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Statement by the Legal Experts Group of the Stefan Batory Foundation on the Constitutional Tribunal Ruling on Abortion

On 22 October 2020, the Polish Constitutional Tribunal (CT) has ruled a provision that allowed medically-assisted abortion in cases where prenatal test or other medical considerations indicated a high probability of a severe and irreversible abnormality or an incurable disease of the foetus as unconstitutional (ref. K 1/20).

Legal Flaws of the CT Ruling

The CT ruling is procedurally flawed:

- The CT ruled as the full Court, which included individuals elected by the Lower Chamber of the Polish Parliament of the 8th Term to serve as CT judges even though these positions had already been lawfully filled. Consequently, these individuals have had no mandate to rule in CT. This applies to Mariusz Muszyński, Jarosław Wyrembak and Justyn Piskorski, judge-rapporteur in case K 1/20. Since the said individuals have no right to rule on any cases in the Constitutional Tribunal the ruling must be interpreted as ineffective and non-existent.
- The hearing was presided over by Julia Przyłębska, appointed as Constitutional Tribunal President in a process that had also been procedurally flawed.

We have described the aforementioned circumstances in our Statement on the Constitutional Tribunal of 26 January 2017 and in the Judiciary Report of March 2018. We fully support our conclusions presented in these documents.

Comments to the Content of CT Ruling

We believe the ruling fails to acknowledge the need to protect the inherent and inalienable dignity of women and it violates the prohibition of cruel treatment and torture, the right to protection of private life and the right to health. The ruling is in breach of the Polish Constitution, specifically Articles 30, 40, 47, 68 thereof, and fails to provide the protection granted to women in these provisions. The ruling is also in breach of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, the UN International Covenant on Civil and Political Rights of 19 December 1966 and the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950. Poland is a Party to the said Conventions and it is unacceptable that any standards of protection for human rights expressed in these instruments be lowered by means of a conflicting national legislation.

The removal of access to abortion on embryopathological grounds from the Polish legal system is tantamount to the introduction of punishment for this procedure or for any assistance to a pregnant

woman in aborting her pregnancy (Article 152 of the Polish Criminal Code) and, as such, it will violate human rights and freedoms, including the human rights and freedoms under the European Convention on Human Rights. In particular, it may lead to a violation of Article 3 of the Convention (prohibition of torture and cruel, inhuman or degrading treatment), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy). Women affected by the CT ruling may bring actions to the European Court of Human Rights.

We believe that national courts ought to apply existing mechanisms designed to protect human rights and liberties, including the diffused constitutional review of the legislation and constitutionally-minded interpretations thereof:

First, courts ought to consider the legal impacts of non-judges having been involved in the CT ruling.

Second, courts ought to assess whether the application of the law, especially criminal sanctions, could in certain circumstances violate Poland's obligations under binding international legal instruments and/or the constitutional principles, standards or values that have been disregarded or ignored by CT.

Regardless of the legal flaws of the CT ruling, it must be emphasised that according to Article 190 of the Polish Constitution, all Constitutional Tribunal rulings must be published in the Journal of Laws, and they enter into force on the day of publication. It is therefore lawful to perform abortions pursuant to Article 4a Paragraph 1 Sub-paragraph 2 of the Family Planning Law as long as the publication in the Journal of Laws has not been made.

Moreover, in the course of medical procedures aimed at assessing specific cases to identify whether there are legitimate reasons for abortion under Article 4a Paragraph 1 of the Family Planning Law and in court cases arising out of such cases, if any, the assessment of a case may lean towards legitimising abortion if an embryopathological pregnancy poses a life or health threat to a pregnant woman. The presence of an embryopathological condition may lead to irreversible and extremely severe health impacts for a pregnant woman.

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