

REPRODUCTIVE RIGHTS IN POLAND

the effects of the anti-abortion law

REPORT 2008

Federation for Women and Family Planning

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Joint work edited by Wanda Nowicka

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The Federation has obtained Special Consultative Status with the Economic and Social Council of the United Nations



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Article 30. The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.

Article 47. Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.

THE CONSTITUTION OF THE REPUBLIC OF POLAND

Contents

Introduction	7
<i>Wanda Nowicka</i>	
Review of Polish legal regulations on reproductive rights	9
<i>Eleonora Zielińska</i>	
The Anti-abortion Act in Poland – the legal and actual state	17
<i>Wanda Nowicka</i>	
Analysis of court cases concerning the lack of availability of services for terminating pregnancy in Poland	45
<i>Adam Bodnar</i>	
Report of the expert research with gynaecologists and midwives	65
<i>Anna Domaradzka</i>	
Debate on the change to the constitution – analysis of expert opinions for the extraordinary parliamentary commission	80
<i>Eleonora Zielińska</i>	
International institutions on the state of respect for reproductive rights in Poland	90
About the Federation for Women and Family Planning	95

Introduction

Wanda Nowicka

This report on the monitoring of reproductive rights in Poland was created in the framework of the project financed by the European Commission and realised by the Federation for Women and Family Planning, entitled *Proactive monitoring of women's reproductive rights as a part of human rights in Poland*. The report provides a comprehensive overview of reproductive rights in Poland. It deals with the legal issues involved, and the analysis of the Polish legal regulations on reproductive rights (E. Zielińska) deserves special attention, as well as the review of court cases conducted in Poland and at the European Court of Human Rights regarding the lack of access to termination of pregnancy in Poland (A. Bodnar). The report shows the real effects of the current law and social policy with regard to termination of pregnancy, family planning and sexual education (W. Nowicka). Through the use of qualitative research, the report also presents the attitude of the health service to the issues mentioned above and the role of doctors in restricting access to services connected with reproductive health (A. Domaradzka). Moreover, the report publishes guidelines for Poland from international institutions, which aim to improve the respect for human rights regarding reproductive health issues.

Various research perspectives – sociological, legal, empirical research and analysis of available government, police and medical sources – present a very cohesive but grim picture of the extensive and systematic violation of women's rights. The Act, which is exceptional for European conditions, fundamentally limits women's rights to life, health, dignity, self-determination, autonomy and privacy. At the same time, the Act is realised in practice in an even more restrictive way and has created a political and social climate hostile to women's rights in the sphere of reproduction, leading to an almost total ban on abortion.



Public institutions, whose representatives are fully conscious of the violation of human rights in this sphere, ignore social problems, including various pathologies caused by the repressive and criminogenic law. At the same time they fail to meet Poland's international obligations arising from the ratification by the government of the human rights conventions – a violation drawn attention to for years by international institutions created to monitor human rights. Moreover, the hostile atmosphere to women's rights created by fundamentalist politicians has created conditions for undertaking new legislative initiatives with the aim of tightening the abortion regulations. A striking example is the recent attempt by League of Polish Families (LPR) to introduce a regulation in the constitution on the protection of life from the moment of conception. LPR's draft amendment almost led to a total ban on the termination of pregnancy in the Polish legal system (text on the constitutional debate by E. Zielińska). Although the initiative was rejected (it failed by a small number of votes), similar attempts have already been announced for the future.

The debate which accompanied LPR's draft amendment displayed growing acceptance, particularly among legal and medical experts, for a significant lowering of women's rights protection. In particular the right of pregnant women to health is seriously endangered, which can be seen clearly in the example of the case of Alicja Tysiąc. The status of pregnant women has been reduced by the opinion-forming legal circles, to an "environment for the development of the child" in which "mental comfort(..) during pregnancy and childbirth does not have a significant enough character to justify the termination of the life of the conceived child". In addition, in the opinion of medical experts, "the situation of women who find out that the foetus has an incurable defect is so traumatic that sometimes it is better that the patient should be informed about this only after birth" (A. Domaradzka). These statements are not only testimony to the total instrumentalisation of women, reducing them to their reproductive function, but also prove the lack of elementary sensitivity to the difficult situations which are often connected with pregnancy. The drama of a woman carrying a foetus with a serious genetic defect has been reduced by the lawyer to a "lack of comfort", whilst the doctor, who theoretically understands what a difficult experience this can be for the woman, can only propose that she carries the pregnancy to the end.

Although there is a high level of social consciousness about the negative effects of the restrictive act, there is less acceptance of women's right to self-determination. Hypocrisy towards abortion is growing – on the one hand, there is a thriving underground and increasingly widespread use of abortion pills, which can be obtained without even leaving home by using a computer with Internet access. On the other hand, there is the total ban and the pseudo-moral attitude of a growing group of policy-makers for whom morality can be reduced mainly to the so-called protection of life, on condition that it is conceived life. The harm to women forced into heroism against their will, i.e. giving birth in every situation, does not disturb the morality of the majority.

There is a widespread indifference towards women for whom pregnancy is a problem and also a growing religious fanaticism and renaissance of so-called traditional values, according to which the main role of women is motherhood. Although this can in the near future lead to a further tightening of the law, we believe that this report will serve in a small degree to halt these negative tendencies. Women in Poland should regain their rights to self-determination in all issues connected with sexuality and reproduction as soon as possible. We must not forget that women's rights are human rights.

Review of Polish legal regulations on reproductive rights

Eleonora Zielińska

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1. In Polish legal language there is no such concept as "reproductive rights" understood as the right to the protection of reproductive health and self-determination in reproductive matters. However, its designations, inter alia, in the form of the family planning law, for prenatal tests, termination of pregnancy, and also rights connected with pregnancy and motherhood are the subject of regulations in various areas of the law.

2. The Constitution of The Republic of Poland of 2 April 1997¹ in the regulation of Article 18 stipulates that "... motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland". Article 47 guarantees everyone the right to legal protection of their private and family life and moreover, obliges the public authorities to provide special health care, including care for pregnant women. Article 54 guarantees everyone the right to the freedom to express their views and obtain and distribute information. No one questions whether, for example, the right to the protection of health also includes the protection of reproductive health, whether the right to privacy includes at least the right to decide about the conception of a child, or whether the right to obtain information also includes information about family planning. However, the present ruling of the Constitutional Tribunal testifies to the narrow understanding of the above-mentioned rights when they refer to the sphere of human reproduction, particularly in the scope in which they are the exclusive attribute of women. This means that in the case of settlement of their possible conflict, e.g. with the right of the foetus to life, the priority of protection is as a rule granted to the latter. As a result, the constitutional guarantee in the sphere of reproductive rights remains to a large extent only a declaration and the possibility of an individual asserting their rights on this basis is illusory.

¹ Journal of Laws 1997, no. 78, item 483.



3. The Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy² is of fundamental significance for the protection of reproductive rights. The act refers to a few issues connected with reproductive rights, placing on public authorities a series of obligations with which the rights of the persons mentioned in the act should be correlated. And so the bill obliges the organs of governmental administration and territorial self-government to provide pregnant women with medical, social, and legal care, indicating in particular what form this care should take³ (Article 2 par.1). It obliges the above-mentioned organs to provide citizens with free access to "methods and means serving conscious procreation" (Article 2 par.2). It is worth mentioning that although in neither the bill nor the executive provisions is it specified precisely what should be understood by "methods and means serving conscious procreation", nevertheless, among lawyers the dominant opinion is that this obligation concerns all contraceptives registered in Poland, including intra-uterine devices and emergency methods (e.g. Postinor). However, it should be stressed that the fact that hormonal contraceptives are not even partly refunded⁴ causes these methods to be unavailable, and as a result excludes for many women the possibility of actual realisation of the rights guaranteed by the law.

The Act does not regulate the question of consent for advice on contraception and possible prescription of hormonal means available by prescription in the case of minors (the specific regulations in the bill concerning agreement of such a person concern only the termination of pregnancy – see below). Therefore, general principles are in force regarding agreement of patients who are minors to tests or other health services set out in the Bill of 5 December 1996⁵. In accordance with these principles, if the patient is a minor or incapable of giving conscious consent, consent is required from the statutory representative (most often this is the parents), and when the patient does not have a statutory representative or when contact with him/her is impossible – the consent of the Custody Court (Article 32 par.3 and par.8). If the patient is over 16 years old then his/her consent is also required (so-called parallel consent)⁶. A departure from these principles is permissible only in cases when the patient requires immediate medical aid, i.e. a delay caused by proceedings connected with obtaining consent would risk the patient's life or risk serious bodily harm or severe disturbance of health (Article 33 and 34 par.7 of the Act on the Physician's Profession). However, in such cases the doctor is obliged to inform without delay *post factum* the statutory representative, actual guardian or Custody Court about the treatment undertaken. The legal regulation which has been presented raises many doubts among doctors and lawyers. Often it occurs that a girl who is a minor does not want her parents to know that she has already begun having sexual intercourse and at the same time wishes to prevent pregnancy, which also in the opinion of the gynaecologist to whom she has come as a patient, is in her interest. Doctors have doubts as to whether in this situation they can provide her with medical services e.g. in the form of advice on contraception, without the consent of the parents or consent of a Custody Court. The logical and linguistic interpretation of the regulations presented should lead to a negative reply to the question. However, referring to general principles which should guide the doctor in his/her profession and the international standards binding the Republic of Poland, one can infer the right of the doctor to ignore the requirements of the act, in particular if the delay in granting advice would lead to the appearance of negative effects. With regard to general principles, it is necessary here to refer to the regulation of Article 2 of the Code of Medical Ethics, which states that "The greatest moral imperative for the doctor is the good of the patient – *salus suprema lex esto*". With regard to international standards, relevant here is Article 16 of the Convention on the Rights of the Child in accordance with which

² Journal of Laws 1993, no.17, item 78 as amended (further: the Act).

³ Mentioned here is prenatal care of the foetus and medical care of the pregnant woman, material aid and care of the pregnant woman who finds herself in difficult material conditions on the basis of social aid defined in the act, access to detailed information on institutions and organisations helping to resolve psychological and social problems, as well as dealing with adaptation matters.

⁴ The Act of 27 August 2004 on Health Care Services Financed by Public Money Journal of Laws 2004, no. 210, item 21 35 as amended.

⁵ Consolidated act: Journal of Laws 2002, no. 21, item 204 as amended (further: Act on the Physician's Profession)

⁶ If the patient who is over 16 years old is incapacitated, mentally ill or mentally disabled, but with sufficient mental capacity opposes medical proceedings, the consent of the Custody Court is required as well as the consent of the statutory representative or actual guardian or in the case of refusal of consent by them (article 32 par.6 of the Act on the Physician's Profession).

the child has the right to legal protection against, amongst others, arbitrary interference in the sphere of its private life, and also the regulation of Article 24 par. 2f of the Convention concerning the protection of health of minors from which it follows among others, the right of the child to education and services in the scope of family planning"⁷. It is worth adding that in the general commentary of the Committee on the Rights of the Child on the subject of the health of minors⁸ it is clearly underlined that the above-mentioned regulation of Article 16 in the context of health should be interpreted as obliging "the States parties of the Convention to ensure observance of the strict right to privacy and confidentiality in the context of counselling and health matters". At the same time, it is stated there that "providers of health services, taking into account the basic principles of the Convention, are duty bound to maintain confidentiality of information concerning minors, which can be revealed only with their consent on analogous principles to rescinding professional confidentiality in the case of adults. Minors capable of obtaining counselling independently (i.e. understanding its sense without the participation of the parents or other persons) have the right to privacy and can demand the maintenance of confidentiality of the services which they are provided with, including treatment (point 13 of the Comments)." It is also worth adding that the Committee, in the context of the question of informing, counselling and health services, with the position that early marriage and pregnancy of minors are a significant factor causing their health problems, obliges states-parties to ensure access to information to minors in the context of sexuality and reproduction, including on the subject of family planning and methods and means of contraception, the dangers connected with early pregnancies, prevention of HIV/AIDS and other sexually transmitted diseases, and that is regardless of the marital status of the minor or the consent of the parents or guardians (points 26-28). At the same time it is stressed that the minor should always be given a chance to freely express his/her views, which should be considered in accordance with Article 12 of the Convention. However, if "the minor is sufficiently mature in order to act with insight, then informed consent should be obtained from him/her, whilst informing the parents if it lies in the "interests of the child" (Article 3, point 32 of the Comments). It should be stressed that this unambiguous comment to the above-mentioned regulations of the Convention on the Rights of the Child provides the basis for recognising, that the activities of the physician, without informing or obtaining the consent of the parents, should be recognised as legal always in the situation when the above-mentioned conditions are fulfilled, and particularly when the maintenance of confidentiality lies "in the interests of the child". This view has justification in Article 91 of the Constitution, in which it follows that an international agreement ratified by the Republic of Poland, after it has been announced in the Journal of Laws, becomes a part of the national legal order and has priority before an act if the act cannot be reconciled with the agreement. This statement cannot be obstructed by the declaration announced with the ratification of the Convention on the Rights of the Child, amongst others, to its Articles 16 and 24 par.2f⁹. In the first case, they should be ignored, since they remain at variance with the aims of the Convention. In the second case, it is difficult to recognise that contraceptive advice could be in conflict with moral principles.

Moreover, the act obliges the above-mentioned organs to provide free access "to information and pre-natal tests, in particular when there is an increased risk or suspicion of the occurrence of a genetic or developmental defect of the foetus or incurable illness which threatens the life of the foetus" (Article 2 par.2a). It also places on schools the obligation to provide pregnant schoolgirls with "leave and other aid necessary to complete their education, if possible without a delay in passing the subjects" (Article 2 par.3)¹⁰. It makes compulsory the introduction into the school teaching programme of knowledge

⁷ [http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/504f2a64b22940d4c1256e1c0042dd4a/\\$FILE/G0342724.pdf](http://www.unhcr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/504f2a64b22940d4c1256e1c0042dd4a/$FILE/G0342724.pdf)

⁸ Compare general comments to the Convention on the Rights of the Child. Adolescent health and development in the context of the Rights of the Child, 01/07/2003. CRC/GC/2003/4. (General Comments)

⁹ The content of these declarations is as follows: The Republic of Poland believes that the possibility for the child to exercise its rights as defined in the convention, in particular the rights defined in articles 12 to 16, should be done whilst respecting parental authority, in accordance with Polish customs and traditions concerning the place of the child in the family and beyond the family. In reference to article 24 par.2 letter f) of the convention, the Republic of Poland believes that parental counselling and education in the scope of family planning should remain in accordance with moral principles.

¹⁰ In a situation where the pregnancy, birth or confinement prevents the pupil from sitting exams which are essential for continuing education according to the deadline, the school is obliged to provide another suitable date for the woman within a period no longer than 6 months.

about human sexual life, the principles of conscious and responsible parenthood, family values, life in the prenatal phase, and methods and means of conscious procreation (Article 4). The inclusion of these topics in the basic programme is supposed to guarantee the realisation of this requirement.

Moreover, the Act defines the conditions permitting the termination of pregnancy. It stipulates, above all, that this can be carried out exclusively with the consent of the woman, and by a doctor (specialist in obstetrics and gynaecology) in the following three cases:

1. When the pregnancy constitutes a risk to the life or health of the pregnant woman,
2. Prenatal tests or other medical evidence indicate a high probability of severe and irreversible disability to the foetus or an incurable illness threatening its life,
3. The existence of a justified suspicion that the pregnancy arose as a result of a crime (Article 41 par.1)

The Act warns that in the first two cases the termination of the pregnancy must be carried out in hospital (Article 4a par.3).

At the same time the Act introduces a time limit for terminating a pregnancy in all the cases with the exception of medical reasons (point 1). In the case of so-called legal reasons (point 3) termination of the pregnancy is permitted if from the beginning of the pregnancy no more than 12 weeks have passed, and in the case of so-called embriopathological reasons (point 2) – to the moment when the foetus achieves the ability of life outside the organism of the mother (Article 4a par.2). It also stipulates that the occurrence of medical or embriopathological reasons should be identified by a different doctor from the one carrying out the termination of pregnancy, unless the pregnancy directly threatens the life of the woman. The Regulation of the Minister of Health and Social Care of 22 January 1997¹¹ specifies more precisely that the occurrence of circumstances indicating that the pregnancy constitutes a threat to the life or health of the pregnant woman is identified by a physician in possession of the title of specialist in the scope of medicine appropriate to the type of illness of the pregnant woman. However, the occurrence of embriopathological indications is identified by a physician specialising in genetic defects, rendering a decision on the basis of genetic tests, or by a physician specialising in obstetrics and gynaecology rendering a decision about developmental defects on the basis of ultrasonic images of pregnant woman.

As already mentioned, one of the conditions permitting the termination of pregnancy is the consent of the woman. In the case of termination of pregnancy, written consent is required. Unlike in the case of contraceptive advice, the Act regulates in detail the question of consent to this procedure in the case when the woman is a minor or mentally disabled, indicating here several essential differences. Indeed, the Act makes the legality of the procedure dependent on the consent (written) of the statutory representative, whilst the consent of the Custody Court is required in the case of failure by the statutory representative to grant consent. Nevertheless, parallel consent is required already once the minor has reached 13 years of age. Before reaching 13 years of age, termination of pregnancy always requires the consent of the Custody Court whilst the minor has the right to express her own opinion. In the case of incapacitated persons, the written consent of that person is also required unless the state of mental health prevents them from expressing consent (Article 4a par.4 of the Act). The regulation of the act does not deal with the problem of when the physician can terminate the pregnancy based exclusively on the demands of the minor. Taking into consideration the narrow reasons for permitting termination of pregnancy in Polish law, it seems that the principle of waiving the

¹¹ On the issue of professional qualifications of physicians authorised to carry out termination of pregnancy and identify that the pregnancy threatens the life of the woman or indicates a high probability of severe and irreversible damage to the foetus or incurable illness threatening its life. *Journal of Laws 1997 no.9 item 49.*

requirement to obtain consent from the parents, expressed in the case of contraceptive counselling, can also be applied here.

It should be stressed that the reasons for termination of pregnancy included in the Act of 1993 are set out in an extremely restrictive way, both in comparison with the regulatory environment before the act came into force, as well as in comparison with the regulatory environment in force in other countries (in European countries it is comparable only to Ireland and Malta). The attempt in 1996 to permit termination of pregnancy also in the case of so-called social reasons ended in failure. The liberalisation of the act, one year after coming into force, was recognised by the Constitutional Tribunal as being in conflict with the Constitution¹².

4. Illegal termination of pregnancy is subject to punishment provided for in the criminal code of 6 June 1997¹³. The criminalisation of termination of pregnancy without the consent of the woman serves the protection of reproductive rights. In accordance with Article 153 of the C.C., everyone who by applying violence to a pregnant woman or in another way without her consent terminates the pregnancy or through violence, illegal threats or deceit leads a pregnant woman to terminate pregnancy, is subject to imprisonment from 6 months to 8 years. The qualified type of this crime, with the threat of punishment from one year to 10 years, is when the perpetrator commits the above-mentioned act after the "conceived child" has reached the capability of life outside the organism of the mother (Article 153 par.2). The perpetrator faces punishment of 2 to 12 years imprisonment when the consequence of these actions was the death of the woman.

Punishment, although milder, is also reserved for termination of pregnancy with the consent of the woman, but in contravention of the regulations of the Act. However, the subject of this crime cannot be the woman whose pregnancy was terminated.

It is worth adding that the criminal code also penalises intentional damage to the body of the "conceived child" or causing perturbation to the health which threatens its life (Article 157a), stipulating at the same time that in this situation "the mother of the conceived child is not subject to punishment". Criminal responsibility is also excluded when damage to the body or perturbation to the health was as a result of medical activities conducted by a physician, necessary in order to counteract the danger threatening the health or life of the pregnant woman or conceived child. This regulation, which can be perceived as also guaranteeing indirectly the protection of reproductive rights of the child's parents, for some doctors serves as a brake against conducting more invasive prenatal tests, which many times has constituted a barrier preventing the realisation of these rights.

One should also draw attention in the margins to Article 192 of the C.C., which foresees a punishment for conducting medical treatment without the patient's consent. This regulation should therefore be applied to all treatment connected with reproductive health. However, the fact that in this regulation there is only talk of medical treatment raises doubts as to whether it also concerns such treatment which does not have a curative character (e.g. voluntary sterilisation).

It is worth adding here that on the grounds of the Polish system of criminal law, the permissibility of sterilisation in situations where there is a lack of medical reasons arouses controversy. It follows from Article 156 of the C.C. that denying a human, inter alia, reproductive capabilities (in the current state of knowledge and medical technique sterilisation still does not guarantee full reversibility, although progress in this sphere is very rapid) constitutes a serious damage to health in the meaning of this regulation and is subject to a punishment of 1 to 10 years imprisonment. There is a lack

¹² Ruling of the Constitutional Tribunal of 28 May 1997 (Sign. Act K 26/96).

¹³ Journal of Laws 1997, no.88, item 553 as amended.

of agreement of opinions in the doctrine of criminal law as to whether consent to sterilisation treatment of the interested party, fulfilling the criteria of informed and voluntary consent, can be recognised as a circumstance excluding the illegality of this act, or whether "reproductive capability" is a social good which should be protected even against the will of the person who is a carrier of that good. Lack of legal clarity on this issue leads physicians, in fear of being held criminally responsible, to refuse to carry out such treatment on the request of the patients, and at the same time to violate the patients' reproductive rights in this sphere.

5. In connection with the fact that the providers of health services in the sphere of reproductive health are mainly physicians, the regulations placing obligations on physicians, and not only those contained in the Act on the Physician's Profession, but above all, in the Medical Code of Ethics (KEL)¹⁴, are of key importance for the status of reproductive rights in the system of basic rights and the possibility of their protection. The particular importance of KEL in this sphere arises from the fact that the physician who violates the regulations contained within it can be held responsible by the medical court, which constitutes an organ of the medical chamber (professional association of physicians). This court is authorised to, *inter alia*, deprive the physician of the right to carry out his/her profession indefinitely, i.e. to apply sanctions which a common court cannot apply, even in the case of a physician who carried out a serious crime¹⁵. It is worth mentioning an example which illustrates the awareness of the association authorities that the fear of professional responsibility could strongly influence the professional practise of the physician. When the work on restricting the conditions for termination of pregnancy was prolonged in the Polish Parliament (the Act was finally passed by the Polish Parliament in 1993), precisely such a restriction was introduced to KEL before the act came into force, coming to the aid of the slow legislators. It should be mentioned that the Constitutional Tribunal evaded investigating the constitutionality of such practices, believing that KEL does not have the character of a normative act and as such is not subject to control of the Tribunal¹⁶. The Medical Code of Ethics in force, in contrast to the original version, does not refer directly to termination of pregnancy, however, it does contain very general regulations formulating the obligations of the doctor in the field of procreational health. And so, Article 38 of KEL sensitizes the physician to the need to treat the process of bequeathing human life with an awareness of particular responsibility (par.1). It prohibits physicians from participating in procedures of cloning humans both for reproductive as well as therapeutical purposes (par.39). It warns that "when taking medical action in the case of a pregnant woman the physician is at the same time responsible for the health and life of her child. This is why the responsibility of the physician is to make efforts to maintain the health and life of the child also before birth" (Article 39). A shortcoming of this regulation is that it does not give a clear message that in the case of conflict between the health/life of the mother and the life of the foetus, one should give priority to the protection of the good of the woman. Therefore it creates the risk that in attempting to save the foetus, treatment of the woman will be too conservative, which could have tragic consequences. At the same time KEL obliges physicians to provide, in accordance with medical knowledge, information regarding processes of insemination, and methods of regulating conception, taking into consideration their effectiveness, mechanisms and risk (Article 38 par.2). In KEL there is also a regulation referring to prenatal tests, from which it follows that the physician's duty is to acquaint the patients with the standards of modern genetic medicine and also diagnosis and antenatal therapy. However, at the same time it warns that "in passing on the above-mentioned information, the physician has a duty to inform about the risks connected with carrying out the antenatal test" (Article 38 par.3). It should be mentioned that KEL guarantees the physician freedom of professional action in accordance with his/her conscience and modern medical knowledge (Article 4). In particular justified cases it guarantees him/her the right not to undertake or to aban-

¹⁴ Unified act of 2 January 2004 containing changes passed on 20 September 2003 by the Extraordinary 108th National Conference of Physicians.

¹⁵ Except for the case of a crime against sexual or moral freedom committed against a minor. In such a situation the amendment to the Criminal Code of 2006 created the possibility of a ruling of a life ban against carrying out the profession of physician for persons who are guilty of this crime, including physicians (article 41 par.2a C.C.).

¹⁶ Ruling of the Constitutional Tribunal of 7 October 1992, sign. Act U 1/92/

don the treatment of an ill person, with the exception of emergency cases. At the same time however, it warns that in such cases the physician should indicate to the patient another possibility to obtain medical aid (Article 7).

The Act on the Physician's Profession does not refer directly to any aspect of reproductive rights. Nevertheless, it does contain one very significant regulation which in practice often erases the protection of these rights. This concerns the so-called conscience clause contained in Article 39 of the act. According to the clause, the physician can refuse to provide medical services in violation with his/her conscience, unless there is a situation in which a delay in providing medical aid could cause a danger of loss of life, severe harm to the body or severely affect the health, as well as in other cases of emergency. At the same time the act places on the physician who makes use of the conscience clause the obligation to indicate a real possibility to obtain services from another physician or in another health care facility as well as the obligation to justify and record the refusal of his/her services in medical documentation. The physician who carries out his/her profession as an employee of the health service is also obliged to inform on paper his/her superior beforehand. This regulation gives the physician not only the basis to refuse to terminate pregnancy in the case when it is permissible, but also to refuse to issue a certificate confirming that there are conditions mentioned in the act that permit the carrying out of such an operation. Some physicians, referring to this regulation, also refuse to prescribe contraceptive pills (available only on prescription), also in the situation when there are no contraindications against their use in the case of the patient in question. On the basis of the interpretation of Article 39 of the Act on the Physician's Profession it is difficult to recognize that they do not have the right to do this. This regulation speaks of refusing to carry out health services, and such services in the light of Article 3 of the Act on Health Centres of 30 August 1991¹⁷ are understood very broadly. Activities connected with testing medical advice, or treatment, as well as connected with rulings and opinions about the state of health are also recognised as such. In the case of such an understanding of health services, it is difficult to recognize that it was impermissible to refuse to issue a certificate on the state of health which prevents the safe carrying to term of the pregnancy for the mother, on the basis of Article 39 of the Act on the Physician's Profession. However, there are doubts as to whether the right to refuse to "carry out" health services in the understanding of the regulation, should refer only to a doctor terminating pregnancy, particularly since in KEL the right to refuse is understood very narrowly, as it concerns only treatment. One can question the permissibility of refusing to prescribe hormonal pills dictated exclusively by the religious objections of the physician's conscience against artificial contraception. Issuing a prescription for such means is certainly not "carrying out health services" in the understanding of the regulation in question.

