restrictions preventing transgender persons from remaining in an existing marriage, or remaining in custody of their children, after the legal recognition of their gender; and
- Reform the Law on Civil Status so as to conform with the CJEU's ruling in Coman obligating member States to recognise same-sex marriages concluded lawfully in the EU, irrespective of whether they have opened marriage to same-sex couples in their own territory, and thus also lift the constitutional ban on same-sex marriage by amending Art. 18 of the Polish Constitution; and
- Enact a law ensuring same-sex parents can obtain the transcription of a birth certificate issued abroad listing two persons of the same sex as parents.
- Enact a law allowing transgender persons' having undergone gender reaffirming procedures in Poland to obtain legal gender recognition without having to file a suit against their parents, or to fulfill prior medical or non-medical requirements, in line with international and regional human rights standards.

To the National School for the Prosecution and the Judiciary:

- Put together trainings to assistant judges, judges, and prosecutors on LGBT+ rights issues such as crimes motivated by prejudice.

To the Commissioner for Patients' Rights:

- Raise awareness among LGBT+ persons regarding their rights in the healthcare system, or cooperate with civil society organisations willing to do so.

To the Government Plenipotentiary for Equal Treatment:

- Immediately publish the updated National Action Plan for Equal Treatment 2017-2020, and ensure equality issues are a main focus of the plan; and
- Elaborate all future National Action Plans for Equal Treatment in consultation with civil society organisations working on equality issues.

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Conclusion

Over the past three years, the degradation of the rule of law in Poland, and the weight given to the Catholic Church has induced heightened intolerance towards LGBT+ persons. The Government Plenipotentiary for Equal Treatment's refusal to deal with LGBT+ issues, in favour of "family mainstreaming" instead is only one of the illustration of the anti-LGBT+ developments happening under the current PiS government and the degradation of the rule of law they have brought upon Poland. The only other institution undertaking anti-discrimination issues encompassing the situation of LGBT+ persons is the Polish Commissioner for Human Rights, who the current government has repeatedly attempted to incapacitate, notably through budgetary cuts. This is not surprising as public officials' anti-LGBT+ positioning has been made clear when no public reaction of support to civil society organisations advocating for LGBT+ persons' rights was issued when these organisations were the target of physical attacks.

Under this context, civil society organisations and opposition parties are reluctant to introduce new laws which would expand the rights and protection afforded to LGBT+ persons, for fear this would backlash into further restrictions of these rights.

This is particularly alarming in light of the fact that discrimination against LGBT+ persons occurs in every area of life, religion is sometimes invoked to justify it, and Polish law almost does not prohibit discrimination on the ground of sexual orientation, gender identity, or expression. This entails LGBT+ persons' interests are not at all being safeguarded.

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PART III - THE PROGRESSIVE STRANGULATION OF PARTICIPATORY DEMOCRACY – SPACE FOR CRITICAL NGOs IS DECREASING AT AN ALARMING RATE



A banner in Polish which translates as “free courts” is displayed as Poland’s Prime Minister Mateusz Morawiecki speaks during a debate on the future of Europe during a plenary session at the European Parliament on July 4, 2018 in Strasbourg, eastern France.

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Introduction

To avoid arbitrariness, the principle of controlling power through other powers is one of the essential components of the rule of law, which goes back to the principle of separation and non-confusion of powers. A healthy democracy must therefore allow the existence of an opposition, including financially, and allow for its development. The existence of this opposition guarantees the vitality of the democratic debate. Civil society organisations (hereafter “CSOs”) contribute to this vitality when they enable the State, through their vigilance, to respect its human rights commitments, made when signing and ratifying covenants, conventions, or declarations in this area.

The EU recognises the added value of civil society. Member States, through their adherence to the Copenhagen principles, must therefore regard CSOs as committed partners working towards a shared goal: providing all citizens with the most decent life and the fairest institutions. A recent report by the EU Fundamental Rights Agency (hereafter “FRA”) highlights the current trend of a shrinking civic space to work on improving the condition of their fellow citizens in the EU.⁴⁹⁵ This report, which is based on a case study from the 28 EU member States, should serve as a future framework for examining and reflecting on the situation of CSOs in the EU. The institutional character of the FRA guarantees the impartiality of its observations. This report will therefore use it as a basis for analysing the situation in Poland, by applying the proposed grid to the situation of CSOs, particularly those working on women's rights and LGBT+ rights, in Poland.

