

# **Access to abortion in Poland**

## **Legal issue within political context**

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*There should be a firewall between women's access to reproductive health services and politics*

Nancy Northup, President and CEO

The Centre for Reproductive Rights

## 1. Introduction

There is a variety of perceptions of conception, pregnancy and birth in different cultures. Hahn and Muecke developed for it a term *birth culture* which: 'informs members of a society about the nature of conception, the proper conditions of procreation and childbearing, the workings of pregnancy and labour, and the rules and rationales or pre- and postnatal behaviour'.<sup>1</sup> Their concept describes all relevant elements of the reproductive process in a cultural context. I believe that this perspective can also be taken into consideration for understanding the controversial issue of abortion<sup>2</sup>.

Pregnancy termination and its social acceptance (or its lack) differs not only across countries, but also within them. The size of population, food supply or political environment could be the factors deciding about criminalisation of the abortion procedure. China's 'one child policy' can be used as a great example of a population controlling procedure where abortion is just a tool. In the Western world the controversy in abortion is whether the woman is entitled to control her body and fertility and whether the foetus is considered as a 'human being' from the very first moment of conception.<sup>3</sup> The religious impact is very strong, especially in more conservative countries and less developed societies, where the area of woman's fertility is marked by symbols and myths. What is more, abortion, due to its lethal and irreversible consequences, is highly controversial in many countries and can easily be classified as social and political taboo. Very often, as in the case of Poland, public debate is dominated by emotions and opinions which are not based on scientific facts. Parties can abuse the public with high dose of populist messages what increases the social confusion and creates a serious obstacle to the access not only to services but what is even more important – to health care information. Moreover, as the thesis will prove, Polish women can also be discriminated on the basis of the economic situation, as many women are forced to pay for abortion due to

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<sup>1</sup> Hahn, R.A. and Muecke, M.A., The anthropology of birth in five US ethnic populations: implications for obstetrical practice. *Current Problems Obstetrics, Gynecology and Fertilisation* (1987):10, 133-171

<sup>2</sup> The definition of abortion varies from source to source, however the definition from the *Merriam-Webster's Medical Dictionary* seems the most adequate:

"[T]he termination of a pregnancy after, accompanied by, resulting in, or closely followed by the death of the embryo or fetus". Springfield, Mass.: Merriam-Webster. Accessed 16 January 2012.

<sup>3</sup> Heleman, C.G., *Culture, Health and Illness*, 2007, p. 179

limited access to public health care services, what clearly breaches the principles of right to access to health care described briefly in the methodology chapter.

Additionally, lack of supportive policy and law can lead to serious consequences for regions and even whole countries. It is estimated that in the early 1990s between 100 000 and 200 000 women died each year in developing countries from the complications after illegal abortions<sup>4</sup>. The Dutch abortion foundation Women on Waves claims that every 8 minutes a woman dies as a result of an illegal and unsafe abortion.<sup>5</sup>

This master thesis explains the issue of abortion within context of policy in Poland, European country, well known for its strict law in this matter. There are many issues and elements that define the law and its social acceptance and this thesis aim at describing the majority of them, making possible withdrawing conclusions and recommendations based on comprehensive research rather than partial and subjective opinions that dominate public debate in Poland.

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<sup>4</sup> World Health Organization, *World Health Statistics 2005*. Geneva: WHO p.45-52

<sup>5</sup> Women on Waves website accessed 10<sup>th</sup> October 2011, <http://www.womenonwaves.org>

## 2. Methodology

The introduction offered a vast explanation of the nature of abortion as a political issue. There is a wide range of topics and opinions that add difficulties into reaching a consensus between different parties such as catholic groups, politicians, feminists, lawyers, health professionals and even particular citizens. To make sure this thesis offers a comprehensive and non-arbitrary approach, I would like to present the reader broad explanation of the context in which the abortion has to be seen in Poland.

Additionally, I must say that there are very few objective documents that describe or analyse the issue of abortion in Poland that would enable me to construct the thesis in simple, very logic order. Thus, the approach I am taking offer the reader free space for reflections and conclusions from the evidence I gathered. Sections, into which I divided the thesis, aim at describing, comparing and analysing the situation in Poland with examples from around Europe. Once again, very often the set of materials that are used may seem incomplete in their scientific character, however they are coming from variety of sources and the main principle I have followed is objectivity and impartiality.

Important matter is to explain why it is so controversial that Polish abortion law is so strict, even though the liberal impact from surrounding countries has been very big, as Poland has been a member of the European Union for the last 7 years and participated in majority of initiatives focusing on human rights issues. The GDP<sup>6</sup> economic indicator places Poland in the 44<sup>th</sup> place<sup>7</sup> (out of 183 countries) and since 1989 Poland has been a democratic republic. Due to its complicated past, in international relations Poland could have been named as mediator between Western and Eastern world as Polish experiences in fighting for human rights could set an example to less developed countries where the democratic dispute is non-existent. However, this country stands out in Europe in other way: *by being an outlier on its women's fundamental rights* as described in the annual report 2010-2011 by the Centre for Reproductive Rights, a well-known American non-governmental organisation.<sup>8</sup> The public dispute around reproductive rights in Poland is very strongly affected by the religious ideology and therefore lacks scientific arguments. This is confirmed by case law, legal papers or interviews with health specialists and politicians.

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<sup>6</sup> Gross Domestic Product

<sup>7</sup> According to International Monetary Fund 2010

<sup>8</sup> Centre for Reproductive Rights, Annual Report 2011, p.21

In this paper the pregnancy termination procedure will be explained while taking an international legal approach, with guiding principle of equal access to health care explained in international treaties, as the right to health is closely related to other human rights.<sup>9</sup> The definition of the right to health can be found in the article 12 of International Covenant on Economic, Social and Cultural Rights (1966) which states:

1. The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realisation of this right shall include those necessary for:
  - A) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - B) The improvement of all aspect of environmental and industrial hygiene;
  - C) The prevention, treatment and control of epidemic, endemic, occupational and other diseases
  - D) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

The Committee on Economic, Social and Cultural Rights in General Comment no. 14 explaining the art. 12 of the Covenant, interprets the right to health as an inclusive right that extends not only to timely and appropriate health care, but also many other underlying determinants, like the right to access to health-related education and information, including the sexual and reproductive health. This comment is especially valid for this paper's topic, as the education and information about the reproductive health is highly influenced by religious rules, as for example the prohibition of pre-marriage sexual relations or non-acceptance of any contraceptives except natural ways of regulating fertility. This issue will be explained further, as the sexual education plays the most important part in reducing the number and the need to access the abortion procedures.

Again in more formal words the right to health contains four interrelated and crucial elements, the application of which depends on the health system conditions of a particular state party. These elements are:

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<sup>9</sup> General Comment no. 14 (2000) on Health, 11/08/2000. E/C.12/2000/4

- 1) Availability of functioning health care facilities, goods and services as potable drinking water, hospitals, clinics, trained medical personnel and essential drugs<sup>10</sup>
- 2) Accessibility of health facilities, goods and services. This element is characterised by a particular importance in pregnancy termination, as in many countries the access to abortion and information about it is the main obstacle for women to enjoy the highest attainable health. Accessibility can be understood in four dimensions:
  - a) Non-discrimination, meaning equal access irrespective of income, occupation, place of living or social status
  - b) Physical accessibility, which means that medical facilities must be within safe physical reach, for everybody and especially vulnerable and marginalised groups.
  - c) Economic accessibility, in other means affordability. This dimension highlights the issue of equity, ensuring everybody can afford basic services and that worse-off are not disproportionately burdened with health expenses.
  - d) Information accessibility, meaning the right to seek, receive and impart information and knowledge concerning health issue. For this paper, this dimension has a big value, as big amount of abortions might have been avoided if only adolescents were better informed about sexual activity consequences.<sup>11</sup>
- 3) Acceptability as all goods and services must be ethically and culturally appropriate, meaning respectful of minorities, gender or ethnical groups.
- 4) Quality remains the last of these conditions, ensuring that health facilities, medical personnel and services are scientifically advanced and of good quality.

Another UN treaty of substantial importance for the issue of reproductive rights is going to be reviewed in Polish context in order to explain the link between discrimination of women in Poland and their reproductive role. Notably, it is the only human rights treaty that mentions family planning. It is called the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Nevertheless its importance cannot be oversimplified to the area of reproductive rights. It challenges the gender stereotypes and myths, requiring States parties to undertake appropriate measures in political, social, economic and cultural fields. Yet again, these obligations are relevant mentioning, as Polish citizens and very often also the professionals, due to religious impact, act insular and do not treat women with respect they deserve, what will be exhaustively explained in chapter 3.

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<sup>10</sup> As defined by the WHO Action Programme on Essential Drugs

<sup>11</sup> Art. 19.2 of the International Covenant on Civil and Political Rights

On the basis of the CEDAW treaty, the States parties are expected to submit a national report to the Committee, indicating the tools they have adopted to give effect to the requirements of the Convention. During its annual session, the Committee members discuss these reports with the Government representatives and indicate areas for further action by the specific country. The Committee also concludes general recommendations to the States parties on matters concerning the elimination of discrimination against women.<sup>12</sup> Results from the latest annual session about women`s reproductive rights in Poland is brought in 4<sup>th</sup> chapter and adequate analysis is following.

Universal Declaration Bioethics UNESCO from 2005 constitutes another example of international treaty that highlights the importance of non-discriminative and protective role of the law. Poland as a member of UNESCO signed this treaty, however until now it did not ratify it, what means that obligations stated in this declaration are not fully embodied in Polish legal system. Nevertheless, as any other international law, the recommendations are very strong and should be implicitly embedding. The following article plays an important role in protection of reproductive rights:

*Art. 14 Societal responsibility and health*

1. *The promotion of health and social development for their people is a central purpose of governments that all sector of society share.*
2. *Taking into account that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition, progress in science and technology should advance:*
  - A) *Access to quality case and essential medicines, especially for the health of women and children, because health is essential to life itself and must be considered to be a social and human good*  
*[...]*
  - D) *Elimination of the marginalisation and the exclusion of persons on the basis of any grounds,*

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<sup>12</sup> Introduction of Convention on the Elimination of All Forms of Discrimination against Women, accessed on: [<http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>]



### *E) Reduction of poverty and illiteracy<sup>13</sup>*

As the first point is rather obvious and requires the State party to take all appropriate measures to protect and promote health among their citizens, the second point remind that enjoyment of health is one of fundamental human rights and no one can be deprived this law on any basis. Mentioning women and children`s health as a social good reminds about the reproductive role of women and special protection they need due to that fact. Once again the non-discriminatory role of the international law was brought forward in point D of this article. Nevertheless, I believe that last point is also very important, as reduction of poverty and illiteracy may involve many means, but education stands as the highest priority. The statement of World Medical Association on Family Planning and the Right of a Woman to Contraception from 1996 confirms the previous conclusion.

*The WMA recognises that unwanted pregnancies and pregnancies that are too closely spaced can have a serious adverse effect on the health of a woman and of her children. These adverse effects can include the premature deaths of women. Existing children in the family can also suffer starvation, neglect or abandonments resulting their death or impaired health, when families are unable to provide for all their children. [...]*

*Access to adequate fertility control method is not universal; many of the poorest women in the world have the least access. Knowledge about how their bodies work, information on how to control their fertility and the materials necessary to make those choices are universal and basic human rights for all women.<sup>14</sup>*

These quotes offer a well-recognised proof for the connection between the access to information about fertility control and poverty and health impairment. On the basis of this conclusion I would aim at finding a scientific proof for connection between sexual education and numbers of abortions conducted, as many countries` policies seem to confirm that the highest quality of sexual education, the lower amount of teenage and unwanted pregnancies and thus the lower amount of pregnancy termination. This information is based on assumption that many unwanted teenage pregnancies come from lack of knowledge about contraceptives and human fertility.

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<sup>13</sup> Art. 14 of Universal Declaration Bioethics UNESCO

<sup>14</sup> World Medical Association Statement on Family Planning and the Right of a Woman to Contraception, 48<sup>th</sup> General Assembly, Somerset Wes, Republic of South Africa, October 1996

The mentioned earlier treaties regulations offer abstract requirements which need to be examined within particular context. To be able to fully understand the controversy around abortion procedure there is a need to conduct a multidisciplinary research, broadening the legal approach. This thesis examines therefore not only the legal, but also the political and ethical perspective within Polish societal system in order to interpret and analyse the level of reproductive rights execution. This holistic approach aims to include all relevant elements that detain Polish citizens from access to health care facilities they are entitled to. There are many various examples of political and societal activities, proving the difficulty in assessing health services and breaching the international obligations of Polish state. As a Member State of European Union and United Nations, Poland is obliged to follow International Law regulations by including them into the national law and executing the law with democratic tools. In order to explain these requirements United Nations and European treaties are analysed in the context of Polish situation.

This master thesis contains three main parts that are divided into 5 chapters. After the introduction and methodology chapter, the third chapter explores the Polish political and legal system, and the societal opinion, which is very important as the citizens have the right to elect legislative power members. This part is very broad as it contains also national case law, providing examples of concrete women and their families that found obstacles and irregularities in the legal procedures or cannot count on help from the national remedies. Moreover, as the legal system contains ethics, professionals` behaviour description is also present in that part in order to analyse the reasoning of medical professionals. The following chapter describes the relevant international legal documents, making possible answering the research question, whether the Polish Act on *Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy* is in line with international law principles, included in ratified by Poland documents. In the last part of the thesis the assessment is made and the analysis is resulting in outcomes helping to conclude if there is a need to change the abortion law in Poland.

This thesis interprets many issues that help understand how big the controversy of reproductive health and sexual education is. It takes more than one perspective to analyse holistically this issue and that is why the methodology cannot be oversimplified by using only legal angle. Polish policy and societal contexts are equally relevant for comprehensive explanation of the problem of abortion in Poland. Therefore the thesis answers the following sub-questions in subsequent parts. At first, I will describe the Polish health care system. Then

the political and societal situation will be explained which will examine what impact has the political situation on access to abortion. This part will provide insight into the role of religious institutions in the reproductive rights debate, which have a significant meaning for the development of the good practice among gynaecologists. Afterwards, the analysis of sexual education will follow. That part reviews the students' opinion about their Preparation to Family Life classes and help to answer the difficult question whether Poland is following the international obligation in providing its citizens with exhaustive information about human sexuality.

Then the public debate would be researched and I will review reports and sociological studies about abortion in order to complete the information how the abortion is perceived in Poland. The next part, reviewing the Polish legal system will enable the reader to understand how the law is organised and whether the patients and citizens' rights are protected enough. The national case law will add scientific analysis to the descriptive part and enable the reader to see the practice of abortion law execution in Polish clinics and courts. At this point it is worth mentioning that Polish law is not based on precedence, thus the case law is not a source of law. Many cases are not public and according to the Supreme Medical Court, they must protect professionals' privacy in the area of legal actions. The following section about professionals' ethics will contribute to the comprehensive explanation of the situation of women in the area of reproductive rights, as it will answer the question what is the professional attitude and behaviour towards women's family planning issues. It will also prove the high importance of ethics in the area of abortion and the necessity of adequate guidelines that would enable the doctors to act independently of their beliefs or opinions.

The analysis and answers to these questions will be synthesised with international treaties ratified or signed by Poland. Last part will provide legal analysis of current state of the reproductive rights in Poland and recommendations withdrawn from conclusions among all the chapters.

This thesis aims at reviewing available legal documents as national case law or international case law in order to analysis the state of law in the area of reproductive health in Poland. As the issue of abortion is very ideological I wanted to make sure this thesis is comprehensive and exhaustive and the approach describes the relevant elements in objective and impartial way. As explained earlier, the state of health law is the core for good condition of the reproductive rights execution, but as seen in many publications presented in this thesis, the

abortion issue does not simply fall within the legal approach as it has been used by many political parties as a provocative element of their electing campaigns. Additionally, the pro-life movements supported by catholic organisations very often play an important role in the public debate as their methods are very provocative. What is more, the Polish citizens are strongly divided in opinions about abortion what adds another dimension to the issue of abortion. And last, but definitely not least, the ethical approach is extremely relevant in the issue of abortion, which very often puts questions as when the human life starts, is it at the moment of conception, as stated by the Catholic Church or the foetus becomes human only by the time of birth. These moral dilemmas very often drive the practice of gynaecologists and other professionals who should act in line with the Code of Medical Ethics and do no harm, but as this thesis will prove, the daily practice of physicians can be very controversial and against the Code of Medical Ethics.

The order of information presented aims at analysing the situation in Poland from the most well-known, political and societal perspective, through rather intimate, ethical explanations of the professionals' behaviour, to the legal part which analyses the issue of abortion through principles included in the legal documents that were signed or ratified by Poland. That form of organisation would enable to reader to understand the difficulty in assessing the situation only from one perspective, as the issue of abortion is very personal and subjective issue.

### 3. Poland

History of abortion in Poland is very complicated due to its unstable political situation for the most of the 20<sup>th</sup> century. Many historical facts, as for example liberalisation of the anti-abortion law by Hitler or Stalin are still reminded by the pro-life activists, aiming at bringing bad connotations to the pregnancy termination. Nevertheless, in the middle of 20<sup>th</sup> century, abortion was a very popular solution for unwanted pregnancies for many women, as the contraceptives` accessibility was very low. Thus in 1956 the abortion law was liberalized for broader “social” reasons enabling any women 18 or older to terminate the pregnancy in the first trimester after conception.<sup>15</sup> Women that wanted to perform abortion had to prove their inability to bring up a child due to being unmarried or a student or other social incapability. However, according to Marek Okolski, even these requirements were unnecessary after 1960.<sup>16</sup> The law liberalization was explained by the concern about women`s health due to very high fertility rate, a post-war “baby-boom”. Okolski tries to explain the lack of catholic society`s protests by the fact that church at that time experienced a lot of harassment due to Stalin`s regime.<sup>17</sup>

In 1981 new wave of antiabortion activists started to express their concerns about the current state of law. Movement of Unborn Child with Ministry of Health made a law proposal to restrict the abortion law substantially. However due to quite tough political situation that issue was smeared away from societal agenda.

Political distraction in the '80 and '90 is very often a feminists` explanation for not participating in the “second wave” of feminism that was the main reason of implementation women oriented law regulations in US and Western European countries.<sup>18</sup> Literature describes the “second wave of feminism” series of strikes and movements that went through United States and Europe expressing the demands of equalities in the legal field, at workplace and what is the most relevant for this research – reproductive rights.<sup>19</sup> The second wave lasted for

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<sup>15</sup> Okolski M., *Abortion and Contraception in Poland*, Studies in Family Planning, 1983:263

<sup>16</sup> Idem

<sup>17</sup> Idem: 264

<sup>18</sup> Szczuka, K. and Bratkowska, K., *Duża książka o aborcji* [The big book about abortion], Czarna Owca, Warszawa 2011

<sup>19</sup> Whelehan, I., *Modern feminist thought: from the second wave to "post-feminism"*, Edinburgh University Press 1995, p.3

almost 30 years, since 1960 to the end of 1980 – Poland at that time was behind the “iron curtain” and communist politicians translated the feminists’ movement into their own, economy-related language what can be seen on the poster in the figure 1.