One should add that a similar conscience clause is contained in Article 23 of the Act of 5 July 1996 on the Profession of Nurse and Midwife¹⁸. According to the regulation the nurse or midwife can refuse, after informing the superior beforehand, to carry out health services in violation with her conscience, subject to the reservations of Article 19 (i.e. in the case of danger of loss of life, serious harm to the health of the patient). There are doubts as to whether in itself cooperation in carrying out health services by the physician entitles the nurse or midwife to refer to this clause. However, the conscience clause is not foreseen by either the Pharmaceutical Act or the recent draft of the Act on the Profession of Pharmacist¹⁹, which does allow the pharmacist to refuse to issue a medical product, but only in the situation when the life or health of the patient could be threatened by issuing the product (Article 28). Also in force is the Code of Ethics of Pharmacists, which in Article 4 par.2 states that "if due to his/her conviction the pharmacist cannot undertake certain actions in the pharmacy, he/she is obliged to indicate a pharmacist who will undertake those actions."

¹⁷ Journal of Laws 1991, no.91, item 408 with later amendments.

¹⁸ Unified act: Journal of Laws 2001 no.57, item 602 with later amendments.

¹⁹ In May 2007 subject to ministerial agreement.

www.mz.gov.pl/wwwmz/index?mr=q491&ms=382&ml=pl&mi=382&mx=0&mt=&my=131&ma=08464-22k

Summarising our deliberations over this question, one should stress that conscience is an individual category and in relation to this, such a decision always has an individual character, and in more ways than one. A general refusal by the whole hospital to conduct e.g. termination of pregnancy or such a decision by the senior registrar of the gynaecological-obstetrics ward on behalf of the employees is impermissible from the legal point of view. Moreover, every refusal requires an individual approach due to the condition that it cannot take place when there is a danger of loss of life or serious harm to the health of the patient. Therefore refusal by a doctor to carry out treatment must be preceded each time by an examination of the patient to ensure that such a situation does not occur and should also be recorded in medical documentation. Attention should also be paid to the fact that the statutory obligation placed on all physicians using the conscience clause to inform the patient of the real possibilities of obtaining health services in another place also obliges the organs responsible for realising the act to guarantee women the real possibility of obtaining health services guaranteed to them by the act.

6. It should also be stressed that the Polish legal system does not contain regulations referring to so-called assisted reproduction. The absence of regulations has the advantage that there are no legal barriers to such treatment, and one could suppose that if regulations were introduced, they would be very restrictive. However, physicians who undertake such treatment know international standards and it seems that they observe them in practice (as indicated by the fact that there are no proceedings in relation to professional liability). The lack of regulation has the disadvantage that assisted reproduction treatment is not financed by public funds.

7. It should be added that the Republic of Poland signed the so-called Bioethical Convention of the European Council but so far has not ratified it. This means that whilst it is not formally bound by the regulations of this Convention, it has nevertheless by the fact that it has signed it, obliged itself not to introduce legal regulations below the minimum standards contained within it. The fact that Poland ratified the European Convention of Human Rights has led to petitions in the European Court of Human Rights in Strasbourg, including petitions in connection with reproductive rights, of which so far one has ended with a judgement in favour of the plaintiff (the case of A. Tysiąc).

The Anti-abortion Act in Poland – the legal and actual state

Wanda Nowicka

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The experience of the last 15 years of enforcement of the anti-abortion act allows us to assess its social effects. Research conducted for the needs of this report shows that the majority of conclusions arising from the Federation's research, published in the Report of 2000, are still relevant¹. The following conclusions are drawn from the monitoring which was conducted:

- 1) The Anti-Abortion Act is not observed. It has neither liquidated nor even limited the phenomenon of termination of pregnancy. Pregnancies are still terminated in the so-called abortion underground. On the other hand, the rights of women to terminate pregnancy in accordance with the act are notoriously violated.
- 2) The Anti-Abortion Act, although it has not achieved its main aim, i.e. to eliminate abortion for social reasons, has led to a very serious limitation of

¹ *The Anti-Abortion Law in Poland. The functioning, social effects, attitudes and behaviour.* Ed. Nowicka W., (September 2000), Federation for Women and Family Planning, Warsaw.



access to abortion even in the conditions in which it is permissible. Abortions are practically not carried out at all in public hospitals. Some of the clients of the abortion underground are women who have the right to a legal abortion but who, for various reasons, were not in a position to execute that right. In comparison with the Federation's previous research, this phenomenon has grown.

- 3) Abortion underground is also referred to in the case of legally prohibited surgical termination of pregnancy (most often carried out by physicians in their private surgeries or in hospitals), as well as the sale of the so-called abortion pill offered through various persons, including through the Internet.
- 4) Abortion carried out illegally is a common phenomenon. Estimates of the scale of this phenomenon, published in the previous report, remain without change; the number of such abortions could range from approximately eighty thousand to a hundred and twenty thousand abortions annually or even more.
- 5) Some women go abroad in order to terminate pregnancy. This phenomenon is termed abortion tourism and is of an individual, unorganised character.
- 6) Knowledge within society, and also among employees of the health service, on the conditions permitting termination of pregnancy is at a low level.
- 7) From the Federation's many years of experience it follows that the anti-abortion act has led to many human dramas caused by a variety of health and life problems of many thousands of women in Poland.

The greatest change that we have observed in comparison to the report of 2000 is the increasingly common use of medical abortion as a method for termination of pregnancy and the hugely growing role of the Internet as a source of information about the possibility to terminate pregnancy. The Internet helps women to obtain not only information, but also to exchange experiences.

The Polish government led by Jarosław Kaczyński, apart from repressive actions, has taken no steps to improve this state of affairs, which is the result of a criminogenic law, and has consistently ignored all the pathologies connected with the current situation. Moreover, it has not realised the recommendations resulting from the international conventions ratified by Poland, although international institutions monitoring the observance of human rights arising from these conventions have many times recommended steps to be taken to counteract the violation of women's rights in our country. Even worse than this, recently a serious threat to tighten abortion regulations has appeared. In April 2007 the Polish Parliament by a small majority rejected an amendment to the Constitution of the Republic of Poland which could have led to a total ban on abortion.

From our experience, the current anti-abortion act – one of the most restrictive in Europe – should be quickly liberalised, since it has led to too many dramas and suffering of women. It is high time that the government and Parliament took appropriate steps towards improving this situation.

Termination of pregnancy in Polish law

The current legal state of affairs concerning abortion is regulated by the *Act of 7 January 1993 on Family Planning, Protection of Human Foetus and Conditions for Termination of Pregnancy*², popularly known as the anti-abortion law. The possibility of termination of pregnancy is defined in Article 4a, point 1 of the Act:

"Termination of pregnancy may be carried out only by a physician in the case when:

1. the pregnancy constitutes a threat to the life or health of the pregnant woman,
2. prenatal tests or other medical indications show a high probability of a severe and irreversible damage to the foetus or an incurable illness threatening its life,
3. a justified reason exists to suspect that the pregnancy has arisen as a result of a criminal act."

This Act was softened in 1996, allowing abortion for social reasons, expressed in the addition to Article 4a point 4. *Pregnant women who find themselves in difficult living conditions or a difficult personal situation.* However, a year later the Polish Parliament rescinded the possibility to terminate pregnancy due to social reasons as a result of the decision of the Constitutional Tribunal, which recognised it as being in violation of the Constitution.

The Act defines precisely until when it is possible to carry out an abortion for each specific case. In the case of possible damage to the foetus, termination of pregnancy is permitted until the moment when the foetus achieves the capability of independent life outside the organism of the pregnant woman. However, in the case of rape, this is possible only if no more than 12 weeks have passed from the beginning of the pregnancy.

In the Act an additional opinion of a second physician is required: *The occurrence of circumstances, which are mentioned in par.1 points 1 and 2, are confirmed by another physician than the one who terminates the pregnancy, unless the pregnancy directly threatens the life of the woman. The circumstance mentioned in par.1 point 3 is confirmed by a public prosecutor.*

The punishment for termination of pregnancy in violation of the law is defined in the Criminal Code³. The woman does not incur any penal consequences. The physician and the person providing the woman assistance in terminating the pregnancy are threatened with imprisonment of up to three years. If the woman is killed as a result of these actions, the perpetrator is subject to a punishment of up to 10 years imprisonment.

Realisation of the Act on Family Planning

The government has a statutory obligation to prepare a report each year on the realisation of the act on family planning, however, it does not completely fulfil this obligation. On the website of the Polish Parliament⁴ there is a the Council of Ministers report available on the realisation in 2005 of the Act of 7 January 1993 on Family Planning, Protection of Human Foetus and Conditions for Termination of Pregnancy, as well as the effects of its realisation. Up to the moment of the dissolution of the Polish Parliament of the 5th term (7 September 2007), the report has yet to be accepted by the Polish Parliament. The governmental report from 2006 is also waiting to be examined by the Parliament.

In its reports, the government limits itself exclusively to providing the official number of terminations of pregnancy carried out in accordance with the law in public hospitals. It baulks at providing an estimate concerning the number of abortions carried out in the so-called abortion underground, in which the number of abortions significantly exceeds the official statistics. The unwillingness of the government to undertake such research on the scale of the abortion underground is most likely due to the fact that if any such research confirmed the actual scale of the underground, it would signify a total failure of the Act on Family Planning in liquidating or at least reducing the number of abortions. Failure in this scope is what the government most clearly does not want to admit to. This is why the authorities have up to now concentrated above all on prosecuting persons carrying out abortions in the underground, as if this would improve the state of realisation of the Act.

The following is a table of live births, abortions and spontaneous miscarriages on the basis of government reports and GUS statistics⁵ for the years 1993-2005:

³ Article 152-154 of the Criminal Code, Journal of Laws no. 88, item 553 and no. 128, item 840

⁴ [http://orka.sejm.gov.pl/Druki5ka.nsf/0/E98C77E1484866D9C125723B005278FB/\\$file/1174.pdf](http://orka.sejm.gov.pl/Druki5ka.nsf/0/E98C77E1484866D9C125723B005278FB/$file/1174.pdf)

Table 1. Live births, artificial and spontaneous miscarriages.

Year	Live births	Teenage births up to age 19	Percentage of teenage births up to age 19	Total number of abortions	Abortions due to social reasons	Abortions due to threat to life or health of the woman	Abortions due to severe or irreversible damage to foetus	Abortions due to suspicion that the pregnancy is a result of crime	Spontaneous miscarriages	Percentage of spontaneous miscarriages in total number of all registered pregnancies (births + spontaneous miscarriages)
1993	494 310			685	–				53 057	9,69%
1994	481 285			782	–	689	74	19	46 970	8,89%
1995	433 109			559	–	519	33	7	45 300	9,47%
1996	428 203			505	–	457	40	8	45 054	9,52%
1997	412 635			3047	2524	409	107	7	44 185	9,67%
1998	395 619			310	–	211	46	53	43 959	10,00%
1999	382 002	28,769	7,53%	151*	–	94	50	1	41 586	9,82%
2000	378 348	27,771	7,34%	138	–	81	55	2	41 007	9,78%
2001	368 205	25,832	7,02%	124	–	63	56	5	40 559	9,92%
2002	353 765	24,331	6,88%	159	–	71	82	6	41 707	10,55%
2003	351 072	22,514	6,41%	174	–	59	112	3	41 381	10,54%
2004	356 131	20,502	5,76%	193	–	62	128	3	42 183	10,59%
2005	366 095	19,395	5,30%	225	–	54	168	3	40 754	10,02%
2006**	374 244	19,230	5,1%	340	–	82	246	12	–	–
			Total change = fall 2,43%							Total change = 0,32%

*Figures given in the government report do not add up to 151

** 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)

According to the official statistics, the number of legal abortions remains on a similar level – approximately 200 abortions annually, which in no way is a reflection of the real number of abortions. The number of spontaneous miscarriages is disturbing, which stands at significantly higher than forty thousand annually. In comparison with 1993, the number of miscarriages in 2005 rose by 0.32%. In the Mazowsze Voivodship the number of spontaneous miscarriages rose by 5490 cases (2000) to the figure of 6000 in 2005 (5954)⁶. The high level of miscarriages draws attention, particularly in the case of the rapid development of modern medicine. This testifies not only to the unsatisfied health needs of pregnant women, but perhaps also to the effects of using the so-called abortion underground.⁷ It is worth focusing here on the phenomenon of pregnancies among adolescents. Although the number of births among adolescents up to the age of 19 in absolute figures has fallen significantly in recent years, however, taking into consideration the constant fall in the total number of births, the percentage fall of adolescent births is statistically very slight, at only 2.43%. It should also be remembered that we are talking here of births, and not pregnancies, which could be significantly higher. In fact, it is not known if in percentage terms fewer teenagers are becoming pregnant or simply if fewer girls are deciding to continue the pregnancy. The high number of births amongst teenagers in comparison to Western Europe testifies to the serious lack of education among the younger generation, which is an absence of reliable sexual education in Polish schools.

Access to legal termination of pregnancy

Although the Polish law permits the possibility of legal termination of pregnancy in three cases, in reality women most often are not able to exercise this right. Termination of pregnancy is practically not carried out at all in hospitals. In a country in which there are almost 10 million women of reproductive age, in 2001 there were only 124 legal abortions. Doctors refuse women the right to a legal abortion by referring to the conscience clause and sometimes even hinder them from carrying one out in another institution – although in the case of refusal the law places obliges them to indicate a place where the abortion can be carried out by another physician. Physicians freely interpret the regulations concerning termination of pregnancy, prompting them to refuse women an abortion despite the medical indications, which *de facto* forces them to give birth despite serious health problems. It seems that for the doctor the most important thing is for the woman to survive the birth. Her later state of health is not taken into account. Some believe that if there is not one hundred percent certainty that the pregnancy could cause the death of the woman, then she should give birth, since there is a chance that she will survive. Moreover, the majority of doctors do not discern the health threats of a pregnancy for adolescents, which in developed countries is recognised as a high-risk pregnancy, and so as counterindications for giving birth. A woman with AIDS was refused an abortion in the majority of Warsaw's hospitals because, as they explained, a woman who is seropositive can have a healthy child⁸. Her right to health was not taken into account. Directors often refuse abortions in hospital and despite a statutory obligation to send the patient to another hospital, they do not do this. The state has not introduced suitable appeal and control mechanisms which would improve the respect of a woman's right to terminate pregnancy.

It is very difficult to obtain a certificate on the medical indications to carry out an abortion. Many women phoning the Hotline for Women, run by the Federation since 1992, have been told by doctors that they should not give birth since there is a threat to their health, although, the doctors in question did not dare to express this opinion on paper in order to permit a legal termination of preg-

⁶ Study on births and newly-born babies in the years 2000-2005 in Mazowieckie Voivodship, Mazowieckie Centres of Public Health (November 2006), Warsaw. http://www.mczp.pl/publikacje/opracowanie_dot_porodow_i_noworodkow_2000_20_05_woj_maz.pdf

⁷ Vide information on the functioning of the abortion underground obtained by doctors from patients coming with requests for examination or curettage who openly admitted that they had had an illegal abortion, Anna Domaradzka, Report from expert research with doctors, gynaecologists and obstetricians.

⁸ *Women's Hell, contemporary histories*, (2001), Federation for Women and Family Planning, Warsaw and stories from the Women's Hotline.

nancy. Women in a situation where their own lives are threatened, or where the foetus is severely malformed, must therefore find a doctor who will turn out to be a reliable specialist and without ideological prejudices or fears, who will issue an opinion based on the medical indications.

Doctors who do not want to issue an opinion or carry out an abortion, create their own "regulations" which they refer to, requiring new, unnecessary documents. They direct them to successive examinations which are not required by law, which for the woman often means extra financial expense, since not all the tests are refunded and it is necessary to wait very long for some of them in the public health service⁹. The time is extended and often exceeds the deadline for permission to terminate pregnancy regulated by the Act. Situations occur in which the physicians criticise women whose pregnancy threatens their life, accusing them of caring more about their own comfort than the "good of the child". The mother of Agata Lamczak¹⁰, from Piła, experienced this herself. Her daughter died when doctors decided too late to allow the termination of her pregnancy, which threatened her life. The pregnancy prevented proper treatment of ulcerous inflammation of the large intestine and weakened her organism. The doctor told her mother that "Agata is too interested in her own ass instead of being interested in something else". In another hospital the doctor told the patient whose foetus was seriously damaged, that the woman should expect a miscarriage or the death of the foetus and should simply wait until it happened. Besides this, she should be grateful because they are obliged to save the life of every living being and she should be glad that they would not save the life of what she would give birth to.¹¹

The rights of pregnant women are notoriously violated. In particular, the pregnant woman's right to health is increasingly questioned and recognised as a right of lower value than the right to life of a foetus¹². Many Polish women decide to take the matter to court with regard to this. A few such stories are described in the publications of the Federation in the series *Women's Hell*. The best-known is the story of Alicja Tysiąc¹³, who was forced to give birth to her third child despite serious medical counterindications to terminate the pregnancy which was threatening her health. Ms Tysiąc decided to lodge a complaint to the European Court of Human Rights in Strasbourg. On 20 March 2007 the Court recognised the grounds for the complaint and ruled that a violation of the European Convention of Human Rights and Basic Freedoms had taken place, including the right to respect the private and family life, *inter alia*, due to the fact that there were no procedures which would make possible an appeal against the doctor's decision.

The above-mentioned report of the government indicates that in 2006 there were 12 abortions carried out as a result of rape. At the same time, from official police reports (which covered only rapes that were reported) we see that in 2006 there were 1829 rapes reported, including 172 group rapes¹⁴. These figures make a big impression, and one can say that it is highly likely that a significant number of women who became pregnant as a result of a criminal act, including rape, are not able to make use of the possibility which is provided to them by Polish law, and cannot exercise their right to a legal, free abortion.

When referring to a criminal act, contrary to popular belief this does not only refer to rape, but also to incest, a sexual act with an insane or helpless person, a sexual act with a girl below 15 years of age, sexual harassment, and forced prostitution.

⁹ *Women's Hell*, (2001), op. cit.

¹⁰ *Medical error or failure of treatment*, Namysłowska-Gabrysiak B. in: *Prawo i Medycyna*, no. 3/2005, 20, vol. 7

¹¹ The story of Joanna K. (in the appendix)

¹² Extraordinarily characteristic for such an opinion is the comment of Włodzimierz Wróbel – expert of the parliamentary commission working on the amendment to the constitution: "Therefore there arises the question whether every threat of negative consequences for the health of the pregnant woman justifies a restriction of the protection of life of the conceived child and the permissibility of termination of the pregnancy. Undoubtedly, a comparison of the collision of values in the perspective of their gravity would indicate the primacy of the child. Therefore the protection of health of the mother alone cannot justify taking the life of the conceived child, particularly since the threat which would be connected with continuing the pregnancy would involve only minor and reversible consequences to the health of the woman."

¹³ *Women's Hell Continues*, edition 2 supplemented, (2007), Federation for Women and Family Planning, Warsaw.

¹⁴ Police statistics for 2006 www.policja.pl

However, it should be remembered that the occurrence of the crime must be reported to the public prosecutor, which can be a traumatic experience for women. However, in order to terminate a pregnancy in accordance with the law in such cases, women must have a certificate from the public prosecutor. This situation is more difficult, since in the above-mentioned circumstances women have only 12 weeks in order to make a decision to report the crime and obtain the certificate. Women who are the victims of criminal acts attempt to forget about the event as quickly as possible, but at the same time they must go through all the procedures which often exacerbate their trauma. It is a great shock for them to learn that they are pregnant as a result of rape and the attempt to realise their right to terminate the pregnancy exposes them to more degrading experiences. This is why many women fail to report rapes and other crimes of a sexual nature. Relatives of women who had become pregnant as a result of rape often phoned the Federation's hotline asking for help, but wished to avoid reporting the case to the police¹⁵. Women were ashamed that they had been raped – they did not want to talk about it, and in particular it was important for them that the people closest to them should not find out. Moreover, the legal process prolongs the procedures so that the deadline for a legal abortion is often exceeded.

The Federation also receives information from women who have had problems obtaining a certificate from the public prosecutor entitling them to terminate the pregnancy. We know that public prosecutors often question the fact that rape has taken place, particularly if the victim of the crime cannot provide any witnesses. One of them told a woman that "after all, the child can always be adopted afterwards". Therefore one should not be surprised that many of them, fearing similar difficulties, immediately decide to have a backstreet abortion. Women are also afraid that by informing the judiciary or other institutions, then someone will be interested in the fate of their pregnancy later. In the government reports there is no analysis of the situation of women who are refused or prevented from having a legal abortion. They do not indicate legal solutions or procedures which would help women in a similar situation exercise the rights which they are entitled to. Incidentally, in accordance with the standards of human rights and medicine, at the moment of reporting a rape the victim should receive the day after contraceptive pill, allowing her to avoid becoming pregnant as a result of a criminal act. Moreover, she should also receive antiretroviral drugs (as part of so-called post-exposure treatment) which can prevent infection of the HIV virus. It is not necessary to add that in Poland rape victims do not receive such help.

The abortion underground

The abortion underground is a difficult phenomenon to examine due to its illegal character. We know that it is flourishing and that many women make use of illegal abortions which they have to pay for. Since it has a purely commercial character, the cost of abortions is very high. Termination of pregnancy is carried out mainly by doctors, who undertake such activities only for financial reasons. We rarely hear of a doctor who would terminate a pregnancy for anything other than financial reasons, e.g. motivated by feelings of sympathy and a willingness to help women. More and more often we hear of people outside this group of professionals, who offer pills for medical termination of pregnancy.

Women must have at their disposal a sufficient amount of money and determination, in order to terminate a pregnancy in the so-called abortion underground. Undoubtedly, many women have had abortions which were carried out professionally, thanks to this they have not had any health problems. Those who have had such experiences say: "it's a weight off my mind", "at last I have it behind me". It is poor women whose health is most at risk. Determined, they decide on an abortion or services carried out in worse conditions, offered by non-professionals, often risking their life or health. The quali-

¹⁵ Hotline 2005-2007

ty of services most often depends on the price. Although it is not possible to measure this phenomenon with statistics, we often find out about women who died as a result of an illegal abortion¹⁶.

Services in the underground

The methods of searching for doctors vary. Usually, women begin by reading the ads. In every newspaper we can find ads with the following contents:¹⁷

"An induced period, gynaecologist, the cheapest."

"aaa gynaecologists, professional and safe induced period."

"Aaa gynaecologist pharmacologically induced period."

"Experienced gynaecologist full range cheap."

"Gynaecologist pharmacologically."

Another way to obtain information how to contact a doctor is through the Internet. Apart from ads and websites, it is possible to make use of Internet forums, where women exchange information. Often information on abortion is given on forums with completely different subjects, e.g. on forums for breeding animals.

Example post:

lady_in_red21

Where can I terminate a pregnancy in Łódź?

Several women answered the question, here are a few examples:

Kaja –

If it's not later than 7-9 weeks, then you can look for an ad such as "pharmacologically return your period". It shouldn't cost you more than 500 zł, at least that's how much girls wrote on the forum earlier. If it's later, then you have the possibility of a normal abortion. I think you can easily get one for about 1500 zł or maybe even less. I know there are buses to Belarus, in the newspaper they wrote that the whole trip costs 1400.

Kinia36

If you don't want the child, at least carry the pregnancy and I will find him/her a good loving home. I'm speaking seriously. Let him/her live.

Antygoona

I see you have doubts, so probably you want the child to live, trust that. Certainly it will be tough, but I believe you'll get by, you'll love it with all your heart and you will do anything for him/her. Please trust your heart.

kaja –

you aren't a bad person and don't let anyone convince you otherwise!! If you have thought it through and made a decision – then it is the right one. Not every woman wants to be a mother nor can every woman afford to be – it is ONLY AND EXCLUSIVELY your decision. And don't listen to women who persuade you to carry on and give it away – they don't understand that someone might not want to be an incubator for 9 months. If you don't want or cannot – it is your decision. I wish you all the best.

Traditionally it is possible to search for a contact on the so-called "grapevine". Help for the woman who has decided to have an abortion often comes from the woman's own inner circle. Her friends not only help to find a doctor, but also collect the money for the abortion and accompany the woman on the way to the doctor. Very few people are aware that they could have serious legal problems because they provided such help. This happened, for example, to Kasia's husband (see footnote 15), who had a court case for so-called aiding and abetting, because he gave his wife a lift to the doctor and gave her the money for the abortion.

¹⁶ *Women's Hell*, op. cit. The story of Kasia, who died as a result of an illegal abortion. When problems arose during the abortion, the doctor waited too long before sending her to hospital in fear of her own safety.

¹⁷ *Gazeta Wyborcza*, April 2007

Dramatic appeals for help are sent to the e-mail address of the Federation. Often these are women who have been on their own with the problem and do not have the means for an abortion in safe conditions. Sometimes their despair is so great that these women, particularly young girls, not knowing where to turn to, even consider taking their own lives. There are still situations where parents do not accept the news that their teenage daughter is pregnant (requires their help) and throw her out of the home as "punishment". Once the mother of a young girl who had an unplanned pregnancy phoned the Federation's Hotline. She demanded that we find some kind of centre for her since it was impossible to keep her at home due to condemnation from neighbours and the teenager's school environment. The girl was supposed to leave her family home like in a 19th century novel, since she had brought disgrace and shame upon the family. We get anonymous calls for help every month. Examples of letters sent to the Federation by e-mail are in the appendix. Every story is a separate drama, but the experiences of women are similar – fear, loneliness, a feeling of being abandoned and left at the mercy of a doctor who they do not know, if they manage to find one or collect the money for the abortion.

Abortion methods

In the abortion underground there are two main methods of termination of pregnancy in use. Medical abortion enjoys growing interest. This can be seen by the number of telephone calls to the Hotline from people (both men and women) interested in this method and the number of discussions on the Internet. Surgical methods, most often carried out by a gynaecologist, are still the main method.