I. The need for a favourable regulatory environment

To do their work, civil society actors involved in promoting fundamental rights need to be able to exercise their rights fully and without unnecessary or arbitrary restrictions. This necessitates that States fully implement their positive obligations to promote human rights and create an enabling environment for CSOs. Art. 51(1) of the EU Charter of Fundamental Rights obliges the Union and member States to respect all Charter rights and “observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.” The rights to freedom of association, freedom of peaceful assembly (Art. 12 of the EU Charter of Fundamental Rights), and freedom of expression and information (Art. 11 of the Charter) are of particular importance in this context and apply to EU Member States when they are acting within the scope of EU law.⁴⁹⁶

The government has introduced a number of laws that raise concerns regarding the space for CSOs. In particular, human rights groups fear that these powers could be used against them in their work, including preventing them from being able to protect the confidentiality of their sources.

CSOs have expressed their concerns regarding the anti-terrorism law adopted in June 2016, as well as the February 2017 Act concerning the police, which disproportionately affect a number of rights, including the freedom of peaceful assembly, the right to privacy (increased surveillance of Internet communications under the government's authority, blocking websites, ...). As is often the case in the fight against terrorism, the very loose definition of the terms included in the law does not seem to meet the requirement of foreseeability. In particular CSOs working as human rights defenders fear that these laws will be used against them, especially when it comes to protecting the confidentiality of their sources.

In the event of an increased level of security due to a terrorist risk, gatherings may be banned without any set time limit on these prohibitions, which may disproportionately affect freedom of association and peaceful assembly.

As regards the restrictions on freedom of expression, Poland already criminalises abusive, offensive, or insulting behaviour against public officials carrying out their official activities; insulting and/or defamation of the heads of State; it prohibits insulting the State or State symbols; defamation or denigration of various State institutions, such as governments, parliaments, courts, armed forces, and

495. European Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, 2017.

496. European Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, 2017, p. 7.

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public bodies, or the authorities in general; defamation of foreign heads of State.

The Polish Council for the Prevention of Racial Discrimination, Xenophobia and Intolerance, established in 2013 to coordinate the work of different public institutions in the fight against hate speech and other acts of intolerance, has been abolished. It is also important to note that hate crimes concerning sexual orientation are not recognised in the Penal Code, which leaves the decision whether to prosecute entirely at the discretion of the judge. Knowing that justice has been completely reorganised so that it is under the control of the executive, we may rightly fear that such crimes will not be prosecuted effectively.

There have also been repeated attacks against the Commissioner for Human Rights, a strong indicator of the instability of the legislative framework. The office of the Commissioner for Human Rights was an honoured institution, particularly because of the independence of the commissioners. The last to hold office, Adam Bodnar, is well-respected. This did not prevent the leaders of the ruling Law and Justice (PiS) party from publicly criticising the Commissioner and endeavouring to damage his reputation and restrict the scope of his work. In September 2016, they called for the dismissal of Adam Bodnar because he intervened in a criminal case incriminating a printer who refused to provide services to representatives of an organisation advocating for LGBT+ rights. In 2016, the Polish Parliament also passed a law making it easier to lift the Commissioner's immunity. All these campaigns and attempts to destabilise the Polish Commissioner for Human Rights demonstrate how power seeks to eliminate the opposition, even structurally, and even though it is formally organised.