**Figure 1**

(Poster text: *Woman in Polish People's Republic has rights equal to man in every state's related life areas, political, economic, social and cultural. Art. 66 Polish People's Republic Constitution proposal*)

Since 1989 when the Solidarity movement led by Lech Walesa broke the fundamentals of the Soviet Union, Poland began to struggle for independency in every part of the social system. After 44 years under the reign of the communist party steered by the Moscow's dictatorship Poles had to find their own way to organize the state's structures. That reorganization was complicated due to many factors, as for example the economical downfall, weak social organization and big fragmentation of interests. However, since 1945 Poles could always count on one institution that helped them irrespectively their income, social status or opinion – the Roman-Catholic Church. For centuries the church have had a big impact on Polish policy, however during the time of communism it became very important place of gatherings and uplifting Poles' faith not only in God but especially in political independency. The Church's role in creating the new political system was great due to their independent source of reign (Polish Pope in Vatican) and high moral requirements described in the catholic law. Moreover in 1991 89,9% of Poles considered themselves as believers or highly believers what

gives an impression how important and powerful the Church was at the end of 20<sup>th</sup> century in Poland.<sup>20</sup>

The religious impact on Polish political system had a major role in creating many laws and acts that can be considered very strict by more liberal countries as the Netherlands or the United Kingdom. This thesis is focusing on the consequences of narrowing sexual and reproductive rights only to the meaning of family and social cohabitation.

### 3.1. Health Care system

After 1989 Polish political system can be characterized as a parliamentary democracy with an element typical for presidential system, namely the election of the President in open, universal ballot.<sup>21</sup> Political reforms introduced after breaking with USSR implemented major principles such as the *rule of law*, the constitution stating major human rights or the National Ombudsman.<sup>22</sup> New order was also needed in the organization of the health care system. After the Second World War health care was named a public, state's responsibility and was centralized as strictly as any other administrative institution in Polish People's Republic.<sup>23</sup> This form of health care organization is known for being ineffective and does not fit the regional needs. Thus just after the year 1989 Poland began the reorganization of the health care sector starting with the legal transformation. The "Small Constitution" implemented in 1992 was the first major legal act that focused on the most important areas of the state's organization empowering major institutions with ability to perform other reforms. It was called "Small" as its role was to substitute the communist constitution in the most important areas; however it did not provide a Bill of Rights and kept in the old socialist Constitution from 1952.<sup>24</sup> The "Small Constitution" left a large number of legal issues to be resolved by the future, full Constitution.<sup>25</sup>

On April 2<sup>nd</sup>, 1997 the new Polish Constitution was announced and came into force in October 1997. It enshrined many general principles as the Reign of the State, human rights

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<sup>20</sup> According to Catholic Information Agency 2005-2007

<sup>21</sup> A. Attila, *The Politics of Central Europe*, Sage Publications London, 1998: 141

<sup>22</sup> A.P. den Exter, *Health Care Law-making in Central and Eastern Europe, Review of a Legal-Theoretical Model*, Intersentia, 2002: 197

<sup>23</sup> Idem: 198

<sup>24</sup> Idem: 199

<sup>25</sup> E. Baginska, M. Nesterowicz, A. den Exter, *International Encyclopaedia of Laws: Poland*, Kluwer Law International, 2002: 13

and fundamental freedoms, placing the right to health care in “Economic, Social and Cultural Freedoms and Rights” chapter, formulated as follows<sup>26</sup>:

*Everyone shall have the right to have his health protected*<sup>27</sup> Article 68, p. 1

This general principle has been given further, detailed information in following points:

2. *Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of their material situation. The conditions for, and scope of, the provision of services shall be established by statute.*
3. *Public authorities shall ensure special health care to children, pregnant women, handicapped people and persons of advanced age.*
4. *Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment.*
5. *Public authorities shall support the development of physical culture, particularly amongst children and young persons.*

Andre den Exter states that this article does not state an absolute right to health care, as in point 2 limits the rights to be broadly defined “by statute”<sup>28</sup>. It means that Polish authorities give the scope of the health care narrower meaning in other, statutory acts as the Health Care Institutions Act and General Insurance Act. That form of formulation of the law is rather common, as the Constitution is a very inflexible legal act formulating only general and major principles.

Additionally art.18 of Polish Constitution stipulates that "... motherhood and parenthood shall be placed under the protection and care of the Republic of Poland" what should be an incentive to balanced and weighted discussion how these areas should be protected and in what circumstances. However those constitutional regulations remain to a large extent only a declaration, leaving women without a legal foundation to solve very complicated issues.<sup>29</sup>

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<sup>26</sup> den Exter, A.P., *Health Care Law-making in Central and Eastern Europe, Review of a Legal-Theoretical Model*, Intersentia, 2002: 200

<sup>27</sup> Article 68, p. 1 of Polish Constitution

<sup>28</sup> Idem: 200

<sup>29</sup> Zielinska, E., *Review of Polish legal regulations on reproductive rights*, in: *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W.Nowicka, March 2008, p.10



The Health Care Institutions Act was the major step in reorganization of the health system in Poland. It repealed the communist order and opened the opportunities for decentralization, private pharmaceutical and medicine practice sector, and what is the most important the contract possibility what was a great way to enhance effectiveness and quality. The process of privatization started by the Act, enable people to choose the public or private health institutions. Furthermore, the Act provided patients with basic rights as the right to health care, confidentiality or consent. These fundamental rights are followed by administrative and financial issues, establishing control institutions as Medical Chamber or describing the scope of Ministry of Health competencies.<sup>30</sup>

The second pillar of the health care system in Poland is the Universal Health Insurance Act enforcing compulsory health insurance system for the whole population. The underlining principles of the act are:

- Solidarity
- Non-profit social health insurance
- Equal access
- Self-financing
- Free choice of provider
- Good managerial practice

Moreover the act defines the beneficiaries and the scope of the benefit package and the right to equal access irrespective the insurance premium, the chosen fund or place of residence.<sup>31</sup> Therefore, the health insurance act describes a wide range of services in kind, e.g. medical examination and advice, diagnostics, in and outpatient treatment, rehabilitation, maternity care, pharmaceuticals, vaccinations, basic dental care and many more.<sup>32</sup> However there are many services that require co-payment or a full payment from the insured and these are e.g. high technology care or some types of dental care.

A legal act that describes patients` rights in more detail is the Physician Medical Code of Ethics. In general this act describes major ethical principles to all members of the Chamber of

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<sup>30</sup> Baginska, E., Nesterowicz, M., den Exter, A., *International Encyclopedia of Laws: Poland*, Kluwer Law International, 2002: 23

<sup>31</sup> den Exter, A.P. ,*Health Care Law-making in Central and Eastern Europe, Review of a Legal-Theoretical Model*, Intersentia, 2002: 200

<sup>32</sup> Dziennik Ustaw, No. 28 Item. 153 (Ustawa o powszechnym ubezpieczeniu zdrowonym from 6 Feb 1997), article 31 section 1 sub 2

Physicians. These principles are formulated as physicians' duties to save human life and health. Furthermore the patients' rights are described, such as respecting patient's dignity, the right to be informed, the right to request a second opinion, medical secrecy and rights in specific interventions as transplantation, procreation and medical experiments.<sup>33</sup> The Code of Ethics in article 39 states that "when undertaking any medical procedures on pregnant women the physician is equally responsible for the health and life of her child".<sup>34</sup> Thus, physician has the obligation to look after the child's life and health before it is born.<sup>35</sup> Any infringement of this law may cause the disciplinary responsibility for the physician.<sup>36</sup> However the full description of abortion practice can be found in the abortion act from 1993.

The Act of 7 January 1993 on *Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy* is a legal foundation of reproductive rights in Poland. This document requires a series of obligations on authorities. The organs of governmental and territorial administration should provide pregnant women with medical, social and legal care pointing in particular what form this care should have. It obliges the above-mentioned organs to provide citizens with free access to "methods and means serving conscious procreation".<sup>37</sup> Eleonora Zielinska indicates in her paper that in neither the bill nor the executor provisions the methods and means serving conscious procreation are explained. Nevertheless the dominant opinion among lawyers and other specialists is that this rule obliges the government to provide access to all registered contraceptives including post-conception methods (e.g. Postinor or Escapelle). However, what is worth mentioning is that hormonal contraceptives are not even partly refunded and very often denied due to the "Conscientious Clause" excluding the women of the guaranteed rights.<sup>38</sup>

Furthermore, the act describes special circumstances under which abortion can be performed by a physician. They read as follows:

- 1) when pregnancy endangers mother's life or health,

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<sup>33</sup> Medical Code of Ethics, Warsaw, April 1994

<sup>34</sup> Idem

<sup>35</sup> den Exter, A.P., *Health Care Law-making in Central and Eastern Europe, Review of a Legal-Theoretical Model*, Intersentia, 2002: 213

<sup>36</sup> Baginska, E., Nesterowicz, M., den Exter, A., *International Encyclopedia of Laws: Poland*, Kluwer Law International, 2002: 58

<sup>37</sup> The Act of January 7th 1993 on *Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy*, art.2.

<sup>38</sup> Zielinska, E., *Review of Polish legal regulations on reproductive rights*, in: *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W. Nowicka, March 2008, p.11

2) prenatal examinations indicate high possibility that the foetus will be severely and irreversibly damaged or

3) there are strong beliefs that the pregnancy is a result of a criminal act.<sup>39</sup>

In situations defined under first two points the abortion can be performed by a medical doctor in hospital only, and only up to the point when the foetus is able to live independently outside the mother's body. Nevertheless the abortion is allowed up to the 23<sup>rd</sup> week of pregnancy. The process of abortion requires second medical statement in the form of medical certificate unless the pregnancy threatens woman's life. The Regulation of the Ministry of Health and Social Care of 22 January indicates more precisely that the occurrence of circumstances indicating that the pregnancy constitutes a threat to the life or health of the pregnant woman should be identified by a physician specialized in medicine appropriate to the type of illness of the pregnant woman. The physician takes full responsibility for the health consequences of the abortion, even if occurred after the surgery (infections, complications, etc.).<sup>40</sup> In a situation when the pregnancy occurred as a result of a criminal act (rape or incest) the prosecutor's certificate must state that. If there is no formal statement the physician has no right to perform the abortion when there is no medical need. If the condition of woman's pregnancy leads to a state when the abortion can cause the danger of loss of life, severe body impairment or heavy mental disturbance, her consent has no legal significance – the physician shall refuse to perform the abortion or he will face the risk of civil liability for damage inflicted.<sup>41</sup> The surgery itself can be performed only by physician with the first degree specialization in obstetrics and gynaecology – on the other side when the physician that aborts does not have the degree mentioned in the regulations he may be involved in the penal liability under the article 152 of the Penal Code.<sup>42</sup>

To permit the pregnancy termination, the consent of a woman is required. The Act from 1993 provides a detailed question of consent to that procedure in case when the woman is a minor or mentally disabled. The procedure is legally dependent on the consent (written) of the statutory representative, whilst the consent of the Custody Court is required in case of failure by the statutory representative to grant consent. However, a so called parallel consent is

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<sup>39</sup> *Idem*

<sup>40</sup> Baginska, E., Nesterowicz, M., den Exter, A., *International Encyclopedia of Laws: Poland*, Kluwer Law International, 2002: 87

<sup>41</sup> *Idem*

<sup>42</sup> The Supreme Court Judgement of February 28th 1984, KRN 21/84

required already when the minor has reached 13 years. Before reaching 13 years of age abortion always requires the consent of the Custody Court accompanied by minor's own opinion. In the case of incapacitated persons, the Act requires a written consent unless the state of mental health prevents them from expressing consent.<sup>43</sup>

The law defends women by stating that a physician (employed in public health care institution) cannot refuse to abort in the first two circumstances of the act as he may face liability for the damage caused and sanctions from the Labour Code.<sup>44</sup> Nevertheless abortion infringing the circumstances of the Act is a criminal offence described in articles 152-154 of the Penal Code.

The anti-abortion act was liberalized in 1996, and allowed abortion for social reasons, added in Article 4a paragraph 4: *Pregnant women who find themselves in difficult living conditions or a difficult personal situation*. However, in next year Polish Parliament rescinded the possibility of terminating the pregnancy due to social reasons as a result of the decision of the Constitutional Tribunal, which recognised it as being a violation of the Constitution.<sup>45</sup>

Some attention needs to be paid to the conscience clause or conscientious objection. It is described in art. 39 of the Act of the Physician's Profession and is a legal act that makes an attempt to solve the situation of collision of stated law with ideological or personal issues. It takes form of a guaranteed possibility "to deny the professional duty stated by the law on the basis of moral or religious beliefs".<sup>46</sup> However, he or she is obliged to inform the patient where the medical service in question can be obtained and to enter a note concerning the refusal in the patient's medical records. Doctors employed in health-care institutions are also obliged to inform their supervisors in writing about the refusal.<sup>47</sup>

The origin of this right can be found in military duty admission that could have been denied on the basis of the conscientious objection. However due to legalisation of controversial medical and biomedical technology the conscientious objection broadened its power on the

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<sup>43</sup> The Act of January 7th 1993 on *Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy*, Art.4a par.4

<sup>44</sup> Baginska, E., Nesterowicz, M., den Exter, A., *International Encyclopedia of Laws: Poland*, Kluwer Law International, 2002: 87

<sup>45</sup> Nowicka, W., *The Anti-abortion Act in Poland – the legal and actual state*, in: *Reproductive Rights in Poland, the effects of the anti-abortion law, joint work report edited by W. Nowicka, March 2008*, p.19

<sup>46</sup> Pawlikowski, J., *Prawo wyrażania sprzeciwu sumienia przez personel medyczny – problemy etyczno-prawne [The right to express conscientious denial by medical professionals – ethical-legal problems]*, accessed on 29.09.2011 <<http://www.incet.uj.edu.pl/dzialy.php?l=pl&p=32&i=3&m=22&z=0&n=2&k=5>>

<sup>47</sup> *Z vs. Poland* (App no 46132/08) ECHR 16 September 2008

medical personnel as well. Primarily it has been used to deny abortion procedure by physicians, however, its scope is a highly discussed topic in the Polish parliament, as the pharmacists would like to be under the right too, due to denial of selling the post-conception pill or contraceptives in general:

*Pharmacists are forced to sell drugs that destroy human fertility or kill the human embryo at the beginning of its existence. It is a serious form of discrimination that Polish pharmacists are deprived of the right to invoke conscientious objection. This is also contrary to The Code of Ethics of Apothecary, where in paragraph 3 it is stated that the mission of a pharmacist is to cooperate in the protection of life and health and to prevent diseases, as well as contrary to paragraph 4 which says that a pharmacist must have the freedom to act according to his or her conscience.*<sup>48</sup>

At the time those documents were introduced, their aim was to protect the physician and guarantee him the freedom to perform his duty in the best possible way. However, as stated before, as the controversial medical treatments started to emerge on a larger scale, the law has been used to protect morality and conscience of medical professionals.<sup>49</sup> This issue would be explained further in the ethical part of the thesis.

Physicians' moral dilemma is well known problem for many years. For instance the Warsaw Medical Society in 1884 founded a rule stating: *One should not deny the medical assistance to anybody without a righteous cause. The assessment of the morality of the cause is left to the physician's conscience.*<sup>50</sup> Moreover, the Physician Medical Code of Ethics states similar: *To be able to perform his duty, a physician should have the freedom of professional activity, according to his conscience and modern medical knowledge.*<sup>51</sup> Nevertheless, above all these ethical principles, there is one that should be the foundation of every medical activity - *salus suprema lex esto* - the greatest moral imperative for the doctor is the good of the patient.<sup>52</sup>

The conscientious objection rule is an essential instrument for physicians and nurses in morally questioned medical practices, like lethal injections in case of death punishment or

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<sup>48</sup> Klauzula sumienia także dla farmaceutów [Conscientious objection also for the pharmacists], Support Website, accessed on 17.12.2011 <<http://www.sumienie-farm.pl/english>>

<sup>49</sup> Pawlikowski, J., *Prawo wyrażania sprzeciwu sumienia przez personel medyczny – problemy etyczno-prawne* [The right to express conscientious denial by medical professionals – ethical-legal problems], accessed on 29.09.2011 <<http://www.incet.uj.edu.pl/dzialy.php?l=pl&p=32&i=3&m=22&z=0&n=2&k=5>>

<sup>50</sup> Brzezinski, 2002, p. 89

<sup>51</sup> Naczelna Izba Lekarska. Kodeks Etyki Lekarskiej, Warszawa 2004.

<sup>52</sup> Code of Medical Ethics, art.2

euthanasia. Its main aim is to protect medical personnel from participation in procedures that are in conflict with their beliefs. In Poland the conscience clause is used especially to deny pregnancy termination what is confirmed by the presented case law. Women seeking a doctor who will execute a legally founded abortion very often find out that conscientious objection is used to “avoid problem” of performing the termination. Gynaecologists deny to abort without a written explanation and referral to other facility where the procedure can be done – meaning they do not fulfil the requirements of conscience clause as stated in art. 39 of the Act of the Physician`s Profession. However, as many cases show, it is very difficult to prove in front of the court that medical personnel did not fulfil these obligations due to vagueness or badly defined frameworks of this act. Moreover, it happens very often that doctors are using the conscious objection to deny abortion and avoid environmental pressure, meaning they are scared of the procedure rather than against it.<sup>53</sup>

### 3.2. Societal and political situation

In order to explain the reader the background information about Polish social and political system I will briefly describe the most common features of this country.

Poland is an Eastern European country with almost 39 mln citizens. According to the most current social researches done by the Centrum Badania Opinii Społecznej (Public Opinion Research Centre) 94,7% of Polish society consider themselves as Catholics and among them 13% believe in God deeply.<sup>54</sup> That means 4 million people truly believe the Bible`s content and how it is explained, especially by the church authorities. The quoted research examined that Poles` faith have not changed since implementing the governance system`s reforms 20 years ago. Even though the economic and political atmosphere changed dramatically, Poles` spirituality is on a high, stable level.<sup>55</sup> What is the aim of mentioning these facts? It should be understood, that for Poles the faith and the Church are very important. That means Church authorities are bearing (or should bear) great responsibility for spreading information

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<sup>53</sup> Check the in 3.4

<sup>54</sup> Boguszewski, R., ‘Wiara i religijność Polaków dwadzieścia lat po rozpoczęciu przemian ustrojowych’, Research Paper, Warszawa 2009, 4 <[http://www.cbos.pl/SPISKOM.POL/2009/K\\_034\\_09.PDF](http://www.cbos.pl/SPISKOM.POL/2009/K_034_09.PDF)> 4

<sup>55</sup> *Ibidem*, 5

considered important for almost 40% of society (44% of believers attend church ceremonies one time or more a week)<sup>56</sup>.