1. Pharmacological methods

The method of termination of pregnancy which is increasingly used and which allows the greatest anonymity is the so-called abortion pill. It is enough to order it in the appropriate place (usually abroad, since in Poland it is illegal) and swallow it, preferably with the possibility of contacting a doctor in the case of complications. Many women do this¹⁸. On the Internet there are support groups for women who decide to have a medical abortion. This is where women exchange information about how to obtain the pills, how they work and how to use them. Through the Internet they also receive mental support from women who have already gone through the experience. Those who have already decided on such a method of abortion believe it to be the safest and least invasive method.

On the Internet you can read about much more dangerous ways of terminating pregnancy with the aid of pharmacology, such as taking a mixture of tablets produced for the treatment of a specific illness. Unfortunately, there are also tragic cases such as the case of the 16-year-old who wanted to secretly terminate her pregnancy and began to take various pills labelled "not intended for pregnant women". She believed that thanks to this she would have a miscarriage, however, the result was such that the mixture caused a deformation of the foetus. The physician told her, "you have created a monster in your belly"¹⁹.

Women are at risk of being cheated by people offering tablets on the black market. There are cases where tablets of an unknown origin are sold, which can endanger health (see below). Sometimes this is simply placebo. People selling "abortion pills" of an unknown origin claim that they want to help women in need. Often, in an attempt to appear credible, they say that they have experienced similar situations themselves and now want to help others. More and more often women who have bought an unknown medicine phone the Hotline and ask whether it will endanger their health.

¹⁸ Information from Internet forums.

¹⁹ Source Women's Hotline. December 2005.

2. Surgical methods

Abortion carried about by surgical methods consists in terminating the pregnancy through introducing gynaecological instruments into the womb and then using these to remove the foetal tissue. There are two main methods: the vacuum method, which consists in suction of the contents of the womb and curettage of the womb²⁰. In Poland the most popular method is the second of these, the so-called "scrape" abortion. The apparatus for the vacuum method is not standard equipment of gynaecological surgeries. Physicians fear that if similar equipment was found during a search of their surgeries, it would be evidence that they terminate pregnancies. Moreover, they do not have experience in the use of modern methods since they have not been trained in them. This is why they still use the outdated method of curettage, although in the majority of countries this practice is no longer in use.

The quality of services depends mainly on two factors: the price and the professionalism of the person carrying out the abortion. Already during the initial conversation the Doctor informs the patient that after the first stage of the abortion in his surgery she will have to go to hospital to "finish" it. This is a big risk to the health of the woman, but some, in an act of desperation and without sufficient financial means, decide on such a risky abortion²¹. It is easier to carry out an abortion in a large town where people feel more anonymous. Women often go to other towns in the fear that someone from their family or an acquaintance will find out, which could lead to them being condemned by them.

As long as the abortion law is restrictive, the black market will flourish and reap enormous profits. The exploitation of women is manifested not only in the high prices offered, but also in the various cases of women being cheated. Besides offering false pills, there are also known cases of false abortions allegedly carried out on women who were not pregnant.²² Taking into account the experience of other countries where abortion is illegal (Latin American countries), it is not possible to control the illegal sale of pills. The sale of illegal pills and abortions in private surgeries, not subject to any control, creates conditions for risky practices.

Abortion tourism

Many women decide on a trip to another country, in order to have a safe abortion. In spite of appearances, a trip abroad does not necessarily have to be more expensive than the excessive prices in private Polish surgeries. Women most often look for a clinic in a country neighbouring Poland, including the Czech Republic or Germany, where one can legally and safely carry out an abortion. Women who chosen this solution rate highly the professionalism and safety of the services provided. On the basis of scraps of information it is difficult to asses the scale of the phenomenon, but it certainly is not small and is constantly growing, particularly after Poland's accession to the European Union, which has significantly increased the mobility of Polish women. Information on this subject comes from the women who have chosen this solution or are considering it, as well as from the European clinics. From our survey it follows that there are few clinics in Europe (e.g. in Holland, Austria and Sweden) that haven't had dealings with clients from Poland. Most often this is a dozen or so or several dozen cases annually. So-called abortion tourism has an individual character. It seems that organised abortion tourism does not currently exist on a large-scale as it did in the first half of the 90s, when there were agencies organising trips for women to Belarus or to Russia for abortions. As a result of police operations, such agencies were liquidated.

²⁰ *Safe abortion, Technical and policy guidance for health systems*, WHO publication, (2004), translated by Federation for Women and Family Planning, Warsaw.

²¹ One of the Internet forums.

²² There is a case known of fictitious abortions conducted by a gynaecologist from Olkusz, who misled her patients by telling them that they were pregnant. She then carried out an abortion and took money from them., *Gazeta Krakowska*, 04.08.2007, <http://wiadomosci.onet.pl/1583286,11,item.html>

The price of abortions

Often the most important question when choosing the method and type of abortion is money. The cost of an underground abortion amounts to approximately 1500-2500 zł, although there are abortions for 4000 zł. Women and their partners usually look for the cheapest services, which does not always mean they are the safest. Pills are most often offered for approximately 400-1000 zł. Recently, western non-profit organisations have started operating, which sell tablets to foreigners, including above all, Polish women, through the Internet at cost price i.e. approximately 200 zł. They are motivated purely by their desire to help women and not by profit.

The scale of the abortion underground

In the report for the year 2000²³ the Federation presented its estimate concerning the scale of the abortion underground. On the basis of comparative demographic data and own research, the number of abortions in Poland was estimated at between 80,000 and 190,000 annually. Since that time no "hard" data has appeared that would verify the previous estimates. In order to get an idea of the real scale of the phenomenon, it is worth comparing statistical data from several European countries. Data from selected countries is presented in the table below, which shows the population of the given country and the number of abortions – countries are placed in order according to their size of population. Although the number of abortions does not depend only on the size of the population, undoubtedly there is a correlation. Above all, it is the country's health and education policies i.e. access to contraception and sexual education²⁴, that influences the number of abortions of a given country, which is why in Western Europe, where much has been done in this area, there are significantly fewer abortions than in Eastern Europe, where such policies, with few exceptions (the Czech Republic), are practically not carried out. According to data available from the 90s, in the countries of Western Europe the number of abortions per 1000 women of reproductive age stood at approximately 10 (in Holland – 6.5), however in the countries of Eastern Europe this index was approximately 20-70 abortions per 1000 women²⁵. Although in the 21st century the number of abortions in Eastern Europe has fallen significantly, it is still much higher than in Western Europe. Although this is not a sufficient basis to be tempted into making an estimate for Poland, however it is clear what level the figures could be. In the table below a simulation of the number of abortions in Poland is presented, if the abortion index per 1000 women of reproductive age were at the level of France, Hungary and Slovakia. Although the figures obtained in this way differ fundamentally, all of them significantly exceed 100,000.

The fact that there exists a developed abortion underground in Poland is not even questioned by the most vociferous opponents of the right of women to abortion, who just a few years ago claimed that the scale of the underground is insignificant. Now even they admit that the scale of the underground reaches a few tens of thousands (in other words, they believe that in Poland, which has a population two and a half times larger than Holland, there are at least half the number of abortions than in Holland – the country with the lowest abortion index in the world!) and although these are still numbers which have been understated, the most important thing is that they have stopped pretending that the phenomenon does not exist. In their estimates they completely forgot that the number of births in Poland is falling. What is the significance for estimates of the scale of the underground of the fact that from 1993 (i.e. the year of introduction of the abortion ban) to 2004 the number of births has fallen

²³ *The anti-abortion law in Poland, functioning, social effects, attitudes and behaviour, Report* (September, 2000), Federation for Women and Family Planning, Warsaw.

²⁴ *Induced Abortion*, Van Look P., von Hertzen H. http://www.gfmer.ch/Books/Reproductive_health/Induced_abortion.htm

²⁵ *The Incidence of Abortion Worldwide*, Stanley K. Henshaw, Susheela Singh and Taylor Haas, *Family Planning Perspectives*, Volume 25, Supplement, (January 1999).

by about 140,000!²⁶ These figures expose the lie of opponents of the right to abortion who claim that the abortion ban will increase the number of births. In Poland it is precisely the opposite. It should not surprise anybody – nowhere in the world does demographic data confirm the existence of such a correlation, that where there is an abortion ban there are more children born. However, politicians use this argument in the public debate in contradiction to obvious facts and scientific knowledge.

Table 2. Abortion in Europe²⁷

European countries (from the largest population)	Population	Live births	Number of abortions	Abortions per thousand women (of reproductive age)
Russia (2004)	143.406.042	1.502.477	1.797.567	45.1
Germany ²⁸	82.689.000	685.795	130.000 (2005)	
France ²⁹	62.400.000	767.816	203.000 (2005)	14.6
Italy ³⁰	58.607.044	562.599	130.000 (2003)	9.1
England ³¹	53.400.000	715.996	194.000 (2006)	
Spain ³²	43.064.000	453.278	85.000 (2004)	8.9
Poland ³³	38.157.000	366.095	?	
Poland* - simulation 1			146.000	14.6 (at the level of France)
Poland* - simulation 2			279.000	27.9 (at the level of Hungary)
Poland - simulation 3			139.000	13.9 (at the level of Slovakia)
Romania	21.154.226	216.261	191.000 (2004)	34
Holland ³⁴	16.319.868	194.007	33.000 (2005)	8.7
Czech Republic ³⁵	10.234.092	97.667	30.000 (2003)	16.3
Hungary	10.037.768	95.137	68.000 (2004)	27.9
Bulgaria	7.673.215	69.886	47.200 (2004)	25
Slovakia	5.379.465	53.747	20.100 (2004)	13.9

²⁶ In 1993 almost 493,000 children were born and in 2004 almost 358,000. For: *Women's reproductive health*, Milczarek I., (2005) Secretariat of the Government Plenipotentiary for Gender Equality, Warsaw.

²⁷ <http://www.johnstonsarchive.net/policy/abortion/index.html>

²⁸ <http://www.johnstonsarchive.net/policy/abortion/index.html#GE>.

²⁹ Direction de la Recherche, des Etudes, de l'Evaluation et des Statistiques DREES

³⁰ <http://www.johnstonsarchive.net/policy/abortion/italy/ab-italy.html>.

³¹ http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsStatistics/DH_075697.

³² <http://www.johnstonsarchive.net/policy/abortion/spain/ab-spac.html>.

³³ http://www.stat.gov.pl/cps/rde/xbcr/gus/PUBL_struktura_ludnosci_01_tablica1.xls.

³⁴ <http://www.amsterdam.info/netherlands/population/>

³⁵ <http://www.johnstonsarchive.net/policy/abortion/czech/ab-czac.html>.

*In the simulation for Poland the figure of 10 million women of reproductive age has been used to simplify calculations. In 2005 the figure was 9,865,301 (GUS)

It is also worth mentioning that if someone decides to make an estimate of the number of abortions in Poland (this number was never known) the basis is most often taken as the official number of abortions carried out in public hospitals in the 80s. At that time hospitals terminated approximately 150,000 pregnancies annually. However, these figures are very illusory. In those days most abortions were carried out in private doctors' surgeries, which were flourishing. Even then, it was estimated that in total there could be two or three times more abortions than the official hospital statistics. All these factors taken together create problems in estimating the scale of the underground in Poland in a precise way, but they give an idea of its scale.

The anti-abortion camp currently concentrates on prosecuting illegal abortions. They are constantly demanding that the law enforcement bodies concentrate their efforts on prosecuting people who are terminating pregnancies in the abortion underground. On the other hand, the government is consistently ignoring the phenomenon of the underground and not taking any steps to assess its scale, despite the recommendations of international institutions. The lack of credible data is a convenient alibi for public institutions, freeing them from the responsibility to seriously tackle the problem of a very restrictive but ineffective law.

The fight of law enforcement bodies with the abortion underground

Radical representatives of the right have put constant pressure on the government to ensure that the restrictive law is fully observed, which means only concentrating on a struggle with the abortion underground and not ensuring access to abortion in accordance with the law. The Parliamentary Commission for the Family and Women's Rights, and also a variety of organisations against the right to abortion, have mobilised police to intensify the fight against the abortion underground. By applying the tactics of provocation, or by referring to "certain" sources, police have arrested doctors carrying out abortions and people connected with the cases. The existence of such a strategy on the part of the police was described briefly by the spokesperson of the Ministry of the Interior and Administration in a letter to the Federation. It explained that "*the fight against the 'abortion underground' is one of the priority tasks in the programme of police operations*"³⁶. This tendency will probably not change.

In Legionowo a doctor was arrested "red-handed". A group of masked policemen broke into the surgery in which a patient under anesthesia was being prepared for an abortion. At the same time the abortion was prevented. The Federation and the Legal Clinic of the University of Warsaw wrote a letter to the Ministry of the Interior and Administration asking about details of the operation and an explanation of the police procedure³⁷. In its reply, the Ministry of the Interior and Administration excludes the possibility that during the police operation the rights of the patient were violated. In the opinion of the Ministry of the Interior and Administration everything took place in accordance with the procedure in force³⁸ (reply of 11 June 2007). It is difficult to agree with the police in this case. The standards of human rights and the rights of the patient clearly indicate that breaking into a gynaecological surgery when a patient is awaiting medical treatment is a violation of human rights, in particular, the right to dignity and intimacy.

The so-called "defenders of the rights of conceived life" have begun active surveillance of the underground. They have made an appeal to citizens, in which they urge people to inform the police about every situation where there is the possibility that an illegal abortion could be carried out. On their website they have added a model letter informing that a crime has been committed³⁹.

³⁶ http://www.federa.org.pl/newsletter_tpl/Mamprawo41/mail_MSWiA.doc

³⁷ <http://www.federa.org.pl/?page=news&newsid=193&lang=1>, the letter was also signed by the Group "Same o Sobie", Feminoteka Foundation and Centre for Women's Rights

³⁸ http://www.federa.org.pl/newsletter_tpl/Mamprawo41/MSWiA_LEgion.pdf

³⁹ http://www.prolife.com.pl/serwis/index_p.php?strona=reaguj_na_nielegalna_aborcje

Police statistics on termination of pregnancy⁴⁰

The detection rate of cases of illegal abortions is relatively small in comparison with the scale of the phenomenon.

Termination of pregnancy with the consent of the woman (Article 152)

§ 1. Whoever terminates a pregnancy in violation of the law with the consent of the woman is subject to a punishment of up to 3 years imprisonment.

§ 2. This same punishment applies to whoever assists a pregnant woman in terminating the pregnancy in violation with the regulations of the act or persuades her to do so.

§ 3. Whoever carries out an act defined in § 1 or 2 when the conceived child has achieved the ability of independent life outside the organism of the pregnant woman, is subject to a punishment of 6 months to 8 years imprisonment.

In the years 1999-2006 the police registered one case of death of a woman (Article 154 of the Criminal Code) as a result of abortion (2001). These statistics contradict the information known from the press, which informed of the death of a young woman as a result of an illegal abortion in 2005 as well as information from the police themselves (see below)⁴¹.

Table 3. Crimes against life - termination of pregnancy with the consent of the woman in the years 1999-2006. Number of crimes from art. 153 which concerns termination of pregnancy without the consent of the woman is a few cases per year. In 2006 there were 2 cases, in 2005 – 4, in 2004 – 5 in 2003 – 4 and in 2002 – 10.

Year	Art. 152 par. 1-2	Art. 152 par. 3
1999	92	3
2000	19	1
2001	17	0
2002	200	0
2003	38	0
2004	26	0
2005	56	0
2006	47	2

An analysis of the information on the operations carried out by the law enforcement bodies and the judiciary contained in the above-mentioned government report on the realisation of the Act in 2005 gives an interesting view of the detection rate of illegal abortions. In 2005 the public prosecutor registered 100 cases. The basis for beginning proceedings constituted, inter alia, findings arising from other proceedings (31 cases); information from health service institutions (24 cases), information from people close to the pregnant woman (19 cases, including 13 from the woman's partner, 6 from the family), anonymous information about illegal abortions in private surgeries (8 cases). In 41 cases

⁴⁰ <http://www.policja.pl/portal.php?serwis=pol&dzial=17>.

⁴¹ In March 2005 21-year-old Karina Kozik from Sędziwojewe (Wielkopolska) had an illegal abortion which was conducted by a gynaecologist in his private flat in Swarzędz. After the abortion she had a haemorrhage and an ambulance took her to hospital in Poznań, where she died. (Super Express, 22.03.2005)

proceedings were carried out concerning the termination of pregnancy with the consent of the woman, however, in 27 – in connection with providing assistance to a pregnant woman in terminating a pregnancy. In other words, the cases were most likely against doctors who terminated the pregnancy and against all those who assisted the woman e.g. by taking her to the doctor. In 2005, of those 100 cases, 80 proceedings ended on their merits, resulting in 26 prosecutions, whilst in 54 cases the proceedings were suspended. In one of the cases the accused, Jerzy K., stood before the court in Toruń accused of committing 21 crimes consisting in the sale of abortion pills to women and passing on instructions to them on how to use them, which in the case of 2 women led to health problems and in the case of one, led to death. Incidentally, the question arises as to why the case of the death of this woman was not recorded in the police statistics for 2004 or 2005? This fact, and the failure to record the death of another woman, Karina Kozik (see above) seriously puts in question the credibility of the police statistics on the deaths of women as a result of illegal abortions. In 2005 the courts recognised 22 cases against 29 people. In 17 of these cases 22 of the accused were sentenced. The court applied a suspended sentence from one to two years imprisonment for 21 of the accused as well as fines. For 4 of the accused gynaecologists there was also a ban imposed on carrying out their profession for a period of 2 to 10 years. One of the 2 cases in which there was a decision finding them innocent concerned importing to Poland so-called abortion pills called "Methotrexat" and "Cytotec". However in this case the prosecutor appealed. Fifty-four of the cases which were suspended in 2005 were the subject of official supervision. In 4 of these cases the decision to suspend the case was deemed premature. This part of the government report ends with the following conclusion: (...)the data(...) presented(...) does not allow an unambiguous assessment of both the scale of the phenomenon, nor the effectiveness of the Act of 7 January 1993 on Family Planning(...) as well as the regulation contained in the criminal code currently in force in limiting the scale of illegal abortions and its social effects."

Infanticide and abandonment of newly born babies

Punishment for infanticide and abandonment is regulated by Article 149 and 210 of the Criminal Code:

Article 149. A mother who kills her child during childbirth under the influence of the birth is subject to a punishment of 3 months to 5 years imprisonment.

Article 210.

Par. 1. Whoever, in violation of the duty to care for minors below the age of 15 or people who are incapable of looking after themselves due to their mental or physical state, abandons such people, is subject to a punishment of up to 3 years imprisonment.

Par. 2. If the result of such an act is death of the person mentioned in par.1, the perpetrator is subject to a punishment of 6 months to 8 years imprisonment.

The number of registered infanticides amounts to a dozen or so each year. It is difficult to state whether this represents an actual fall in the scale of the problem in comparison with the 90s. However, it is possible to state that the real number of undetected cases is significantly higher.

From police statistics it can be clearly seen that in opposite proportion to the fall in the number of infanticides there was a rise in the number of cases of abandonment⁴². The number of cases of leaving newborn babies in hospital immediately after birth due to reasons other than health (currently - over 100 cases annually, however, in 1993 – 252 and in 1996 – 803). This is without doubt evidence that a large number of women became pregnant against their wishes. There is no reliable education on how

⁴² <http://www.policja.pl/portal/pol/4/308/>.

to prevent pregnancy, access to advice and services in this sphere, nor the possibility to terminate pregnancy due to social reasons. The restrictive law, lack of effective government action in the sphere of prevention, and the absence of social aid inevitably lead to similar tragedies. The situation is not improved by social ostracism towards so-called "heartless mothers" who are perceived exclusively as the cause of the existing situation, whilst the role of the women's partners is totally ignored. There is neither a state policy in this sphere apart from increased penal repression towards women, nor a public debate on the legal-social conditioning of this phenomenon and the real ways of preventing it.

Table 4 Crimes reported: Infanticide. Abandonment and abandonment causing death.

Year	Infanticide Article 149 C.C.	Abandonment Article 210 par. 1 C.C.	Abandonment causing death Article 210 par. 2 C.C.
1990	50	20	2
1991	53	36	1
1992	59	28	0
1993	56	38	0
1994	52	53	3
1995	42	55	4
1996	44	54	2
1997	43	77	3
1998	38	63	4
1999	31	46	1
2000	47	71	0
2001	26	76	0
2002	28	63	3
2003	25	86	0
2004	19	58	1
2005	12	70	2
2006	10	94	1

Criminal codification was given according to the Criminal Code in force on 1.09.1998.

Table 5⁴³. Newborn babies left in hospital due to reasons other than health, 1995-2006.

Year	Total number of children	Per 10,000 births
1995	738	17,0
1996	803	18,8
1997	685	16,6
1998	594	15,0
1999	737	19,3
2000	861	22,7
2001	899	24,5
2002	1018	29,0
2003	1090	29,0
2004	1012 ⁴⁴	28,4
2005	1013*	27,7
2006	826*	22,1

* The governmental report, 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)

Prenatal tests

The Act on Family Planning obliges the government administration bodies and the municipal authorities to ensure free access to information and prenatal tests, particularly when there is a high risk or suspicion of the existence of genetic defects or developmental defects of the foetus or incurable illness threatening the life of the foetus (Article 2 point 2 of the Act). Access to prenatal tests is in practice seriously restricted. Doctors often do not send women for prenatal tests despite clear medical indications. Cases when women were forced to give birth to children with very serious defects have been publicised by the media. A highly publicised case has been fought in the courts in Łomża⁴⁵ for many years by Barbara and Sławomir Wojnarowski – parents of two seriously handicapped children. The woman was refused prenatal tests and as a result was forced to give birth to a second child with the same genetic disorder as her first child. Doctors do not send women for tests even when there are serious medical indications, which to a certain degree is caused by a lack of sufficient knowledge, the high cost of the tests, but above all, a commonly held false belief that information about a possible defect of the foetus will have an overwhelming influence on the decision to terminate the pregnancy. However, many women decide to continue the pregnancy even when they are aware of a defect of the foetus. Doctors also rarely take into consideration the fact that an early diagnosis can make treatment possible even during pregnancy.

Although the number of tests is growing each year, it is still disproportionately low in relation to needs. According to the governmental report on the realisation of the Act in 2006, 7739 invasive

⁴³ Reproductive health in Poland – Ten years after Cairo, Niemiec T., (2004) Presentation, <http://www.unic.un.org.pl/swp/2004/lunch-UNFPA-finale.ppt>

⁴⁴ *Women's Reproductive Health*, op. cit.

⁴⁵ *Women's Hell, contemporary histories and Women's Hell Continues*, op. cit.

prenatal tests were conducted (in 2005 – 4034), 707 pathologies of the foetus were detected (2005 – 481) and in 17922 cases genetic advice was given (in 2005 – 18,812). In 2006 there were 246 terminations of pregnancy in relation to severe and irreversible damage to the foetus (in 2005 – 168)⁴⁶. "The small number of prenatal tests conducted in Poland is striking testimony to their poor availability. For example: in 2000 there were 380,000 children born, of which 35,000 were born to women over 35. Therefore, tens of thousands of women should have had access to such tests. At the same time, in 2000 there were only 1,600 invasive prenatal tests conducted. It follows from this that only 4.5% of women with indications for prenatal diagnosis were tested! In comparison, in the Czech Republic for a number of years approximately 10,000 women have been tested annually, in other words, 19 times more than in Poland (calculated according to population)"⁴⁷.

Contraception

Poland departs from European standards in the area of family planning and reproductive health. Research shows that as far as frequency of use of modern contraceptive methods is concerned, Poland is in last place in Europe⁴⁸. According to data from the World Health Organisation, in Poland modern contraceptive methods – the pill, the contraceptive patch, IUDs – are used by only 19% of women (in Great Britain – 81%, in Italy – 38.9%, and in Romania – 29.5%).⁴⁹ Such results can be explained by limited access to information and advice about modern methods of contraception in the public health service as well as lack of refunding, which results in high costs of contraception.

Availability

Only condoms and spermicide are sold freely. In Poland there are no machines where one can purchase condoms quickly and easily in case of need. Contraceptive sterilisation in Poland is virtually unavailable. Other methods of contraception issued on prescription by a doctor are only available at full price. Only one contraceptive, which appears under three different trade names, is partly refunded by the state. However, it can be used only by some women. Advice in this sphere in Poland is also medicalised. A serious barrier preventing access to contraception is the requirement of a medical examination and prescription. Contraceptive advice is not included in the system of basic health care, and in relation to this, the Health Funds do not refund contraceptive advice. The only option is private visits to a gynaecologist, which are expensive, especially since some doctors require a monthly visit for a prescription. Many women complain that the doctors do not know about modern forms of contraception (post-coital contraception) and others try to impose their own views on the patients during the visit. Such practices constitute a serious restriction of access. The cost and required frequency of doctor's visits is a difficulty for all women, but for teenagers it constitutes an exceptionally difficult barrier. The price is high (the cost of the pill is approximately 35 PLN for one packet) and doctors do not always give prescriptions, citing the conscience clause in their refusal. Here it should be remembered that approximately 40 percent of society lives below or at the social minimum. Moreover, sometimes it is necessary to wait several weeks for a visit to the gynaecologist, which for women who are continuing hormonal contraception is unacceptable. However, for people who need emergency contraception, this means they have no chance of receiving it. As a result, it is necessary to make a private appointment, which costs approximately 70-100 zł. If we add to this the cost of the pills, then it comes to an amount which many women cannot afford. There is a lack of specialist advice centres and information centres which promote reliable knowledge on contraception. There is also no counselling for young people.

⁴⁶ [http://orka.sejm.gov.pl/Druki5ka.nsf/0/E98C77E1484866D9C125723B005278FB/\\$file/1174.pdf](http://orka.sejm.gov.pl/Druki5ka.nsf/0/E98C77E1484866D9C125723B005278FB/$file/1174.pdf) and [http://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/25/\\$file/25.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/wgdruku/25/$file/25.pdf)

⁴⁷ *Health and Medicine. Prenatal diagnostics in Poland*, Tajak M., Bulletin of the Federation (1/22, 2002). Warsaw.

⁴⁸ <http://www.biomedical.pl/aktualnosci/polki-najrzadziej-w-europie-stosuja-antykoncepcje-281.html?sid=78604e264f0395cae32516ce040087e>

⁴⁹ *Health of women in procreational age 15-49*, Report 2006, (2007) Development Programme of the United Nations, Warsaw.