II. Financing and funding

Access to resources is an integral part of the right to freedom of association, as defined in Art. 22 of the ICCPR and other human rights instruments, including the EU Charter of Fundamental Rights (Art. 12). Art. 13 of the U.N. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (hereafter, the "U.N. Declaration on Human Rights Defenders") enshrines the right to "solicit, receive and utilise resources" to promote and protect human rights. The concept of "resources" is broadly defined to include financial assistance, material resources, access to international funds, solidarity, the ability to travel and communicate interference, and the right to benefit from the protection of the state.⁴⁹⁷

One can reasonably speak of civil society intimidation, when, as practised in countries that do not comply with the rule of law, the government has decided to attack, by means of a defamation campaign, and even administrative and judicial harassment, critical CSOs that receive national public funds or funding from abroad. Blackmail on registration is a form of intimidation which can also be harmful to smaller CSOs by preventing them from acting for the benefit of the community and from exercising their role as guardian of democratic standards and respect for human rights vis-à-vis the government. In terms of harassment, Poland is not that different from Hungary.

The adoption of the National Freedom Institute Act in September 2017 created the National Centre for the Development of Civil Society, which mandate is to allocate state funding to civil society. Previously, decisions on how to allocate public funds to CSOs were shared between different ministries and local governments, a system which facilitated the distribution of resources to several beneficiaries. The law places the National Centre under the authority of a plenipotentiary director with discretionary powers, but largely under the control of the Prime Minister. The composition of the Centre's governing bodies, the Director and the Council, civil society development programmes are monitored from within the government. Projects of thematic areas will be proposed by the director, projects that the Council will approve without any meaningful consultation with civil society, which was not consulted further by the government during the drafting of the law. The National Freedom Institute Act provides for the allocation of funds on the basis of competition.

Some CSOs critical of the government, which are currently funded by the state, are thus justifiably afraid their funding will be reduced or denied. In the field of women's rights, LGBT+ rights, the rights of asylum

497. European Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, 2017, p. 8.

seekers and migrants, some CSOs are already experiencing difficulties in accessing the funds to which they are entitled, due to unexplained delays in transfers.

The Ministry of Justice has already refused funding to several women's rights organisations in 2016, including the Women's Rights Centre, which has been receiving annual funding since 2012, under the pretext that the centre focuses solely on women's rights and, therefore, discriminates against men who are victims of violence.

The limitation or even the disappearance of public funding would be particularly damaging for these CSOs, whose existence really depends on funds obtained. In some cases involving potential private partners, the only possibility of turning to private financing sometimes stalls as there is a risk of appearing to challenge power by supporting activities that the government would "censure."

Moreover, even without a reduction in the budget allocated through public funding, the increase in GONGOs and radical right-wing organisations proposing many radical legal solutions to the Government (such as *Ordo Iuris*), which are more often centrally-funded, means drastic restrictions in the share of funding available for critical CSOs.

There are real concerns about the lack of transparency in the distribution of funds.

In addition, in terms of the harassment and intimidation of the opposition, we note that, following the 2015 general elections, the new government substantially reduced the Commissioner's budget thus limiting his capacity to carry out its mandate, including in this area. The Commissioner's budget was indeed of 38,602,000 złotys⁴⁹⁸ in 2015, following which he applied for an 18% increase in 2016. However, not only was the demand discarded, but the budget was decreased to 35,619,000 złotys,⁴⁹⁹ i.e. the same budget that had been allocated to the Commissioner in 2011.⁵⁰⁰ The budget planned for 2018, after the approval by the Parliament, amounts to 39,433,000 złotys,⁵⁰¹ while the Ombudsman had motioned for 42,639,000 złotys.⁵⁰² The increase (in comparison with 2017) is mostly caused by plans of investments in buildings of the Ombudsman's Office in Warsaw.

III. The right to participation

Art. 11 of the Treaty on European Union (TEU) specifies that EU institutions "shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action" and "shall maintain an open, transparent and regular dialogue with representative associations and civil society." The right to participation in public affairs is also recognised in Art. 25 of the ICCPR and was recently reaffirmed in the Council of Europe Guidelines for civil participation in political decision-making, as adopted in September 2017 by the Council of Europe's Committee of Ministers. One of its components is civil participation, which the guidelines define as "the engagement of individuals, NGOs and civil society at large in decision-making processes by public authorities."⁵⁰³

In Poland, however, a new legislation which passed in 2016 gave priority to "cyclical" gatherings (gatherings taking place at regular intervals) and reduced the scope of counter-demonstrations against them. Legislation prevents proposed gatherings from taking place at the same place or at the same time as a cyclical gathering, much to the chagrin of CSOs, worried that their protests be less effective. This law, for example, prohibits demonstrations from taking place at the same time as cyclical commemorations of the Smolensk disaster, during which President Kaczynski lost his life. The law is now in force after having been declared constitutional by the Constitutional Tribunal, which independence has been seriously damaged following the 2015 Constitutional crisis, in March 2017.