The Polish Federation of Pro-Life Movement created a document called: "How the law protects life; the Polish way to the right to life law." where its objectives are stated. *Poland is the first country which, in the conditions of democracy, rejected the legislation permitting abortion and replaced it with the pro-life law. It is a precedent which proves that the legality of abortion is not a requirement of civilization and it may begin a new trend in abortion law all over the world.*<sup>57</sup> This document states that the amount of performed abortions began to decrease from the beginning of the 80s when pro-life movements developed and the Catholic Church under the Pope John Paul II's leadership started to intensify its activity. During that period women's reproductive health improved as well as, which is stated in the report, number of deaths connected with pregnancy, delivery and postpartum started to decrease and *only one death resulting from illegal abortion has been reported in that time.*<sup>58</sup> This report offers a variety of answers to many questions valid in the debates between two sides of the abortion law conflict. For example very important questions: "What is the scale of the underground abortions problem in Poland? Are the accounts of their massive scale occurrence true?" were answered very generally: *It is very difficult to estimate the real number of illegal abortions in Poland; nevertheless there is no evidence that this number is high. On contrary, the lack of the side-effects connected with abortion such as gynaecological complications indicates that the illegal abortion is not a very social problem. All this allows us to put forward a credible thesis that, though illegal abortion is still a problem, it is not a large scale phenomenon, as was suggested by the Polish branch of the International Planned Parenthood Federation. Claims of this kind lack any substantial basis, and are aimed at misinforming the public, as well as undermining the antiabortion Act, its purpose and usefulness.*<sup>59</sup>

In recent years, the pro-life organisations gained a growing support. The homogeneity of religious structure is a big incentive for the political parties to support the institution of the Polish Roman-Catholic church and their "satellites" like, for example, the most conservative party in the Polish parliament, the LPR (The Polish Families League) which gathered enough

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<sup>56</sup> Boguszewski, R., 'Wiara i religijność Polaków dwadzieścia lat po rozpoczęciu przemian ustrojowych', Research Paper, Warszawa 2009, 4 <[http://www.cbos.pl/SPISKOM.POL/2009/K\\_034\\_09.PDF](http://www.cbos.pl/SPISKOM.POL/2009/K_034_09.PDF)

<sup>57</sup> Polish Federation of Pro-Life Movement, *How the law protects life; Polish way to the right to life law*, p.1 <[www.prolife.com.pl](http://www.prolife.com.pl)>

<sup>58</sup> Idem

<sup>59</sup> Idem

votes to be a part of the 2005-2007 government. The LPR introduced in 2007 the regulation in the constitution on the protection of human life from the moment of conception, what almost led to an absolute ban on abortion.<sup>60</sup> Even though the initiative was rejected then, in May 2011 the Polish parliament, with a much less conservative coalition almost decided to ban the pregnancy termination again, the voting was rejected due to 5 members of parliament who voted against that strict legal rule.

Marcin Libicki, triply elected for Polish parliament, former member of the European Parliament in an article for one of the most influential newspapers in Poland said: “You cannot force a woman to get pregnant, but when she is, I believe, we can [force her to give birth]. After conception the child needs protection”.<sup>61</sup> Irrespectively of social, mental, physical state of women, they are believed to be the depositaries, objectivized in their maternity role. Health and life of pregnant women is endangered due to the lack of appropriate regulations. Wanda Nowicka provides an example of young women from Pila that died in pain due to denial of pregnancy termination despite the fact her life was endangered due to collateral infection.<sup>62</sup>

Moreover, the political debate about abortion displayed growing acceptance, especially within law and medical experts, for a significant lowering of women's rights protection.<sup>63</sup> The clear example of rather exceptional behaviour of physicians and lawyers is Alicja Tysiac case that will be described in the following sections.

Mentioned examples prove that abortion in Poland is influenced by ideological impacts. The absolute forbidding of abortion termination would lead to death of many pregnant women, as the doctors would fear the public punishment announced by religious fundamentalists.<sup>64</sup> The rights of women are rarely on the political agenda, as for majority of Polish population abortion and murder still mean the same. Moreover, in Polish legal language there is no term

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<sup>60</sup> *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W.Nowicka, March 2008, p.9

<sup>61</sup> M. Libicki in interview for *Gazeta Wyborcza*, 23-24 July 2011

<sup>62</sup> *Z. Vs Poland*

<sup>63</sup> *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W.Nowicka, March 2008, p.9

<sup>64</sup> W. Nowicka for *Gazeta Wyborcza*, 5 August 2011



for the reproductive rights in the means of protection, sexual education or self-determination in sexual matters.<sup>65</sup>

The other side of this, controversial for many, debate is held by pro-choice and feminists' organisations, like Federation for Women and Family Planning, Ponton or Astra. They are actively engaged in women's reproductive health protection, advising the United Nations and controlling international directives and regulations in that matter, organising demonstrations and protests. However their most important role is creating a great source of information for youth, women and men in the field of sexual health, contraception and abortion. Their demonstrations can be very direct, as for example the one organised against the complete abortion prohibition on July 12<sup>th</sup>. Their posters and slogans were made in the atmosphere of black humour, stating for example: "Be a man, sacrifice the life of you wife!", "We don't forbid the rapists to be fathers!" or "A ten year old can be a great mother!". They are also acting in more implicit way, using the strategy of 'naming and shaming', that is informing the public about the voting of particular Member of Parliament in governmental sessions.<sup>66</sup> The Federation created also "Open Days", during which MPs can talk with women on telephone of trust and be able to make fully responsible and wise decisions.

Recent elections held in Poland on the October 9<sup>th</sup> 2011 showed how the Polish society is changing. Janusz Palikot, a former businessman and MP from Civic Platform party, in 2010 formed a political party named the Palikot Movement. During the last election he gained 10.02% votes<sup>67</sup> what made his party a third power in the Sejm (Polish Parliament) bringing first transsexual, first declared homosexual and second Afro-American as Members of Parliament. Janusz Palikot's party programme mentions issues that were hidden from public debate for a very long time: legalisation of homosexual relationships, liberalisation of soft drugs, liberalisation the abortion act or equal payment for women and men. Wanda Nowicka, mentioned leader of the Federation for Women and Family Planning become a Member of Parliament gaining 7 065 votes<sup>68</sup>. Her presence in the Sejm will bring more attention to issue of reproductive rights in Poland and a proper debate may begin.

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<sup>65</sup> Zielinska, E., *Review of Polish legal regulations on reproductive rights*, in: *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W. Nowicka, March 2008, p.10

<sup>66</sup> W. Nowicka for Gazeta Wyborcza, 5 August 2011

<sup>67</sup> Polish Elections Commission, <[www.pkw.gov.pl](http://www.pkw.gov.pl)>

<sup>68</sup> Polish Elections Commission, <[www.pkw.gov.pl](http://www.pkw.gov.pl)>

### 3.3. Sexual education

As mentioned before, the adequate sexual education can serve as a security tool in the area of reproductive health. Many countries, where the abortion is socially acceptable, made a big effort to introduce “sex classes” at every stage of child’s education. Moreover, according to the art.12 of the European Social Charter, State Parties are obliged to provide access to health-related education and information, including sexual and reproductive health. However, many children and adolescents in Poland are disposed of this right since the early childhood as there is no formal programme for children in sexual education. According to a very recent research conducted by organisation Ponton, 53% of examined young people did not receive any information about reproductive rights at their homes, as many parents believe (or want to believe, to avoid difficult topics) that children should get appropriate knowledge about contraceptives, physiology or relationships at school.<sup>69</sup> According to the law, schools are required to provide 42 hours of Preparation for Family classes<sup>70</sup> in the overall education programme. There are 14 hours of classes for every type of schools – starting at primary school (children are being taught at 11-12yr.) then middle school and high school. However a frightening picture can be seen when we look at the execution of this law at schools – adequate report was realised by the Ponton group in years 2009-2010 where over 600 young people described their experiences on the Preparation for Family Life classes.

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<sup>69</sup> Raport of Sex Educators Group ‘Ponton’, *Skąd wiesz? Jak wygląda edukacja seksualna w polskich domach* [How do you know? How does the sexual education look in Polish homes] September 2011, accessed on: [www.ponton.org.pl](http://www.ponton.org.pl)

<sup>70</sup> According to the Act of January 7th 1993 on *Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy*, the knowledge about sexual life, rules of conscious and responsible parenthood, family values, prenatal life and methods of contraception are included to the teaching programmes.

*Have you ever had some kind of sex education at your school?*

Table 1

	Number	In per cent
No	252	39.6
Only in primary school	92	14.4
Only in middle school	104	16.3
Only in secondary school	58	9.1
In primary and middle school	28	4.4
In middle and secondary school	8	1.3
In primary, middle and secondary school	14	2.2
Yes but no data on the type of school	76	11.9
Total	637	100

As seen in Table 1<sup>71</sup> the mentioned law is not executed as highly as the parents expect what leaves a big knowledge gap during a very important time for young people where sexual education should provide very basic information – crucial for well-developed sexual behaviour and assertive habits. Almost 40% of young people did not experience any form of formal sexual education and when we add the lack of support from parents the facts are frightening. If only we add what information the pupils can withdraw from the lessons we get a very disturbing picture how they are being prepared for responsible management of their sexual life:

*Our Preparation for Family Life teacher was a 60-year-old pedagogue who only discussed sex in one lesson and told us some incredible stories for example that to prevent pregnancy a girl should take a bath in water mixed with vinegar which would wash out and kill sperm.*

*In middle school the subject of sex came up. They presented it as a tool of Satan, source of evil, disease and a way to destroy your life.*

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<sup>71</sup> Report of the Ponton Group of Sex Educators, *What Does Sex Education Really Look Like in Poland?*, June 2009, p.3

*Our Preparation for Family Life teacher started from describing phases of fetal development in subsequent months (...) in each lesson we had to watch graphic pictures of abortion and they showed us a film with pro-life doctors and activists who spoke about the negative effects of the procedure and the civilization of death in the West. The teacher said that the first rulers to allow abortion were Hitler and Stalin – biggest murderers in human history.*

*We were taught by an elderly woman who probably wanted to earn some extra money to add to her pension. In class she read to us a Catholic magazine “Gość Niedzielny” and said that when a girl is raped she can only blame herself and she should be excommunicated.<sup>72</sup>*

The mentioned report, prepared on the basis of information from adolescents, describes the differences between the formal requirements and implementation of the subject Preparation for Family Life in schools. Classes are not enough monitored and many times instead of learning issues important from the perspective of development and health, pupils do not learn anything useful but might even absorb dangerous stereotypes and myths about sexuality and contraception. Adolescents still don't have appropriate access to information about health, STI prevention, sexuality, contraception and assertiveness. There is need to introduce reliable, neutral and age-adjusted sex education and it must be based on scientific and medical standards of human rights approved by the UN and EU treaties. Every Polish child and pupil has a right to reliable sex education as the Polish state is obliged to provide proper sex education according to the requirements of the Polish “Act on Family Planning” and multiple international obligations.

The issue of sexual education in Poland can be easily compared to the situation that happened in Croatia 5 years ago.

### **3.4. Social studies and non-governmental activities**

Kazimiera Szczuka, a well-known Polish literature critic, feminist and intellectualist in collaboration with PhD Katarzyna Bratkowska, issued last year a “Big Book about Abortion”

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<sup>72</sup> All quotes come from the Report of the Ponton Group of Sex Educators, *What Does Sex Education Really Look Like in Poland?*, June 2009

which aims to inform and describe the issue of abortion to adolescents and women in order to ensure them in rights they have and explain what they can do in the case of unwanted pregnancy. The book takes the perspective of pro-choice activists who believe women are entitled to decide about their bodies and whether they wish to give birth to a child or not. However, just few months after the premiere, a negative campaign started, to remove the book from the book store shelves dedicated to adolescents. Well known book stores indulged the public pressure and placed the book at shelves dedicated to adults.<sup>73</sup>

*We do not consider abortion positive or negative. We do not evaluate all the feelings that can accompany it. We do not evaluate the thousands of reasons, why woman decides to terminate the pregnancy. We are both for the legalisation of abortion. Even those who name themselves as anti-abortionists very often are pro legalisation. Why? Because they do not want to make the choice for somebody else. Because they want to confront with reality rather than close in the circle of self-sensitivity. Because they want to be solidary with women. Because they know the statistics and know that the prohibitions do not help anybody. Do not decrease the number of [abortion] procedures.*<sup>74</sup>

The authors believe they are able to inform consent many women who, in specific circumstances, can act irresponsibly and do things they would never agree on before an unwanted pregnancy happens.

*Fear is a mister that destroys everything. Fear is a man. Legs and hands start to shake, the brain becomes a jelly. Complete paralysis. Under such a fear you do stupid things. And then you stay silent.* – said 20 year-old Lena in Gazeta Wyborcza, who organised series of reports “Abortion in Polish”. She becomes silent soon after she goggled “home methods to terminate pregnancy” and “how to miscarry”.<sup>75</sup> You can find answers to these questions on number of forums and websites, especially in ones that are created for youth and women:

*Bath in hot water. App. 25min deep submerge in bathtub. The temperature of the body must reach app. 40 degrees. In that kind of bath you are getting weak, so it would be good to have*

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<sup>73</sup> Podgórska, J., *Duża awantura wokół dużej książki* [Big affair about the big book], Polityka, October 30, 2011

<sup>74</sup> Szczuka, K. and Bratkowska, K., *Duża książka o aborcji* [The big book about abortion], Czarna Owca, Warszawa 2011, p.5

<sup>75</sup> Oprzedek, K., *Kliknelam i poroniłam* [I clicked and missaried], Gazeta Wyborza, December 17-18, 2011

*somebody around. [...] The bleeding should start up to 3-4 hours, strong stomach ache. The earlier the pregnancy, the less bleeding.* (Odpowiedzi.pl) [Answers.pl]<sup>76</sup>

*As far as I know, very intensive exercise, hitting lower part of your stomach.* (Dojrzewamy.pl) [adolescence.pl]<sup>77</sup>

The series of report in Gazeta Wyborcza described the history of abortion in Poland and explained the point of view of different parties, pro-life and pro-choice activists, but the most importantly they gathered opinions from women who are very scared and often insulted for their activity:

*If people from my village would knew, what I'm talking with you about, I would have been lynched* - says Maria.

*I wanted to be gone – reminds Lena – It was shame and fear of my mother. I was ashamed that I was doing sex and that I become pregnant. I was scared that, when it will all emerge, she would abandon me.*

*After abortion I had a mission, to log on different forums and write that there is more of us and all of us have some dreams, which we don't want to drown in nappies. But I was easily overwhelmed by the amount of "bitches", "prostitutes" and "sluts", which were directed to me. I'm not a strong-women – when I read something like that, I feel bad and I need a hug."* Said Katarzyna on the basis of the newspaper.<sup>78</sup>

To illustrate what kind of offence women are dealing with in internet, I followed some of the anti-abortion websites:

*F..cked feminists, full of inferiority complexes, fears, they justify murdering of these children, and when I look at their pseudo-intelligence I think that "every pig is God's creation".* (From comments under drastic short movie placed on youtube.com)

*If you think that the baby until the birth does not have the soul, you should seriously consider yourself and be grateful to your mother that she doesn't have the same opinion as you, as probably you wouldn't exist. You would have been murdered in her womb, without any chances to defend yourself and to see our beautiful world. Abortion just like euthanasia is the*

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<sup>76</sup> Oprzedek, K., *Kliknelam i poronilam* [I clicked and missaried], Gazeta Wyborza, December 17-18, 2011

<sup>77</sup> Idem

<sup>78</sup> Idem

*worst crime that is committed. Nothing and nobody justifies the massacre on unborn children*  
(From the same as above).

*I will be honest: I wish all those devil helpers all the worst – I hope they would never see their children and grandchildren.* (From fronda.pl, catholic portal)

Polish websites are full of that kind of comments, what makes the access to scientifically based information even more difficult. Women are forced to ask very discretely about information how and where they can undergo the procedure. Those worst off do not have many choices, usually they borrow money for underground procedure or try to miscarry with “home methods”. In Alicja Tysiac case, her efforts to undergo such a procedure did not pay off, as she could not afford to pay for illegal termination, which cost app. 1000 – 4000zl depending on the length of pregnancy and place of residence.<sup>79</sup> Women that have enough resources, go abroad to countries where abortion is legal, as for example Czech Republic, Germany, the Netherlands or UK. In the debate organised by Member of Parliament (and former Ministry of Health), Marek Balicki and Federation for Women and Family Planning the numbers of so called “touristic abortion” of Polish women, were showed. According to Wanda Nowicka (the leader of the Federation) 80-200 thousands of Polish women undergo the abortion every year among which 10-15% goes abroad. Different statistics were presented by the Polish Society for Human Life Defence: 7-14 thousands abortions per year.<sup>80</sup> In order to make sure the European statistics were showed, gynaecologists and hospital directors from clinics all around the Europe were invited. They were asked to present number of Polish women who are undergoing the procedure in their clinics:

*- There are coming to us women mainly from Warsaw, Poznan and Wroclaw, but also from Czestochowa or Wadowice. Aged 16-48.*

Informed dr Janusz Rudziński, gynaecologist from Prenzlau clinic in Germany. In 2009 there were 350 women who came to him for abortion. This year is almost 400 and he believes the amount increase to 600. These are mostly highly educated women: business women, artists, scientists, journalists, students. They have big knowledge about contraception, they become pregnant by accident. Dr Christian Fiala, director of Gynmed Clinic for Contraception and

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<sup>79</sup> W. Nowicka for Gazeta Wyborcza, 5 August 2011

<sup>80</sup> Dubrowska, M., *Polskie aborcje w klinikach całej Europy* [Polish abortions in clinics all over Europe], Gazeta Wyborcza, 27 August 2010

Abortion in Vienna and Salzburg says his clinics perform app. 200 abortions among Polish women. He adds:

*- The safest time for the proceedings is 6-7 week of pregnancy. When the woman needs to go abroad, she loses more time and the risk is higher. Others go to clinics where the sanitary conditions are worse. Complications may arise.*

Dr Olga Loeber from Dutch clinic Mildred Rutgers Huis explained that in her clinic app. 80-100 Polish women come every year for the termination. Ann Furedi from the British Pregnancy Advisory Service described a shocking example that happened in her clinic:

*- One of our clinics received a call from Polish investigation organs. They demanded information about women undergoing abortion with us. The hospitals do not give that kind of information.* <sup>81</sup>

During the debate, several issues arise among which the low quality of sexual education in Poland. However, very interesting comment came from the mouth of former Health Ministry, MP Marek Balicki:

*- If polish doctors behaved as British, the abortion would be accessible.*

And he referred to the narrow interpretation of the “danger to mother’s life or health” which is broadly interpreted by the British gynaecologists and by that allows women to undergo abortion also due to social reasons. <sup>82</sup>

The respondents of this debate highlighted the issue of decreasing number of abortion due to decriminalisation – a comment was made that in the Netherlands, where the abortion is legal, the amount of procedures conducted is the lowest in Europe. <sup>83</sup>

At the end the organisers formulated an informal communiqué to Polish MPs: the statistics show that abortion is the most common gynaecological surgical procedure, regarding whether it is legal or not. Penalisation of abortion does not stop women from undergoing it, but it can decide where they do it. The novelisation of the anti-abortion act is still valid, though. <sup>84</sup>

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<sup>81</sup> Idem

<sup>82</sup> Dubrowska, M., *Polskie aborcje w klinikach całej Europy* [Polish abortions in clinics all over Europe], Gazeta Wyborcza, 27 August 2010

<sup>83</sup> Relation from the citizen debate “Touristic abortion of Polish women”, Helsinki Foundation for Human Rights, August 29, 2010

<sup>84</sup> Idem



### 3.5. National case law

This section will provide cases in national courts, where the Act from 1993 is playing the main role. Although this Act presents three fundamental possibilities to legally terminate pregnancy, in practice, women do not have real access to this treatment due to many various circumstances. The following cases describe the obstacles to obtain reproductive health care services. The case of Wojnarowski`s analyse denial of prenatal examination which main objective is to help the parents to undertake a serious decision about their pregnancy.<sup>85</sup> The M.A. case describes a raped woman who was denied the abortion and had to go through an embarrassing, 7 year-long legal path in order to receive compensation. The last example of Agata case explains how destructive the public debate can be on individual adolescent life who was a victim of a rape.