Doctors do not inform patients about all the possible methods of family planning (taking into consideration modern methods of family planning). Most often this phenomenon is noticeable when the woman wants to begin using hormonal contraception. There are cases even in private clinics when the doctor not only refuses to prescribe the pill, but starts to moralise and insult the patient. The doctor presents false information about the harm caused by contraception. Instead of obtaining expert help from a specialist, women face the risk of humiliating treatment. Outraged by this state of affairs or simply frightened by the whole situation, many women phone the Federation (information from the Hotline from the years 2005-2007). In this situation the patient has the right to lodge a complaint.

The Federation is conducting an information campaign aimed at encouraging patients to demand from the doctor a written refusal in the case of refusal to prescribe hormonal contraception for ideological reasons.

The worst situation is in the case of emergency contraception, otherwise known as "post-coital contraception", or the morning after pill, often presented by gynaecologists as the abortion pill (which unlike emergency contraception, is banned in Poland). Due to the fact that it should be taken up to 72 hours after intercourse, it may be presumed that it is necessary to make a private appointment, since it is most certainly necessary to wait over 3 days for an appointment in a state-owned institution. All this incurs a cost. There are also cases when the pharmacists refuse to sell medicines, using the excuse of their convictions. In accordance with the Medical Code of Ethics which is currently in force, in this situation they should indicate another pharmacist who will sell the medicine.⁵⁰

The effects of not prescribing emergency contraception are often similar to those described in the letter sent to the Federation. This story is typical. A 24-year-old girl needed emergency contraception after having sex during which she could have conceived. The doctor who she visited refused to prescribe it to her. When she found out that she was pregnant, she decided to terminate the pregnancy. She had a serious heart problem and was worried about her health, besides this, she was not yet ready for motherhood. She looked for help at a private gynaecologist. She had an abortion quite quickly. The whole situation cost her a lot of stress and money. She believes that she made the right choice and does not regret her decision.

For many years, health policy in Poland has ignored the importance of prophylactic action in the sphere of reproductive health and broadening knowledge on the subject of contraception. The recent draft bills of MPs of the 5th term of the Polish Parliament were even aimed at making access to contraception more difficult, since, as one of the politicians publicly declared, "contraceptive pills cause infertility and there should be a warning against using them." Such a regulation was supposed to be found in the National Programme for Support to the Family – said Marian Piłka, MP of Law and Justice (PiS), who wanted to work on this programme⁵¹. The Ministry of Health decided to promote so-called natural methods of family planning. In 2006 the National Group for Promotion of Natural Family Planning⁵² was reactivated, and Bogdan Chazan, a well-known campaigner against the right to abortion, was appointed its chairperson.

This represented a continuation of the work of the group, for it was first set up in November 2001 "with the aim of spreading throughout society knowledge on the subject of natural family planning methods, cooperation in organising natural family planning advice centres and active counselling in this sphere." In recent months the Commission has been working on preparing a prophylactic pro-

⁵⁰ Currently in the Pharmacist's Ethical Code there is a regulation: (Article 4.)

1. In carrying out his/her tasks, the pharmacist must have the freedom to act according to his/her conscience and the freedom to undertake professional activities in accordance with ethical guidelines, the current level of knowledge and the state of the law.

2. If due to his/her convictions the pharmacist cannot undertake certain activities in the pharmacist's, **he/she is obliged to indicate a pharmacist who will undertake such activities.**

⁵¹ <http://www.polskiexpress.ie/> 17.11.2006.

⁵² Journal of the Ministry of Health. 06.09.35

gramme to promote NFP in order to once again apply for a subsidy. In the letter of the Minister of Health to the Speaker of the Senate of the Republic of Poland, B. Borusiewicz, of 08.01.2007, we read that: "For the realisation of the tasks of the National Group for Promotion of Natural Family Planning 387,061.00 zł has been allocated in 2006. These funds were allocated for the purchase of specialist literature, office equipment, computer equipment, office materials and services for the realisation of the tasks defined by the National Group for Promotion of Natural Family Planning. I also inform you that currently the draft expenses of the National Group for Promotion of Natural Family Planning in 2007 are being discussed"⁵³. In January 2007 the Information Office for the NGPNFP was set up, whose aim was to promote natural methods of family planning through supporting teachers of NFP and also reaching wider layers of people who wish to find out about these methods. The office collects information to enable the building of a nationwide database of NFP advice centres and also set up a nationwide telephone information service.

The Federation for Women and Family Planning is monitoring the state of government and parliamentary work connected with the above-mentioned subject, because regardless of who is currently in power, the problem continues to exist. Moreover, taking into account the political situation, there are fears that the negative trends and changes introduced by the Kaczyński government will not undergo a change for the better. In relation to the above, recommendations for the authorities are elaborated in accordance with the guidelines of the World Health Organisation. The Ministry of Health is obliged to inform honestly and without prejudice about all methods of contraception. The Ministry of Health, which in accordance with the Act on Family Planning has an obligation to provide citizens with the possibility of a full choice of family planning methods based on unbiased and honest information, is breaking the law in this sphere.

Sexual education

The document which obliges the state to conduct lessons on "Education for life in the family" is the *Act on Family Planning, Protection of Human Foetus and Conditions for Termination of Pregnancy*. This is regulated in detail by the ordinance on the method of teaching in school and the syllabus on knowledge of human sexual life, on the principles of conscious and responsible parenthood, on family values, on life in the prenatal phase and methods and means of conscious procreation contained in the basic programme for general education. This programme is aimed at preparation for marriage and the family, and to a very small degree touches on the question of sexuality and reproduction. In the last few months of the functioning of the government coalition it was very difficult to obtain specific information in the Ministry of National Education on how these aims are realised in practice and what changes have been introduced and what changes are planned. Nevertheless, from the Federation's years of experience, we know that the majority of teachers do not possess suitable qualifications, whilst the training courses for teachers are run by method centres whose programmes are not always in accordance with the best world standards and modern science. Lessons are often run by religion teachers. The programme propagates traditional roles in the family and does not provide reliable knowledge on contraception. The contents of some of the school textbooks present the approach of the Roman Catholic Church to human sexuality, reproduction and sexual roles. The current school programme not only fails to provide young people with knowledge on sexuality, which they so badly need and expect, but often misleads them, particularly on questions of contraception.

In textbooks recommended by the Ministry of National Education you can find much biased, unscientific material which is contradictory with modern standards. Here are some examples of textbook quotes intended for lessons: *Homosexual acts are in violation of natural law, since they do not*

originate from real emotional and sexual fulfilment, which takes place in relations between a man and a woman. [Król T., Ryś M. (red.) - *Journeying Towards Adulthood. Education for life in the family for secondary school students*. RUBIKON, p.91] Contraception pills are described as dangerous for the health and life of women, and the emergency contraception pill up to 72 hours after intercourse is described as an abortion pill: *Pills are generally prescribed to healthy young women, and their effect can make them ill, requiring treatment.* [op. cit p.190] *Early-abortion methods (anti-implantation) apart from(...) the spiral, include, "post-coital tablets". They are used mainly in the case of rape.* [op. cit. p.191] *The fear of an unplanned pregnancy means that often a method is chosen which is harmful for health, in order to avoid conception(...)* *The problem is very serious because young people who may wish to have children one day are thoughtlessly destroying their fertility and may never be able become parents in the future.* [red. Kosińska E. – *Around Us. Knowledge about society. Module: Education for life in the family*. 3rd Class Lower-secondary School, p.82]⁵⁴.

The attitude of the Ministry of National Education towards sexual education was created in the last few months by the far right politicians of League of Polish Families, which determined the shape and contents of the programme of education for life in the family. In the e-mail sent to the Federation by Hanna Wujkowska, the current advisor to the Minister of Education, we were told that in the school year 2007/2008 this subject will be realised according to current principles. However, it is known that work has started in extending it. In the programme there is supposed to be selected philosophical, anthropological and sexuological material. The textbooks which are already on the ministry's list promote the catholic model of the family, marital sex as prevention of venereal diseases and natural methods of birth control. Recently the list in force was updated. The subject is supposed to be compulsory and the grade from this subject will count towards the average grade.

In an interview published in *Nasz Dziennik* (02.07.2007), Roman Giertych, as Minister of Education, clearly indicated that he intended to enter into the basic programme in the sections concerning human life, a part about the tragic practices and consequences of abortion. He also intended to change the textbooks used in schools in this same spirit, in order to enforce this knowledge in the secondary school certificate and exams. Giertych said: *"I am convinced that when a young girl finds out what killing a child before it is born really involves, then she will never want to have anything to do with it."* Although these were plans for 2008-2009, there is no sign of an improvement in the observance of reproductive rights as a result of the coming elections.

The former Minister of Education also undertook many other activities, the intentions of which were not completely clear. An example which leaves one wondering is how the ministry carried out a public count of pregnant schoolgirls and what conclusions were supposed to be drawn from the report of this research.

The task of the ministry report on pregnancy amongst schoolgirls was to diagnose the situation and, on this basis, prepare an adequate programme to counteract pregnancy among teenagers. Taking into consideration the announcements of the Ministry of National Education on the new programme, one can doubt whether this would bring the desired effect in reducing teenage pregnancies. Another thing that leaves one wondering is why the ministry does not use the existing governmental data, the statistics from the Main Office of Statistics, which is contained in this report in table 1.

The state of education in Polish schools does not meet social needs in this sphere. Despite social acceptance for this form of education – almost 80% of Poles support the introduction of sexual education in schools⁵⁵ – and the lowering of the age of sexual initiation, sexual education is practically non-existent in Polish schools. From the research we see that sexual activity among young people

⁵⁴ Information material from the Group Ponton, *What are young people worried about? Reflections at the end of the school year 2005/2006*.

⁵⁵ *Abortion, sexual education and in vitro fertilisation*, CBOS, Warsaw, February 2005

is high. "The average age of sexual initiation according to research in 2005 was 18.42 years(...) a significant difference was observed between the average age of sexual initiation of men (18.08) and women (18.82)(...) The average age of sexual initiation has fallen slightly in relation to previous years. In 1997 it was 18.43 for men and 19.34 for women. In 2001 the average age was 18.32 and 19.12 respectively."⁵⁶ This data shows how badly young people need education in this sphere, taking into account the fact that some of them have already had their first sexual experiences. Leaving them to themselves exposes this group to the risk of obtaining random and not always true information from other sources, which could lead to many misfortunes and dramas, such as unwanted pregnancy or the spread of HIV infection and other sexually transmitted diseases. In the situation in which there is no reliable sexual education or state centre promoting sexual health, healthy young people are seriously at risk. This danger is **lack of knowledge**.

Since the beginning of its activities, the Federation for Women and Family Planning has been monitoring the state and methods of conducting sexual education in schools. From the counselling conducted by us we know the state of (or rather lack of) knowledge of young people in this sphere and their needs and expectations. This experience is the basis for the recommendations that we elaborated for successive governments, which would help to create a comprehensive education programme for young people and a national programme of prevention of pregnancies amongst teenagers. The Federation reacts to the decisions of the Ministry of National Education, using open letters and appeals, preparing and publishing alternative material and reports concerning the issue under discussion, as well as leaflets on sexual health among young people. The Act on Family Planning has never been fully realised in the sphere of providing young people sexual education, although it has been in force for 14 years.

Peer education

In connection with the lack of reliable knowledge on sexuality in schools, an alternative has appeared in the form of peer education. This is an initiative of young people who want to spread knowledge on contraception and prevention of HIV/AIDS among their peers. The most well-known are the volunteers of the group Ponton (Group of Youth Sexual Educators), operating for several years alongside the Federation for Women and Family Planning. In the last two years the Ponton group has conducted talks in many of Warsaw's lower-secondary and secondary schools, and also in one of Warsaw's children's homes and in the women's section of a prison. In the schools the lessons are usually for 90 minutes⁵⁷. Ponton volunteers have been providing counselling on a broad scale for many years. Young people can ask questions by way of e-mail as well as on Ponton's internet forum. Young people write around a dozen or so e-mails every day. During the school year a hotline operates on Fridays, and during the summer holidays there is a special helpline, the so-called "Ponton Holiday Hotline".

The experience of Ponton shows that the knowledge of young people about their bodies, sexuality and contraception is often appallingly low. Unfortunately, there are cases when teenagers ask us for help too late. During the holidays volunteers answer many questions concerning pregnancy and sexual initiation (examples of text messages are in the appendix). There are times when the volunteer has to answer about 40 questions during a three hour shift. The need of young people for reliable information and religiously neutral counselling continues to grow. There is nothing strange in this, since young people most often cannot count on school or home to provide them with this information. All the activities of the Ponton Group, although their scope is growing, seem to increasingly reveal that the educational system has a serious deficiency due to its complete failure to include sexual education in the syllabus.

⁵⁶ Zbigniew Izdebski, *Risky decade. Sexuality of Poles in the age of HIV/AIDS*, Zielona Góra 2006

⁵⁷ Lessons are conducted on a part workshop basis. Often pupils lengthen the lessons on their own initiative by not going for a break. This shows that there really is great interest in information and honest, open conversations on subjects connected with sexuality.

Attempt to change the constitution

In September 2006 one of the coalition parties of that time, League of Polish Families, presented in the Polish Parliament a draft law on changing Article 28 of the Constitution of the Republic of Poland by introducing a regulation on the protection of life from the moment of conception. The draft intended to introduce a total ban on the termination of pregnancy.

Numerous opinions from specialist lawyers were ordered (see the text by E. Zielińska on the constitutional debate in this report). These were supposed to confirm or question the need for the regulation on the protection of life from the moment of conception in the Constitution. As a result of this initiative the discussion on the subject of abortion heated up. This mobilised both the camps for and against the right to legal abortion. Abortion became the main political topic again.

During the vote in the Parliament on 13 April 2007, all the amendments to the Constitution on the protection of life from conception were finally rejected. Among the 443 deputies voting that day, 269 voted in favour of accepting the amendments, whilst the required majority of 2/3 of all deputies was 296 votes.

In the nearest future, however, we expect another battle over the so-called anti-abortion bill, since the camp against the right to abortion is planning to submit a legislative draft on this matter.

Violation of human rights – summary

The phenomena described above clearly show that many women's rights, which are an integral part of the catalogue of human rights, are violated in Poland. Pregnant women are treated as second-class citizens, because the state denies them part of their rights. Such an interpretation was adopted and sanctioned by the Constitutional Tribunal in its ruling on the law on family planning (Ruling of 28 May 1997 sign. Act K 26/96), in which it was written: *"From the essence of recognising human life as a constitutional value, there results the need to limit the rights of the pregnant woman"*.

The right of pregnant women to health is seriously limited. This is particularly the case when the pregnancy represents a risk to the health of the woman, which is increasingly common because often it is women who are ill, who are older, or teenagers who become pregnant. In the light of the above-mentioned practices, a pregnant woman who has a health problem cannot be certain that the doctor who she turns to for an opinion on the future of the pregnancy will take into account her state of health and if necessary will make an appropriate decision and give consent to terminate the pregnancy. She also cannot be certain that she will be sufficiently informed on the influence that the pregnancy will have on her health, particularly when she is ill or is undergoing treatment. Often doctors suspend therapy during the pregnancy, which can be dangerous for the woman. In practice, pregnant women are denied any legal protection, since there are no mechanisms to appeal against the decision of the doctor. They are practically completely dependent on the doctor's opinion, which is often formed not by putting the interests of the patient first, but by following his own religious beliefs or fears. The women's only resort is to make a complaint to the courts after giving birth, but taking into account the experience of the Federation's clients, they have little chance of getting compensation. The right of women to reproductive health services is seriously violated in many cases. This concerns contraceptive advice, refusal to send the patient for prenatal tests, as well as refusal to terminate pregnancy in accordance with the law. Also in the case of women giving birth, more and more often the decision to perform a caesarean section is delayed, despite significant indications. In the case of refusal to send the woman for prenatal tests, the woman's right to make use of the latest

achievements in medical science is limited. This also concerns modern methods of terminating pregnancy such as the suction method or medical abortions. Since termination of pregnancy is available in Poland in certain cases, it should be carried out in accordance with the newest, safest and cheapest methods, all the more so, since they are universally available in the rest of the world. A refusal to provide health services which for physiological reasons, only women need, is a case of sexual discrimination. Reproductive rights are violated in Poland in a special way. In recognising the right of the individual and couples to decide on all matters connected with procreation, governments, including the Polish government, have undertaken to realise these rights by introducing the appropriate policies and legislation i.e. universal access to education, information and services. Failure to introduce sexual education in schools, failure by public institutions to improve counselling and services in the sphere of family planning, as well as the restrictive anti-abortion regulations constitute a violation of reproductive rights. It puts society, and particularly women and young people, at risk of various dangers connected with this sphere of life. Without real possibilities to avoid the threats, women, including teenagers, suffer unwanted pregnancies. More and more often they fall victim to the HIV virus, since it is precisely young people and women who are particularly at risk of infection of sexually transmitted diseases, including HIV/AIDS.

A curious example of ignoring the right of people to decide on matters of their own fertility is denying men and women the right to voluntary sterilisation as a method of family planning. Sterilisation – permanent infertility – is one of the most popular methods of family planning in the world – in Poland it has been recognised as illegal as a result of a confused interpretation of Article 155 paragraph 1 of the Criminal Code, in accordance with which it is recognised that denying the capability to reproduce with the consent of the interested party is identical to denying the capability to reproduce as a result of violence or crime. The decisions of adults and conscious people on matters which have an enormous influence on their future lives, and which they are fully responsible for, do not have any significance for the judiciary. Women who did not plan a pregnancy and who do not want to or cannot continue it are denied a decision about giving birth to a child. The only real choice that they have is either forced motherhood or an underground abortion.

Forcing women who don't want a child or cannot have a child to give birth is a serious violation of human rights on deciding about one's own life, whilst forcing women to give birth when the pregnancy threatens their health, life, when it originates from rape or when there is a risk of giving birth to a disabled child is inhumane and in violation of the constitution of the Republic of Poland and the international human rights standards. No one has the right to force women to take a heroic stance and expose them to unnecessary risk and suffering. Unfortunately in Poland this is common practice. For the fifteen years of the enforcement of the anti-abortion law the Federation has been dealing with many cases of women whose rights have been violated.

As long as the law in Poland remains in violation with the standards in force in the European Union, women will be exposed to its many, sometimes drastic effects. One should hope that soon the policies of the state will undergo a fundamental change and will be based on rational foundations and not on ideology – in accordance with the expectations of society and the best examples.

Special thanks from the author of the report to Prof. Antoni Rajkiewicz for his valuable remarks on this chapter of the report.

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Appendix – the experience of women

Women contact the Federation every day by telephone, letter or personally in various matters connected with sexuality and fertility. Here are some examples:

From letters to the Federation

The story of Karolina K.

Karolina – a married woman and mother of a one-year-old son – was celebrating Christmas. On Christmas Day she had a miscarriage. The whole family was shocked by this fact. The woman had had a normal period and was not aware that she was pregnant. At the beginning of December she began her period, but the bleeding continued longer. At first she thought it was the result of stress and moving house. During Christmas there was no chance to visit the gynaecologist, so she began looking for information on the Internet, but without a specialist she could not verify it. After Christmas Eve she felt weak but she blamed it on the weather. In the morning she had a temperature so she stayed in bed longer to warm herself up. In the afternoon she went to the toilet. Whilst urinating the bleeding increased and she felt "something" "come out" from her. She was terrified. Her husband phoned for an ambulance. When the ambulance arrived, "everything flooded out" and the woman was in shock. The ambulance workers made light of the matter. They took the woman, measured her blood pressure and took her to hospital for a routine gynaecological examination. In the hospital – Centre for Health of the Polish Mother – the doctors did not receive her too pleasantly. The doctor diagnosed a miscarriage and, pulling the umbilical chord, said "what's hanging from you here?" After being taken to the antenatal room, the nurses and doctors suggested that she had "got rid of" the foetus. It was 4 months old. The doctor asked "and where's the little foetus?" Unfortunately the family members had already used the toilet at home and there was no possibility to retrieve what had "flowed out of the woman". Soon the police arrived. They tried to be nice, but clearly suggested that it would be better if "it" was found. They asked if the woman had been unfaithful to her husband and if she had got rid of the pregnancy on purpose. After regaining her strength the woman signed herself out of the hospital and the investigation was closed.

Marta's story

My name is Marta. I'm 25. In October 2004 I terminated my pregnancy because the doctor refused to prescribe me Postinor, using the excuse that it was against his conscience. I hadn't planned the pregnancy and I don't plan on having a child at all – I have a serious heart defect. I was forced to look for help on my own. So I found myself in a private gynaecologist's surgery. The doctor treated me professionally and with understanding. He sent me for all the necessary examinations and the next evening I had my appointment for the abortion. The abortion was carried out very professionally – all the time an anaesthetist was in attendance. Immediately afterwards I was prescribed antibiotics and after 14 days I went for a check-up. The only drawback was the financial side – 2000 zł, but the doctor was so understanding that he reduced the price significantly. Since then I visit that gynaecologist regularly. For two years I have been taking Depo Provera and I feel safe and confident. Today I am a college graduate, I am doing postgraduate studies, I have an excellent job and I am in a relationship with a man. But I remember what happened 2 years ago, and probably I will never forget. I never want to have children and that is my conscious choice. My friends don't know why I have such radical views on abortion, contraception and the role of women. They don't need to know. Yes, I am for abortion, for decent sexual education and equal rights for women. I have always been, but since that time my views have been radicalised significantly. Every woman should

have the right to decide about themselves, when and if they want to have children at all. This cannot be decided by the state, which unfortunately is represented mainly by men – they will never understand what trauma a woman experiences when a doctor refuses to prescribe Postinor and forces her to give birth to a child regardless of the consequences.

The story of Marta Z.

In December Marta ended up in the pathological pregnancy ward with the diagnosis that the embryo was not developing (in 8 weeks it was only 4 mm, and there was no echo of the embryo's tissue). The woman was kept in hospital with no information. Nobody wanted to tell her what had happened. She was treated like a pregnant woman and given drugs to maintain the pregnancy. The woman was devastated that no doctor would tell her what the situation was and why she had to stay in the hospital all that time. After a few days of uncertainty and lack of any information the doctor informed her that she had had a miscarriage and she was signed out of hospital.

The story of Katarzyna J.

18-year-old Katarzyna wanted to begin using hormonal contraception. She went to the clinic for contraception but the doctor refused to give her a prescription, saying that she would not play a part in murder. Katarzyna demanded that the doctor give her the refusal on paper. The doctor did not want to write anything and demanded that the woman leave the surgery. The woman was determined and said that she would not leave the surgery without something on paper – either a prescription or a refusal. When she saw that the girl was determined, the doctor finally wrote a prescription.

From e-mails

Help!

My girlfriend and I are 17 years old. 24 hours ago, after drinking alcohol we had sex. She usually takes contraceptive pills, but two days ago her packet finished and she didn't take any pills. 10 hours after intercourse she took a tablet from the new packet, but that day she got a period and a few hours later she took another tablet. In this situation is the only thing we can do to take a 72 hour tablet? Can contraceptive pills work?

(...) I am 17 and I'm pregnant, my mother had a baby not long ago and my step-father doesn't treat me well. I don't know whether he will beat me if I tell them at home in fact, I'm even too scared to think what he'll do. I'm sure they'll throw me out of the house. Please can you give me any information on abortion, where I can go, what I can do?

I'm 6 weeks pregnant. My world has collapsed around me, I know I'm not ready to be a mother yet, I still feel like a child myself, the very thought makes me hysterical. I want to be able to look after the child, be able to provide for it, and now I have no money, the father doesn't want it. Please can you help me(...)

I am 18 and I'm pregnant. I'm in the 7th month. I don't even know if the baby will be born healthy because I haven't been to the doctor. I've tried everything including attempts at suicide. My parents don't want to see me, I can't look at myself. I can't imagine how I can bring up a child(...)

My name's Kasia, I'm 16. Recently I took a pregnancy test and it turned out that I'm pregnant. I can't give birth, it's a nightmare for me. My parents can't find out about this, and I need a doctor. Can someone help me?

My name is Marta and I'm 15. My boyfriend wants me to have sex with him but I'm not ready. I told my friends who I trust. They told me we can have lighter sex which is called piting. (It is spelled differently) I have no idea what this is. I don't want to ask my friends because they might laugh at me. I haven't spoken about this with my boyfriend yet, tell me what this is. Please.

Stories from the Hotline

A woman in her 20th week of pregnancy. She bought a pharmacological preparation "to cause a premature birth". She asked if it is safe.

A woman terminated her pregnancy pharmacologically. She's going for an examination and wants to know if the doctor will be able to notice that she has had an abortion.

A woman after an unsuccessful medical abortion doesn't give up and still wants to terminate the pregnancy.

A woman is still bleeding a week after terminating her pregnancy (curettage). She asks if there will be a punishment if she goes with this to the doctor.

A doctor prescribed a girl Postinor 16 days after intercourse. She knows that Postinor is used up to 72 hours after intercourse and wonders whether to take it.

An 18 year old who wanted to start having sex went to a gynaecologist in order to get a prescription for the pill, but instead of giving contraceptive advice or sending her for an examination, he started moralising to her.

A woman in the 4th week of pregnancy was wondering whether to terminate the pregnancy or not because she was worried that when her employer finds out that she is pregnant he will fire her.

A gynaecologist did not confirm the girl's pregnancy although she was pregnant. All the time she took medication. In the 27th week of the pregnancy the specialist told her that the foetus was damaged.

A woman phoned the hospital. Crying, she told how the doctors suggested that her miscarriage was an abortion. She asked about her rights and if she faced imprisonment.

The neighbour of a family in which a teenager was pregnant phoned. The woman asked what the law was in this case and if the girl had the right to make a decision concerning her pregnancy.

Some young girls phoned on behalf of their friend who was pregnant. They had heard that there are tablets which can cause the foetus to decay (even in the case of a pregnancy of a few months) and expel the remains with the urine.

Text messages to the Ponton Holiday Emergency Service

Text message: I can't find information anywhere about where I can do a free HIV test in Warsaw, please help.

Text message: Can you get pregnant by having sex using the withdrawal method? What is the effectiveness in percentage terms of this method.

Text message: Recently I've noticed that my sister doesn't eat anything at all. Is this anorexia? How can I help her? Does she need the help of a psychologist?