498. 8,777,472.38 euros.

499. 8,099,186.28 euros.

500. U.N. Human Rights Committee, "Report on measures taken by the Republic of Poland to implement the provisions of the International Covenant on Civil and Political Rights in the years 2008-2015," Information provided by the Commissioner for Human Rights of the Republic of Poland in accordance with the International Covenant on Civil and Political Rights in connection with the consideration of the seventh periodic report of the Republic of Poland covering the period from 15 October 2008 until 31 October 2015, 6 October 2016.

501. 9,112,066.73 euros.

502. 9,852,900.19 euros.

503. European Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, 2017, p. 10.

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Mass demonstrations, as we saw in 2016 (the Black Protest against the revision of the law on abortion) and 2017 (the Chain of Lights protest against the reform of the judiciary) are well within the government's sights.

In addition, there is a lack of transparency and dialogue in the decision-making, dialogue and transparency processes that are required in the rule of law. This is all the more damaging when CSOs are themselves concerned by the scope of laws passed without consultation (see "National Freedom Institute Act" above).

IV. Guaranteeing a safe and secure space for civil society

CSOs and activists in the EU face physical and verbal attacks, harassment and intimidation by non-State actors. These incidents take place both online and offline. Some State officials even engage in verbal attacks and create negative narratives that stigmatise CSOs or discredit their work, harming both the support base for CSOs in society and activists' morale and motivation. It is vital for public officials to refrain from attacks, including verbal attacks, and unfounded attempts to discredit organisations that promote human rights and non-discrimination. Neither public authorities nor civil society organisations are properly recording – at the EU or national level – data on attacks and threats against CSOs.⁵⁰⁴

In 2016, the headquarters of several Polish CSOs working to defend LGBT+ rights were attacked and tagged, then invaded by people yelling insults.

Intimidation also comes from the State. In 2017, the authorities searched the offices of the Center for Women's Rights in Warsaw, Gdańsk, Łódź and Zielona Góra, who work to help victims of domestic violence. In addition, State-controlled media have accused a number of CSOs of fraudulently obtaining funds, which is akin to real smear campaigns.

Recommendations

To the European Union:

• To the Members of the European Parliament in particular:

- Organise follow-up visits in Poland on the situation of the rule of law and its consequences for LGBT+ persons and women's sexual and reproductive rights. On these occasions, secure meetings with the Polish Human Rights Commissioner and civil society organisations working on equality issues.

• To the European Union institutions, the European Commission and the European Parliament:

- Use all necessary means to ensure full compliance by Poland with its obligations under European Union law, particularly with regards to the EU's founding values of respect for democracy, the rule of law, and human rights, as enshrined in Article 2 of the Treaty on European Union (TEU). Having regard to Articles 2 and 7 TEU, engage a structured dialogue with Poland on serious violations and deterioration of human rights, with a special focus on LGBT+, reproductive rights, freedom of expression, freedom of association, and more broadly on the shrinking space for civil society; and
- Enhance cooperation with the Council of Europe and its Venice Commission, and civil society, in monitoring observance and ensuring full compliance by Poland with such obligations.

• To the European Commission:

- Make better and more comprehensive use of infringement proceedings when Polish law is not in accordance with EU law obligations, including the Charter of Fundamental Rights of the European Union. This is notably the case for:
 - o the Law on the Protection and Assistance for Victims and Witnesses, which fails to fully implement the EU Victims' Rights Directive into national legislation by de facto excluding homophobic, biphobic, and transphobic crimes' victims from its scope and from the

504. European Agency for Fundamental Rights, Challenges facing civil society organisations working on human rights in the EU, 2017, p. 11.