#### 3.5.1. The case of Barbara and Slawomir Wojnarowski

Barbara Wojnarowska was a mother of a child with a genetic disorder, hyperchondroplasia of bones. In 1999, when she found out she was pregnant she asked the doctors in the Provincial Hospital in Łomża – Dr. Leszek P. and Dr. Agnieszka G. for a referral for prenatal tests. However, the doctors refused issuing the referral, despite the well-funded suspicion that the foetus was suffering from a serious genetic malfunction.

Following that, Ms Wojnarowska gave birth to a baby girl that was affected with the same disorder as her brother - hyperchondroplasia. With her husband they pledged a complaint to the Regional Court in Łomża claiming damages for the violation of the rights of the patient, also claimed damages to cover the costs of treatment and rehabilitation of the child, the increased costs of maintenance of the child, the loss of income by B. Wojnarowska, as well as the loss of half the ability to work. The money was supposed to cover the costs of rehabilitation and specialist treatment of the girl until she reached adulthood (in total app. 1.5 million zloty). The Regional Court (and later Appeals Court in Białystok confirmed) stated that it was not possible to perform the abortion on legal basis, as it could be done up to 20 week of pregnancy and up to that moment it was not possible to detect the child`s illness. The court did not find any connection for the refusal of conducting the prenatal tests and damage

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<sup>85</sup> Bodnar, A., *Case-law concerning the lack of availability of services for terminating pregnancy in Poland* in: *Reproductive Rights in Poland, the effects of the anti-abortion law, joint work report* edited by W. Nowicka, March 2008, p.51

caused to Wojnarowski family, stating that prenatal tests results would not give the full information about the foetus health status to perform legal abortion. However the second appeal was pledged to the Supreme Court, which did not agree with the previous decisions. In the judgment of 13 October 2005<sup>86</sup>, the court stated: "*the detection of defects in the foetus was possible between the 20th and 24th week of the pregnancy and its termination for these reasons was permitted up to the 24th week, which must clearly change the assessment on the existence of a connecting causality.*" Thus, the main claim of Mr. and Mrs. Wojnarowski of wrongful birth<sup>87</sup> was not taken into consideration by the first and second instance courts by wrong assessment of time framework when the pregnancy termination can be executed (!). Nevertheless, in the opinion of the Supreme Court the damage to the parents is not the fact of the birth of a child with a genetic defect, but the financial loss arising from the necessity of incurring additional costs of maintenance and bringing up the child, in connection with the child's handicap, which the parents did not plan, did not agree to incur, and did not have to incur, if their right to family planning and the right to decide about terminating the pregnancy had not been violated. These increased costs encumbering the parents should be covered in the form of a monthly pension defined in the Article 444 Paragraph 1 of the Civil Code.<sup>88</sup>

### 3.5.1. The case of M.A.

M.A. was raped in July 1996 by an unknown perpetrator, whose identity establishment proceedings were suspended. In September 1996 M.A. had her pregnancy confirmed by a gynaecologist who assessed the age of the foetus as 11 weeks and referred her for an abortion. In hospital, where the pregnancy was supposed to be terminated, the doctors found out that the foetus was 14 weeks old and by that the prosecutor refused to issue a consent that would enable M.A. to perform legal abortion. Instead, the prosecutor decided to ask a specialist to establish the real age of the foetus. As a result, the rape victim could not terminate the pregnancy, which was a result of a crime, because the time limit defined by the law was exceeded. On 30 April 1997 she gave birth to a son and three years later she filed a lawsuit against the State, the Town Hospital of Dabrowa Gornicza for damages due to violation of her

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<sup>86</sup> Judgment of the Supreme Court of 13 October 2005 IV CK 161/05

<sup>87</sup> Wrongful birth claim is defined as a claim of the child's parents, who claim compensation for increased costs of its maintenance (rehabilitation, treatment), since they were effectively prevented from exercising their statutory right to terminate the pregnancy.

<sup>88</sup> Bodnar, A., *Case-law concerning the lack of availability of services for terminating pregnancy in Poland in: Reproductive Rights in Poland, the effects of the anti-abortion law, joint work report edited by W. Nowicka, March 2008, p.51*

personal integrity and compensation for being unable to work from October 1996 until October 2000, as well as a pension for the maintenance costs of her son born in April 1997. Finally, she was awarded damages for being forced to give birth to a child which conception was a result of a rape, including 20,000 PLN (5,000 EUR) as a compensation for violation of her personal interest<sup>89</sup>. Further on, the Supreme Court in front of which the lawsuit against the State Treasury took place, stated that in the circumstances mentioned in the Act of 1993 on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy, forcing woman to give birth to a child conceived as a result of rape constitutes a violation of a constitutional principle which is freedom of ability to decide about one's private life.<sup>90</sup> This case was a precursor of claims for wrongful birth in Poland. As it was said before, due to the refusal to perform abortion, M.A. claimed for damages for violation of her personal life. Despite that, she requested a pension for her son, which was supposed to be the equivalent of the costs of his maintenance. She stated that the hospital in Dąbrowa Górnicza did not conduct the abortion at the beginning of October 1996, whereas it was in their duty to perform it. The reason for the refusal was the incorrect definition of the age of the foetus as 14 weeks old instead of 11 weeks. The consequences of preventing the abortion were the costs of maintaining the child and lost ability to earn any income in 3 year period.

In its judgment of 8 October 2001, the Regional Court in Katowice as well as the Appeals Court in Katowice in the judgment of 20 June 2002 dismissed M.A. claim for a pension. The Appeals Court allowed the possibility of a connection between the assessment of the age of the foetus in the hospital and the obstacles the plaintiff met while obtaining a statement from the public prosecutor to let her terminate the pregnancy. At the moment of the case, there were doubts as to whether M.A.s pregnancy was a result of a crime.

The Appeals Court in Katowice, however, ruled that the prerequisite of liability in crime under Article 444-449 of the Civil Code can be only damages to the body or disturbance of health<sup>91</sup> and by that the claim for a pension was dismissed. In the opinion of the Appeals Court this case does not involve the birth of a child. Although in the circumstances where M.A. has an obligation to maintain the child, the impossibility of obtaining financial support

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<sup>89</sup> Art. 448 of the Polish Civil Code

<sup>90</sup> Judgment of the Supreme Court of 21 November 2003, VCK 16/03 (OSNC 2003, no. 6 item 104)

<sup>91</sup> Article 444. § 1. In the case of a bodily injury or a disturbance of health, the redress of the damage shall cover all the resulting costs. Upon the demand of the injured person the person liable for the redress of the damage shall deposit in advance the sum needed to cover the costs of treatment, and if the injured person became permanently disabled, also the sum needed to cover the costs of his training for another occupation.

from the father of the child (unknown rapist) does not give her the basis to hold liable the defendant, the borough council, as responsible for the hospital in Dąbrowa Górnicza.

Nevertheless, the Supreme Court did not agree with the above-mentioned view in its decision of 21 November 2003.<sup>92</sup> According to its opinion, the violation of the rights of the victim of a rape to an abortion by preventing the resources which would allow the performance of an abortion – in the situation when she had a right to one – can give rise to financial losses, entitling her to make a claim the compensation for the damages arose from that crime. The Court agreed that this damage should cover the expenses connected with the pregnancy and birth along with loss of expected income as a result of that criminal activity.

Furthermore, the Supreme Court took into consideration the significance for the possible liability for damages of the fact that M.A. did not give the child up for adoption (despite the possibility she was given). However, the Supreme Court pointed out that such a possibility should not influence the scope of liability on the basis of the claim for wrongful birth.

In case of giving the child up for adoption (what meant the same as freeing oneself from the obligation of bringing up the child) to the right of the child to be maintained in its natural family would be detrained, just like the rights of the plaintiff.

As a result of the above-mentioned judgment, the case of M.A. was referred for a new hearing by the courts of the first instance.<sup>93</sup>

### 3.5.2. The case of Agata

Agata is a fourteen year-old girl who wanted to perform abortion as she become pregnant. To remind the reader, Polish law in the Act from 1993 consider adolescents below 16 years old not mature enough to participate in any sexual activity. Thus Agata pregnancy in the view of Polish law was a result of rape. By that, she is legally enabled to perform abortion within first 22 weeks of pregnancy. It is important to say that, as the formal circumstances of the case have not been confirmed since June 2008, when the situation happened. However, there have been numerous articles in Polish press describing the case of the adolescent. In order to maintain the non-arbitrary perspective of this thesis, several references will be used.

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<sup>92</sup> Ibidem

<sup>93</sup> Bodnar, A., *Case-law concerning the lack of availability of services for terminating pregnancy in Poland* in: *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W. Nowicka, March 2008, p.51

Agata - the name that *Gazeta Wyborcza* used for the girl who wished to remain anonymous - went to a gynaecologist after the rape, who in turn informed her mother and the police. After discussing the problem, they agreed it would be best for the young girl's future and health to terminate the pregnancy, and applied for and were granted permission for an abortion.<sup>94</sup>



**Figure 2** Text message: Dear ... Many people moved by your situation is today with you because you become a mother very young. Give the baby your love. It lives in you and it has the chance to return your love.

According to *Gazeta Wyborcza*'s article from June 6<sup>th</sup> 2008, the Polish Federation for Women and Family Planning has been following the story and knows that "the girl, at first, wanted to have the abortion in Lublin, where she resides. However, two hospitals refused to perform the procedure. A priest suddenly appeared in one of them during a conversation between the girl's mother and the hospital director. The priest began trying to convince the 14-year-old that she should give birth."<sup>95</sup>

Apparently, the priest along with a variety of anti-choice protesters and activists showed up at the hospital trying desperately to force the young girl to carry the pregnancy to term.<sup>96</sup> She has been receiving several text messages on her cell phone, one of which is showed in Fig.2.

However, according to other newspaper, *Rzeczpospolita*, Agata's mother at first

asked for help the gynaecology department director, dr. Wanda Skrzypczak. The director did not agree to conduct the abortion in her hospital in Lublin. Because of this denial she was rumours started to appear, as she manipulated the fourteen year-old and was expected to call the priest Jan Podstawka. Moreover, she was suspected to promise the girl, if she gave birth, she would adopt Agata with her child. As explained above, there were legal indications to

<sup>94</sup> Zawada, G., *Abortion for Rape Victim Causes Nationwide Dispute*, Krakow Post, July 3, 2008 *Gazeta Wyborcza*

<sup>95</sup> Idem

<sup>96</sup> Newman, A. *Unprotected and Assaulted: 14 Year Old Raped and Denied Abortion*, Reproductive & Sexual Health and Justice. News, Analysis & Commentary, June 8, 2008

conduct the abortion, however Agata changed her mind very often, what significantly complicated the whole situation.<sup>97</sup>

Jacek Solarz, director of the Lublin hospital conducted an investigation asking gynaecologists whether they would conduct the procedure.

- *Nobody is willing to do that – he stated.*<sup>98</sup>

The National Health Fund (NFZ) speaker, Edyta Grabowska-Woźniak, replied to this statement by saying:

- *When the hospital denies [abortion] due to the conscious clause, it has to indicate other facility where it will be done, as soon as possible.*<sup>99</sup>

Minister of Justice confirmed it in radio interview:

- *If the hospital denies performing the procedure, we can say it is law violation.*
- *We didn't start to look for other hospital. I'm not afraid of legal sanctions as the ethics is above the law – Jacek Solarz replied.*

And explains he is waiting for the expertise from Ministry of Justice, Ministry of Health and even Lublinian State Hall.<sup>100</sup>

As a result, Agata's mother turned to the Federation for help in locating another hospital this past week, which they did.

In the meantime, the Minister of Health, at that time Ewa Kopacz, stated in political talk-show “Teraz My” that the abortion will take place and she said she has found hospital that will conduct the girl's pregnancy termination.<sup>101</sup>

Shockingly, the priest and pro-life protesters showed up at this *second* location in Warsaw. An account of what occurred from the author of the article in Gazeta Wyborcza follows:

*I don't know how the priest found out about a private procedure taking place in Warsaw – Wanda Nowicka, president of the Federation, wonders - Obviously, confidentiality of medical*

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<sup>97</sup> Rzeczpospolita

<sup>98</sup> Szlachetka, M., Pochrzęst, A., *Agata z matką chce aborcji. Szpital odmawia* [Agata with her mother want abortion. The hospital denies], Gazeta Wyborcza, June 12, 2008.

<sup>99</sup> Idem

<sup>100</sup> Idem

<sup>101</sup> “Teraz My” programme emitted on 16.06.2008 at TVN channel

*records and the patient's right to privacy have been violated.* According to reports provided by hospital employees, all hell broke loose when abortion opponents appeared at the hospital. – It was a horror – an employee says. They attacked her. In addition to the priest, there were journalists from Radio Maryja or Trwam Television. And the women from the anti-abortion organizations occupied the office.<sup>102</sup>

*Agata was discharged from hospital on Thursday. When she exited the hospital with her mother, women from pro-life organizations followed her – activists from the Federation say.* The mother flagged a police patrol car. The police took them to a police station in the Srodmiescie District of Warsaw. But the pro-life activists made it there as well.<sup>103</sup>

18.05.2008 the Catholic Information Agency (KAI) disclosed that the fourteen year-old went under the procedure of abortion after becoming pregnant with her friend. It was the last day when the abortion could have been conducted according to Polish law, informed the Polish Press Agency (PAP) at this day.<sup>104</sup>

### 3.6. Professionals' ethics

The issue of undertaking difficult decisions by physicians, midwives and pharmacists was mentioned in the legal part, while explaining the conscience clause described in art. 39 of the Act of the Physician's Profession. However, the previous part of national case law provided a good basis to examine this topic in detail.

Federation for Women and Family Planning thank to the support from European Commission organised a project called *Proactive monitoring of women's reproductive rights as a part of human rights in Poland*, the main goal of which was to examine the quality of services and access to gynaecological treatments<sup>105</sup>, with particular regard to abortion procedures. As a

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<sup>102</sup> Newman, A. *Unprotected and Assaulted: 14 Year Old Raped and Denied Abortion*, Reproductive & Sexual Health and Justice. News, Analysis & Commentary, June 8, 2008

<sup>103</sup> Idem

<sup>104</sup> Accessed on:

<[http://wiadomosci.gazeta.pl/wiadomosci/1,114873,5324839,KAI\\_\\_14\\_letnia\\_Agata\\_z\\_Lublina\\_usunela\\_ciaze.html](http://wiadomosci.gazeta.pl/wiadomosci/1,114873,5324839,KAI__14_letnia_Agata_z_Lublina_usunela_ciaze.html)>

<sup>105</sup> The precise procedures taken into consideration were: standard gynaecological-obstetrics services covering prevention, basic gynaecological care and gynaecological care (so called preconception care), sexual education, access to contraception, prenatal tests, birth and postnatal care (including lactation counselling), as well as care in special situations, such as risky pregnancies, complications with the birth, miscarriage, indications to



part of that research interviews were conducted with gynaecologists, midwives, professors from Medical Academy, hospital and clinics directors and other professionals experienced in the field reproductive health.<sup>106</sup>

However, the results do not surprise after getting familiar with national case law. The main results are:

- Access to gynaecological services are based on inequality due to education, age, place of residence and income level,
- According to interviewees, the main cause of this diversity is so-called “human factor”, which means a various attitude and behaviour of doctors, directors of health services centres and nurses,
- While talking about an abortion and prenatal tests, the researchers concluded that the emotional arguments dominated the discussion and lack of rationalisation in that issue is present,
- The division of doctors who are against the right of women to have an abortion and those who understand the righteousness of this procedure is very sharp and visible,
- Radical anti-abortion professionals do not justify the need of abortion even while the pregnancy endangers the women`s health or life, and neglect of these critical circumstances is visible,
- Doctors avoid terminating the pregnancy, what limits the access of women to these procedures. Doctors tend to send their patients elsewhere, what sometimes effects in exceeding the limit for which the legal abortion can be performed.
- Moreover, the researchers named main barriers to access a legal abortion, they are: lack of definition what a threat to life is and big legal responsibility coming from other acts that impose fines for killing the foetus; medical difficulties in diagnostics in the first stage of the pregnancy (Wojnarowska case); lack of knowledge about the issue within political environments what can cause wrong political statements and decisions; the attitude of doctors willing to avoid complicated cases; complicated procedures and taboo in abortion issue what pushes the women to look for illegal abortions.

The interviews provided very practical perspective on the health care system in Poland, for example by pointing the poor financial situation and low skills and consciousness of

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terminate the pregnancy, oncological gynaecology, care for rape victims, and people suffering from AIDS or infected with HIV.

<sup>106</sup> Domaradzka, A., Report of the expert research with gynaecologists and midwives in: *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W. Nowicka, March 2008, p.67



professionals. Few respondents mentioned the need to refer patients to other clinics or even creating the lines, due to limits that arose from contracts signed by health entities with the National Health Fund.<sup>107</sup> Moreover, all respondents highlighted the need for better sexual education among adolescents and through doctors and media. However, some of the interviewees presented a negative attitude towards the modern contraception methods and stressed the need to spread the knowledge about natural ways of regulating fertility or raising awareness about the dangers connected with the use of contraceptives. From the conversations conducted with them it can be concluded that such a point of view is not based on scientific arguments but on religious and ideological beliefs – the personal beliefs that came from the teachings of the Catholic Church. Nevertheless, some agreement could be found between all the respondents that can be summarized in following quote coming from one of the interviews: *Lack of information – there is neither discussion on this subject nor the language available to speak about these issues. Prudery prevails in schools and lack of knowledge leads to bad decisions.*<sup>108</sup>

The next topic discussed with specialists in the field of gynaecology was about the state of contraception accessibility. The biggest problem, according to respondents, is the high price of contraception pills, however when asked about its reimbursement by the state, they claimed it would be too big a burden for the already stretched budget. Moreover, the lack of knowledge about contraception within society creates a specific dependency of the patient with the doctor, as usually his knowledge (and among that, his beliefs) are substantial for the access to contraceptives. That means arising controversy around the post-coital contraception<sup>109</sup>, where some of the interviewees defined it as an early abortion method and did not express willingness to issue a receipt, what was based on their emotions rather than medical knowledge. However, some of the respondents named it an emergency solution for women that would help avoid the abortion. Another controversial topic was about the prenatal tests, which again placed the respondent on two completely different poles. First group expressed the need to conduct the prenatal tests more regularly, especially within women above certain age and ease the access. The second group differed drastically, as one of the professionals stated that *women should be better informed about the risk of miscarriage after*

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<sup>107</sup> The contract are signed by hospitals, clinics, private entities and other health providing institutions for a certain amount of services (counted in patients or hours of using a particular equipment)

<sup>108</sup> Domaradzka, A., Report of the expert research with gynaecologists and midwives in: *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W. Nowicka, March 2008, p.70

<sup>109</sup> e.g. Postinor Duo, Escapelle – contraception pill that works after the probable conception and should be given within 72 hours. It is very often used in the Western Countries in situation of rape or other contraceptive failure.