Text message: How long does it take for contraceptive pills to be absorbed? Can vomiting weaken their effectiveness?

Text message: Can I get pregnant from having sex for the first time?

Text message: Can a 13 year-old girl get pregnant?

Text message: My boyfriend and I touched each other but he kept his underwear on. Can sperm somehow get through clothes? I am very afraid of getting pregnant.

Text message: How can I check as quickly as possible if I am pregnant?

Text message: I have done three pregnancy tests. All the results were negative. Could I be pregnant nevertheless?

Text message: What is the probability of getting pregnant through rubbing each other?

Text message: I am 15 years old and once I masturbated. Could this be the reason why I haven't had a period yet?

Text message: What is the best method of contraception for the first time?

Text message: My boyfriend is trying to persuade me to have sex. We are supposed to go away together. I am wondering whether I should agree to have sex then?

Case-law concerning the lack of availability of services for terminating pregnancy in Poland

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Introduction

For many years one of the most important human rights problems in Poland has been the question of the application of the so-called anti-abortion law¹. Although the law introduces three fundamental possibilities to legally terminate pregnancy², in practice, due to various circumstances women do not have real access to this treatment.

This problem has been dealt with many times by organs of the United Nations. It has also been the subject of interest of women's organisations. However, despite reprimands from the UN Human Rights Committee, which monitors state compliance with the International Covenant on Civil and Political Rights, the legal situation of access to abortion has not changed fundamentally. It is only in recent years that several rulings of the Supreme Court have been issued, as well as the ruling of the European Court of Human Rights in the case of *Tysic vs. Poland*³, which demand different views of the problem. These rulings also directly constitute a guideline as to how women whose rights have been violated can exercise those rights.

In this report court rulings will be presented in cases concerning the refusal to carry out a legal termination of pregnancy (or carry out other actions which could allow a decision to be made concerning termination of pregnancy). In the last part of the report,

¹ Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy (Journal of Laws of 1993, no. 17, item 78 as amended).

² In accordance with article 4a of the Act on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy, an abortion can be carried out by a doctor when (i) the pregnancy constitutes a threat to the health or life of the pregnant woman, (ii) prenatal tests or other medical grounds indicate a high risk of a severe and irreversible deformity of the foetus or an incurable illness threatening its life, (iii) it is justified to suspect that the pregnancy arose as a result of a criminal act.

³ *Tysic vs. Poland*, application no. 5410/03, judgment of 20 March 2007 (section IV)



general principles arising from these rulings and also the legal possibilities for aggrieved women to make their claims will be outlined.

The case of B. Wojnarowska and Małgorzata A. – a vindication of justice in the national courts

The case of B. Wojnarowska and Małgorzata A. are model cases in which people whose rights have been violated in relation to access to abortion, tried to sue for liability in the national courts. Although they are two completely different cases, they have some common elements. In both cases the injured parties tried to win compensation for the violation of their rights and also made claims for wrongful birth. The case of B. Wojnarowska also has one more aspect. B. Wojnarowska, apart from suing for civil liability, has also tried to institute legal proceedings against Dr. Leszek P., who refused to carry out proper prenatal tests, and cause him to be punished by the Medical Disciplinary Court. This unsuccessful attempt led to a constitutional complaint made to the Constitutional Court, in which the basic mechanisms of the functioning of disciplinary courts in the Medical Association was put into question.

Below, after presenting the circumstances of both cases, there will be a review of the procedures and legal rulings applied in them and which are of significance for the interpretation of how one can pursue one's rights in Poland in the case of a refusal to terminate pregnancy by a doctor.

The case of Barbara and Sławomir Wojnarowski – facts

Barbara Wojnarowska is the mother of two children. Her first child was born with a genetic disorder – hyperchondroplasia of the bones. When in 1999 she became pregnant a second time, the doctors in the Provincial Hospital in Łomża – Dr. Leszek P. and Dr. Agnieszka G, refused to refer her for prenatal tests (including genetic tests), despite the existence of well-founded suspicions that her next child could be born with the same genetic disorder as the first. Barbara and Sławomir Wojnarowski filed a lawsuit in the Regional Court in Łomża against the above-mentioned hospital and its two doctors. The Wojnarowskis demanded satisfaction for the violation of the rights of the patient as well as compensation to cover the costs of treatment and rehabilitation of the child, the loss of wages of B. Wojnarowska as well as the loss of half of the ability to work (due to so-called "wrongful birth"). The money was to cover the cost of rehabilitation and specialist treatment for the girl until she reaches adulthood.⁴

The case of M.A. – facts

M.A., who lives in Dąbrowa Górnicza, was raped in July 1996 by an unknown perpetrator. Criminal proceedings to establish the identity of the rapist were suspended. The rape victim obtained confirmation of pregnancy in September 1996 from a gynaecologist, in which the age of the foetus was defined as 11 weeks. The doctor also referred her for an abortion. However, during the examination in the hospital it turned out that the pregnancy was 14 weeks in gestation, and in connection with this the public prosecutor refused to grant consent to carry out an abortion, but instead decided to ask a specialist to establish the real age of the foetus. As a result, M.A. could not legally have an abortion because the time limit defined by the law was exceeded.

On 30 April 1997, M.A. gave birth to a son. In October 2000 she filed a lawsuit against the State Treasury – Voivod Ś., Town Hospital in the Borough of Dąbrowa Górnicza for damages due to violation of her personal interests and compensation due to the fact that she was unable to take up paid employment from October 1996 to October 2000, as well as a pension for the benefit of her young son, which would constitute the equivalent of maintenance costs.

⁴ On this case see Miroslaw Nesterowicz *Civil responsibility of the doctor and hospital for damages connected with the birth of a disabled child*, *Prawo i Medycyna* (Eng. Law and Medicine) no.13/2003, pp. 35-40; Magdalena Bielecka, *Court case on bad birth (notes on the judgment of the Regional Court in Łomża and the Court of Appeal in Białystok)*, *Prawo i Medycyna*, no. 20/2005, pp. 29-44.

Claim for violation of patients' rights

Both in the case of B. Wojnarowska and Małgorzata A., lawsuits were filed for damages for violation of patients' rights.⁵

An analysis of the decisions leads us to draw the conclusion that in the case of a refusal to terminate pregnancy (or preventing a decision on whether to continue the pregnancy or not) the decision to award damages for violation of patients' rights is legitimate.

The above-mentioned legal principle was established in the case of Małgorzata A. She was awarded damages for being forced to give birth to an unwanted child (which was a result of rape), including 20,000 PLN as compensation for violation of her personal interest (art.448 Civil Code). Her lawsuit was directed against the State Treasury, Town Hospital in the Borough of Dąbrowa Górnicza.

In its decision of 21 November 2003⁶, the Supreme Court recognised that in the light of the regulations of the Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy, forcing a woman to give birth to a child conceived as a result of rape constitutes a violation of the constitutionally protected personal interest which is a widely understood freedom covering the possibility to decide about one's private life. Damage connected with this violation justifies in principle the claim for compensation (Art. 448 Civil Code), despite the conflict of personal interest arising in such situations.⁷

The above-mentioned case cleared the way for the later ruling of civil courts in the case of B. Wojnarowska. In this case, the Appeals Court in Białystok ruled with a legally valid judgement of 5 November 2004 that "in the circumstances of this case there is no doubt over the right of the woman to decide about her personal life as well as the right to family planning, not excluding the right to terminate pregnancy".⁸ The court ruled that the violation of the above-mentioned rights should be considered in the category of protection of personal interest and in particular the violation of freedom and personal interest, mentioned in Art. 47 of the Constitution of the Republic of Poland and in Article 23 of the Civil Code. In the opinion of the Appeals Court in Białystok, "one should also consider in the categories of violations of personal interest prevention from carrying out tests which would decide on the legal possibility to terminate the pregnancy". As a consequence, the Appeals Court in Białystok found in favour of B. Wojnarowska and awarded her the sum of 60,000 zł as compensation for violation of her personal interest in connection with the violation of her rights as a patient.

The Supreme Court agreed with the above-mentioned opinion expressed in the case of B.S. Wojnarowski. In the ruling of 13 October 2005⁹ it stated that the Appeals Court in Białystok and the Regional Court in Łomża had correctly decided that B. Wojnarowska should receive compensation for the violation of personal interest. It indicated, as the basis of this violation, Article 448 of the Civil Code in connection with article 19a paragraph 1 of the Act of 30 August 1991 on Public Health Centres¹⁰. The above-mentioned regulation establishes the principle in accordance with which the patient has the right to health services corresponding to the requirements of medical knowledge and to information about his/her state of health. However, in accordance with Article 37

⁵ On patients' rights see Maria Boratyńska, Przemysław Konieczniak, *Patients' Rights*, Difin Publishers, Warsaw 2001; Jacek Jonczyk, *Patients' Rights and Responsibility for Damages in Treatment*, Prawo i Medycyna, vol. 1 (1999), no. 2, p. 27 and following.

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

⁷ On the judgment compare T. Justyński, *Voice on the judgment of 21 November 2003*, V CK 16/03, State and Law, no. 9/2004, p 122 and further.; M. Nestorowicz, *Voice on the judgment of 21 November 2003*, V CK 16/03, Judicial Decisions of Polish Courts, no. 10/2004, p 125 and further.; P. Sobolewski, *Paestra*, no. 9-10/2005, p. 232 and further; Mikołaj Wild, *Wrongful birth claims in Polish law (Comments on the judgment of 21 November 2003)*, V CK 16/03, Court Review, no. 1/2005, pp. 49 - 59.

⁸ Judgment of the Court of Appeal of 5 November 2004, sygn. akt I A Ca 550/04, I A Cz 781/04.

⁹ Judgment of the Supreme Court of 13 October 2005, IV CK 161/05.

¹⁰ Journal of Laws no. 91, item 408 as amended.

of the Act of 5 December 1996 on the Physician's Profession¹¹, in the case of diagnostic or therapeutic doubts, the doctor on his/her own initiative or on the request of the patient, if he/she recognises it to be justified requirements of medical knowledge, should request for the opinion of a specialist. The Supreme Court recognised that in the light of the circumstances of the case of B. Wojnarowska, medical services were not provided (in this case, tests enabling her to make a decision on termination of pregnancy) to the level corresponding to the requirements of medical knowledge, and therefore her rights were violated as a patient.

In the case of B. Wojnarowska a claim for damages for the violation of personal rights was also filed by her husband. The Supreme Court clearly stressed that in principle both parents are entitled to a claim for such damages:

"Realising the controversy aroused in jurisprudence around the world and doctrine by the problem of claims connected with giving birth to a deformed child which would not have been born if doctors had provided the parents with information enabling a legal termination of pregnancy, it should be stated that since the above-mentioned Act of 1993 on Family Planning grants parents the right to conscious family planning and the woman the right to terminate pregnancy, *inter alia*, in the situation defined in Article 4a paragraph 1 point 2 for so-called genetic reasons, then this right should be recognised as a **right of the parents**, the violation of which gives rise to damages liability."¹²

However, the courts of both instances dismissed the lawsuit of the husband stating that, above all, the rights of B. Wojnarowska as a patient were violated, and did not consider the case in the category of violation of the rights of parents. However, the Supreme Court in the judgement of 13 October 2005 clearly stressed that preventing the parents from exercising the above-mentioned rights, which led to the birth of a handicapped child against their will, there arises on the part of the responsible party a duty to pay a suitable compensation on the basis of article 448 for damages incurred arising from a violation of **their** personal interest.

After the judgment of the Supreme Court, the case returned to the Regional Court in Łomża. The only legally valid claim judgment is the judgment on damages in favour of B. Wojnarowska for violation of her rights as a patient to the sum of 60,000 zł. Following the thorough examination of the case, on 28 December 2007, the Regional Court in Łomża found that personal rights' of the father were also violated by actions of medical doctors and adjudicated 30,000 PLN as damages. Furthermore, the Regional Court adjudicated damages in connection with the wrongful birth claim (see below).

Wrongful birth claim

Basic concept

The concept of a 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. Therefore it is a situation in which the pregnant woman had a legal possibility to terminate the pregnancy (e.g. due to a genetic defect of the foetus or a threat to her life or health), but the doctor refused to perform such an operation or did not send her for the appropriate tests, and thus, the woman was forced to carry the pregnancy to term and give birth. Wrongful birth claims can also arise in a situation where the public prosecutor refused to recognise that the pregnancy is the result of rape and likewise, the pregnant woman was not allowed to exercise her statutory right to terminate the pregnancy.

¹¹ Unified Act – Journal of Laws in 2002, no. 21, item 204 as amended.

¹² Judgment of the Supreme Court of 13 October 2005, IV CK 161/05, p.13

A wrongful birth claim should be distinguished from a wrongful life claim. A wrongful life claim is filed by the child for damages for the suffering caused by its birth and compensation for the costs of its maintenance throughout its life. The basic argument is as follows: if it had not been for the decision of the doctor, the child would not have been born and would not have gone through the suffering connected with its life. Wrongful life claims are extremely controversial and have not been recognised in judicial decisions (with a few exceptions) in Poland.¹³

In Poland the legal possibilities for wrongful birth claims were shaped by the judicial decisions of the Supreme Court. Until now, the Supreme Court has dealt with various questions connected with wrongful birth claims only three times. However, it should be stressed that twice this was in relation to the case of M.A.

The case of M.A. – refusal to terminate pregnancy arising as a result of rape – judgment of the Supreme Court of 2003.

This case is basically a precursor in Poland of claims for wrongful birth. As mentioned, due to the refusal to terminate her pregnancy which arose as a result of rape, M.A. made a claim for damages for violation of her personal interest. Apart from that, she claimed a pension for her son, which was the equivalent of the costs of his maintenance. She claimed that the hospital in Dąbrowa Górnicza which she sued did not perform at the beginning of October 1996 the termination of pregnancy as a result of rape. The reason for the refusal was the incorrect definition of the age of the foetus as 14 weeks old instead of 11 weeks. A consequence of preventing the abortion was the costs of maintaining the child as well as loss of the possibility to earn an income.

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 her claim for a pension. The Appeals Court allowed the possibility in principle of the existence of a connection between the establishment of the age of the foetus in the hospital and the difficulties which the plaintiff had in obtaining a certificate from the public prosecutor to allow her to terminate the pregnancy. For this reason doubts arose as to whether the pregnancy had arisen as a result of a crime. It was possible to prove, however, that the failure to issue the certificate on time was not due to the actions of the doctor.

The claim for a pension was, however, dismissed, since the Appeals Court in Katowice ruled that the prerequisite of liability in tort under Article 444-449 of the Civil Code can be only damages to the body or disturbance of health. In the opinion of the Appeals Court this concept does not cover the birth of a child. Although M.A. is encumbered with an obligation of maintenance towards the child, the impossibility of obtaining maintenance 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.

The Supreme Court did not agree with the above-mentioned view in its ruling of 21 November 2003¹⁴. In the opinion of the Supreme Court, the violation of the rights of the woman to an abortion by preventing the performance of an abortion – in the situation when she had a right to one, when there are justified suspicions that the pregnancy arose as a result of a criminal act – can give rise to financial losses, entitling her to make a claim to compensate for the damage arising from this event. This damage covers the expenses connected with the pregnancy and birth as well as loss of expected income as a result of these events.

In relation to this, the Supreme Court considered the significance for the possible liability for damages of the fact that M.A. did not give the child up for adoption (despite the existence of such a pos-

¹³ Compare on this subject Tomasz Justyński, *Conception and birth of the child as a source of civil responsibility*, Zakamycze, Kraków 2003; Michał Kowalski, *Liability of the doctor for wrongful birth in German law*, no. 11/2002, vol. 4, pp. 65-73, compare also Dominika Tykwińska-Rutkowska, *Wrongful birth and wrongful conception claims in the light of judicial decisions*. Selected comments, *Prawo i Medycyna*, no. 20/2005, pp. 16-28

¹⁴ Judgment of the Supreme Court of 21 November 2003, sygn. akt V CK 16/03, (OSNC 2004/6/104)

sibility). The Supreme Court pointed out that such a possibility cannot influence the scope of liability on the basis of the claim for wrongful birth. Performing the duty of giving the child up for adoption (and at the same time freeing oneself of the obligation of maintenance) would be detrimental to the right of the child to be brought up in its natural family as well as the parental rights of the plaintiff. However, these values are protected constitutionally.

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. However, before they issued a legally valid judgment, the case of B. Wojnarowska reached its conclusion in the Supreme Court. In this case the next principles referring to the wrongful birth claims were established.

The case of B. & S. Wojnarowski – refusal to perform prenatal tests – judgment of the Supreme Court of 2005.

B. & S. Wojnarowski, apart from 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 approximately 1.5 million zł).

As far as the wrongful birth claim is concerned, the Regional Court in Łomża and the Appeals Court in Białystok did not recognise the existence of a connection between the refusal to perform prenatal tests and the possibility to take a decision to terminate the pregnancy by B. & S. Wojnarowski. According to the Appeals Court in Białystok, the opinions of the specialist experts collected in this case testify to the fact that it was not possible to detect the illness of the daughter of Mr and Mrs Wojnarowski at the time when it was still possible for the mother to perform an abortion. The court stated that an abortion could have taken place up to week 20 of the pregnancy and up to that moment it was not possible to detect the child's illness. This is also why there did not exist an adequate connection between the refusal to refer the patient for tests and the damage of Mr and Mrs Wojnarowski, which means that damages cannot be awarded in their favour for the loss of earnings by the mother of the child, as well as for rehabilitation and treatment for the child. As a result, the main claim of Mr and Mrs Wojnarowski - for wrongful birth, was not taken into consideration.

The Supreme Court did not agree with this view. In the judgment of 13 October 2005¹⁵, the Supreme Court recognised as justified, in part, the damage claim in the form of maintenance costs. The Supreme Court, in analysing the evidence gathered, ruled that "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*." Moreover, it noted that the prerequisite for allowing termination of pregnancy is a high probability of a defect and not the absolute certainty of its existence, which is indicated in Article 4a paragraph 1 point 2 of the Act on Family Planning.

On this basis it considered whether the parents could make a wrongful birth claim at all. In this it referred to the principle expressed in the case of M.A. in the judgment of 21 November 2003. 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

¹⁵ Judgment of the Supreme Court of 13 October 2005 IV CK 161/05. Compare also M. Nesterowicz, *Voice to the judgment of the Supreme Court of 13 October 2005, IV CK 161/05*, Judicial Decisions of Polish Courts, no. 6/2006, item 71; T. Justyński, *Voice to the judgment of the Supreme Court of 13 October 2005, IV CK 161/05*, State and Law, no. 7/2006, p. 110 and further; W. Borysiak, *Voice to the judgment of the Supreme Court of 13 October 2005, IV CK 161/05*, State and Law, no. 7/2006, p. 116 and further; P. Sobolewski, *Voice to the judgment of the Supreme Court of 13 October 2005, IV CK 161/05*, Judicial Decisions of Polish Courts, no. 11/2006, item 125.

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 Article 444 paragraph 1 of the Civil Code.

The Supreme Court stressed that a child, in the case of a refusal to perform a legal termination of pregnancy (or a refusal to perform prenatal tests – as in the case of the Wojnarowskis), can never be recognised as a damage. Therefore it is not possible to make a claim by a handicapped child (or parents acting in its name) arguing that the very fact of life with a handicap is a damage (so-called claim for wrongful life) to the child, not the parents. The Supreme Court, following the example of many courts of western states, clearly stressed that it is only possible for the parents to claim for increased costs connected with maintaining the child which they did not plan and those costs should be recognised as damage.

As a result, the Supreme Court overruled the judgment and referred the case for a new hearing before the Appeals Court in Białystok. The latter, in turn, in the judgment of 7 March 2006, referred the case to the Regional Court in Łomża. Therefore, although in the judgment of the Supreme Court, the most important principles regarding wrongful birth claims in this case were settled, the subject of further proceedings was to establish the level of damage incurred by Mr and Mrs Wojnarowski, whether the doctors who were sued in the case had acted wilfully, and whether there is a causal link between negligence of doctors and the non-possibility to carry out prenatal testing.

In the judgment of 28 December 2007, the Regional Court in Łomża found that the Provincial Hospital in Łomża should be liable for the negligence of medical doctors, which resulted in non-performance of comprehensive prenatal testing by B. Wojnarowska, and thus lack of possibility to terminate the pregnancy. The Regional Court in Łomża has made a comprehensive examination of different expert opinions and witnesses in order to establish the course of events and medical knowledge related to this issue. The Court has also concentrated on the precise determination of damages which should be awarded to the Wojnarowskis. Apart from declaring that a husband should receive damages for breach of his personal rights, the Court adjudicated the following damages:

- monthly pension in the amount of 1,129 PLN to cover the lack of possibility for B. Wojnarowska to be further employed due to the need to take care of her daughter,
- monthly pension in the amount of 1,103 PLN to cover increased expenses for rehabilitation and treatment of Monika Wojnarowska,
- approx. 155,000 PLN to cover different costs borne by parents in connection with treatment of Monika Wojnarowska and to cover additional costs necessary for her proper rehabilitation in the future.

However, the Regional Court in Łomża did not find that medical doctors acted wilfully. Accordingly, it is only the hospital which bears responsibility for their actions as employees, whilst they are not responsible individually. The case is not yet final and is still the subject of appeal proceedings before the Appeals Court in Białystok.

Immediately following the judgment of the Regional Court in Łomża and the media attention connected with it, a private firm declared that it would cover the expenses connected with the treatment of Monika Wojnarowska (and her brother – Mateusz) with a growth hormone. This kind of therapy is very expensive (approx. 1.6 mln PLN in the course of 8 years). Most likely, if they hadn't made the

case public, the Wojnarowskis would not have found such a sponsor. Furthermore, the Wojnarowskis in March 2008 were given the right to a new council flat. They had been requesting such a flat since the birth of Monika Wojnarowska, but their attempts had been unsuccessful.

The case of M.A. – refusal to terminate pregnancy arising as a result of rape – judgment SN of 2006.

After the Supreme Court issued a judgment on 21 November 2003, the case of M.A. regarding the refusal to terminate pregnancy arising as a result of rape was referred for a new hearing. In the new proceedings before the Regional Court in Katowice, M.A. extended the claim, demanding from the borough of Dąbrowa Górnicza the redress of the damages in the form of the costs of maintaining the child for the period until it achieves the ability to maintain itself. This claim was justified by the fact that the child requires permanent care due to numerous disorders which it suffers from; the plaintiff does not work and bears the full costs of maintaining the child.

The Regional Court in Katowice dismissed the claim in this scope. The Appeals Court in Katowice, trying the appeals case of the plaintiff, decided to present to the Supreme Court the legal issues to be settled. In particular, the doubts of the Appeals Court were aroused by the question of whether in the case of illegal prevention of termination of pregnancy which resulting from rape, the scope of redressing the damage covers the costs of maintaining the child. Moreover, the court intended to obtain an answer whether in the case of failure to identify the rapist, the liability of redressing the damage covers the costs of maintenance of the child incurred by the mother also in the part which would encumber the father?

In the judgment of 22 February 2006¹⁶, the Supreme Court, answering the legal question it had been asked by the Appeals Court in Katowice, stated that:

"the subject of liability for illegal prevention of termination of pregnancy arising as a result of rape, in which the perpetrator was not identified, incurs the costs of maintaining the child in the scope that the mother of the child making personal efforts to maintain it and bring it up is not able to satisfy the justified needs of the child."

The following circumstances, which differentiate this case from the case of Mr and Mrs Wojnarowski (and also all other cases in which we are dealing with deformed fetuses), has an influence on the above-mentioned judgment:

- the M.A.'s child was born completely healthy, and so there were no grounds for additional costs of maintaining the child such as costs of rehabilitation, treatment, etc.;
- in the case of birth of a child which is the result of rape, the decision whether she will look after the child on her own or not belongs to her. If she makes such a decision, then, in a certain sense, she takes on the cost of maintaining the child. As the Supreme Court noted, "the mother, in deciding to keep the child, agreed to incur part of the costs by exercising personal efforts to bring up and maintain the child with the aim of satisfying the justified needs of the child";
- the potential damage cannot be undefined as concerns the level of the maintenance, but must be the necessary costs actually incurred on the child, of which their existence is highly likely in the concrete circumstances of the case.

The above-mentioned judgment of the Supreme Court does not resolve the problem of liability of damages of the subject for refusal to perform an abortion (despite the patient fulfilling the statutory pre-

requisites). First of all, it leaves the common courts quite a lot of freedom to decide how to assess what costs the mother is able to satisfy, and what she is not. This can have a big impact in the court proceedings in which the main argument is about proving what the child really needs. In the situation of a typical civil litigation this would not be a surprising solution, since actually the common courts should have a relatively large amount of freedom in defining the amount of the claim. However, in a situation which is about the needs of a child that is already living and the mother is placed in a situation that she must claim damages to cover the costs of maintenance of the child which, it must be stated, was not supposed to live, the situation is much more complicated. The use of such imprecise clauses places it in a weak position in the proceedings. The Supreme Court does not give any guidelines as to what circumstances should influence the award of damages – whether it should be the financial standing of the mother or of her whole family. Should the "personal efforts of the mother", which are mentioned in the judgment of the Supreme Court, cover her earnings from paid work, or also financial means obtained from other funds too (foundations, benefits etc.). The judgment of the Supreme Court does not refer to the question of what can constitute "justified needs of the child", whether it should be referred to the environment in which the child lives or rather to the national average.

One can state that the Supreme Court used the above-mentioned formula in order not to define precisely the amount of the claim, but to create the possibility to award damages of a maintenance character. Through the use of such general formulas it gave the signal that there is an entitlement to damages to a certain level, but at the same time the definition of the amount is left to the courts, giving them greater freedom in defining those damages. Therefore the question arises, whether the courts will be able to perform this duty quickly and effectively. The current proceedings in the Polish courts on the question of so-called wrongful birth cases indicate that pursuing this type of claim and defining its amount raises very serious difficulties.

In the resolution of 22 February 2006 in the case of M.A. the Supreme Court suggested that "it is desirable to initiate legislative work enabling the acceptance by the state of the maintenance costs of the child in the case when the woman did not take advantage of the legal possibilities to terminate the pregnancy or when she was illegally prevented from performing this operation." This postulate appeared earlier in academic work of M. Nesterowicz¹⁷. Both the case of B. & S. Wojnarowski and M.A. indicate that on the basis of Polish law it is possible to pursue damages claims for "wrongful birth". However, in practice, obtaining a legally valid judgment awarding such damages is seriously impeded. This is the origin of the postulate for the "acceptance by the state of the maintenance costs of the child", which in essence could mean the introduction of a special maintenance fund to support parents who were prevented the possibility of taking a decision on continuing the pregnancy or not. The existence of such a fund would considerably facilitate the pursuit of this type of claim.