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- o specific protection and support that are required for them
 - o the Law on Civil Status, which is not compliant with CJEU's ruling in Coman requiring member States to recognise same-sex marriages concluded lawfully in the EU, irrespective of whether they have opened marriage to same-sex couples in their own territory, and thus also lift the constitutional ban on same-sex marriage by amending Art. 18 of the Polish Constitution
 - Find new and flexible ways to provide financial support to local NGOs and human rights defenders, overcoming the shrinking space for civil society in Poland, and ensuring civil society is enabled to pursue its work on LGBT+ and reproductive rights.
 - **To the European Agency for Fundamental Rights:**
 - Pay thorough attention to the situation of Poland when investigating and drafting the upcoming report on the shrinking space for civil society in EU member States, and to that effect, ensure Polish civil society organisations and the Polish Human Rights Commissioner are consulted.

To the Council of Europe:

- **To the Parliamentary Assembly of the Council of Europe:**
 - Publicly voice concerns regarding the rapidly deteriorating situation in Poland and formally reinstate a monitoring procedure on this member State.
- **To the Venice Commission of Democracy through Law of the Council of Europe:**
 - Maintain cooperation, dialogue, and offers of legal advice to the government of Poland regarding legislative initiatives, in order to ensure their compliance with European standards regarding democracy, human rights and the rule of law.

To the Government of the Republic of Poland:

- Ensure counter-terrorism efforts, through recently adopted Acts (such as the Acts on the police, counter-terrorism, and cyclical gatherings), least impact fundamental freedoms in Poland, such as freedom of peaceful assembly, freedom of association, freedom of expression; and
- Ensure funding is fairly and transparently distributed among civil society organisations, including those critical of the government; and
- Increase the financial resources of the Human Rights Commissioner; and
- Ensure an enabling legal, institutional and administrative environment for civil society, which acknowledges the fundamental role that civil society organisations play in protecting democracy, the rule of law and human rights and ensuring democratic oversight over government's actions, and ensures their protection; and
- To this end, ensure that the registration process for NGOs is simple, non-onerous and expeditious and to refrain from adopting laws requesting already registered NGOs to re-register;
- Ensure free and non-politicised access to funding, including EU funding, for NGOs, refrain from imposing and lift any restriction that would hinder access to such funding;
- Refrain from issuing statements and running public campaigns targeting civil society organisations and attempting at delegitimising them through an hostile rhetoric, and address any attempt to stigmatise or attack human rights defenders, whether by public officials or non-State actors; and
- Conduct a regular and constructive dialogue with NGOs, including by holding consultations with civil society organisations over proposed legislation and seeking their expertise on matters which fall within their mandate.

To the Polish Parliament:

- Amend the 2016 anti-terrorism law so as to define "terrorism" more specifically, to meet the foreseeability requirement; and
- Repeal the 2017 Act on the National Institute of Freedom – Centre for the Development of Civil Society, or amend it so as to ensure the Institute is fully independent from the executive, distributes public funding in a transparent manner, and does not discriminate against NGOs on the basis of the type of activity they conduct; and
- Repeal the National Freedom Institute Act.

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Conclusion

The Polish government seems determined to silence the country's democratic opposition. Limitations to freedom of demonstration, smear campaigns, intimidation, the narrowing of the vital financial space are all attacks against CSOs that are merely revitalising the Polish democratic space.

The European institutions cannot allow the attacks on the rule of law in Poland to develop, as they have done for too long in the case of Hungary. This has led to some States, advocates of authoritarian and populist politics, believing that anything goes. Defending CSOs is paramount. If EU institutions do not react, this lack of assistance will put the rule of law in danger.

CONCLUSION OF THE REPORT

Through its international and European human rights commitments, Poland has undertaken to uphold women's sexual and reproductive rights and protect LGBT+ persons' rights. Yet, the findings of this report indicate not only a wide gap between the State's human rights obligations and its implementation of them, but also recent intensified attempts at actively backtracking on these commitments and the few rights already recognised.