*a prenatal test* whereas other 2 respondents proposal was to resign from conducting the tests at all, as in their opinion, the state of women who find out that the foetus has an irreversible malfunction is so traumatic *that sometimes it is better that the patient obtains this knowledge only after the birth.*<sup>110</sup> This pathological situation is even worse, when one considers that the woman should carry the damaged foetus irrespective of her state of mind, as from the other response it can be concluded that a woman should continue that kind of pregnancy in order not to create difficulties for the supervising doctor in terms of abortion, especially when the pregnancy would be advanced and would involve complicated surgery. Despite pathological comments as those, majority of doctors understand the need of prenatal tests.

Furthermore, the research focused on the command of the Act on Family Planning and views on its realisation. All the interviewed respondents knew the principles of the act, however only two from 8 were able to give detailed analysis. The researchers divided the respondents into four groups according to their opinions about the Act:

First, pragmatic group stated that the Act is faulty, as it was imprecise and left the doctor with a big dose of responsibility. They said that in legally justified cases women have the possibility to abort (if not in one hospital then they are referred to another). Their pragmatism can be expressed in stating that anyway, the majority of women that decide on abortion in a private surgery or a pharmacological termination.

The conservative point of view was dominating in the second group. In this group's opinion the Act in its present framework is a form of expression of the societal consensus and covers all the significant circumstances for termination of pregnancy. The realisation of the Act does not raise any doubts among these respondents. They said it is not possible to assess the scale of the abortion underground.

The third group presented the most restrictive opinion. They stressed that the Act is too liberal and the indications for terminating pregnancy are very rare. In their point of view in the majority of cases the woman should give birth, even if the foetus is going to die after birth.

The last, liberal group said the Act is too restrictive and its form causes the growth of the unregulated, illegal abortion. These respondents saw its faultiness in political ideology which is far from the reality. In the last group, which turned out to be the biggest opponents of the Act, two very interesting comments were made:

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<sup>110</sup> Domaradzka, A., Report of the expert research with gynaecologists and midwives in: *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W. Nowicka, March 2008, p.71

*"Emotional arguments and not scientific ones are used, and ideological language dominates. There is no tendency to rationalise this question, the losses and gains are not calculated, they do not think about the future of, for example, children with Down's Syndrome."*

*"The Act is ideological but it is not controllable. The medical indications should be extended to include psychological and psychiatric indications."*

The next issue analyses the proceedings undertaken by medical and disciplinary courts and the Disciplinary Court Spokesman. Their negligence in legal activity have been noticed by the Helsinki Foundation for Human Rights and analysed by journalist Krzysztof Sobczak in daily newspaper "Rzeczpospolita". This article reminds the case of Barbara Wojnarowska, who was waiting 1826 days for court decision about her right to get the reference for prenatal testing. At the end, Ms Wojnarowska learned that her case is overdue. Barbara and Wojciech Wojnarowski, as explained in national case law before, had to go through the whole legal path in Poland and at its end they received the compensation by winning the case and considering the physician guilty by the Highest Court. However, the legal procedures in medical chamber courts were in a very bad condition, according to the journalist.<sup>111</sup>

According to art.17 Polish Constitution professions characterised as publicly trusted, among which the physicians are placed, can create local chambers which play the representative and controlling role. Thus the medical environment created local chambers and disciplinary courts. To one of those, Ms Wojnarowska pledged her case in order to legally decide whether the physician that denied her the prenatal tests, violated the law. The disciplinary court was expected to conduct an investigation and punish the doctor disciplinarily in case of a breach of the law. However, the court did not state anything and the whole 5 years spent on internal correspondence. The investigation was conducted very slowly; the head spokesman suspended it twice. Twice the General Medical Court did not understand the cause and ordered to resume the investigation. The third time the head spokesman did not even have to explain himself, as the case was already overdue.<sup>112</sup>

Professor and advocate Zbigniew Holda complains on the very short time the investigation is overdue and indicates the 10 years' time-frame, which already requires the investigation in

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<sup>111</sup> Sobczak, K., *Helsińska Fundacja Praw Człowieka krytykuje zasady postępowań dyscyplinarnych. Lekarska Temida przed Trybunał Konstytucyjny* [HFHR criticizes the rules of disciplinary trials. Medical Temida in front of the Constitutional Tribunal], *Rzeczpospolita*, August 9, 2006

<sup>112</sup> Bodnar, A., Bernatt, M., Paprocka, A., *Skarga do TK w sprawie odpowiedzialności dyscyplinarnej w samorządzie lekarskim* [Complaint to Constitutional Tribunal according to disciplinary responsibility in the medical court], communiqué of the Helsinki Foundation for Human Rights, posted July 28, 2006

criminal law. The five years period, he says, is too short and enables the investigation to be conducted only as a façade and in result protecting the good name of suspected doctor.<sup>113</sup>

In available statistics, kept by patient organisation Primum Non Nocere, there are app. 20-30 thousands malpractices, among which 90% is suspended and in those which are held in front of the court one out of ten doctors are pledged guilty.<sup>114</sup> According to the head of the patients' organisation, Adam Sandauer one should not expect a lot from courts that state against their colleagues.<sup>115</sup>

### 3.7. Conclusions

The above mentioned examples of dramatic life situations of three Polish citizens prove the difficulty the Polish courts have in valuing and assessing claims in the area of reproductive rights. Moreover, it is usually the so called “human factor” that is the attitude of prosecutors, policemen or even judges where the emotional rather than scientific arguments dominate and the behaviour (even on duty!) is extremely unilateral. From the research conducted by the Federation of Women and Family Planning, very interesting summary came from one of the respondents, describing the current situation in Poland: *the Ministry of Health does not guarantee access to some of the services due to ideological reasons, depending on the conjuncture – this concerns abortion and prenatal tests. This shows that the state policy can have a direct influence on real access to some of the services which women in Poland have a right to.*

The disciplinary courts were given an exceptional status in order to solve environmental issues but also solving cases with their consumers – patients. Prof. Zbigniew Holda pledged a constitutional complaint on law requiring the 5 year time frame in which the disciplinary courts are allowed to conduct the investigation. In his opinion this state of law violates the art.45 Polish Constitution assuring Polish citizens with right to justified and public trial without unjustified delay. This indictment focuses on few dimensions:

- At first it accuses the art.51 p.4 of the legal act from May 17, 1989 about medical chambers of breaching the polish Constitution by not providing adequate time frame for the penal investigation what deprive the patients of the right to the justified trial

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<sup>113</sup> Sobczak, K., *Helsińska Fundacja Praw Człowieka krytykuje zasady postępowań dyscyplinarnych. Lekarska Temida przed Trybunał Konstytucyjny* [HFHR criticizes the rules of disciplinary trials. Medical Temida in front of the Constitutional Tribunal], Rzeczpospolita, August 9, 2006

<sup>114</sup> Idem

<sup>115</sup> Idem

- Second, it questions the role of the Spokesman, who plays a role of a prosecutor in medical proceedings and should uptake all means in order to conduct the justified trial
- Third, accusing party indicates the medical chambers act, in the medical responsibility issue, art.57 p.2 does not precise important issues as the status of parties in the investigation, the status of victim, public character of the case, the manner of decision announcement or the participation of non-governmental organisations in the trial.
- At last, according to the accusing party, there are number of regulations breaching the constitution, as: the restriction of open proceeding in front of the medical court, unpublicised access to the trial decisions, or the legal status of the victim which is not a party in the trial and has very minor competences<sup>116</sup>

The constitutional complaint points out the problems in the functioning of the medical disciplinary courts. The Helsinki Foundation for Human Rights also communicated that to Minister of Health, Minister of Justice and to members of parliament in order to consider legislative activity in that matter. However those appeals did not bring enough effects, as there has not been implemented any change in the medical disciplinary courts legal status.

What is even more, the issue of reproductive rights should include the social aspect; it is very intimate and difficult for majority of women. Many cases of rape are not claimed and many court cases are not public, as the taboo around women`s sexual life is a great obstacle preventing them to execute their rights in reproductive health as accessing the medical services they are entitled to.

Thus the legal path that last so long can be a very emotional period for women, who are not being protected well enough. There is a need to change not the state of law, but the state of its practice, which is the biggest issue in the Polish legal system. As seen in the example of Ms Wojnarowska, the disciplinary courts do not fulfil their obligations in assuring citizens with adequate protection of their rights in the environment of physicians, not because there are not enough requirements to do so, but because of cronyism and environmental corruption. That behaviour is very dangerous and as seen from many cases it can lead to serious social consequences, health disorders, or even death, as the case of Z. vs. Poland will prove.

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<sup>116</sup> Bodnar, A., Bernatt, M., Paprocka, A., Skarga do TK w sprawie odpowiedzialności dyscyplinarnej w samorządzie lekarskim [Complaint to Constitutional Tribunal according to disciplinary responsibility in the medical court], communiqué of the Helsinki Foundation for Human Rights, posted July 28, 2006

#### 4. International conventions and treaties

Since the post II World War Nuremberg trials there was a growing need to guarantee by law the protection of human health. Human Rights Declaration of 1948 and following covenants as the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights created a universal set of human rights around the globe. Among all areas of a societal system the health care sector can be named as very specific due to current developments, globalization and the increased expenditures of health care sectors in different countries. It requires special attention by international and national political bodies.<sup>117</sup>

World Health Organisation as a United Nations pillar dedicated to health issue created a universal definition of health that imposes obligations of the states` governments:

*Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.*

General Comment on health named these obligations as: the obligation to respect meaning that member states are prohibited to act in the contrary to the stated rights and freedoms, second is the obligation to protect which means the states are expected to undertake legal and political activities in order to provide tools and means for its citizens to have these rights protected, the last obligation from the GC is the obligation to fulfil, that is facilitation, provision and promotion of their rights. This set of requirements is important to fulfil the right to health principle and guide the member states in realisation of the rights.<sup>118</sup>

Additionally, Poland as member state of the European Union and the Council of Europe has special requirements to fulfil on the continental level, namely the resolutions of the European Convention of Human Rights and Fundamental Freedoms (1950), the Social Charter from 1961 or European Council`s Regulations. The ratified international legal acts are also sources of law, what was confirmed in August 1990, when Poland acceded to the Vienna Convention of 1969 on the Law of Treaties, which stipulated: *Every treaty in force is binding upon the parties to it and must be performed by them in good faith and a party may not invoke the provisions of its internal law as a justification for its failure to perform a treaty.*<sup>119</sup> Polish Constitution set a legal basis for ratified documents by article 88 of the Constitution form 1997:

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<sup>117</sup> Den Exter, A.P., *International Health Law and Ethics; Basic Documents. Maklu 2009, p.11*

<sup>118</sup> Idem

<sup>119</sup> Art. 26 and 27 from Vienna Convention of 1969 on the Law of Treaties

*The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.*

The fact that Poland ratified the European Convention of Human Rights has led to legal complaints application in the European Court of Human Rights in Strasbourg, including petitions in connection with reproductive rights. So far only a few of them have ended with a court decision in favour of the plaintiffs (the case of A. Tysi c and R.R.).<sup>120</sup>

#### **4.1. European Convention on Human Rights and Fundamental Freedoms**

On the basis of the Convention there does not exist the right to health care at a defined level. The Convention does not guarantee access to any particular technology or services connected with reproductive health. The state-party of the Convention are required only certain duties regarding these services, which arise from other regulations of the Convention.<sup>121</sup> Nevertheless, the Act provides rights that can be connected with cases of reproductive health.

**Article 2 of the Convention – The right to life.** This regulation can be applied when a woman is refused to terminate pregnancy despite the fact that the continuation of the pregnancy puts her life at risk, or also when it is required to treat a life-threatening illness. In the case of death, the duty to explain all the circumstances of the case belongs to the state. This positive duty also covers the necessity to establish an independent and efficient judicial system which will make it possible to investigate the cause of malpractice or death of the patients and bring to justice the persons responsible for the inadequate professional help. This article has been raised in the case of Z. against Poland, where Z. as a plaintiff pledged a case against Polish state under Article 2 claiming the state failed to secure a legal framework that would have prevented the death of her daughter. She especially challenged the manner in which the law governing conscientious objection has been regulated.

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<sup>120</sup> Zielinska, E., *Review of Polish legal regulations on reproductive rights*, in: *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W. Nowicka, March 2008, p.16

<sup>121</sup> Bodnar, A., *Case-law concerning the lack of availability of services for terminating pregnancy in Poland* in: *Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W. Nowicka, March 2008, p.57



**Article 3 of the Convention – prohibition of torture, inhuman or degrading treatment.**

Naturally there is no definition of torture or inhuman treatment as it is very subjective issue for every case concerned by the European Court of Human Rights in Strasbourg. Like in the example of Alicja Tysiac, it can be claimed that the refusal of access to certain services or lack of advice, can cause violation of Article 3 of the ECHR Convention. Similar situation can be found in the case of R.R. The ECHR court found the Polish state guilty of not fulfilling this law by not providing access to prenatal testing, which resulted in giving birth to child with Turner syndrome by R.R. – her prenatal tests were voided by doctors and thus postponed the time within which the abortion could have been carried out.

**Article 6 of the Convention – the right to a fair hearing.** Individuals have the right to a fair hearing in two cases – when pursuing their rights and duties of a civil character and when appearing as an accused in a criminal case. In many examples of case law, this right was the subject of a case, as courts failed to provide women and their families with scientific rather than emotional trials and decisions. Almost all the cases filled into ECHR bring up this article, as the plaintiffs feel their legal path within national remedies is not objective as they meet many obstacles, especially in the area of reproductive rights where the arbitrary judgements can be common in a Catholic country as Poland. Nevertheless the ECHR very seldom makes use of this article as seen in the examples of case law (check A. Tysiac and R.R.)

**Article 8 of the Convention – the right to respect for private and family life.** This right covers the right of respect for the mental and physical integrity of a given person and includes issues regarding pregnancy. This right means also the positive obligations of the state in taking action and creating policies guaranteeing execution of this law. A good example of executing this law can be seen in the European Court of Human Rights' decision from March 2007. In this court's opinion on the basis of this law Poland had failed to secure rights to Alicja Tysiac by not performing the legal abortion and by that posing her health and life at risk. In the case of R.R. Poland again lost the case due to lack of interventions forcing the doctors to carry out the prenatal tests where there were grounded suspicions the R.R.'s foetus suffered severe genetic malformation.

**Article 13 of the Convention – the right to an effective remedy.** In the circumstances when the individual is denied the possibility to benefit rights guaranteed by the Convention, she/he ought to have the possibility to an effective remedy in front of a national authority, to deal



with the merits of the complaint and to grant effective relief. This aim is served by the Article 13 of the Convention and can be significant in exercising the accessibility of various types of services in the scope of reproductive health. That law is very often raised in front of the ECHR court aside the article 6 and/or art. 8. However, in many cases the court does not see the need to hold a separate judgement on the basis of this article when the mentioned two had been failed.

**Article 14 – non-discrimination principle.** This article can be used in situations with ethical and minorities related issues, as in cases of Roma women being sterilised on compulsory basis, as in the case of A.S. vs Hungary, where the non-discriminatory principles were brought up due to ethnical, Roma roots of A.S. who was sterilised without an informed consent (as the consent form was written in Hungarian which was not understood by A.S.)

For the last 10 years Poland has experienced a significant increase in judicial trials in both national and international courts in area of reproductive health and in particular, the most important problem in this sphere – the lack of access to abortion despite having a right to it arising from the Article 4a of the Act on Family Planning.<sup>122</sup>

The following cases prove that the European Convention of Human Rights can be used successfully as an instrument to pursue rights connected with reproductive health.

#### 4.1.1. Alicja Tysiac vs. Poland

Alicja Tysiac became pregnant, for the third time, in February 2000. The children she already had: Krystian, aged 7 that time and Patrycja (6) were brought up by Tysiac alone. Ms Tysiac has been suffering from severe myopia (-20 diopters in each eye) for many years, her sight had been in bad condition since she had been born.<sup>123</sup> When she discovered the pregnancy she became very concerned about her eyes and well-being of Krystian and Patrycja: “People cannot imagine what kind of fear was filling my mind while thinking about losing sight. I

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<sup>122</sup> Bodnar, A., *Case-law concerning the lack of availability of services for terminating pregnancy in Poland in: Reproductive Rights in Poland, the effects of the anti-abortion law*, joint work report edited by W. Nowicka, March 2008, p.65

<sup>123</sup> *Tysiac vs. Poland* (App no 5410/03) ECHR 20 March 2007

wasn't thinking about the unborn baby, but about the children I've already had.”<sup>124</sup> Ms. Tysiac visited three ophthalmologists and all of them refused to certify that Tysiac's pregnancy is explained for being terminated on the medical grounds despite her concerns and requests. Therefore Tysiac visited her GP who later issued certification that her pregnancy put her health at risk. In April, the second month of pregnancy, Tysiac's sight worsened to -24 dioptries in each eye. On April 26th she had an appointment in a hospital, that she believed would confirm that her health status was endangered and that would earn her the right to terminate the pregnancy. She was examined by head of department Dr R.D. who did not confirm previous examinations and found the lack of incentives to perform abortion. His opinion to unable Tysiac to perform abortion was irrevocable, and eventually she did not find any other way to fight for her right. She wanted to perform the abortion legally, but since there were no possibilities she contacted a doctor who offered her the performing the abortion for 2,000 zlotys. She agreed to that amount but after being examined by the doctor, he wanted 5,000 zlotys because of her health status and possible difficulties. She did not have that amount of money and gave up the fight for performing an abortion. She gave birth to a baby girl on November 8th by the caesarean surgery. After the delivery her sight deteriorated considerably as a result of a retinal haemorrhage.