Disciplinary proceedings by the medical chambers

The case of B. & S. Wojnarowski also has another dimension, since it had a certain influence on changes in the sphere of the functioning of the medical disciplinary courts. In 1999, B. Wojnarowska notified the district screener for professional liability of the neglect of duties of Doctor Leszek P. Proceedings were to decide whether the doctor had broken the principles of medical ethics by refusing to refer the patient for prenatal tests despite the fact that her first child had been born with a serious genetic defect (dysplasia of the bones). The lack of referral for tests prevented B. Wojnarowska from making a decision about continuing the pregnancy. As a result, the plaintiff gave birth to a daughter who had the same genetic defect as her first child.

¹⁷ Mirosław Nesterowicz, *Civil liability for damages arising from treatment in French law (according to the act of 4 March 2002 on patients' rights)*, *Prawo i Medycyna*, no. 12/2002, pp. 116-122.

The proceedings before the disciplinary organs against the doctor have been pending for 5 years and were finally suspended due to the fact that the punishability of the act came under the statute of limitations. The whole of the proceedings were conducted in a lengthy and ostensible way and in the end the plaintiff's case was not considered on its merits. The Supreme Screener for Professional Liability twice discontinued the proceedings and the Supreme Medical Court did not agree with these decisions and ordered the case to be taken up. Finally, in the last and third decision on discontinuing the proceedings of 26 January 2005 the Supreme Screener pointed out that the punishability of the act came under the statute of limitations and thus, the proceedings were discontinued. This decision was upheld by the Supreme Medical Court of 13 October 2005. In the whole of the proceedings there were periods of no activity whatsoever on the part the Supreme Screener for Professional Liability, which lasted even as long as a year and which raised serious doubts as to whether the proceedings were conducted fairly.

With regard to the decision to discontinue the proceedings due to the statute of limitations having been exceeded, in July 2006 B. Wojnarowska filed a constitutional complaint that questioned some of the principles of the functioning of the medical disciplinary courts in the medical association. In the complaint, the following questions were presented with regards to whether or not these principles were in conformity with the Constitution:

- Limited transparency of proceedings before the medical court, which can be attended only by members of the medical association, in effect preventing any social control over the proceedings in process from either the plaintiff, the media, social organisations or even the organs of public authorities, as well as the courts of the highest instance;
- the non-public announcement of judgments of the medical courts;
- the legal status of the plaintiff, who in the proceedings before the medical court is not a party and has a narrow range of entitlements, insufficient for the protection of his/her rights;
- the 5-year period of the statute of limitations for punishability of the actions of the doctor, i.e. article 51 paragraph 4 of the Act of 17 May 1989 on Medical Chambers, is too short in the context of the practical operation of the organs of the medical association, in particular the period of time taken by the Supreme Screener for Professional Liability to consider a case. This allows the proceedings to be carried out in an ostensible way, protecting in essence the interests and good name of the accused doctor, and without the aim of honestly explaining the case;
- the regulation of the institution of professional liability. The Supreme Screener for Professional Liability fulfils in the disciplinary proceedings of the doctor the role of the prosecutor – he/she institutes the evidentiary proceedings, as well as appearing before the medical court, supporting the request for the doctor to be punished. However, as it turned out in the case of B. Wojnarowska, the Supreme Screener for Professional Liability does not guarantee the injured party an objective and fair explanation of the case. The Supreme Screener for Professional Liability, like the accused doctor, is a member of the medical association, which can have a negative influence on his/her neutrality.

The above-mentioned constitutional complaint is currently under consideration by the Constitutional Tribunal. However, it seems that it has had an influence on the Ministry of Health, which has undertaken action aimed at reforming the system of disciplinary medical courts. On 15 June 2007 the Ministry of Health presented a draft of a new act on medical chambers, which proposes far-reaching changes in relation to the current act of 17 May 1989. The main virtues of the proposed regulation are:

- transfer of the regulation of professional liability of doctors to the level of an ordinance of the Minister of Health and Social Care of 26 September 1990 on proceedings on the subject of professional liability of doctors¹⁸ to the act on medical chambers;
- transparency in the proceedings before the disciplinary courts;
- recognition of the right of the injured party to appear in the disciplinary proceedings as a party;
- introduction of complaints against the excessive lengthiness of proceedings before the disciplinary courts.

Generally, the proposed changes are going in the right direction and increase the possibilities to institute proceedings by parties suffering damage by the actions of a doctor, including women whose doctors have unlawfully refused prenatal tests or the performance of termination of a pregnancy. However, the proposed act could have gone further. Concern may be raised by the maintenance of the possibility of the unlimited length of time for the evidentiary proceedings and unclear criteria for prolonging them in the situation when there is a possibility that the case can fall under the statute of limitations after 5 years of the act being committed. Moreover, the draft does not introduce greater guarantees of independence of the Supreme Screener for Professional Liability nor does it introduce the principles of remuneration for his/her work. A good solution would be to allow, in imitation of the Code of Criminal Procedure, civil society organisations to disciplinary proceedings on the subject of professional liability of doctors. Perhaps during the legislative work these shortcomings will be corrected.¹⁹

Conclusions

The analysis of the two above-mentioned cases – the case of M.A. and the case of B.& S. Wojnarowski – leads us to the following conclusions. During the last few years the courts have managed to create relatively transparent principles for pursuing damages claims and compensation for the refusal of access to a legal abortion. This development in judicial decisions should be assessed, since it testifies to a certain courage in the outlook of the courts and of their understanding of the social weight of the problem in Poland.

However, in the judicial decisions – particularly concerning liability for wrongful birth – there are doubts which could make it difficult to obtain damages. In particular, these concern the scope of the damage incurred by the parents and as a result, the damages pursued. It seems that it is necessary to create in this area comprehensive rules which could take place only through the resolution of similar cases by the Polish courts.

Although the legal rules of liability for wrongful birth have been established, it is still difficult for injured parties to obtain a final judgment awarding damages or a pension in their favour. Both the cases of B. Wojnarowska and M.A. are taking place (or took place) over many years and apart from awarding damages for violation of personal interest, have not yet managed to reach final judgments on the question of the claims for wrongful birth. This means that waiting for justice can sometimes last many years, particularly if you are a person who is "blazing a legal trail".

The disciplinary proceedings instituted by B. Wojnarowska before the disciplinary courts could be of vital importance. There is hope that this will lead indirectly to permanent changes in the scope of the rules of these proceedings towards a strengthening the rights of injured persons and guaranteeing the fairness of the proceedings.

¹⁸ Journal of Laws from 1990, no. 69, item 406.

¹⁹ Compare on this subject the opinion of the Helsinki Foundation for Human Rights of 27 July 2007, prepared by Maciej Bernatt.

The use of the European Convention of Human Rights to pursue rights connected with reproductive health – remarks about the case of *Alicja Tysic*

Use of the Convention for cases on reproductive health

On the basis of the Convention there does not exist the right to health care at a defined level. Consequently, the Convention does not guarantee access to any particular services connected with reproductive health. The State-party of the Convention possesses only certain duties regarding these services, which arise from other regulations of the Convention.

The following rights defined by the Convention can have an application to cases connected with reproductive health:²⁰

– Article 2 of the Convention – the right to life. In the case when the state permits grossly bad medical care, which results in the loss of life, this can lead to liability on the basis of the Convention. This regulation can find its application, for example, when a woman is refused an abortion despite the fact that the continuation of the pregnancy puts her life at risk, or also when it is necessary to treat a life-threatening illness. In the case of death, the duty to explain all the circumstances of the case lies on the shoulders of the state. If it does not carry out this duty, it can also be liable on the basis of the Convention. In the recent judgment in the case of *Byrzykowski v. Poland*²¹ the European Court of Human rights stated that a positive duty rests on states to establish regulations obliging hospitals (both public and private) to accept means to protect the life of patients. This positive duty also covers establishing an independent and efficient judicial system which will make it possible to establish the cause of death of the patients treated in hospitals and bring to justice the persons responsible for the death. This system must be effective and act quickly so that knowledge of the mistakes will allow them to be avoided in the future.

– Article 3 of the Convention – prohibition of torture, inhuman or degrading treatment. There does not exist a standard definition of what torture, inhuman or degrading treatment mean. It is necessary to exceed a certain level of affliction so that the actions on the part of the public authorities qualify as degrading treatment. Such actions can be, for example, treatment of the patient which is not in accordance with standards, which result in a large level of personal stress, anxiety and indignity. The appraisal of whether the level of "degrading treatment" was exceeded is subjective – it depends on the circumstances of the specific case. One can claim (as Alicja Tysic did – see below) that the refusal of access to services in the sphere of reproductive health or the lack of advice on this question – in certain situations can cause a violation of Article 3 of the Convention. This standard establishes the existence of a guarantee on the side of the public authorities in the scope of positive obligations aimed at carrying out an honest and comprehensive examination of who possibly is guilty of acts which exceed the norms of Article 3 of the Convention. If the authorities do not explain such accusations in a sufficient way (by, for example, carrying out disciplinary or criminal proceedings), then this can also be a violation of Article 3 of the Convention;

– Article 6 of the Convention – the right to a fair hearing. Individuals have the right to a fair hearing (and in connection with this a procedural guarantee) in two cases – when pursuing their rights and duties of a civil character and when appearing as an accused in a criminal case. With regard

²⁰ A comprehensive guide to the application of the Convention for the Protection of Reproductive Health is the publication by Magda Krzyzanowska-Mierzevska, *How to use the European Convention for the Protection of Human Rights and Fundamental Freedoms in matters of reproductive law: The case law of the European Court of Human Rights*, ASTRA – Central and Eastern European Women's Network for Sexual and Reproductive Health and Rights.

²¹ *Byrzykowski v. Poland*, judgment of the European Court of Human Rights of 27 June 2006, application no. 11562

to services in the scope of reproductive health, the possibility to make an accusation of violation of rights to the court could arise in relation to a civil process against a doctor (or institution) which prevented the patient from benefiting from the given service. In published works there is a suggestion that the greatest chances of success on the basis of this standard could be for cases regarding the accusation of violation of the principle of adversary trial proceedings, particularly when using the knowledge of specialist experts in a given case.²² Article 6 of the Convention does not grant, however, the right to institute criminal proceedings against another person;

– Article 8 of the Convention – the right to respect for private and family life. In accordance with the judicial decisions of the European Court of Human Rights, the right to respect of family and private life arising from Article 8 of the Convention covers the right of respect for the mental and physical integrity of the given person and includes issues regarding pregnancy. This right means not only the obligation of the authorities to withhold interference, but also contains in itself the positive obligations – taking action and conducting policies so that the guarantees arising from this law are actually realised. Of course this does not mean the state must carry out a specific policy in the scope of health protection. Nevertheless, from Article 8 of the Convention one can infer that if the state decides to guarantee citizens a right, then it should ensure that this right is really possible to pursue. In accordance with the judicial decisions of the European Court of Human Rights, rights should have a real and not illusory character.

– Article 12 of the Convention – the right to marry and found a family. Article 12 has been narrowly interpreted and does not, as of yet, have a direct connection with reproductive health issues. Up to now the European Court of Human Rights has not reached the conclusion that the right to enter into marriage and found a family can infer the right of a person to procreate. However, this right can be helpful when analysing the appraisal of violation of other rights guaranteed by the Convention;

– Article 13 of the Convention – the right to an effective remedy. In the case when the individual is refused the possibility to benefit from certain defined rights guaranteed by the Convention, he/she should have the possibility to an effective remedy before a national authority, to both deal with the merits of the complaint and to grant effective relief. This aim is served by Article 13 of the Convention and can be significant in appraising the accessibility of various types of services in the scope of reproductive health, particularly in the case when access to them is dependent on the discretionary powers of the officer.

– Article 14 – non-discrimination principle. Article 14 of the Convention guarantees the principle of non-discrimination of other rights guaranteed by the Convention. Alicja Tysi c (noted below) claimed that because of her bad eyesight she has suffered discrimination as a result of being prevented from exercising her rights under the Convention. However, in view of recognising the violation of Article 8 of the Convention, the Court did not find it necessary to consider the violation of Article 14. Nevertheless, it may happen that the discrimination principle may find its way into jurisprudence in the field of reproductive rights (e.g. compulsory sterilization because of membership of a certain ethnic group would easily fit into this category).

Exhaustion of Domestic Remedies Principle

In the case of violation of the rights guaranteed by the Convention, before referring the case to the European Court of Human Rights it is necessary to fulfil certain procedural requirements. The most important of these is the use of the national means of appeal. The protection system of the Convention has a subsidiary character – it should be applied only in situations in which the individu-

²² Compare Magda Krzy anowska-Mierzevska, *How to use the European Convention...*, p. 29

al has not obtained protection of his/her rights guaranteed by the Convention on a country level. However, this means that there is a remedy that is accessible, capable of providing redress in respect to the applicant's complaint and has a reasonable prospect of success.

The approach of the European Court of Human Rights regarding the use of the national means of appeal, will depend on the character of the given case, and in particular on the accusations made. When, for example, the woman pursues a civil claim for wrongful birth or if her rights as a patient have been violated and her claim was not recognised (or if the norms of proceedings of her case were violated), then it may be necessary to make use of the whole recourse to the law in the country (including an appeal against sentence to the Supreme Court). If such means are ineffective, for example, if a system lacks independence, it may not be necessary to seek domestic remedies before going to Strasbourg.

However, if the charge is based on a violation of Article 2 or 3 of the Convention, then the use of the country's means of appeal can consist in only an attempt to explain – with the use of appropriate legal means – the circumstances connected with the specific case (e.g. establishing guilt) if it turns out that the state organs did not carry out their positive obligations concerning an examination of the circumstances of the specific case, then the final decision ending the proceedings in the case ends the national proceedings and enables a complaint to the European Court of Human Rights to be made. In each case the complaint should be lodged within 6 months of the issue of the final judgement in this case.

The circumstances of the case of *Tysic versus Poland*

In the year 2000 Alicja Tysic was the mother of two children and suffered from serious sight impairment. The doctors warned her against another pregnancy since she would risk a haemorrhage inside her eye and the retina would become detached, and as a consequence she would become blind. When it turned out that she was pregnant a third time, three opticians who she consulted with verbally stated that to continue the pregnancy would put her sight at risk. At the time she had sight impairment of approximately -20 dioptries. However, they refused to issue a statement that would enable her to terminate the pregnancy. A. Tysic also consulted a general physician, who issued a statement that the pregnancy is a risk due to her sight impairment, and also due to the fact that her two previous children were born by caesarean section.

In the second month of the pregnancy, in April 2000, A. Tysic's eyesight deteriorated to 24 dioptries. On 26 April 2000 A. Tysic met a gynaecologist R.D. in order to terminate the pregnancy. She was examined by a senior registrar, who claimed that there were no medical grounds which would allow an abortion. As a result, A. Tysic could not terminate the pregnancy and gave birth to her third child in November 2000. As a result of giving birth to the child, Alicja Tysic's eyesight has deteriorated. She now falls within the first group of disability, which means that in her case she is advised against any physical effort, including care for her children, and requires permanent help from third parties.

A. Tysic attempted to institute criminal proceedings against R.D. However, the investigation was discontinued due to the investigator's opinion that there was no connection between the decision of the doctor and the deterioration of her eyesight. Moreover, no disciplinary proceedings were instituted against the doctor.²³

Charges raised in the complaint to the European Court of Human Rights

A. Tysic lodged a complaint to the European Court of Human Rights in January 2003 against Poland for violating the European Convention of Human Rights for the failure of the state to correctly apply the regulations of the law governing abortion. In particular, Alicja Tysic complained about the violation of Convention provisions guaranteeing the right to respect private life (Article 8 of the Convention) by failing to provide an abortion and the lack of appeal procedures in Polish law against the decision of the doctor in connection with article 4a of the Act on Family Planning (mentioning the cases when abortion is allowed in the light of the law) (Articles 8 and 13 of the Convention). She also presented a charge of degrading treatment (Article 3 of the Convention) and a charge of discrimination (unequal treatment due to sex and disability – Article 14 of the Convention).

Involvement of non-governmental organisations

In this case, four opinions of *amicus curiae* were presented to the court by the following organisations: the Helsinki Foundation for Human Rights together with the Federation for Women and Family Planning, the Center for Reproductive Rights in New York, the Association of Catholic Families, and the Forum of Polish Women from Gdask. It is worth mentioning that, the Law Clinic of the University of Warsaw was also involved in the case at the stage of national procedures and preparation of the complaint to Strasbourg.

In the opinion of the *amicus curiae*, the Helsinki Foundation together with the Federation for Women and Family Planning argued that women in Poland in practice have seriously restricted access to abortion as allowed on the basis of Article 4a of the Act on Family Planning. Testimony to this is the low number of abortions allowed on the basis of the act, which have been carried out in recent years. This number has fallen significantly – from 782 in 1994 to no more than 200 in successive years. These statistics, confirmed by examples from the practical application of the *Act on Family Planning*, indicate the existence of a problem of a systemic character.

The decision to perform an abortion is made in practice by two doctors (or by the prosecutor and a doctor in the case of a pregnancy arising as a result of rape), whilst the doctor who is supposed to perform the abortion often questions the previously issued consent of another doctor. Doctors refuse to perform abortions for medical-genetic reasons by citing the "conscience clause"²⁴, however most often they do not fulfil their obligations which arise from this (e.g. they do not make a note of the refusal, they do not refer the pregnant woman to where she can have an abortion). The lack of clear criteria and the doubts about the construction of the right to abortion on medical and genetic grounds means that doctors can refuse to perform an abortion and the medical examinations connected with this due to fear of being punished. Sometimes the lack of sufficient knowledge about the conditions permitting termination of pregnancy is at fault.

Judgment of the European Court of Human Rights

The European Court of Human Rights stated that in the case there was not a violation of Article 3 of the Convention and that a more appropriate regulation of the Convention for considering the case is Article 8 of the Convention which guarantees the right to respect private life.

²³ Compare on the subject of the conscience clause, Eleonora Zieliska, *The Conscience Clause*, *Prawo i Medycyna*, vol. 5 (2003), no. 13, p. 25 and further.

The Court stressed that the case refers to the question of respecting private life, since pregnancy and the circumstances connected with it are inextricably connected with the private life of the woman – they decide about her physical and psychological integrity. At the same time it explained that in Article 8 of the Convention there is the concept of so-called positive obligations, i.e. actions which must be undertaken by the state in order to ensure that the rights arising from Article 8 of the Convention are realised.

The Court believed that there was no dispute in the case as to whether the plaintiff suffered from an illness resulting in a serious impairment of her eyesight (myopia). Yet despite this, it stressed that its role is not to replace a medical judgement carried out by a doctor as to the seriousness of the state of the plaintiff, nor as to whether her state justified an abortion or not. The Court explained that its role is not to examine whether A. Tysic had the right to an abortion. As the Court stated "*Nor would it be appropriate to speculate, on the basis of the medical information submitted to it, on whether their [the doctors'] conclusions as to whether her pregnancy could or could not lead to a deterioration of her eyesight in the future were correct*". Therefore the Court did not question the opinion of the medical community and did not state that Alicja Tysic "had the right to an abortion", it did not assess whether the illness of her eyes was a sufficient basis to terminate the pregnancy. The Court only stated that it was not demonstrated whether Polish law as applied in the case of Alicja Tysic contained mechanisms which would make it possible to determine whether the conditions for terminating pregnancy had been met in her case (see §124 of the judgment). Due to this situation the applicant suffered legal uncertainty, anguish and stress connected with contemplating the possible negative consequences of her pregnancy on her health. The Court stressed that the fears of the applicant that her pregnancy and birth could lead to a deterioration in her sight were not irrational. It noted that they were justified by the opinions which she had obtained from the doctors as well as her previous medical experiences.²⁵

Taking into consideration the above-mentioned circumstances, the Court noted that in Poland there is a problem with access to abortion due to therapeutic reasons, for instance due to the threat of criminal liability of the doctor and the confusing procedures concerning the situation when a doctor can perform an abortion but refuses to do so. The Court stressed that the government of the Republic of Poland drew attention to this problem in its official announcements.

The Court stressed that if the national legislator decides to introduce the possibility to perform an abortion in certain circumstances, then it cannot create legal procedures in such a way as to restrict such a possibility in practice. This is a requirement of the principles of the rule of law. Moreover, the state should ensure the existence of an independent organ which, after allowing the pregnant woman to state her case, can issue a written decision justifying the refusal to perform an abortion (or consent) based on the statutory indications. Moreover, the procedures before such an organ should be timely so that a decision can be made before the expiry of the time limit when an abortion is possible or also in order to limit the further deterioration of the woman's sight.

Against this background, the Court in Strasbourg examined the procedures existing in Poland concerning the performance of a therapeutic abortion. It stated that they do not contain an effective mechanism which would make it possible to determine whether in a given circumstance an abortion may be performed. The procedures currently in force could function correctly, but only if there did not exist a serious dispute in Poland about the permissibility of termination of pregnancy and if doctors were not afraid of performing abortions. However, this is not the case and this is why the state must ensure procedural mechanisms. In the case of A Tysic the lack of these mechanisms and the situation which resulted from this caused for her a prolonged state of uncertainty, stress and anguish, taking into consideration the possible negative consequences on her health and pregnancy.

²⁵ In particular the European Court of Human Rights referred to the Fifth Periodical Report submitted by Poland to the UN Committee for Human Rights (CCPR/C/POL/2004/5), in which the government of the Republic of Poland states that the regulations of the anti-abortion law are not fulfilled and that some women, although they fulfil the statutory conditions for permitting a termination of pregnancy, do not in reality have access to such treatment.

The Court recognised that the possibility for the applicant to claim damages after giving birth does not constitute a sufficient means of appeal, since this takes place after the birth of the child, and cannot prevent damage to her health. Similarly the possibility of criminal or disciplinary proceedings against the doctor is an ineffective means, since it can take place *post factum*.

Taking into account the above-mentioned circumstances, the Court noted a violation of the Convention due to the failure of Poland to fulfil its positive obligations regarding the effective respect of private life.

Due to the recognition of a violation of Article 8 of the Convention, the Court recognised that there was no necessity to deal with the violation of Article 13 of the Convention (the right to a fair hearing) and Article 14 of the Convention (the prohibition of discrimination). The Court in Strasbourg awarded A. Tysic damages of 25,000 euros as well as legal costs (in particular the costs of legal aid) amounting to a total of 14,000 euros. This is the highest damages awarded by the European Court for Human Rights in Polish cases.

Reactions after the judgment in the case of Alicja Tysic – potential of enforcing the judgment

Unfortunately, the ruling in the case of *Tysic vs Poland* does not answer the question about what the attitude of the European Court of Human Rights would be in the situation if Poland tightened the abortion legislation. There are two possibilities in principle. According to the first, the Court in Strasbourg could adopt the position that it is not its role to assess a country's legislation and that the scope of permitted possibilities to terminate a pregnancy belongs to the so-called margin of appreciation, which grants the state discretion on the necessity of a restriction.²⁶ Such reasoning is indirectly indicated by the judgements of the Court to date.²⁷ However, a second possibility is a consideration by the Court in Strasbourg as to which value should prevail in the case of a conflict – the health and life of the woman and her right to privacy as well as the right to decide about herself – or the value in the form of the protection of the life of the foetus? The resolution of this problem can be one of the most important tasks for the European Court of Human Rights and it is not at all a foregone conclusion that the Court in Strasbourg will always share the position of granting the states parties the margin of appreciation. However Perhaps the case of *Tysic vs Poland* can be considered as a small step in this direction, despite numerous reservations made by the Court itself.

The judgment in *Alicja Tysic v. Poland* raised a lot of controversy in Poland. It was one of the reasons why the Government decided to ask a panel of 5 judges to refer the case to the Grand Chamber. The panel of 5 judges did not agree with the arguments presented by the Government and did not use this competence. Therefore, the judgment in *Alicja Tysic v. Poland* became final on 24 September 2007.

The finality of the judgment means that Poland must execute it. Execution of the judgment is not only paying damages to A. Tysic and the legal costs of the proceedings at the Court, but also making appropriate changes in the law so that similar violations of human rights will not take place in the future. In particular the changes should consist in introducing effective appeal mechanisms which would make it possible to obtain binding and final decisions regarding whether in a given situation the norms of Article 4a of the Act on Family Planning are fulfilled and allow a termination of pregnancy.

²⁶ On the margins of permissibility compare Yourew, H.Ch., *The Margin of Appreciation Doctrine in the Dynamics of the European Court of Human Rights Jurisprudence*, Martinus Nijhoff Publishers, Kluwer Press, London – New York – the Hague, 1996; Onder Bakircioglu, *The Application of the Margin of Appreciation Doctrine in Freedom of Expression and Public Morality Cases*, German Law Journal, nr 7/2007 (vol. 8), p. 711 and further.

²⁷ *Vo v. France*, no. 53924/00, judgment of the European Court of Human Rights of 8 June 2004. (Grand Chamber), par. 82 – "the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a "living instrument which must be interpreted in the light of present-day conditions"... The reasons for that conclusion are, firstly, that the issue of such protection has not been resolved within the majority of the Contracting States themselves, in France in particular, where it is the subject of debate..., and, secondly, that there is no European consensus on the scientific and legal definition of the beginning of life".

The issue of execution of the judgment raised a lot of public attention in Poland. However, the Government has not yet presented any complex plan of reform in this area.

The case of R.R. – insufficient protection of the national courts – in search of justice before the European Court of Human Rights

There is another case from Poland in the European Court of Human Rights concerning the refusal of access to medical services connected with the carrying out of the so-called anti-abortion law. Recently the Court communicated to the Government of the Republic of Poland a complaint filed by R.R. against Poland.²⁸

When R.R. was pregnant with her third child, she was informed, on the basis of ultrasound scan results, of the likelihood that the foetus suffered from Turner syndrome. A genetic examination was recommended to confirm or dispel these suspicions. However, her local physician refused to give her a referral to undergo such an examination as in his view her condition did not qualify for an abortion.