The situation of women's sexual and reproductive rights and LGBT+ persons' rights has been going downhill from October 2015 when the PiS party came into power. These rights and persons have been the target of retrogressive policies and legislative initiatives, in complete disregard of Poland's engagements before U.N. and European bodies. The civil society organisations and national bodies advocating for their rights have also been subjected to PiS-sponsored initiatives aimed at silencing them and hindering their work. These have been some of the impacts of the rapid degradation of the rule of law which has ensued since the election of a PiS-led government, openly seeking to embark on the path towards an "illiberal democracy" in the country.

This decline in the rights of every day Polish citizens, in particular LGBT+ persons' rights and women's sexual and reproductive rights, is only symptomatic of a wider degradation of the rule of law in Poland, which has started under the current government. This report has sought to demonstrate how the undermining of checks and balances, the attacks against the independence of the judiciary, and the strangulation of dissenting voices, have impacted the daily lives of Polish citizens, by adopting an equality lens to render the current situation more palpable.

Since it came to power, the current PiS-led government has indeed severely undermined Poland's check and balances through what can be described in no other way than a court-packing scheme.⁵⁰⁵ Through amendments rushed through the Sejm, the current government has brought each judicial institution under its control, one by one. First, under what was called the "Constitutional crisis," it awarded itself the right to verify the Constitutional Tribunal's judgements, and to refuse to acknowledge and execute them. Then, it managed to forcibly terminate the mandate of all judges sitting on the National Council of the Judiciary, and ensures new ones were politically-appointed. The Supreme Court met the same fate when the government succeeded in forcing approximately 40% of sitting judges to retire and allowing for the General Prosecutor to further appeal final judgments. Finally, the powers of the Ministry of Justice were dramatically increased, thereby worryingly increasing political supervision over these key players in Polish democracy. This resulted in the European Court of Justice voicing concerns as to whether Poland can even fulfil the right to a fair trial to the standard required among EU member States in the context of an extradition request.⁵⁰⁶

PiS' anti-democratic agenda did not only concern the judiciary, but also several fundamental freedoms of Polish citizens such as the freedom of assembly, which it severely restricted through its 2016 law on cyclical gatherings – a mean to prohibit demonstrations of civil society voices critical of the government. Freedom of expression was also reduced in the name of counter-terrorism, whereby critical voices are no longer tolerated and are criminalised. Civil society organisations, whose actions consist in precious resilience in the face of the developments which occurred over the past three years, were also targeted by the current government through schemes meant to reduce or completely cut their funding.

However, over this period, civil society has not remained silent. Thousands took part in protests in favour of women's rights, such as the Black Protest, and in favour of an independent judiciary, such as the Chain of Lights protest. These demonstrations have also sparked regional and international solidarity with Polish citizens through numerous petitions, declarations, and calls from academics, experts, civil society, governments, and institutions all around the world. They testify of the hundreds of thousands eyes on the Polish government today. While Polish citizens will bear the consequences of the current government's actions for many years to come, the international community, the European Union and its member States, and Polish citizens are watching and counting on the government to stop disregarding the heritage of the Polish fight for freedom and basic rights.

505. Marcin Maczak, "Poland: From Paradigm to Pariah? Polish Constitutional crisis – facts and interpretations," March 8, 2018.

506. European Court of Justice, Preliminary Ruling, Case C-216/18, 25 July 2018.

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Several recommendations in that sense have been formulated in this report, to the attention of the Polish government. It is also now up to the European Union in particular to take the necessary action to address the rapidly deteriorating situation in Poland, which impacts the lives of all Polish citizens, and especially those left most defenseless by the lack of judicial independence and shrinking space for civil society. In this context, these developments have led the European Commission to trigger the Art. 7(1) procedure of the Treaty on European Union in November 2017,⁵⁰⁷ reserved to member States which present a clear risk of a serious breach of the EU's fundamental values.⁵⁰⁸ FIDH strongly hopes that this report will help the European Council take the necessary measures to ensure the rule of law, democracy, and human rights are preserved in Poland.

507. European Parliament resolution of 15 November 2017 on the situation of the rule of law and democracy in Poland (2017/2931(RSP)).
508. As laid out in Art. 2 of the Treaty on European Union.