Ms Tysiac considered her case important not only for her, but also for other women trapped in the middle of law regulations. She lodged a criminal complaint against Dr R.D. basing her case on art.4a about Conditions Permitting Pregnancy Termination from 1993 Act. The prosecutor further requested the preparation of an expert report by a panel of three medical experts (ophthalmologist, gynaecologist and specialist in forensic medicine) from the Białystok Medical Academy. The examinations did not prove a connection between sight worsening and Tysiac's pregnancy. Prosecutor stated that there was no causal link between Dr R.D. actions and the deterioration of the applicant's vision. Tysiac lodged appeal against that decision to the Warsaw Regional Prosecutor, mainly complaining about the inconsistency in the examinations. She stated that she was examined only by one of the experts and the one that did it, the ophthalmologist did not perform his examinations precisely, because it was done in 10 minutes. Other experts, like gynaecologists did not examine her at all. Even though, the Warsaw Regional Prosecutor upheld the previous decision of District Prosecutor and discontinues the investigation. In final decision from August 2nd with no further appeal,

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<sup>124</sup> Rowicka, B., *Prawda o Alicji Tysiac* [The truth about Alicja Tysiac], Newsweek.pl, accessed on 23.09.2011: <[http://www.newsweek.pl/kobieta/artykuly/ja\\_kobieta/prawda-o-alicji-tysiac,47871,2](http://www.newsweek.pl/kobieta/artykuly/ja_kobieta/prawda-o-alicji-tysiac,47871,2)>

the District Court decided to discontinue the investigation and stated that ‘the refusal to terminate the pregnancy had not had a bearing on the deterioration of the applicant's vision’. Moreover, the Court did not mention the applicant`s complaint about procedures inconsistency. After losing those cases Tysiac lodged her complaint against dr R.D. in disciplinary court of Chamber of Physicians. Unfortunately for her the Chamber did not find any disciplinary violations. That time Tysiac`s case became publicly known and her personal details were used by many media to show society`s disapproval for her behaviour especially by wanting to perform an abortion. By that time Tysiac was struggling with taking care of her three children with eyesight disability which made her unable to see anything in the distance of more than 1,5m. Polish Medical Panel considered her disability as significant<sup>125</sup> and on that ground she receives a monthly pension of 540 zlotys that is approximately 135 euros.

As all the possibilities to seek for justice have been exhausted within the national courts on the January 15th 2003 Alicja Tysiac lodged complaint against Poland to the European Court of Human Rights in Strasbourg. She explained that not allowing her to terminate pregnancy, bearing in mind risk she was exposed to, can be considered as violation of art.3, 8, 13 and 14 of the European Convention of Human Rights and Fundamental Freedoms from 1950. On June 2nd 2005 Federacja na Rzecz Kobiet I Planowania Rodziny (The Polish Federation for Women and Family Planning) and Polish Helsinki Foundation for Human Rights helped Tysiac receiving her just satisfaction as a court`s opinion friendly institutions.

On the March 20th 2007 Chamber of seven judges of the European Court of Human Rights decided the following:

- by six votes to one, that there had been a violation of Article 8 (right to respect for private life) of the European Convention on Human Rights what was based on observation that under the 1993 Pregnancy Termination Act performing abortion was legal and lawful as it posed at risk the woman`s life or health. Knowing the circumstances of the case as a whole, Court concluded that Poland had failed to secure Ms Tysiac`s right to respect her private life and by that breached art. 8 of the Convention

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<sup>125</sup> Polish social law stipulates situation where citizen is disabled and by that unable to obtain any form of occupation and Medical Panel estimate the level of disability and by that grant a pension (PL - renta)

- unanimously, that there had been no violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention

The court stated Ms Tysiac 25,000 euro in respect of non-pecuniary damage and EUR 14,000 for legal costs and expenses.<sup>126</sup>

#### 4.1.2. R.R. vs. Poland

In early December 2001 R.R. went to Dr. S.B. in a hospital in the city of T. After an ultrasound scan, S.B. estimated R.R. was in the 6<sup>th</sup> or 7<sup>th</sup> week of pregnancy. A few weeks later, on January 23<sup>rd</sup> and February 20<sup>th</sup> 2002 other scans were performed and on the latter date S.B. estimated that the foetus may be affected with a malformation, and thus informed R.R. about that. The patient stated she would like to have abortion in case the suspicion was confirmed. Subsequently, she went to hospital in T. for the third ultrasound scan, where it was confirmed that the foetus was suffering from some, yet undefined, malformation. Thereof a genetic examination of amniocentesis was recommended by Dr O. in order to confirm or dispel the suspicion. In the meantime R.R. had another ultrasound scan in a private clinic where the results again confirmed likelihood of an unidentified malformation. Genetic tests were recommended once again. Professor K.Sz., a specialist in human genetics, recommended that the applicant should obtain a formal referral from her family doctor, S.B., to have the test carried out in a public hospital in Łódź, which was outside her region, but with the recommendation it would be covered by the Universal Medical Insurance Fund.

Subsequently, S.B. refused to issue a referral, because in his view the foetus' condition did not qualify the applicant for an abortion under the provisions of the 1993 Act. At this point of the case, the Polish Government submits that no reference was made that the foetus may be affected with the Edwards syndrome, and R.R. disagreed as she stated that during that visit she was told that the scan rose to a suspicion of either Edwards or Turner syndrome. In the first week of March 2002 R.R. and her husband visited S.B. during his night duty at the hospital in T. They demanded termination of the pregnancy. He refused and indicated that the results of the ultrasound scan could not be treated as a sole ground for diagnosis that the foetus was affected with severe malformation. He proposed having a panel of doctors from the same hospital review his decision. R.R. refused.

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<sup>126</sup> *Tysiac vs. Poland* (App no 5410/03) ECHR 20 March 2007

Later, on 11 March 2002 the applicant was admitted to a public hospital in T. and requested advice. She was told that a decision on termination could not be taken at that hospital and was referred to a university hospital in Kraków, to a pathological pregnancies ward, in another region, for further diagnosis. However, during her stay in the hospital in T. a hospital lawyer was asked to give an opinion with a view to ensuring that the laws on the availability of legal abortion were respected. The lawyer said that termination of pregnancy would entail a serious risk to her life and that the two caesarean births which she had previously had constituted the most important risk factor in deciding whether she should have a genetic test at all.

On March 14<sup>th</sup>, immediately after being discharged from the T. hospital, the applicant travelled 150km to Kraków. She went to see Dr K.R. at the Kraków University Hospital. He criticised her for contemplating an abortion. Moreover, she was informed that the hospital categorically refused to carry out abortions and that no abortions had ever been performed there for the last 150 years. She was also refused a genetic examination by Dr K.R. that stated it was not necessary in her case. She stayed in the hospital for three days and had another ultrasound scan performed, the results of which were inconclusive. R.R. went through urine and blood tests. She was discharged on March 16<sup>th</sup>, 2002 with a record that stated that the foetus was affected with developmental abnormalities. The same was stated in a medical certificate signed by Dr K.R. He recommended genetic testing in order to establish the character of the ailment. Later on, on March 21<sup>st</sup> R. again contacted Professor K.Sz., who had examined her in February. Another ultrasound scan was performed in a private clinic where Professor K.SZ. saw patients with a confirmed suspicion of malformation. R. obtained a referral from the professor to the Mother and Child Hospital in Łódź, but he informed her that he was in fact not competent enough to issue it. The professor told her that in order to have a genetic test carried out in Łódź, which was outside her region, she needed a referral issued by a doctor practicing in her region and, in addition, an approval by a regional insurance fund, together with an undertaking that it would reimburse the costs of the test to the regional fund where the test was to be performed. Subsequently, on March 22<sup>nd</sup>, 2002, she asked Dr K.R. for a referral. Then she was told by him that she would not obtain the referral for testing because if the results were positive she would want to have an abortion. Afterwards, on the same day, she again unsuccessfully asked Dr S.B. for a referral to the Łódź hospital. Two days after that R.R. went to the Łódź Mother and Child Hospital without a referral where genetic test (amniocentesis) was performed on March 26<sup>th</sup>, 2002, in the 23<sup>rd</sup> week of her pregnancy. She was told that she had to wait two weeks for the results.

Just after being discharged from the hospital (where the results were still not available) she wrote a written request for abortion to the hospital in T., as she was desperately afraid that the foetus suffered some serious abnormalities. Dr G.S. told her that he could not take such a decision himself. He had to speak with the consultant. R.R. sent two more complaint letters before receiving the test results that stated:

*“A chromosomal aberration and an ultrasound image were established, indicating the presence of congenital defects which can have a serious impact on the child’s normal development. Further handling of the case under the provisions of the 1993 law on termination of pregnancy can be envisaged. A relevant decision should be taken with due regard to the parents’ opinion”.*

However the doctors in the T. hospital refused to carry out an abortion, Dr G.S. telling her that it was too late by then as the foetus was able to survive outside the mother’s body at that stage. In April 2002 the R.R. and her husband submitted a number of complaints to various health care system institutions. In a reply from the Ministry of Health, dated May 16<sup>th</sup>, 2002, it was stated that “it was impossible to establish on the basis of the available documents why the genetic tests were postponed until February 28<sup>th</sup>, 2002 when the foetus had already become capable of surviving outside the mother’s body.” Next she received a reply from the T. hospital to her letter complaints where were the facts of the case and quoted provisions of the 1993 Act. No assessment of the lawfulness of the conduct of the medical staff involved was made. On July 11<sup>th</sup> R.R. gave birth to a baby girl with a Turner syndrome.<sup>127</sup>

On July 31<sup>st</sup>, 2002 the applicant requested the prosecuting authorities to institute criminal proceedings against the persons involved in her case. She alleged for serious failure on the part of the doctors to safeguard her interest in performing timely prenatal examinations. As a result, the applicant had been denied information on the foetus’ condition and, consequently deprived of the possibility to decide for herself whether or not she wished to legally terminate her pregnancy. One can say she had been forced to continue it.

Next, on December 16<sup>th</sup>, 2002 the Tarnów District Prosecutor discontinued the investigations, finding that no criminal offence had been committed. The prosecutor relied on an expert opinion prepared by the Białystok Medical University, according to which under the 1993 Act legal abortion was possible only when foetal malformation was severe. However, according to this expertise, it was not possible to assess whether malformations of a foetus were severe

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<sup>127</sup> R.R. v. Poland (Application no. 27617/04) ECHR 26 May 2011

enough to justify an abortion until the foetus was able to live on its own outside the mother's body. On January 22<sup>nd</sup>, 2003 the Regional Prosecutor allowed her appeal and ordered that the investigation be re-opened with additional medical evidence. Nevertheless, on December 5<sup>th</sup>, 2003 the prosecutor again discontinued the investigation, finding that no criminal offence had been committed.

After this decision, the applicant appealed once again, complaining, *inter alia*, that the prosecuting authorities had failed to address the critical issue of whether genetic tests should have been carried out in order to obtain a diagnosis of the foetus' condition. Instead the investigation had focused on whether or not the applicant had a right to an abortion under the applicable law. On July 11<sup>th</sup>, 2008 the Supreme Court allowed her cassation appeal, quashed the judgment of the appellate court in its entirety on grounds of substance and ordered that the case be re-examined. The Supreme Court noticed that the applicant's claim was two-pronged: it was based firstly on the failure to refer her for genetic testing and, secondly, on the breach of her right to take an informed decision which resulted from this failure.

According to the first part of her claim, the Supreme Court observed that it was obvious (and had been confirmed by an expert opinion) that only genetic testing could confirm or dispel suspicions that the foetus was affected with a genetic Turner syndrome. The doctors concerned had known of the procedure. They were obliged, under the Medical Institutions Act 1992 to refer the applicant for genetic testing of their own motion, without her asking for it. Under the same Act, the applicant had a legally protected right to obtain precise information about the foetus' health. If the doctors had conscientious objections to issuing a referral, they should have informed the applicant about it and referred her to another specialist who would have referred her for the prenatal testing. They were expected to act in accordance with the applicable laws on the medical profession governing this procedure, but they had failed to do so.

The Supreme Court stated that there were therefore good reasons to accept that the doctors dealing with the applicant's case had breached her personal rights within the meaning of the Article 24 of the Civil Code<sup>128</sup> and her patient's rights guaranteed by the Medical Institutions Act. They had been aware that only genetic testing was capable of determining the foetus'

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<sup>128</sup> Article 24 § 1. The person whose personal interests are threatened by another person's activity may demand the cessation of that activity unless it is not illegal. In case of an infringement he may demand that the person who committed the infringement perform acts necessary to remove its effects and in particular to make a statement of an appropriate contents and in an appropriate form. On the terms provided for in this Code he may also demand pecuniary compensation or an appropriate sum of money paid to a specified public purpose.

genetic situation, but had still refused to issue a referral. However, they had sent her for various tests in a hospital where such a diagnosis was not carried out.

Moreover, the lower courts had stated in their decisions that the applicant did not suffer non-pecuniary damage as a result of the doctors' acts. Such damage had been caused by the distress, anxiety and humiliation R.R. had suffered as a result of the manner in which her case had been handled.

As to the second part of the applicant's claim, the Supreme Court observed that it transpired from the case-law of the Supreme Court<sup>129</sup> that a right to be informed about the foetus' health and to take informed decisions, in the light of that information, as to whether to continue the pregnancy or not was a personal right within the meaning of the Civil Code. If a child affected with a genetic problem was born as a result of failure to carry out genetic testing, a claim for just satisfaction arose on the parent's part. The lower courts had erred in that they had found that there was no adequate causal link between the doctors' conduct in the applicant's case and the fact that she had not had access to legal abortion. According to this the court noted that there had been enough time between the 18<sup>th</sup> week of the pregnancy, when the suspicions had arisen, and the 22<sup>nd</sup>, when the time limit for legal abortion had expired, to carry out genetic testing. When the tests had finally been carried out, the applicant had received the results two weeks later. The tests should therefore have been carried out immediately after the suspicions had arisen, but instead, as a result of postponement on the part of doctors S.B., G.S. and K.R., they had ultimately been conducted much later.

In the case of *R.R. vs Poland* there are issues considered which were not resolved in the case of *Tysic vs Poland*. Above all, the applicant claims that the proceedings in relation to her constituted an example of degrading treatment since she was unaware of the health of her foetus and was denied the appropriate tests in a timely manner. This constitutes a violation of the Article 3 of the Convention, since the state examined in an insufficient way the claims raised by her about her degrading and inhuman treatment. It also raises the violation of positive and negative obligations of the state arising from the Article 8 of the Convention. R.R. did not receive on time the possibility to carry out prenatal tests, which would have allowed her to state whether in her case there were indications for performing an abortion based on the Article 4a of the *Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy*. In this regard this is a case similar to the case of

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<sup>129</sup> Supreme Court judgement IV CK 161/05, 13 October 2005



B. & S. Wojnarowski, where also the main problem consisted not so much in the refusal to perform an abortion, but rather the tests which would have permitted the termination of pregnancy.

R.R. also raised the charge of violation of the Article 13 of the Convention (the right to effective means of appeal). According to her opinion, in Poland there are no procedures which allow a resolution of the conflict between the opinions of the patients and doctors about whether genetic tests are necessary or not.

The case of R.R. constitutes a model case in which the applicant used the legal possibilities available to her on the basis of Polish law – making an accusation of a crime committed by the doctor and also a civil suit for damages for violation of personal interest. In the R.R.'s opinion the national mechanisms are ineffective and this is why she has decided to file a complaint to the European Court of Human Rights.

In the ECHR's judgement the Court confirmed the view that the R.R. was suffering, both before the results of the tests became known and after that, as the diagnostic services which she had requested on were at all times available (financially and physically) and that she was entitled as a matter of domestic law to avail herself of them.

*"It is a matter of great regret that the applicant was so shabbily treated by the doctors dealing with her case"* commented the Court and shared the view of the applicant that the minimum threshold of severity under the Article 3 of the convention has been reached and thereof a breach of that provision was noticed in Poland.

The Court has previously found, citing with approval the case-law of the former Commission, that the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy. Consequently, also legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus. Thus the court concludes that the authorities failed to comply with their positive obligations to secure to the applicant effective respect for her private life and that there has therefore been a breach of the Article 8 of the Convention.

#### 4.1.3. Z. vs. Poland

Z., who is an applicant, in that case seeks for justice in the European Court of Human Rights on behalf of her dead daughter, Y who found out in May 2004 that she is pregnant. Prior to or during the early stages of the pregnancy Y. developed ulcerative colitis and was experiencing symptoms of that disease – nausea, abdominal pains, vomiting and diarrhoea. Those symptoms were causing pain and discomfort and she was repeatedly admitted to hospitals all around Poland – the total number of entities visited was counted as 12. She was formally diagnosed with UC in early June 2004, however, certain examinations as second endoscopy and especially colonoscopy which would ascertain the disease and its extent were not performed. Y. received some diagnostic tests and she was given a pharmacological treatment with steroids and antibiotics. On July 2004 she was diagnosed with abscess and she went under three surgeries in order to remove it.

Applicant of the case, Z. states that during her daughter's stay at the Surgery Department of the Specialist Hospital in Pila, the Head of the Department said: "it is absurd to treat an abscess for a whole week. [Y] is too busy with her bottom, instead of taking care of something else" and was referring to her pregnancy, what humiliated and angered Y. At another hospital visit, in M. Pierogow Regional Specialist Hospital in Lodz in August 2004, a physician refused to perform a full endoscopy saying: "my conscience does not allow me", but he did not formalize his objection and therefore did not direct the patient to another doctor that would be willing to perform the examination. He only justified not performing a full endoscopy by the fear of endangering the life of the foetus. During next visits, Y.'s fiancée urged the doctor at the clinic in Lodz to perform any necessary treatment, irrespective for the life of the foetus, to save Y's life. These demands did not produce any result. The applicant's daughter lost the foetus on September 5<sup>th</sup> 2004 and died on September 29<sup>th</sup> of septic shock caused by sepsis.<sup>130</sup>

The investigation started on December 6<sup>th</sup> when the applicant's lawyer asked the Lodz District Prosecutor to institute proceedings about the Y's death. 6 months later, the Regional Agent for Disciplinary Matters instituted a disciplinary proceeding against the doctors who treated Y. After consulting several experts and hearing witnesses, he concluded that there was no evidence of medical malpractice and discontinued the proceedings. In this stage of the case, the applicant submits the prosecutor did not obtain the necessary information, such as full medical records, to assist experts in forming their opinions. Moreover, according to the

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<sup>130</sup> Z. v Poland, European Court for Human Rights (Application no. 46132/08), 19 June 2009

applicant the national investigation was focused on whether an abortion was necessary to provide appropriate treatment to her daughter and not on the circumstances of Y's health, for example if there was a medical need to perform the colonoscopy.

Additionally, in 2005 the Minister of Health established a special expert committee to investigate Y's treatment and her death circumstances. The committee concluded that the death had been directly caused by sepsis.

On June 11<sup>th</sup>, 2008 the prosecutor discontinued the investigation, concluding that on the ground of the experts' opinions, there was no basis for any doubts or objections as to the treatment received by the applicant's daughter, and no direct link between the treatment and death of the applicant's daughter had been established. The applicant appealed. On September 5<sup>th</sup>, 2008 the District Court discontinued the proceedings. Meanwhile, in September 2007 the applicant had brought a compensation claim in the Łódź District Court against the M. Pierogow Regional Specialist Hospital in Łódź. The civil proceedings are still pending.

The ECHR brought up the relevance of the Article 39 of the Medical Profession Act, saying that the doctor may refuse to carry out a medical service, invoking objections on the ground of conscience. However, as the court explained, he or she is obliged to inform the patient where the medical service can be accessed and to write a note concerning the refusal in the patient's medical records. Doctors who are employed in health-care institutions are also required to inform their supervisors in writing about the refusal.