R.R. was subsequently refused a genetic examination in local and academic hospitals. In the 23rd week of pregnancy she went, without a referral, to another hospital where she was admitted as an emergency patient. Genetic tests were performed there. In the 25th week of her pregnancy she received the results confirming that the foetus was suffering from Turner Syndrome. Before and after she obtained the results, she again requested the local hospital to carry out an abortion. This was refused since by then it was too late for a lawful abortion on grounds of foetal abnormality. The applicant eventually gave birth to a baby suffering from Turner Syndrome.

She unsuccessfully requested the prosecuting authorities to institute criminal proceedings against persons involved in handling her case. She also filed a civil lawsuit for compensation against the relevant physicians and health care institutions. Her claims were dismissed by domestic courts, as they found that there had been no procrastination on the doctors' part and that under the World Health Organisation standards termination was permissible only until the 23rd week of pregnancy. The cassation appeal is pending before the Supreme Court.²⁹

In the case of *R.R. vs Poland* issues are 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 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 article 8 of the Convention. R.R. did not receive on time the possibility to carry out prenatal genetic tests, which would have allowed her to state whether in her case there were indications for performing a termination of pregnancy from Article 4a of the so-called anti-abortion law. In this regard this is a case similar to the case of *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 termination of pregnancy.

R.R. also raised the charge of violation of Article 13 of the Convention (the right to effective means of appeal). In 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 plaintiff made use of the legal possibilities available to her on the basis of Polish law – both making an accusation of a crime committed by

²⁸ Application no. 27617/04

²⁹ Information on the case is based on the information contained in the Information Note No. 97 of the European Court of Human Rights, of May 2007.

the doctors, as well as a civil suit for damages for violation of personal interest. The national mechanisms – in the opinion of R.R. – turned out to be ineffective and this is why she has decided to make use of the possibility to file a complaint to the European Court of Human Rights.

The case is still at an early procedural stage. A judgment can be expected in 2008. It is likely that before making a judgment in this case the Court in Strasbourg will suspend a judgment of the Grand Chamber in the case of *Tysic v. Poland*. Therefore this judgment will constitute a standard legally binding in the whole system of the Convention.

Potential of other problems from the scope of reproductive health before the European Court of Human Rights

The case of *Tysic vs Poland* is an example of a successfully ended case in the form of a judgment of the European Court of Human Rights on the protection of reproductive health. The case of *R.R. vs Poland* also has a certain chance of success. These cases prove that the European Convention of Human Rights can be used successfully as an instrument to pursue rights connected with reproductive health. Its application is limited by the special character of the Convention (as well as the subsidiary character of the control mechanism) and the scope of the guaranteed rights. Nevertheless, taking into consideration the real problems in the scope of reproductive health in Poland, one can imagine cases concerning the following questions:

- refusal to provide in vitro fertilisation by the state for poor married couples who cannot afford to pay for the treatment in private clinics (a charge of violation of Article 12 of the Convention, which establishes the right to get married, but one can try to infer from it also the positive obligations of the state in the scope of providing the possibility of procreation)³⁰;
- lack of access to contraceptives due to the fact that they are not refunded for poor people. In this case the injured party could raise the charge that due to the fact that they possess 3 or 4 children they were at risk of great stress connected with the potential of another pregnancy (potential charge of violation of the positive obligations of the state arising from Article 8 of the Convention as well as the potential charge of violation of Article 3 of the Convention depending on whether it is possible to establish a minimum level of inconvenience in order to state degrading or inhuman treatment);
- criminal liability for conducting informational activity about the possibility of performing abortion abroad, including the use of pharmacological abortions (liability on the basis of Article 10 of the Convention)³¹;
- refusal to perform medical tests due to the risk to the foetus, which consequently resulted in the death of the pregnant woman (potential charge of violation of article 2 of the Convention)³²;
- refusal to terminate a pregnancy due to the fact that in a given hospital such operations are not performed, despite the fact that they are financed by public funds (potential charge of violation of Article 3 and 8 of the Convention);
- lack of consent from the father to terminate a pregnancy in the case when he is in a permanent and stable relationship with the woman (potential charge of violation of Article 8 and Article 12 of the Convention).³³

³⁰ Compare, for example, Joanna Kocik, *Every fifth couple in Poland cannot have children in a natural way*, *Gazeta Krakowska* from 12 February 2007. In the article a married couple is described, which for over a year has been trying for a child. Diagnostic tests allowing preparation for in vitro at a later time are not carried out in Krakw.

³¹ See, for example, *Open Door and Dublin Well Woman v. Ireland*, judgment of the European Court of Human Rights of 29 October 1992, A. 246.

³² Barbara Namysłowska-Gabrysiak, *Medical errors or unsuccessful treatment?*, *Prawo i Medycyna*, no. 3/2005, p. 20 and further.

³³ See *R.H. v. Norway*, decision on admissibility, App. No. 17004/90, *Eur. Comm'n H.R.* (1992), *Paton v. United Kingdom*, App. No. 8416/78, 3 *Eur. H.R. Rep.* 408; *Boso v. Italy*, App. No. 50490/99, *Eur. Comm'n H.R.* (2002).

Conclusions

In recent years there has been a significant increase in judicial decisions of both national and international courts in the scope of reproductive health and in particular, the most important problem in this sphere – the lack of access to termination of pregnancy despite having a right to this arising from Article 4a of Act on Family Planning. Judgments in the above-mentioned cases have led to the establishment of principles which have a significance much greater than only an assessment of individual cases. Firstly, they indicate a serious problem of the system of pursuing legal personality arising from Polish legislation. In this context the most authoritative announcement is the judgment of the European Court of Human Rights in the case of *Tysic v. Poland*. Secondly, they fill out the normative content of the regulations of Polish civil law in the spheres in which it would be difficult to obtain a specific decision of the legislator, and considerations of justice and general norms of civil law call for the regulation of the sphere of "wrongful birth" claims. Thirdly, in a longer-term perspective these judicial decisions will lead to the liquidation of the state of the systematic violation of the rights of women, since they indicate what actions should be taken in order to achieve this. If the public authorities do not decide to improve access to services of termination of pregnancy in a comprehensive way, even more such cases could appear, particularly since the legal trail has already been blazed.

Report of the expert research with gynaecologists and midwives

Anna Domaradzka

Anna Domaradzka is a sociologist, assistant in the Institute of Social Studies of the University of Warsaw. She has coordinated, among others, research on the equal status of women and men in the framework of the National System of Monitoring Equal Treatment of Women and Men, has conducted research on the observance of reproductive rights of women with HIV/AIDS.

Introduction

The research conducted constitutes part of a project *Proactive monitoring of women's reproductive rights as a part of human rights in Poland*, realised by the Federation for Women and Family Planning, financed by the European Commission. The aim of the research was to gather information on the quality and real access to gynaecological and obstetrics services, with particular regard to termination of pregnancy. It was decided to conduct the expert research based on detailed interviews with selected persons whose position and experience allows one to recognise them as specialists in the field of the research. They were directors of well-known hospitals or gynaecological-obstetrics clinics, professors of the Medical Academy, gynaecological and obstetrics consultants, as well as other persons with great professional experience in gynaecology and obstetrics. The aim of the research was to obtain as detailed knowledge as possible on the condition of gynaecological-obstetrics care in Poland, with particular stress on actual access to the services of termination of pregnancy within the framework of the existing *Act on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy*.

This report attempts to answer a series of research questions, among others:

1. What does the realisation of women's reproductive rights look like in Poland?
2. What is the quality of and access to gynaecological-obstetrics services in Poland?
3. What does the quality of and access to gynaecological-obstetrics services depend on in Poland?
4. How is the scope and realisation of the Act on Family Planning assessed by the medical profession?

The answers to these and other questions are to be found in the later part of this report. In analysing the results, attention should be drawn to the fact that the report presents the opinions of a diverse group of experts and is based on purely qualitative research, aimed rather at deepening the analysis of the issue rather than defining its scale.



Description of the research and methodology

In the period from May to July 2007 expert research was conducted with gynaecological and obstetrics doctors. Ten detailed individual interviews were conducted as well as one telephone interview. A detailed script was used to conduct the interviews, containing questions concerning the *Act on Family Planning*, actual access to termination of pregnancy, as well as other issues connected with the subject of reproductive rights of women. The interviews were conducted with the directors of hospitals or the managers of gynaecological-obstetrics clinics, gynaecological and obstetrics consultants as well as consultants of oncological gynaecology, and professors of the Department of Gynaecology and Obstetrics of the Medical Academy. Eight respondents came from Warsaw, one from Lublin, one from Wrocław, and one from Katowice. In addition, two conversations were conducted with midwives and a lactation adviser.

Results

Main results

- In Poland there is inequality in women's access to gynaecological-obstetrics services due to education, age, place of residence and income level.
- The main cause of this diversity of quality of gynaecological-obstetrics care is, in the opinion of those researched, the so-called human factor, in other words, the attitude and behaviour of individual doctors, registrars, and directors of health service centres.
- In the discussion on abortion and prenatal tests, emotional rather than scientific arguments predominate and the language used is extremely ideologized. There is no tendency to rationalise the question of prenatal tests and abortion. There is a sharp divide between those doctors who recognise the right of women to abortion and those who believe that women should not have such a right.
- In the opinion of the radical opponents of abortion, termination of pregnancy is not justified even by the threat to the health and life of the woman. Among some clearly anti-abortion doctors, there is a tendency to negate the indications entitling women to legally terminate the pregnancy - for example, the statement that they have never encountered a situation where the woman's life was threatened.
- The subject of termination of pregnancy is still taboo in Polish medical circles, and the problem of family planning is a political question.
- Access to a legal abortion is in practice extremely limited – doctors are unwilling to carry out such operations and hospitals send patients somewhere else. This referral to other institutions, most often not defined, sometimes has the effect that the time limit for which a legal abortion can be performed is exceeded. In effect, the realisation of the act is additionally restricted: to those women who find themselves in a situation defined in the act and who find an institution which will realise those rights for them.
- The main barriers to access to a legal abortion are:
 - The unclear legal situation, particularly the doubts about the definition of a threat to the life of the woman and the inconsistency with other legal acts which impose fines for the damage or killing of a foetus.
 - The difficulties connected with diagnostics in the first stage of the pregnancy, which detect only some of the cases of irreversible defects to the foetus in the period in which it is legally permissible to terminate a pregnancy.
 - The politicisation of the question of abortion – the operation has been defined as taking life.
 - The precautionary attitude of some doctors, who attempt to avoid problematic situations.
 - Complicated procedures and the high risk that they will not receive the services encourage women to look for other solutions (pharmacological means, illegal abortion in a private surgery).

Assessment of the quality and access to gynaecological-obstetrics services

When assessing the quality and access to gynaecological-obstetrics services one should take into consideration both the standard gynaecological-obstetrics services covering prevention, basic gynaecological care and gynaecological care (called by some gynaecologist doctors in Poland pre-conception care¹), 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 terminate the pregnancy, oncological gynaecology, care for rape victims, and people suffering from AIDS or infected with HIV.

As far as the general assessment of the quality and access of health care is concerned (in particular, gynaecological-obstetrics services), the majority of respondents pointed to the very poor situation in the Polish health service, both due to its poor financial situation, as well as the falling level of skills and consciousness of doctors. This is well summed up by the remarks of one of the respondents: *Taking into account the poorly equipped state of hospitals, the lack of preparation as far as obstetrics is concerned, the low wages and lack of reform, we come out remarkably well. Another respondent stressed that it is to the credit of people that it isn't as bad as it could be.*

A few of the respondents indicated the necessity to refer patients or create queues as a result of lack of funds to realise certain services. The existing limits, arising from the contracts signed by hospitals from the National Health Fund, do not allow them to serve all patients who come to see them. The hospital directors drew attention to the fact that usually by the middle of the year the limits for gynaecological-obstetrics services have been used up. In this situation the directors use two strategies – they continue to provide services, and after the end of the year they go to court to execute from the National Health Fund the funds for the so-called surplus performance, or they limit the number of free services performed in order to fit inside the limit.

Some hospitals attempt to patch the holes in the budget by offering patients additional paid services (e.g. a separate birthing room, a family birth, birth in water, the care of a chosen midwife). However, since according to the National Health Fund, offering paid services is in contravention to the existing law, these types of activities are punishable. One of the respondents also pointed out the threat connected with surplus performance – *exceeding the contract can result in a smaller contract in the next year.* Some of the directors drew attention to the rigid financial principles which translate into problems with access to services: *there are queues to the gynaecological-obstetrics clinic due to the insufficient contract with the National Health Fund.*

The respondents pointed out that postnatal care and help with pregnancy complications is improving, however, there is still a need for further improvement. The majority of respondents also indicated that in their opinion the quality and access to services has improved over recent years. As the respondents said: *postnatal care and help with pregnancy complications looks better and better; the present quality of gynaecological-obstetrics services does not digress from EU standards; there is better and better care, oncological programmes, prevention.*

According to some of the respondents the development of private diagnostic surgeries offering ultrasound diagnostics, mammography and cytological examinations is a big problem. The lack of control over the quality of the diagnostics offered by them allows one to suppose that some of the tests carried out there are unreliable and therefore can give women a false sense of security. According to the respondents, some of the private surgeries use outdated apparatuses and their staff do not have sufficient knowledge in the scope of diagnostics.

¹ Behind the definition of pre-conception care is hidden the assumption that the patient is planning to become pregnant, which is why it seems more appropriate to use the term gynaecological care. The term pre-conception care, which often appears in interviews, means above all, planning a pregnancy, although some respondents used it in a wider context, narrowing the category of gynaecological care to matters connected with pregnancy.

From the conversations one can draw the conclusion that there is a large diversity in quality and access to gynaecological-obstetrics services depending on the institution (hospital, clinic) and region. The lack of specialists and suitable equipment is a common complaint, particularly in rural areas. However, even in large centres (including specialist hospitals) the quality of services offered gives rise to doubts. One of the respondents drew attention to the fact that in his opinion *there is no willingness to create specialist centres*.

In a few conversations there were reflections on the negative effects of the existing educational system, as well as the power structure in health service centres. As one of the respondents summarised this: *the human factor and the feudal conditions prevailing in the hospitals is of remarkably large significance*. From the respondents' statements, one can draw the conclusion that the human factor can have a decisive influence on both the quality of services offered, as well as the situation of the whole of the hospital or region. As one of the respondents expressed it: *the human factor causes a diversity of quality and access to services*. Another respondent pointed out that the profile of the Voivodship branch of the Polish Gynaecological Association is also of vital importance – in some of these there is stress on education of doctors, in others on promoting new methods of contraception to the detriment of elements connected with the care of the pregnant woman. However, it seems that the present system of education and the rigid hierarchy prevailing in these circles have an enormous influence on the attitude of doctors. Both these factors strengthen the conformist attitudes and behaviour which aims to defend the interests of the doctors rather than of the patients.

In many of the conversations the question of private practices of doctors working in state clinics was raised. In extreme cases the hospital becomes an extension of the private practice: according to the respondents, such a situation means that in order to get into hospital or obtain the care of a chosen doctor, first one has to be treated privately by this doctor. As a result, this means that patients who do not require special care often turn up at specialist hospitals. As one respondent said *doctors working in the clinic have private practices – this is why a lot of healthy women are referred to the hospital*. Some of the respondents stressed the pathological character of the situation and the conflict of interests that arises, which is harmful not only for the women who cannot afford private treatment, but also for the morale of the employees of the health service, as well as the patients themselves.

The human factor also has an influence on the attitude towards more complicated cases requiring specialist knowledge and skills. The respondents evoked such examples: *Hospitals avoid problematic cases, e.g. oncological beds are liquidated; some registrars don't want to accept pathological pregnancies because it is connected with risk and they do not have enough knowledge*. Among the respondents there were therefore very negative assessments of doctors. The respondents spoke, above all, of such problems as nepotism, the bad moral environment, bad organisation and bad training of the Polish health service, aimed at obtaining material benefits, sometimes even at the cost of the patients' health.

However, among the respondents there were also those who assess the current situation optimistically and say that *at the moment there is full access to gynaecological services, sometimes only in a different hospital than where the patient wants to go, because the choice of doctor is limited by the possibilities of the doctor and the National Health Fund contract*. However, all the doctors interviewed pointed out that obstetrics and gynaecological operations should not be limited. Currently there is confusion as to which operations are limited and which are not – the respondents expressed various opinions on this subject and the National Health Fund did not give an unambiguous answer to this question. Up to 2006, births were not limited, but from 2007 they have been lumped together with other gynaecological services and some of the directors claimed that this creates financial

problems, because the births "eat away" at gynaecology funds. However, from other conversations it followed that *births are still unlimited, because they are settled with ER-Ki²*.

Apart from the best centres, the infrastructure of the hospitals or gynaecological-obstetrics wards also leaves a lot to be desired. As one of the respondents said: *80% of the hospitals in Poland do not meet the requirements – in the operating theatre there is 16 m² instead of 30 m², a lack of facilities for the disabled, 3m² instead of 6m² per patient. However by 2012 all hospitals must meet the requirements.*

In the next part of the report the respondents' opinions and attitudes concerning the issues of women's reproductive health are described in detail.

Sexual education

All the respondents placed great emphasis on the need to increase social consciousness in the scope of sexuality and procreation as well as family planning. The majority of respondents stated that the level of consciousness and knowledge about contraception is growing. However, there is still a great need to convey this knowledge both in schools and through doctors and the media. However, some of the respondents were clearly hostile towards modern methods of contraception and stressed the need to teach 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 follows that such an attitude is not based on scientific arguments but on religious and ideological beliefs – the private beliefs connected with the teachings of the Catholic Church.

There was a danger indicated in connection with the lack of sexual education, such as the danger of sexual behaviour which can even constitute a danger to life (an example given was teenagers going abroad). Lack of knowledge translates into a lack of care about oneself and often draws with it health consequences. One of the respondents assessed very negatively the level of sexual education: *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.*

Gynaecological care

The doctors interviewed pointed out the necessity to develop prevention and counselling as well as so-called preconception care of women planning a pregnancy, which is aimed above all at preventing pathological pregnancies. At present, counselling on family planning is of a low level – doctors are not trained on how to speak with patients on this subject. According to the respondents, very few doctors realise how important it is to prepare the woman to become pregnant. Some of the respondents pointed out that the health of the woman before pregnancy is very important for the course of the pregnancy, because a healthy pregnancy must be planned. It was argued that in this scope a large role is to be played by family doctors, who have direct contact with the woman and should make her aware of the importance of a healthy lifestyle, suitably chosen contraception, the importance of preparing herself to become pregnant, because as one of the respondents stated, *fertility is not given, you have to work for it and look after it*. According to another respondent, this is so important since *prophylactics prevents a fall in fertility*.

The majority of the respondents recognised the development of preconception care as one of the priorities. This would concern, above all, young women and girls, who should be made aware of the prevention of cervical cancer, safe sexual behaviour, and the influence of lifestyle on fertility and the course of the pregnancy. The interviews conducted suggest that the most important aim of gynaecological care of a woman is not her health, but to bring about the birth of a healthy child.

² They are settled as emergency treatment.

Perceiving the woman through her role as a future mother is justified in situations when women are planning a pregnancy, but from the statements of the respondents it follows that often greater importance is placed on this issue than the individual needs or plans of the woman.

Contraception

The majority of the respondents stated that there is no problem in Poland with access to various types of contraceptives. For some women the only barrier could be the price of contraceptive pills (*large availability and choice of contraceptives, the only thing that limits it is the price – they are too expensive in relation to wages*). Despite this, most respondents were against refunding the pill, arguing that the burden on the budget is too big for the state to be able to allow it (*there shouldn't be a subsidy for contraception because there is no money*). One of the respondents also believed that *refund the pill is a golden goose for the pharmaceutical firms*.

However, according to the respondents, the large availability of contraceptives is accompanied by a still insufficient knowledge of family planning. Again, for some this means the need for reliable information on the available and effective methods of regulating fertility, and for others, however, it means above all the promotion of natural methods of birth control. One of the respondents stated that *at the moment a patriarchal, top-down attitude prevails which does not consider the value system of the patient, or her personality, e.g. the woman is "forced" onto the contraceptive pill*. In this case, however, the value system of the patient is clearly equated with the value system of the doctor, which could lead to a situation in which the woman would like to use the pill but she does not receive it. Another respondent stressed the low level of consciousness of Poles about the subject of contraception and other issues: *People often do not know what prenatal tests are, what in vitro is, or how to use contraceptives*. The lack of knowledge about contraception means that the responsibility for the patients' decision on this matter rests to a large extent on the doctors, among whom attitudes resulting from their value system and not based on scientific knowledge are becoming more and more common. As far as post-coital contraception is concerned (e.g. Postinor Duo, Escapelle), then some of the respondents rejected it, defining it as early abortion methods, which is not justified from a medical point of view, but is based on the private views of the doctor. The second group of respondents recognised it as an emergency solution allowing the woman to avoid an abortion.

Prenatal tests

Prenatal tests is a subject which evoked controversy among the respondents. The experts interviewed presented extremely diverse views – from demands for full access to all prenatal tests, to caution and stressing that *women should be better informed about the risk of miscarriage after a prenatal test*. The latter suggested that in such a situation *it is better to rely on a good ultrasound*. There were also drastic proposals to completely resign from these types of tests because, in the opinion of two of the experts interviewed, the situation of women who find out that the foetus has an irreversible defect is so traumatic that sometimes it is better that the patient obtains this knowledge only after the birth. It is worth noting that such a proposal is based on the assumption that the woman will not be able to or will not want to terminate the pregnancy and will be forced to bear a pathological pregnancy. However, from the remarks of some of the respondents one can conclude that the woman should bear such a pregnancy in order not to create a problem for the doctor in connection with termination of the pregnancy, particularly if the pregnancy is at an advanced stage and an abortion would involve a complicated and risky operation. Once again we are dealing with a pathological situation in which the rights of the patient are placed in the background against the needs and fears of the doctor.

However, the majority of the respondents pointed out the need for prenatal tests to be carried out, particularly in the case of high-risk groups, in other words, those who have a history of abnormal

pregnancy, women over 35, women who have had a miscarriage, or when a suspicion exists that there could be hereditary genetic defects. According to one of the respondents, a barrier to full access to prenatal tests could be article 23b of the Civil Code, according to which tests are permissible which do not increase the risk of miscarriage, whilst genetic prenatal tests have a 1% risk of miscarriage. The possibility of diagnosing a defect at an early stage of the pregnancy is relatively small, so it is rarely possible to diagnose foetal defects at a stage when there is a legal possibility to terminate the pregnancy. As one of the respondents said: *prenatal tests give a result in the 18th week of the pregnancy, at the earliest, when an abortion is no longer legal.*³ The second barrier is the lack of consciousness among patients, who often do not realise that such a possibility exists, who do not know what such tests involve, or who are afraid of them.

One of the respondents was very critical of the attitude of some centres towards prenatal tests, claiming that they do not provide access to such tests for ideological reasons: the respondent claimed that he knows a situation in which a genetic institute does not carry out prenatal genetic tests because although they have the technical possibility to do so, such actions are recognised as "in conflict with the conscience".

An additional question is the problem of queues which make access to specialist prenatal tests more difficult. One of the respondents said that this creates the situation in which, for example, *a diabetic patient had a date for tests after the birth, because it was not a life-saving service.* One of the obstetricians said that the bad access to ultrasound examinations is connected with the fact that doctors from public clinics have private surgeries and examine their patients using the hospital apparatus. This causes a lengthening of the official queues.

Birth and antenatal care

Birth and antenatal care is the right of every patient and until 2006 it was a service unlimited by the National Health Fund. The situation has undergone a change and, as one of the respondents said: *Since 2007, there have been limits on births and gynaecological operations as well as care of newly born babies – we have a rigid budget, there are no longer unlimited procedures. Surplus services performed are settled by the National Health Fund after one year, which constitutes a risk which the majority of hospitals do not take, because this means going to court.* Another respondent stated that such a solution is harmful not only because it influences the number of gynaecological operations that can be performed, but also *the limitation on births kills competition – earlier, the more births there were, the more the hospital earned.*

Directors of Warsaw hospitals pointed out that more and more often women do not have anywhere to give birth in Warsaw and there are situations where women giving birth must be sent to another hospital, sometimes outside the city. From the statements of the hospital directors, it follows that annually the hospital sends away in total a few hundred women giving birth. Such a situation could be caused by the fact that many patients from the whole of the Voivodship come to Warsaw (even from Radom).

The solution applied at the moment in Warsaw is the creation of the Coordinator of the Capital's Health Service which functions as part of the Office of Health Policy of the capital city Warsaw. Every hospital sends each day to the Coordinator information on the places available and then the hospitals which must send the patient away contact the Coordinator and obtain information about free places in other centres. As one of the respondents said, through the intermediary of the Coordinator, problematic patients are also transferred: *There are hospitals, where they dump problematic cases, such as an illegal Ukrainian immigrant giving birth and similar problems.*

³ In this case it is worth referring to the verdict of the Supreme Court of 13 October 2005 described in the article by Adam Bodnar and included in this report. As Bodnar writes: *The Supreme Court, in analysing the evidence gathered, stated that in the case under consideration, "it was possible to detect defects of the foetus between week 20 and 24 of the pregnancy, and termination of pregnancy is permissible till the 24th week..."* Moreover the Court noted that a condition for the permissibility of an abortion is a high risk of defect, and not an absolute certainty of its existence, which is indicated by art. 4a par. 1 point 2 of the Act on family planning."

Some of the respondents pointed out that an important indicator of the level of care is the antenatal death rate. In Poland there are large regional differences in this respect, which the respondents referred to: *in Lubelski region it's about 6%, like in Sweden, and in Lower Silesia as high as 12% – where do these differences come from? It's a question of who the Voivodship consultant is.* Another respondent described the differences like this: *the figures for 2005/2006, antenatal death rate 5.4% Opole, 7% Lublin – they are already in Europe, because they introduced as fast as possible the three-grade system, they have good cooperation with the National Health Fund.*

The respondents stressed that the early selection of women with a difficult pregnancy and women with a physiological pregnancy enables the most appropriate and best suited care for the given case, and so reduces the antenatal death rate. These were also the aims of the three reference points introduced in autumn 2006 for the obstetrics and gynaecological division, which were supposed to make it possible to streamline access gynaecological-obstetrics services, particularly in the case of non-physiological pregnancies.