ANNEX ON MECHANISMS TO PRESERVE THE RULE OF LAW IN THE EUROPEAN UNION

The European Union has a number, albeit limited, of monitoring mechanisms enabling it to respond to violations of EU law in member States, including the EU's founding values as enshrined in Art. 2 TEU and the Charter of Fundamental Rights of the European Union, now recognised as part of the Treaties (Art. 6(1) TEU).

Among these mechanisms:

- **Art. 7 TEU**, often considered a “nuclear weapon,” which can be used in situations where there is a “clear risk of a serious breach by a Member State of the values referred to in Article 2” (Art. 7(1) TEU) or “a serious and persistent breach by a Member State of the values referred to in Article 2” (Art. 7(2) TEU) and whose scope of application is not limited to situations covered by EU law;

ART. 7 TEU		
	Preventive Mechanism	Sanctioning Mechanism
WHO?	The Council , acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, on a reasoned proposal by one third of the member States , the European Parliament or the European Commission .	1st step (Article 7 TEU, para. 2) - The European Council , acting by unanimity on a proposal by one third of the member States or by the European Commission , and after obtaining the consent of the European Parliament; 2nd step (Article 7 TEU, para. 3) - The Council , acting by a qualified majority; 3rd step (Article 7 TEU, para. 4) – The Council , acting by a qualified majority.
WHEN?	When there is a clear risk of a serious breach by a member State of the values referred to in Article 2	When there exists a serious and persistent breach by a member State of the values referred to in Article 2 .
HOW?	The Council hears the member State in question and may address recommendations to it, in accordance with the same procedure, in order to determine that there is a clear risk of a serious breach by a member State of the values referred to in Article 2.	1st step (Article 7 TEU, para. 2) - The European Council determines the existence of a serious and persistent breach by a member State of the values referred to in Article 2, after inviting the member State in question to submit its observations; 2nd step (Article 7 TEU, para. 3) - The Council may decide to suspend certain of the rights deriving from the application of the Treaties to the member State in question, including the voting rights of the representative of the government of that member State in the Council; 3rd step (Article 7 TEU, para. 4) - The Council may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

- **Infringement procedures**, which enable the EU to react to specific violations of EU law according to the procedure provided for in Art. 258 TEU;⁵⁰⁹

INFRINGEMENT PROCEDURE (ART. 258 TFEU)	
WHO?	European Commission , on its own initiative or based on complaints lodged by citizens, corporations and non-governmental organization, petitions and questions by the European Parliament or non-communication of the transposition of Directives by the member States
WHEN?	If the European Commission considers that a Member State has failed to fulfil an obligation under the Treaties
HOW?	1) The European Commission sends a letter of formal notice (LfN) to the concerned member State inviting it to submit its observations on the question raised therein within two months. 2) If the Member State fails to reply or the reply is not satisfactory, the European Commission issues a reasoned opinion , allowing the Member State an additional two-month period within which to comply with recommendations. 3) If the Member State fails to comply with the commission's recommendations , the Commission can take the case to the court of Justice of the European Union (CJEU) , whose judgment is binding. If the Member State fails to comply with the Court's judgment, the Commission may, after sending a further letter of formal notice and reasoned opinion, bring the matter before the CJEU a second time, seeking the imposition of a penalty payment under Article 260 of the TFEU.

509. This legal limitation, which confines the possibility of the EU to react to violations of European law, including the Charter of Fundamental Rights of the European Union, which are not violations of one or several specific provisions of EU law, is contained in Art. 51 of the Charter of Fundamental Rights of the European Union. Pursuant to this provision, and according to the interpretation given by the Commission itself in its Communication, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM(2010) 573 final, 19 October 2010, the Charter only applies to members “when they implement Union law” and the Commission can only react to violations of rights protected by the Charter in member States in these situations. That interpretation has been confirmed by the Court of Justice of the European Union (CJEU) for example in *Kreshnik Ymeraga and other vs. Minister of Labour, Employment and Immigration*, case C-87/12, judgment of the Court (second chamber) 8 May 2013 and in *Thomas Pringle vs. Government of Ireland, Ireland et The Attorney General*, case C-370/12, judgment of the Court (plenary assembly) of 27 November 2012.