The applicant complains on the basis of the Article 2 that the state failed in prevention of the death of her daughter. She specifically stresses the manner in which the law of conscientious objection is regulated and overseen and under the same article that the doctors treating her daughter failed to carry out the necessary diagnostic tests and to provide the treatment her daughter required. Furthermore, the applicant alleges under the Article 8 that her daughter was subject to inhuman and degrading treatment as a result of the doctors' refusal to undertake necessary medical services. Y stipulates that the doctors did not provide her and her daughter with reliable and timely information about her daughter's health. She further complains about the conscientious objection rule and about her lack of access to the relevant medical records. Moreover, the applicant submits under the Article 14, in connection with the Articles 2, 3 and 8, that her daughter was discriminated on the ground of her pregnancy. In the end the applicant complains under the Article 13 that the authorities failed to carry out a competent investigation.

This case is still pending to be resolved, as the ECHR posed questions to the involved parties of the case.<sup>131</sup>

#### **4.2. Convention on the Elimination of All Forms of Discrimination against Women**

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted by the United Nations General Assembly on 18 December 1979. It entered into force as an international treaty on 3 September 1981 after the twentieth country had ratified it. This treaty is especially important for this thesis topic, as this is the only international treaty that explicitly supports women's reproductive rights. By the tenth anniversary of the Convention in 1989, almost one hundred nations have agreed to be bound by its provisions, among which stands Poland. On the basis of this treaty, Poland is obliged to include information and advice on family planning in the education process<sup>132</sup> and to develop family codes that guarantee women's rights "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights".<sup>133</sup>

##### *Article 5*

*States Parties shall take all appropriate measures:*

*(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;*

*[...]*

*(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.*

*[...]*

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<sup>131</sup> Z v Poland, European Court for Human Rights (Application no. 46132/08), 19 June 2009

<sup>132</sup> Art. 10.h. of Convention on the Elimination of All Forms of Discrimination against Women

<sup>133</sup> Art. 16.e. of idem

*(h) Access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning.*

This article gives the issue of information and setting good examples of social equality a very high importance. However, the case of sexual education described in chapter 3, clearly shows that Poland does not fulfil the recommendations from the art. 12. of CEDAW.

#### *Article 12*

*States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.*

Z vs. Poland case illustrates an example of denying access to health care due to pregnancy of Z.'s daughter. A conclusion can be withdrawn, that Y. (Z's daughter) was deprived of her rights due to her obligation to give birth to a child. As explained previously, there is a dominating stereotype of women as "children-carriers" what can lead, as in this Polish case, to tragedy of death. Poland definitely does not take enough adequate measures to ensure elimination of discrimination.

#### *Article 14*

*1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.*

*[...]*

*(b) To have access to adequate health care facilities, including information, counselling and services in family planning;*

The issue of unequal access to health services or contraceptives due to place of residence is well known by hundreds of thousands of women in Poland, especially living in rural, eastern areas of the country. Moreover, the information in the form of sexual education is substantially abused as the Ponton organisation report proves.

## *Article 16*

*States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*

*[...]*

*(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;*

This point is especially relevant for the Polish situation, as all the cases described indicate the violation of this law. Wojnarowski`s case – lack of information about the health state of the foetus, M.A. case – denying of the abortion, Agata case – violation of privacy, lack of independent information, Alicja Tysiac – not being able to perform the termination, even though medically assessed the danger of losing sight, R.R. – unexplained delay in prenatal tests that would allow her to perform legal abortion, Z.case – death of Z. daughter who was denied life-saving procedure due to her pregnancy.

Polish women cannot decide freely on the number of their children, as very often the public protects the foetus more than the woman carrying it. The debate about the “soul” of the foetus is very vivid and sometimes can be very aggressive, as examples in the 3<sup>rd</sup> chapter showed.

During the 20<sup>th</sup> session of Committee on the Elimination of Discrimination against Women in 1999 determined pursuant to article 21, to elaborate a general recommendation on article 12 of the Convention. This article, as mentioned above, requires States to eliminate discrimination against women in their access to health care services, throughout the life cycle, particularly in the areas of family planning, pregnancy, confinement and during the post-natal period. The most relevant elements of this recommendation to this thesis are explained below.

*11. Measures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.*

This recommendation is especially relevant due to numerous examples of refusing abortions or even the prenatal tests due to conscientious objection (for example Wojnarowski's case, Agata's case, M.A. case and Alicja Tysiac case).

*13. The duty of States parties to "ensure, on a basis of equality between men and women, access to health care" services, information and education implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system which ensures effective judicial action. Failure to do so will constitute a violation of article.*

In case law of Z. vs Poland nor the respect, protect or fulfil the Y's rights to health care have not been fulfilled and by that Poland violated the article of the convention. Pregnancy of Y was more important than her state of health and because of that, doctors denied her the right to abort and caused by that her death. The executive action and policy was not in line with art 12 of the CEDAW convention.

*20. Women have the right to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available alternatives.*

In the Wojnarowski's case, Mrs. Wojnarowska while discovering she is pregnant, requested prenatal tests that would enable her to know whether the foetus has any malfunction, as her previous baby was born with genetic disorder. She was refused these tests by two gynaecologists despite the well-founded suspicion that her baby would be born with similar disorder.

*21. States parties should report on measures taken to eliminate barriers that women face in gaining "access to health care services" and what measures they have taken to ensure women timely and affordable access to such services. Barriers include requirements or conditions that prejudice women's access such as high fees for health care services, the requirement for preliminary authorization by spouse, parent or hospital authorities, distance from health facilities and absence of convenient and affordable public transport.*

Poland does not go in line with this recommendation, as clearly show the example of M.A. who as a rape victim had the right to undergo the procedure of abortion, however the state failed in providing her services in a timely manner what would enable her to terminate the foetus which was a result of a rape.

*23. In their reports, States parties should state what measures they have taken to ensure timely access to the range of services which are related to family planning, in particular, and to sexual and reproductive health in general. Particular attention should be paid to the health education of adolescents, including information and counselling on all methods of family planning. (Health education for adolescents should further address, inter alia, gender equality, violence, prevention of sexually transmitted diseases and reproductive and sexual health rights.)*

As indicated by the Ponton report on Sexual Education, the execution of this recommendation is not fulfilled appropriately. The Preparation to Family Life teachers very often are not educated well enough to deal with sexual rights and spread knowledge to adolescents.

*29. States parties should implement a comprehensive national strategy to promote women's health throughout their lifespan. This will include interventions aimed at both the prevention and treatment of diseases and conditions affecting women, as well as responding to violence against women, and will ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services.*

There is no national strategy aiming at promoting women's reproductive and sexual health, however there are actions aiming at preventing the violence against women, breast cancer and HPV (human papilloma virus).

*31. States parties should also, in particular:*

*(c) Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion;*

Poland does not punish women who underwent abortion; however the social stigma they are facing can be even worse than legal punishments. The recommendation of prioritising the prevention of unwanted pregnancy, however, should play much more important role in Polish state. Due to lack of data the number of women who died after illegal abortion is missing. However, according to



World Health Organisation the decriminalisation of abortion decreases the amount of lethal victims of illegal pregnancy termination.<sup>134</sup>

### 4.3. European Social Charter

At this stage, it should be reminded that Poland as a member of European Union and European council has particular legal obligations coming from this fact. During the last decade there were a number of important reforms introduced as a result of Polish accession to the European Convention of Human Rights and Fundamental Freedoms, as well as Charter of the Self Government. The jurisprudence of the European Court of Human Rights has also played an important role in the 'Europeanisation' of the Polish legal system. However the focus of this thesis would be on the European Councils Social Charter.

Domestic political and economic reforms<sup>135</sup> together with changes in the international environment led, to the signing of the Europe Agreement in 1991. One of the most important legal consequences arising from this has been an obligation to approximate the Polish legal system to the law of the European Communities (European Union).<sup>136</sup> The legal obligation to approximate the legal system with the law of the European Union arises from the Europe Agreement.<sup>137</sup> According to art 68 of the EA:

*The Contracting Parties recognise that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavours to ensure that future legislation is compatible with the Community legislation.*<sup>138</sup>

The process of approximation has a voluntary character, which can be defined as the situation where *a third state adapts its national law to Community law rules which have no binding*

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<sup>134</sup> Warriner, I.K. et al. *Can midlevel health-care providers administer early medical abortion as safely and effectively as doctors? A randomised controlled equivalence trial in Nepal*, The Lancet, 377, Issue 9772, p. 1155 - 1161, 2 April 2011

<sup>135</sup> Menkes, J., *Problemy prawne przystąpienia Polski do UE* [Polish legal issues due to EU inclusion], Najwyższa Izba Kontroli, No 2/1998, p. 48-69

<sup>136</sup> It became even more important when the prospect of EU enlargement became a realistic one, since the accession criteria as specified by the Copenhagen Summit include: a well-functioning free market economy, democracy and rule of law together with adoption of the *acquis communautaire*.

<sup>137</sup> Lazowski, A., *Adaptation of the Polish legal system to European Union law: Selected aspects*, Sussex European Institute, 2001

<sup>138</sup> Idem

*force in relation to that state and in the framing of which state may have had no real participation.*<sup>139</sup>

As noted by Menkes, the lack of *success* in approximation activities shall not be considered as breach of the international treaty (providing that approximation works take place), although it is important to bear in mind the political implications of this.<sup>140</sup> However, as noted by other well know expert in EU law, the approximation task *should mean an obligation to incorporate the respective Community rules into the legal order of the associated country to the fullest extent possible as an important condition of membership in the Union.*<sup>141</sup>

Thus there are few articles from European Social Charter, especially relevant for this thesis. They are the following:

Article 11(2):

*With a view to ensuring the effective exercise of the right to protection of health, the Contracting Parties undertake, either directly or in cooperation with public or private organisations, to take appropriate measures designed inter alia: to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health.*

Article 16:

*With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal, and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.*

As well as the non-discrimination clause in the Preamble of the 1961 ESC taken together with Articles 11(2) and 16: *[T]he enjoyment of social rights should be secured without*

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<sup>139</sup> Evans, A., *Voluntary Harmonisation in Integration between the European Community and Eastern Europe*, ELRev 22(1997) 201

<sup>140</sup> In other words, the breach of obligation of international law will not be lack of approximation of the new Polish legal acts with the Community law, but failure to take best endeavours to achieve this aim. See: Saganek, P., Skoczny, T., *Selected Issues and Areas of Adaptation of Polish Law to the Law of the European Union*, p. 37, Warsaw University Centre for Europe, Warsaw 1999.

<sup>141</sup> Piontek, E., *Central and Eastern European Countries in Preparation for Membership in the European Union – a Polish Perspective*, in: Yearbook of Polish European Studies 1 (1997) 73, Warsaw University Centre for Europe, 1997.

*discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin.*

Article 17:

*With a view to ensuring the effective exercise of the right of mothers and children to social and economic protection, the Contracting Parties will take all appropriate and necessary measures to that end, including the establishment or maintenance of appropriate institutions or services.*

In order to provide case law on the execution of these rights I will use the case of collective complaint from Croatia.

#### **4.3.1. INTERRIGHTS vs. Croatia**

The INTERRIGHTS non-governmental organisation pledged a complaint to the European Council on the violation of article 11 of the European Social Charter and the text of the preamble, stating that the Croatian state breached the principles included in those legal requirements by lack of control over the sexual education curricula of school children and adolescents.

The matter of this complaint contains of three elements:

- Failure to provide mandatory and comprehensive sexual and reproductive health education to the vast majority of Croatian schools
- Support for scientifically inaccurate, biased and discriminatory information to students
- Ineffective oversight combined with inadequate attempts at reform

This complaint is based on concerns over the systematic failure of the Croatian state to provide children and adolescents with comprehensive and unbiased reproductive health education. The Teen STAR teaching curricula is the matter of the biggest critique, as it contains discriminatory, unscientifically based and potentially harmful content as for example:

*Contraception nullifies the essence and purpose of a sexual act, separates the partners' uniting factor (love) from openness to life which is also a natural component of a sexual act;*

*Contraception can, to a certain degree, present protection from infection, but on the other hand it can also give a false sense of security and sooner or later fail the user; Knowledge of female fertility may later be applied in marriage for the purpose of planning a family, that is to avoid or achieve conception, in a natural way, without using chemical or mechanical means; The conclusion is that communication is not as important as certain other qualities of family interaction: a bond, life in a family with both biological parents, the unemployment of the mother.*<sup>142</sup>

The complaint indicates the State's responsibility for implementation of the Teen STAR educational programme, its content and ensuring whether it is in line with human rights obligations. Moreover, the INTERIGHTS highlights the State's obligation to train the teachers ensuring all pupils receive a high quality education. The implications for the sexual health of Croatian young people are serious, as can be read in the complaint text, both in terms of the transmission of STIs (Sexually Transmitted Infections) and appropriate family planning. INTERIGHTS points that current teaching contributes to, rather than undermines the stigma, harassment and discrimination experienced by individuals on the grounds of sexuality, family status or gender.

The Croatian Government replied to these arguments by defending its current sex and reproductive health education system. For example it pointed out that HIV/AIDS prevalence in Croatia is relatively low, that the number of teenage pregnancies has gone down and that the number of abortions among adolescents remains at a stable level.<sup>143</sup>

In its decision, the European Committee on Social Rights explains that art 11 and 12 of the European Social Charter contains a general obligation on the part of the State to provide education with the aim of raising public awareness in respect of health-related matters. One of the frameworks within which that kind of education is to be provided is the school. With reference to one of its Conclusions from the reporting procedure, the Committee explains that health education at schools should be provided throughout the entire time of schooling. It adds that it should cover the following elements: prevention of smoking and alcohol abuse, sexual and reproductive health education, in particular with regard to prevention of sexually transmitted diseases and AIDS, road safety and promotion of eating habits. Subsequently the

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<sup>142</sup>(INTERIGHTS) v. Croatia, International Centre for the Legal Protection of Human Rights, Complaint No. 45/2007

<sup>143</sup> Toebe, B., *Sex education in schools is compulsory and must not give evidence of discrimination of homosexuals – a comment to European Committee of Social Rights, International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Croatia*, (no. 45/2007)

Committee creates a clear framework containing requirements for sexual and reproductive education at schools. According to Brigit Toebe from Netherlands Institute of Human Rights, this framework is not only relevant to Croatia, but also to other Member States, where similar issues may arise.<sup>144</sup> The Committee considers that States must ensure:

- *that sexual and reproductive health education forms part of the ordinary school curriculum;*
- *that the education provided is adequate in quantitative terms, i.e. in respect of the time and other resources devoted to it (teachers, teacher training, teaching materials, etc.);*
- *that the form and substance of the education, including curricula and teaching methods, are relevant, culturally appropriate and of sufficient quality, in particular that it is objective, based on contemporary scientific evidence and does not involve censoring, withholding or intentionally misrepresenting information, for example as regards contraception and different means of maintaining sexual and reproductive health;*
- *that a procedure is in place for monitoring and evaluating the education with a view to effectively meeting the above requirements.*

With reference to the non-discrimination clause in the preamble to the Charter, the Committee adds that the education concerned must be provided to school children without discrimination on any ground, direct or indirect, and that it should embrace the entire range of the educational process. It notes that the education itself should not be used as a tool for reinforcing demeaning stereotypes and perpetuating forms of prejudice which contribute to the exclusion of marginalised groups.<sup>145</sup>

Later on, Dr Toebe refers to the Committee decision, where the situation is assessed in Croatia in light of the above-mentioned framework. The Committee concludes that the

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<sup>144</sup> Toebe, B., *Sex education in schools is compulsory and must not give evidence of discrimination of homosexuals* – a comment to European Committee of Social Rights, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v Croatia*, (no. 45/2007)

<sup>145</sup> Idem

education provided in Croatia is adequate from an organisational and quantitative perspective. Additionally, the Croatian sex education programme meets the requirements and the main standard indicators of reproductive health in Croatia do not give enough evidence to state the bad reproductive health outcomes compared to other European countries.

However, the Committee had difficulties with specific elements in the ordinary curriculum in Croatian schools. It concludes that certain elements are ‘manifestly biased, discriminatory and demeaning, notably in how persons of non-heterosexual orientation are described and depicted.

The conclusion withdrawn from the decision based on this complaint can help to re-check the standards of sexual education in Polish schools, as among many, the Committee recommendations are:

- *Establish a dedicated sexual and reproductive health education as a core element of the national curriculum that meets international standards and best practice.*
- *Ensure content of sexuality education curricula is evidence-based, gender sensitive, non-discriminatory and in accordance with other international standards.*
- *Ensure content of sexuality education curricula enables young people to have access to accurate information necessary to make informed choices about their sexual and reproductive lives and protect their health whilst avoiding perpetuating outdated and discriminatory stereotypes.*
- *Appropriately train and educate teachers on sexuality education.*
- *Subject compulsory and extra-curricular sexuality education programmes to independent and periodic monitoring, inspection and evaluation.*
- *Ensure that approval and/or support of any extra-curricular programmes taught in schools is dependent on the programmes being non-discriminatory and evidence-based.*
- *Ensure that existing and future governmental processes regarding development of a compulsory sexuality education programme is transparent and respects the rule of law.*

#### 4.4. Conclusions

Mentioned cases aim at being relevant examples for the international dimension of the reproductive health issues in Poland. Alicja Tysiac, R.R. and Y. went through a very difficult path of assessing the health facilities they all have been entitled to by law. Their examples clearly show how complicated is the procedure of pregnancy termination in Poland, even if their cases were within the breach of, the so called anti-abortion, law from 1993. In two of three examples Poland failed to secure women`s basic rights as Polish citizens – the right to prohibition of torture, inhuman or degrading treatment and the right to respect for private and family life.

The Act on *Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy*, requires the state to assure women with adequate care especially in situations mentioned by the act that is when the health and life of women is endangered, when the foetus is suffering from malformation or the pregnancy is the result of a criminal activity. In opinions of many international bodies and non-governmental organisations, this law is considered very strict for European standards - but even though the execution of the act is vague and not performed exhaustively. The ethical rule of conscious objection instead of being a form of protection of physicians and specialists` morality play a role of scapegoat, meaning that doctors do not consider women`s situations but avoid the responsibility of treatment by sending women to other facilities, often to ones that do not provide adequate services (as in R.R. vs. Poland). What is even more, the doctors in many situations act immorally by offending women who take into consideration the abortion instead of providing advice and support (as in Z. vs. Poland, Tysiac vs. Poland and R.R. vs Poland).

The lack of fulfilling the CEDAW recommendations implies that Poland is dealing with big problem in the area of reproductive rights of women and there is a lot that has to be done in that area. There is probably number of cases that would prove Polish legal system disability, especially in law execution.

The case of INTERIGHTS vs. Croatia, explained in chapter 4, clearly explains how important the adequate sexual education is and that it might be a subject of concern of international bodies as Council of Europe. The conclusions withdrawn from the European Committee of Social Rights should play a teaching role to the Polish government, who as showed in the PONTON report explained above, does not fulfil the recommendations stated in the

Committees conclusion on the Croatian case. If the Polish state does not follow these recommendations, similar complaint might be pledged against Poland, as the Social Charter clearly indicates the state's obligations in the matter of sexual education.