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- The more recently adopted new **EU framework to strengthen the rule of Law** (hereinafter “Rule of Law Framework”), designed to “ensure an effective and coherent protection of the rule of law” by making it possible to “address and resolve a situation where there is a systemic threat to the rule of law.”⁵¹⁰

The EU framework to strengthen the rule of law	
WHO?	European Commission
WHEN?	<p>“In situations where the authorities of a Member State are taking measures or are tolerating situations which are likely to systematically and adversely affect the integrity, stability or the proper functioning of the institutions and the safeguard mechanisms established at national level to secure the rule of law.”</p> <p>“The framework seeks to resolve future threats to the rule of law in Member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met.”</p>
HOW?	<p>European Commission’s assessment</p> <p>The Commission collects and examines all the relevant information and assesses whether there are clear indications of a systemic threat to the rule of law.</p> <p>If this is the case, it initiates a dialogue with the Member State concerned, by sending a “rule of law opinion” and substantiating its concerns.</p>
	<p>European Commission’s recommendation</p> <p>If the Commission finds that there is objective evidence of a systemic threat and that the authorities of the Member State concerned are not taking appropriate action to redress it, the Commission issues a “rule of law recommendation,” recommending that the member State solves the problems identified within a fixed time limit and informs the Commission of the steps taken to that effect.</p>
	<p>Follow-up to the recommendation</p> <p>If there is no satisfactory follow-up to the recommendation by the member State concerned within the time limit set, the Commission assesses the possibility of activating one of the mechanisms set out in Article 7 TEU.</p>

If the Rule of Law was to be threatened, the EU reaction would be justified, by activating one of the aforementioned mechanisms, depending on whether the threat takes the form of a violation of a specific provision of EU law, or a concerning situation “which fall outside the scope of the EU law and therefore cannot be considered as a breach of obligations under the Treaties but still pose a systemic threat to the rule of law”⁵¹¹ or even a “future threat[s] to the rule of law in member States before the conditions for activating the mechanisms foreseen in Article 7 TEU would be met.”⁵¹²

Use of one of these mechanisms does not preclude activating the others, in parallel (i.e. in situations falling under EU law that, together, also represent a systemic threat to the rule of law) or successively (i.e. in situations which can be addressed by the rule of law framework, which last stage can be activation of Art. 7 TEU). These mechanisms are therefore complementary. Their purpose is not to replace, but rather complete other existing mechanisms, such as those at the Council of Europe, to protect the rule of law.

510. Communication of the Commission to the European Parliament and Council, A new EU framework to strengthen the rule of law, COM(2014) 158 final/2 p.3, 19 March 2014. See also the State of the Union address 2013 of the previous President of the European Commission José Manuel Barroso, 11 September 2013.

511. Communication of the Commission to the European Parliament and Council, A new EU framework to strengthen the rule of law, COM(2014) 158 final/2, p. 5

512. Communication of the Commission to the European Parliament and Council, A new EU framework to strengthen the rule of law, COM(2014) 158 final/2, p. 3.



POLSKIE TOWARZYSTWO
PRAWA ANTYDISKRYMINACYJNEGO

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The Polish Society of Antidiscrimination Law (PSAL) is an expert, Warsaw-based, non-governmental organisation working in the human rights field. Since 2009, PSAL brings together a range of Polish law practitioners, policy experts, lawyers of human rights NGOs in Poland and academics interested in promoting and improving anti-discrimination legislation. The organisation is committed to providing the best and most adequate legal advice to all those who face discrimination on the basis of gender, sexual orientation, age, disability, religion/belief, race and ethnic origin, etc., and conducts research in the field of equality law, drafting comprehensive comparative analyses.

PSAL currently coordinates a group of over 60 legal representatives. PSAL also leads the Coalition for Equal Chances, a coalition of over 70 NGOs nationwide which main objective is setting up joint actions to implement and develop equality-promoting and anti-discrimination law.

Its primary beneficiaries are national human rights organisations who are members of the Movement, and through them, the victims of human rights violations. FIDH also cooperates with other local partner organisations and actors of change.

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FIDH is an international
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ABOUT FIDH

FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

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