That is why I believe that situation around sexual education and societal perception needs to be precisely analysed and new steps need to be carried out in order to improve the situation of women and their families in Poland. The last chapter summarises and offers an analysis of the example of Polish abortion access.



## 5. Legal analysis

### 5.1. National conclusions

Above chapters aimed at describing the legal, political and social situation of abortion in Poland. Moreover, an international case law has been added in order to provide a wider, non-arbitrary perspective to the issue of access to abortion procedure in Poland. However, the court cases in front of European Court of Human Rights and Polish courts are just the top of an iceberg – women that went through those legal paths had to express incredible amount of self-consciousness and desperation. They had to explain on eyes of thousands of observers their intimate and very difficult choices, undress emotionally in front of anti-abortionists who used every possibility to attack and offend women who were already emotionally destructed. Thus thousands of women are scared to say out loud about abortion they had or are planning to have. Irrespectively of whether the procedure is permitted by the act or not – as seen above, the lack of societal acceptance of abortion is big and women face many unpleasant comments from various stakeholders – priests, politicians, anti-abortion activists or ordinary citizens. That is why many individual dramas are hidden and the scale of abortion is still unknown. There are just few data that can give a clue how big the scope of underground abortions is.

Table 2<sup>146</sup> is showing a number of legal abortions noted by the state in years 1988-2004, but the most interesting is the number of abortions carried out before the Act of Family Planning was implemented and in 1997 when the Act was temporary suspended. From those 3,047 abortions 2,524 were carried out due to social and economic reasons. Another concerning fact is that the next year the number of abortions conducted as a result of crime increased very significantly, what is concerning as the amount of rapes or incest cannot rise seven times in one year. These facts leave a big area for suspicion and many conclusions can be withdrawn from it.

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<sup>146</sup> The governmental report from 2006, Warsaw 2007,  
[http://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/25/\\$file/25.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/25/$file/25.pdf)

Table 2.

Year	Abortion in general	Threat for mother's health and life	Disease of conceived child	Pregnancy resulting from crime (incest, rape)	Natural miscarriages
1988	105,333				59,076
1989	82,137				59,549
1990	59,417				59,454
1991	30,878				55,992
1992	11,640				51,802
1993	777	736	32	9	53,057
1994	782	689	74	19	46,970
1995	559	519	33	7	45,300
1996	495	457	40	8	45,054
1997	3,047	409	107	7	44,185
1998	310	211	46	53	43,959
1999	151	94	50	1	41,568
2000	138	81	55	2	41,007
2001	124	63	56	5	40,559
2002	159	71	82	6	41,707
2003	174	59	112	3	42,381
2004	193	62	128	3	42,183

Another example showing the scale of abortion in Poland is a simulation carried out by the Federation of Women and Family Planning, where researchers took the amount of abortions carried out in countries as France, Hungary and Slovakia and adjusted them to the proportions of Polish society. In France, which has 62.400.000 citizens there were 203.000 abortions (from various reasons) conducted in 2005 what gives a ratio of 14.6 abortions per 100.000 women in reproductive age. The same was done for Hungary and Slovakia giving 27.9 and 13.9 respectively. If these number were adjusted to Polish reality they could give three possible scenarios:

- If the ratio of abortions were taken from France - 146.000 abortions
- If taken from Hungary – 279.000 abortions
- If taken from Slovakia – 139.000 abortions

When compared with the data provided by the governmental report it is clearly seen that more than 138.000 abortions (in the quite optimistic simulation based on data from Slovakia) are missing. According to Wanda Nowicka 15% of women that perform abortion can afford to go

abroad, creating the so-called touristic abortion.<sup>147</sup> The missing 85% are forced to pay incredible amounts of money for a termination in underground clinics, take pharmaceuticals available on websites or use home methods as physical exhaustion during exercises or self-harm – all of these procedures not controlled by specialists and capable of impose women's health and life.

According to the report from the Federation of Women and Family Planning Anti-Abortion Act's legal protection is not observed. It has neither liquidated nor decreased the abortions in Poland. Pregnancies are being still terminated in the so-called abortion underground. Moreover, instead of protecting women from abuse in the area of reproductive rights, their privacy and other principles are notoriously violated. The implementation of the Act has led to a serious limitation of access to abortion even in the conditions in which it is permitted by law. Pregnancy terminations are practically not carried out at all in public hospitals, especially due to the "gossip" factor – the management of hospitals and public clinics are very afraid of the bad opinion in the medical environment, as seen in the interviews carried out with gynaecologists and other reproductive specialists. Ironically, some of the abortion underground "customers" are women who have the right to a legal abortion but who, for various reasons, were not permitted to execute that right. It is not uncommon that abortion is referred to the underground clinics by physicians themselves to help them avoid the public assessment. That is also why abortion carried out illegally is a common phenomenon. As explained previously, the adequate number is unknown, however the estimations show that it is much bigger than expected by the pro-life organisations, as for example in the Polish Federation of Pro-Life Movement:

*It is very difficult to estimate the real number of illegal abortions in Poland, nevertheless there is no evidence that this number is high. On contrary, the lack of the side-effects connected with abortion such as gynaecological complications indicates that illegal abortion is not a very social problem. All this allows us to put forward a credible thesis that, though illegal abortion is still a problem, it is not a large scale phenomenon, as it was suggested by the Polish branch of the International Planned Parenthood Federation [Federation of Women and Family Planning] Claims of this kind lack any substantial basis, and are aimed at*

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<sup>147</sup> Dubrowska, M., *Polish abortions In clinics around the Europe*, Gazeta Wyborcza 27.08.2010

*misinforming the public, as well as undermining the anti-abortion Act, its purpose and usefulness.*<sup>148</sup>

As we can see, the pro-life organisations try to not overestimate the number of the illegal abortions as this would imply that the anti-abortion act does not serves the citizens in the way it is aimed – meaning in decreasing the overall amount of abortions.

Another fact mentioned previously is the “touristic abortion” which has been noticed in clinics in Europe, especially in England, Netherlands, Germany and Czech Republic, that is in countries where the abortion is permitted due to social and economic reasons. The public debate taking place in 2010 proved that the problem is visible for Polish neighbours. The precise amount is not known but numbers provided by the guests of Wanda Nowicka and Marek Balicki are worrying. What is even more, as explained during the debate, women who are worst-off are especially discriminated in that situation as they cannot afford to go abroad.<sup>149</sup>

Last but definitely not least, an important fact raised in abortions debates is the lack of appropriate knowledge not only within society, but especially among employees of the health services who have the biggest power in the ability of women to access the reproductive health means – contraceptives, tests and procedures as abortion. In other words, the ECHR explained in their decision about the lack of access to prenatal tests<sup>150</sup> that *if the domestic law allows for abortion in cases of foetal malformation, there must be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus' health is available to pregnant women*. That comment highlighted again the positive obligation on the state to ensure the act is in power and aims at protecting women`s health and life.

Respected human rights lawyer, Dr Adam Bodnar, goes in line with above point of view of ECHR. He explained in Gazeta Wyborcza that it is not the ideology which should be debated but the practice of abortion permissibility and creating adequate legal framework which will allow women to access the abortions services when they are entitled by the law to do so.<sup>151</sup> In his comment, he includes the most substantial issues for solving the very difficult dispute of accessing the abortion in Poland. Dr Bodnar stresses the difference between stating of the law

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<sup>148</sup> Polish Federation of Pro-Life Movement, *How the law protects life; Polish way to the right to life law*, p.3 <[www.prolife.com.pl](http://www.prolife.com.pl)>

<sup>149</sup> Relation from the citizen debate “Touristic abortion of Polish women”, Helsinki Foundation for Human Rights, August 29, 2010

<sup>150</sup> R.R. v. Poland (*Application no. 27617/04*) ECHR 26 May 2011

<sup>151</sup> Adam Bodnar for Gazeta Wyborcza, 07.01.2008

and practising the law. The wrong law practising means that women are being denied the abortion even when they have legal basis to undergo that procedure, as indicated by the Family Planning Act from 1993. There are many causes for that, as for example the invalid use of the conscious objection where doctors do not indicate the facility where the abortion can be conducted (Alicja Tysiac) or denying the access to prenatal tests where there is a serious danger of foetus malfunction (Wojarowski's case). That is where he sees the problem – the law does not reflect the societal need of creating procedures that would allow women to assess their rights, health status and foetus's state in timely manner. Dr Bodnar indicates the Polish Ombudsman should induce the Government to prevent the wrong law practice. It is within his competences to examine the scale of the abortion problem and its causes. He should also act in order to change the wrong practice, by asking the Minister of Health, Medical Chamber representatives or victims of the unjust judgements. Additionally, the lawyer points the difficulty in so called *undefined terms* like “endangers woman's life or health” where the word “endangers” is very abstract and very difficult to assess by doctors. However, when the legislation included that abstract terms, there should be appropriate procedures that would require a minimal framework to “get the law in the right way”.

## 5.2. External comments and reports

International rights oblige governments to report periodically to the established committees on what they did in order to implement the accepted conventions. That form of reporting offers very important opportunities on describing the failures and difficulties but also achievements in the women's access to health care. The international conventions set principles and standards that enable a comprehensive comparison among states and their developments in health policy. However, the implementation of legal resources needs to be mobilised within the state itself, accompanied by international bodies' guidance, like for example educational courses for women teaching them how to advocate for their rights and their protection. Only with appropriate knowledge about the law the health care sector can work properly and ensure every citizen gets adequate and desirable access to health facilities.

All the important facts about women's access to health care services have been noticed by several non-governmental and international organisations that are interested and very often concerned about the situation of reproductive health care in Poland. These organisations

researched the governmental reports in order to find any malfunctions of the system. They concluded the following:

**Concluding observations of the UN Committee on Economic, Social and Cultural Rights (1998)**

12. The Committee notes that restrictions have recently been imposed<sup>152</sup> on abortions that exclude economic and social grounds for performing legal abortions. The Committee expresses its concern that because of this restriction, women in Poland are resorting to unscrupulous abortionists and risking their health in doing so. The Committee is also concerned that family planning services are not provided in the public health-care system so that women have no access to affordable contraception.

**Concluding Observations of the UN Human Rights Committee (1999)**

11. The Committee notes with concern: (a) strict laws on abortion which lead to high numbers of clandestine abortions with attendant risks to life and health of women; (b) limited accessibility for women to contraceptives due to high prices and restricted access to suitable prescriptions; (c) the elimination of sexual education from the school curriculum; and (d) the insufficiency of public family planning programmes. (Arts. 3, 6, 9 and 26)

The State party should introduce policies and programmes promoting full and non-discriminatory access to all methods of family planning and reintroduce sexual education at public schools.

**Concluding observations of the UN Committee on Economic, Social and Cultural Rights (2002)**

28. The Committee is concerned that family planning services are not provided in the public health-care system and that women have no access to affordable contraception. It also expresses concern that education in sexual and reproductive health is not adequately covered in the national school curricula.

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<sup>152</sup> In 1996 the Act on Family Planning [...] was renewed and verified by the Constitutional Tribunal and in that form it is in force by now

29. The Committee is concerned about the restrictive abortion laws, which have resulted in a large number of women risking their health by resorting to clandestine abortionists.

50. The Committee also recommends that family planning services be provided by the public healthcare system, that contraceptives be available at affordable prices and that sexual and reproductive health education be included in the national school curricula.

51. The Committee requests that the State party provide in its next periodic report detailed information, including comparative data, about the problem of abortion in Poland and the measures, legislative or otherwise, including the review of its present legislation, it has undertaken to protect women from clandestine and unsafe abortions.

### **Concluding Observations of the UN Human Rights Committee (2006)**

8. The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health. It is also concerned with the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape, and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions. The Committee further regrets the lack of information on the extent of illegal abortions and their consequences for the women concerned (art. 6). The State Party should liberalize its legislation and practice on abortion. It should provide further information on the use of the conscientious objection clause by doctors, and, so far as possible, on the number of illegal abortions that take place in Poland. These recommendations should be taken into account when the draft Law on Parental Awareness is discussed in Parliament.

9. The Committee also reiterates its concern about family planning regulations adopted by the State Party. The high cost of contraception, the reduction in the number of refundable oral contraceptives, the lack of free family planning services and the nature of sexual education are also of concern to the Committee (art. 6).

### **Concluding comments of the Committee on the Elimination of Discrimination against Women (2006)**

The State party should assure the availability of contraceptives and free access to family planning services and methods. The Ministry of Education should ensure that schools include accurate and objective sexual education in their curricula.

24. The Committee expresses its concern that, as a result of the restructuring of the health sector, there has been a decrease in the number of clinics and health services available to women, in particular in rural areas. The Committee is concerned about the lack of official data and research on the prevalence of illegal abortion in Poland and its impact on women's health and life.

25. The Committee urges the State party to take concrete measures to enhance women's access to health care, in particular to sexual and reproductive health services, in accordance with article 12 of the Convention and the Committee's general recommendation 24 on women and health. It calls on the State party to conduct research on the scope, causes and consequences of illegal abortion and its impact on women's health and life. It also urges the State party to ensure that women seeking legal abortion have access to it, and that their access is not limited by the use of the conscientious objection clause. It requests the State party to strengthen measures aimed at the prevention of unwanted pregnancies, including by making a comprehensive range of contraceptives widely available at an affordable price and by increasing knowledge and awareness about different methods of family planning. The Committee recommends that the State party give priority attention to the situation of adolescents and that it provide age-appropriate sex education, targeted at girls and boys, as part of educational curricula.

### **Comment from Annual Report 2010-2011 Centre for Reproductive Rights**

In 1992, when the Centre formed its mission and opened its doors, Poland was experiencing its own new beginnings. In these earliest years of the post-communist era, new freedoms were introduced and explored: a free market, free elections, and freer speech. Today, the country is generally held up as a model of success in a unified European Union. But Poland stands out in Europe in other ways: by being an outlier on its women's fundamental rights. Poland does not allow women to make the best decisions for themselves and their families when it comes to ending a pregnancy. Polish women are able to legally seek abortion services only in cases when pregnancy puts their health or life at risk, the f[et]us suffers serious birth defects, or the pregnancy is the result of rape. But even then, heavy stigma and ineffective regulations ensuring access mean that Polish women are far from being guaranteed these procedures, even if they fulfil the legal requirements. Over the last seven years, the Centre and its partners have been involved in four cases against Poland in the European Court of Human Rights. In all cases, Polish women were denied necessary, legal procedures related to their pregnancies.



Additionally it should be remarked that Poland signed the Biomedicine Convention of the European Council but so far has not ratified it. It means that it is not formally bound by the regulations of this Convention, however by the fact that it has signed it, obliged itself not to implement legal regulations below the threshold of standards contained within it. It means that the external authorities can make a remarks and comments about lack of certain legal tools or remedies.

### 5.3. Conclusions

The reproductive health related issues are very controversial topics in Poland. The political, social or even a private discussion is influenced by many stereotypes and myths. Nevertheless, the role of the law is to protect the citizens from any abuse in this and any other systemic area. This thesis aimed at providing examples and proofs of practice within the medical, legal and political areas and answering the research question of

Whether the Polish Act on *Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy* is in line with international law and the principles included in ratified by Poland documents?

In my opinion, after conducting the multidisciplinary research, the answer to this question is:

Polish law respects the principles included in ratified by Poland documents, like European Convention of Human Rights or CEDAW. However the practice of the law is very poor in the area of reproductive health due to low acceptance of abortion procedure and any other sexual related topics. Since early childhood Polish citizens are deprived of the law of access to health information, as for example sex education at schools or adequate counselling in clinics, hospitals or any other health related facilities. Young women are denied the access to contraceptives by many means – financially: as the contraceptives are not refunded, politically: as the debate about contraceptives did not even started on national level, ethically: as there are many gynaecologists that refuse to prescribe “normal” contraceptive pills and even more specialist that due to their conscious deny prescription of the post-conception pill (so called emergency pills). Moreover, the Act of January 7th 1993 on *Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy* in many areas do not execute the positive requirements on the state to protect women who are entitled to legal abortion and allow cases as A. Tysiac or M.A. where the pregnancy significantly endangers mothers health or was a result of a crime. Gynaecologists and other health specialists are prioritising their interest over the women’s, as in many cases they refuse to abort due to fear coming from the realisation of criminal acts punishing the physician conducting the abortion. In other cases they deny, the sometimes life-saving medical procedure, due to their personal beliefs. As explained above, they are entitled to do so if only they fulfil other requirements as written explanation and referral to other facility. However the execution of this law is, again, not practiced in reality.

## 5.4. Recommendations

This thesis offered the reader a very detailed insight to Polish state of law, social opinion and practice surrounding the issue of abortion. I believe that the most effective solution to problems occurring in Poland is fulfilling the advices of European Court of Human Rights that proved in Alicja Tysiac case that Polish law in the area of reproductive health are well-formulated but it is the legal practice and ideological dispute that disturbs the appropriate access to the services. Poland needs to especially focus on development of procedures that would enable women to exercise their existing rights, not necessarily liberating the law, as according to WHO report when the abortion is legal it does not decrease the number of termination.<sup>153</sup> However, what is often forgotten by the pro-life activists, in countries where the abortion is totally forbidden the procedures are substantially less safe.<sup>154</sup> Next, the knowledge of specialists needs to be improved, especially in the legal area as they are not fulfilling the requirements as they should, decreasing the access to services even more. The legal procedures of malpractice should be definitely improved and allow the doctors to feel secure enough while conducting the legal abortion and punishing medics who deny women access to health services without any explanation. Sexual education at schools have to be improved, as similarly to the legal problem, appropriate requirements exist but the daily practice is very poor. Government should make sure the teachers are appropriately trained and follow international principles of non-discrimination and spreading knowledge that follows the international standards. Well-planned access to contraceptives can substantially decrease the amount of abortions.<sup>155</sup> The case of INTERIGHTS vs. Croatia should be used as a case law to the improvement of the sexual education curricula, as the effect of the inadequate information can have big consequences on the spread of STI and HIV/AIDS.<sup>156</sup> Poland should follow the European Committee for Social Rights recommendations, which focus not only on sexual education, but also contributes to the social knowledge about avoiding stereotypes and inappropriate behaviour among adolescents. It is very important element to the change in Poles` mentality and decrease vicious behaviour as in comments explained in the 3 chapter. Moreover, a national level debate about reproductive health should start. This debate should focus on the current problems, with sexual education as a priority. The debate should not

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<sup>153</sup> *Facts on Induced Abortion Worldwide*, WHO report, 2007

<sup>154</sup> *Idem*

<sup>155</sup> *Idem*

<sup>156</sup> (INTERIGHTS) v. Croatia, International Centre for the Legal Protection of Human Rights, Complaint No. 45/2007

include people with extremely opposite opinions as that form of an event would aim only for entertainment and is a very common practice that attracts media. Experts from different areas should play the most important role in improving the social acceptance of abortion. Only then women would have a free access to health facilities they entitled to by the international law, which serves the society in protecting the rights in every, even the most intimate area of private life.

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