The three reference grades were separated: the first – covering physiological pregnancies; the second pregnancies with complications; the third – covering more complicated gynaecological-obstetrics procedures. The principle of three-grade prenatal care means that at the first level, healthy women are accepted (regional hospitals in small towns), at the second – risky pregnancies (voivodship hospitals), and at the third – pathological and complicated pregnancies (medical academy hospitals and neonatalogical centres). As one of the respondents stressed, *the aim of early detection of an abnormal pregnancy is to enable the transport of the child in utero, and not after the birth*, which, for example, increases the survival chances of premature babies. In this way a network of hospitals has been created and norms and consensus with the National Health Fund have been elaborated, in order to reduce antenatal mortality of the women giving birth and the premature babies. The respondents stressed the need to create neonatologic wards and intensive therapy wards for newborns so that they will not have to be transported. There are so many plans, however, the realisation leaves much to be desired in the opinion of some of the respondents. One of them summed it up briefly: *the reference system is fiction.*

Special situations

According to some of the respondents, access to gynaecological-obstetrics services is more difficult in the case of women with a risky pregnancy, indications for terminating pregnancy, or a tumour of the reproductive organs. The situation is even worse for people with HIV/AIDS. Some of the respondents pointed out that most often there is a violation of the rights of women "with problems" – drug addicts, AIDS sufferers, or women infected with HIV. However, some of the respondents claimed that in Polish hospitals this type of problem does not appear (which, however, contradicts research done on this subject).

In the respondents' statements there often appeared the argument that as far as health protection is concerned, then in Poland there is a significant marginalisation of the disabled. According to the respondents, poor and older women face a particularly difficult situation, as one of the respondents said: *in particular the group of women over 60 from small towns and villages – they don't want to go to the gynaecologist and they are at a greater risk of a tumour. The second group which requires special attention is young girls on the margins of society, living in larger towns, but often from rural areas – for them there is a high risk of sexually transmitted diseases and abortion.*

The respondents indicated that poverty can have a negative effect on the possibility to receive adequate gynaecological-obstetrics aid, particularly when you first have to see the doctor in the private surgery as a condition to be accepted into hospital.

Knowledge of the Act on Family Planning and views on its realisation

All the respondents knew the Act on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy. However, the level of knowledge of the Act varies – the majority of the respondents knew the basic principles of the Act, in other words, they had a general knowledge of the cases in which termination of pregnancy is permissible. However, the respondents rarely had detailed knowledge concerning, for example, the time limits for terminating a pregnancy. Only two of the respondents were able to give a detailed analysis of the Act, also in the wider legal context.

The respondents presented very diverse opinions on the subject of the Act. It is possible to highlight a few types:

Pragmatic – the Act is faulty because it is imprecise and bears a risk for the doctor; in legally justified cases the woman has the possibility to terminate the pregnancy (if not in this hospital then in another); anyway, the majority of women decide on a private surgery or a pharmacological solution.

Conservative – the Act in its present form is an expression of social consensus and covers all the significant indications for termination of pregnancy; the realisation of the Act does not raise any doubts; it is not possible to assess the scale of the phenomenon.

Restrictive – the Act is too liberal; indications for terminating pregnancy exist extremely rarely, in the majority of cases the woman should give birth (even if the foetus is going to die after birth).

Liberal – the Act is too restrictive and causes the growth of the abortion underground, it is the effect of political ideological lies, in reality it does not work.

More or less half of the respondents assessed the Act and its present scope positively, stressing that all the justified indications for terminating pregnancy, from the point of view of medicine, have been taken into account in it. For example, the respondents said:

"The present Act has caused a fall in the number of abortions."

"There are no indications to kill the foetus in a situation other than a grave untreatable defect of the foetus. In 34 years of work I have never come across a situation threatening the life of the pregnant woman. In the majority of cases of a pregnancy threatening the life of the woman, the situation can be prevented. If a woman has got pregnant, she must make the sacrifice and give birth. If she was raped the same applies – the less acceptable solution is Postinor."

The second group assessed the Act negatively, as testified by the statements below:

"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 e.g. 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."

Realisation of the Act

The majority of the respondents were reluctant to answer questions on termination of pregnancy. Some of them considered it to be a marginalised phenomenon in relation to other issues concerning reproductive health of women, others reacted with distaste (*why do you want to talk with me about such things?*), or with anxiety. The only respondents whose attitude was open were those who either do not work in the public health service at the moment or whose opinions on this subject are already publicly known. The remainder answered reluctantly and laconically the questions concerning the issue of termination of pregnancy, and most willingly after the dictaphone was switched off.

From the statements collected, a general conclusion flows that in the majority of cases doctors (and really whole hospitals) do not terminate pregnancies in the fear of the pressure from the medical community and consequences for their own position and professional career. One of the respondents indicated, however, that the consequences of this are imagined rather than real and that doctors fulfil the putative expectations of the policy-makers. From the respondents' statements it seems that some of the hospital directors try to minimize the number of these types of problematic situations in order to protect the image of the hospital. According to the respondents, this causes the situation in which the woman with indications for terminating the pregnancy either does not go to the state hospitals at all, or immediately goes to those which are well-known for terminating pregnancies. From the respondents' statement one can conclude that if a woman goes to a hospital with an indication to terminate the pregnancy, then usually the doctor will convince her to change her decision, question the correctness of the referral, or send her to another hospital.

According to the respondents, the present situation is caused by the imprecise regulations of the Act. The respondents argued that with the present development of medicine in many cases it is difficult with all certainty to determine whether defects of the foetus are untreatable. However, here one should cite the previously mentioned verdict of the Supreme Court of 13 November 2005, in which the Court noted that the indication for permissibility to terminate a pregnancy is the high probability of a defect, and not the complete certainty of its existence (article 4a par.1 point 2 of the Act on Family Planning). A remarkably common problematic issue for doctors is the threat to the life of the mother. In their opinion it is not possible to foresee whether the influence of the pregnancy and the birth on the organism of the mother will be positive or negative. Such declarations allow us to doubt not only the competence of the doctors, but also the sincerity of the motives which guide them.

However, the doctors interviewed indicated not only problems of definition, but also legal problems. One of the respondents indicated that the Act on Family Planning is not consistent with articles 149a and 156a of the Civil Code (death or damage to the child's body). It seems, however, that the inconsistency of the law is a pretext for many of the respondents not to perform controversial terminations of pregnancy. Such an attitude is probably the effect of consent for such behaviour in the medical profession. Some of the doctors think, above all, of their own safety and peace, and in connection with this they apply a strategy of avoiding problematic situations. When the doctor is more worried about his possible problems than the health of the patient, the woman should have the possibility to appeal against such a decision. However, this type of appeal instrument is still missing.

According to the respondents, the above-mentioned definition and legal difficulties are translated into barriers preventing realisation of the Act and foster the growth of cynical attitudes among doctors. Therefore doctors attempt to avoid this type of situation. Generally, one can say that among the respondents the dominant view was that *the Act is realised quite well and in the present national-political-religious context it constitutes a consensus which was hard to achieve*. It is worth stressing here that among the respondents themselves there is a lack of consensus, because apart from the dominant conservative attitude towards the Act, there are also other, more liberal attitudes.

The conscience clause

All the hospitals researched have a contract signed with the National Health Fund covering a full catalogue of services. Some of the interviewed directors of hospitals were not sure whether their contracts with the National Health Fund cover the induction of a miscarriage (termination of pregnancy). In the majority of cases this was because they had never found themselves in a situation where such an operation took place in their hospital. In such cases one can speak of a conscience clause

covering the whole of the hospital. This is well illustrated by the statement of one of the respondents, according to whom, *the hospital is not a place for abortion*.

Among the respondents it was also possible to meet the opposite view, that *medicine should not be ideological, the conscience clause in a situation where there is a threat to life should not be allowed to function*. As one of the respondents summed up: *the conscience of the doctor should not decide about life, after all, nobody forced anyone into medical studies*. For the majority of respondents, the conscience clause makes sense if it concerns a minority, but it should not concern all doctors in a ward, which is what currently happens.

From the respondents' statements we notice that (as can be seen clearly in the case of Warsaw) there exists a division between hospitals which perform abortions and those which do not perform them. This is why in the situation where the patient receives a referral for termination of pregnancy, usually she finds out where (in which hospital or with which doctor) she has a chance to be received and goes directly there. If the hospital refuses to perform a termination of pregnancy, the hospital director has an obligation to indicate another institution in which the operation will be performed. However, there are still no formal mechanisms which provide the patient a guarantee that she will be received somewhere else. From the respondents' stories we see that patients are either discouraged from "keeping on bringing up the subject" and begin to look for another hospital or a private surgery, or through more or less formal channels they look for a doctor who will agree to carry out the operation for such a patient.

Abortion underground

Poland is one of very few countries in which there is no research into the scale of the problem of illegal terminations of pregnancy. The problem remains undefined and there is no information on the real figure of abortions. As one of the respondents ironically remarked, *from the current statistics one can conclude that Poles do not have sex lives, because there is a restrictive anti-abortion law, access to contraception is made difficult, and despite this there are fewer and fewer children born*.

The lack of hard data which would allow a real assessment of the scale of the phenomenon results in the ambiguous attitude of the doctors, who can be divided into those who believe the official statistics and those who believe them to be unrealistic. At the same time, over half of the respondents stated that simulations on the number of illegal abortions are significantly exaggerated. Some even stated that if illegal abortions take place at all, then it is a marginalised phenomenon. Some of the respondents suggested that they knew doctors who perform illegal abortions privately. They pointed to the number of ads currently in the press and internet advertising for services to evoke a period. The respondents pointed out that at present abortion is becoming invisible, and so even more difficult to detect, because of the increasing popularity of medical abortion. As one of the respondents defined it, *the tablet is replacing the scalpel*. Another respondent stressed that *nobody is able to assess the scale because it is the privacy of the woman, who more and more often decides to evoke a miscarriage at home with the help of various types of pharmacological means*.

The more liberal minded group of respondents stressed that the existence of the problem of the abortion underground constitutes a kind of safety valve, which means that the existing law does not restrict the real possibilities of terminating a pregnancy and at the same time influences the maintenance of the present state of law. A paradoxical situation arises, in which none of the sides have enough motivation to bring about a change in the existing law; doctors accept the status quo because either it creates for them the possibility of illegal earnings, or it frees them from the necessity to perform abortions; politicians, who do not want to risk loss of support of the conservative part

of their voters, are not sufficiently motivated to change things; finally the patients – the most injured party – who want to get the situation over with as quickly as possible and forget about it, and often it turns out that it is easier to terminate a pregnancy privately than in a state hospital. The existing situation means that the pathology is maintained and women who this problem concerns often have no alternative but an underground abortion. This leads to a paradoxical situation in which sometimes one of the ways for the rights to be realised (which are guaranteed by the Act) is to break the law, in other words to make use of the abortion underground.

According to some of the respondents, unwanted pregnancy will always happen, which is why the need for the abortion underground will continue to exist until the law and the mentality of the medical profession changes. The respondents pointed out the need to rationalise the discussion on family planning and abortion. As one of the respondents summed up, *the underground lives from unconsciousness, which is why a dialogue of scientific rationality is needed.*

Summary

The respondents' statements show that women face a whole series of problems in the sphere of reproductive health. These are, above all: a high percentage of cervical cancer and lack of care for pregnancies with complications, including care for mothers with disabled children. A few of the respondents raised the question of infertility treatment, which was not found in the catalogue of services available to patients in the framework of their health insurance. Infertility is not recognised as an illness, which is why neither *in vitro* treatment nor the drugs are refunded, although complications after artificial insemination are now funded. Attempts to introduce in Poland a modern *in vitro* programme of have up to now been unsuccessful.

Among the interviewed doctors there is, however, agreement that prevention and care of women planning a pregnancy should be developed, as well as the need to increase women's awareness about their own health and the influence that their lifestyle has on the course of the pregnancy and the health of the child.

There are many indications that in practice the reference system does not work – there is not enough money for a real increase in centres from the third reference grade. Apart from that, there is no clear divide between patients and in specialist centres private patients are accepted who do not need this type of care.

A significant problem seems to be the question of private surgeries run by doctors employed in state hospitals. Such a situation, usually arising from the very low salaries in the state health service, creates a barrier, preventing access and equal treatment of patients by gynaecologists and obstetricians.

The main problems mentioned by the respondents which influence the quality and availability of gynaecological-obstetrics services, including termination of pregnancy, are above all:

- Lack of money and limits on operations force the hospital to send patients away, creation of queues of patients waiting for gynaecological operations.
- Lack of specialist centres which would deal exclusively with abortion.
- Lack of departments for rehabilitation of newborn babies (Intensive Care Units for newborns).
- The poor detection and low level of treatment of women with cancer of the reproductive organs. The long waiting time for an operation prevents the realisation of the aims of the programme of early detection of cancer.

– the poor system of education and training - according to the interviewees, many doctors lack qualifications, maturity and culture.

As far as how doctors assess the scope of realisation of the Act on Family Planning, the division described earlier into four groups of attitudes is noticeable. Two of these – the pragmatist group and the conservative group – are characterised by either a conviction that a change to the current situation is impossible, or that it is undesirable. The remaining two groups – restrictive and liberal – stand in total opposition to each other. Although among the experts interviewed the dominant attitude was moderate, the influence on the medical profession of supporters of tightening the law seems to be greater than the influence of the supporters for liberalising it. There is much to indicate that the liberal views are expressed only by the people whose position is not dependent on the hierarchical system of dependencies in the state health service. However, there is a growing group of doctors who are hostile to modern contraceptive methods, prenatal tests, and also abortion in cases which are permitted by the law.

In summary, financial problems of the centres of the state health service are most frequently mentioned as the cause of problems connected with the quality and availability of gynaecological-obstetrics services. The mentality of doctors is mentioned in second place, and above all their poor preparation for the profession and their tendency towards conformism. From the point of view of the main issue described in the research, the statement of one of the respondents was characteristic: *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.

Annex

Monitoring of the reproductive rights of women
Script of the expert interview

1. In your hospital is there a/an:

- a. Gynaecology ward?
- b. Obstetrics ward?

2. Is there something which differentiates your hospital/ward from others? What is your hospital/ward known for?

- a. Do you apply special gynaecological or obstetrics methods?
- b. Is the quality of services in your hospital better than in others? Why?
- c. Is the availability of services in your hospital better than in others? Why?
- d. Do you carry out operations which are not available in other hospitals?
- e. Do you have specialists, equipment skills, equipment which is not available in other hospitals?

3. Since 1993, not counting the one-year break in 1997, in Poland the "Act on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy" has been in force.

- a. Do you know this act?
- b. How do you assess this act?
- c. How do you assess its realisation in practice?

4. How many births have there been in your hospital in the last 5 years (annually)?

- 5. How many cases of spontaneous miscarriages have you registered in the last 5 years (annually)?**
- a. How often in your hospital/ward are miscarriages registered (annually)?
- 6. Does your hospital/ward have a contract signed with the National Health Fund for performing induction of miscarriage (in accordance with the Act of 6 January 1993 on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy)?**
- a. Does your hospital/ward have such services contracted?
b. If so, what is the limit?
c. If not, then which hospital are patients referred who need such a service referred to?
- 7. Do patients come to your hospital with a referral to terminate pregnancy?**
- a. If so, how many people annually/monthly?
b. If they do not come to your hospital, then where in your opinion do such patients with a referral for termination of pregnancy go (to another hospital, to a private clinic/surgery)?
- 8. What are the conditions for receiving a certificate that the state of health of the patient entitles her to terminate the pregnancy?**
- 9. Does it happen that doctors in your hospital question the ruling on the permissibility of performing a termination of pregnancy which has been issued by a specialist doctor?**
- a. On what basis?
b. In your opinion, what is a counterindication for terminating pregnancy?
- 10. What conditions must be fulfilled so that a termination of pregnancy can be performed in your hospital?**
- a. What documentation is required to perform a termination of pregnancy?
b. Are patients with indications given a termination of pregnancy in your hospital and how often (per year)?
- 11. What is the procedure for performing a termination of pregnancy?**
- a. What examinations are carried out on the patient before and after the operation?
b. How long does the patient stay in the hospital?
c. What qualifications and length of service must people performing this operation have?
d. Under what name is the operation noted in the hospital/ward statistics?
e. What are the costs of such an operation?
f. Who incurs the cost of the operation? (National Health Fund or patient)
- 12. What are the most common reasons for refusing to perform a termination of pregnancy?**
- 13. Have you heard of a refusal (in your hospital or generally) to perform an abortion in the case when the patient possessed all the required documentation?**
- a. What was the reason for the refusal?
b. What is the procedure in your hospital in the case of a refusal to perform a termination of pregnancy?
c. Was the woman referred to another hospital?
d. Does the hospital have a contract signed with another hospital to carry out induced miscarriages?
- 14. Do you carry out monitoring of the realisation of such services?**
- a. How many services of this type were contracted in your hospital/ward in the last 5 years (annually)?
- 15. Have you encountered the situation in which the doctor refused to perform an abortion citing**

the "conscience clause"?

- a. Can you estimate how many doctors/what percentage of doctors employed in your hospital/ward refuse to perform abortions by citing the "conscience clause"?
- b. What other operations and actions do doctors refuse to perform citing the "conscience clause"?

16. Is a doctor who cited the "conscience clause" obliged to present the refusal on paper?

- a. The procedure varies in the situation in which the doctor is employed and is different according to article 39 of the Act on the Physician's Profession.

17. Is the "conscience clause" necessary? Why?

- a. In what situations should it be applied?

18. What is your opinion about methods of contraception such as:

- a. Contraceptive methods, e.g. condoms, contraceptive pill, vaginal suppository, the coil, or the Dutch cap etc.
- b. Emergency/post-coital contraception, e.g. Postinor-Duo, Escapelle
- c. Early abortion pills, e.g. RU 486

19. Which of the methods mentioned are prescribed to patients in your hospital/ward?

- a. Contraceptive methods, e.g. condoms, contraceptive pill, vaginal suppository, the coil, or the Dutch cap etc.
- b. Emergency/post-coital contraception, e.g. Postinor-Duo, Escapelle
- c. Early abortion pills, e.g. RU 486

20. In what situation and what patients are prescribed these methods?

- a. Are the prescribed hormonal methods dependent on age or consent of the statutory representative (e.g. parent)?

21. Have you heard of the so-called "abortion underground"?

- a. Have you ever come across this phenomenon?
- b. Is it in your opinion a big problem?
- c. How do you assess the scale of this phenomenon?
- d. What should be done to change the current situation?

22. Has a patient ever come to your hospital/ward with complications after terminating a pregnancy (or after an attempt to perform an abortion)?

- a. How many such cases have there been?
- b. Could it be supposed that the abortion was performed in the so-called underground?
- c. In what state was the patient? What were the complications?

23. Do you know which hospitals perform abortions and which do not? Why?

24. In your opinion, is the law which is currently in force good? Why?

25. How do you assess generally the level of gynaecological-obstetrics services aimed at women in Polish hospitals?

- a. Are there any regional differences?
- b. Could you give examples of best practices in Polish hospitals in the scope of gynaecology and obstetrics? And worst practices?

Debate on the change to the constitution – analysis of expert opinions for the extraordinary parliamentary commission

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Drafts

The Constitution of the Republic of Poland of 2 April 1997¹ in article 38 "ensures each human the right to protection of life". This regulation was introduced after a long debate, during which proposals were rejected which stated *explicite* that the guarantee of legal protection of life is the entitlement of humans from the moment of conception.

After the change in the political line-up in the wake of the 2005 elections, on 7 September 2006 a deputy's draft amendment to the Constitution² dealing with the problem of the constitutional formula protecting human life was presented to the Parliament,. It was proposed to give the regulation of article 38 the following text: **"The Republic guarantees every human the legal right to protection of life from the moment of conception"**.

In the course of the parliamentary procedures, this proposal was modified by the addition of the phrase "until natural death" at the end. The intention of the drafters of the constitutional amendment in the first submission³ was to settle once and for all the question of at what moment "a human is entitled to legal recognition as having legal personality and the guarantee of appropriate legal protection"⁴.

In reality it meant a return to the regulation which it was not possible to introduce into the Constitution in 1997 and which could facilitate a further restriction on the conditions permitting termination of pregnancy, as well as prevent a future possible liberalisation of the *Act of 7 January Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy*⁵.

¹ Journal of Laws 1997, no. 78, item 483

² Submitted on the initiative of deputies of one of the parties of the government coalition – League of Polish Families (LPR).

³ Parliamentary document no. 993

⁴ Compare the introduction to the publication of the Bureau of Parliamentary Analysis "The constitutional formula of protection of life. Parliamentary document no. 993, containing all the expert opinions prepared before the first reading of the draft amendment. Parliament Chancellery. March 2007 (3/2007) (quoted further as: Constitutional formula...). In this article the opinions contained in the publication will be analysed.

⁵ Journal of Laws 1993, no. 17, item.78 9 (further: the act).



It should be mentioned that during the parliamentary work, alternative proposals were also submitted with the same aim in mind. They were supposed to introduce to the regulation of Article 30 on the dignity of man (located among the general principles of the Constitution) an indication that its respect and protection is the entitlement of man from the moment of conception. The wording of the regulation which is in force is as follows: "The inherent and inalienable dignity of man constitutes the source of freedom and human and citizens' rights. It is inviolable and its respect and protection is the obligation of the public authorities."

After modification, this regulation would have the following wording: **"The source of freedom and human and citizens' rights is an inherent and inalienable dignity which every human is entitled to from the moment of conception. It is inviolable and its respect and protection is the obligation of the public authorities"**. The proposed modification of the content of article 30 has – in the assessment of its promoters – the value that it will also refer to other rights besides life, rights and constitutional freedom, which *nasciturus* can potentially take advantage of. In particular, there would be a fundamental change in the perspective of the constitutional assessment of the obligations of the legislator in the scope of introducing legal regulations on the question of bioethics, connected with aided procreation, medical experiments, or other civil law protection and the legal personality status of the conceived child⁶.

In the course of the work on amending the Constitution there was another proposal of change presented, this time by the Presidium of Parliament. The proposed changes, inspired by the President of the Republic of Poland, were mainly of a defensive character; it was about preventing the rekindling of the parliamentary debate on abortion after an amendment to the Constitution.

The amendment was to consist of two parts: firstly, it would consist in adding to article 38 paragraph 2 the following wording: **"The Republic of Poland protects the life of conceived children through legislation and the comprehensive attempts of the public authorities."** Secondly, the proposal assumed the existence of an additional regulation in the act amending the Constitution⁷ with the following wording: **"This act does not contravene the regulations defining the scope and punishment of actions against the life of the conceived child in force at the time the act comes into effect"**.

On 13 April 2007 Parliament rejected all the amendments to the Constitution concerning the protection of conceived life. Among the 443 deputies taking part in the voting, 269 voted in favour of the amendments (the required majority to change the Constitution is 2/3 of deputies, which constituted 296 deputies). Therefore the initiative was only a few votes short from introducing a change to the Constitution.

These votes would be enough, however, to change a normal act. The leaders of LPR announced that it is not the end of their fight; after their defeat in attempting to enter into the Constitution of the Republic of Poland the protection of life from conception, the time has come for a fight to change the act itself⁸. For the so-called defenders of life the threat to the life of the mother could be the only permissible reason to terminate a pregnancy. The woman would not be able to make a decision about abortion, which is legal in the light of the law, if the pregnancy arose as a result of rape or if there were a probability of irreversible damage to the foetus.

We present this perspective since it had an influence on the analysis made below of the expert opinions of the Extraordinary Commission for considering the deputies' draft law on the amendment to the Constitution.

⁶ Compare. W. Wróbel (in:) Constitutional formula ... p 96 and 98.

⁷ Below is also considered the introduction of an analogous clause to the content of the Constitution itself.

⁸ Compare *Dziennik* of 26.06.2007

General characteristic of the opinions and selection of experts

During the parliamentary work, 19 expert opinions were ordered. The critical remarks in the first expert opinions and the dynamic of the legislative proposals submitted meant that in turn, the experts were asked new questions. As a result, the scope of the expert opinions was varied (some concerned the draft amendment to the Constitution in its original version, others dealt with changes to the draft, finally others considered the permitted scope of amendments to the draft in the version submitted, from the point of view of legislative processes). Some expert opinions were not connected directly with the draft amendments, but were of a more general character and referred to such questions as, for example, the beginning of human life, the universality of natural law, the right to life and the status of humans before birth in judicial decisions of the Commission on Human Rights and the Court of Human Rights in Strasbourg, or also the models of the constitutional regulations guaranteeing life in those states in which a ban on abortion is in force.

All these factors meant that making any comparison of positions contained in the individual expert opinions turned out to be difficult to carry out. These difficulties were increased by the fact that some of the experts were approached several times to prepare opinions. The record-holder turned out to be W. Wróbel, who prepared 5 opinions. He was the only one who had a chance to take part in the sessions of the Commission, due to the fact that he was appointed permanent advisor of the Extraordinary Commission, and so he had the possibility to give explanations to deputies in relation to their questions and doubts.

It is worth pointing out that the selection of experts indicates that there was no care taken to obtain an assessment of the draft from various ideological and religious standpoints (the overwhelming majority of the experts represented the position of the Catholic Church. In fact, 1/3 of them were priests. There was no care taken to maintain a balanced representation of experts with regard to sex – all, with the exception of one person, were men).

Moreover, insufficient care was taken to reach for the opinions of persons dealing with the issue of equality and non-discrimination, who could have analysed in detail the draft from the point of view of the threats arising from it to the constitutionally protected rights of women.

The selection of the experts – lawyers – also raises reservations due to their specialisation and in particular the poor representation of specialists in the field of constitutional law. Moreover, the statements of the specialists from this field about the effects of the draft amendment in the sphere of constitutional law can leave one unsatisfied, to a large extent due to the fact that the questions addressed to them were limited to accidental issues (see the opinion of R. Grabowski and P. Radziewicz). In this situation mainly specialists of criminal law spoke on the subject of constitutional aspects of the proposed amendments. Indeed, one of them was until 1997 the Chairman of the Constitutional Tribunal, and a second was his assistant. Nevertheless at the same time both were co-authors of drafts of reasons for the decisions of the Tribunal connected with the question of termination of pregnancy, which certainly must have had influence on their objectivity.

In this analysis we will concentrate on analysing those opinions which refer to the amendment of article 38 of the Constitution and concern the question of constitutional guarantees of the protection of life in the aspect of the conditions of permissibility of abortion contained in the act. The opinions of the experts encapsulated in this trend confirm the fears that the rejection of the proposal to amend the Constitution will not rescind the danger of a restriction of the possibilities for terminating pregnancy currently in force.

Moreover, this threat is not only connected with the use of the legislative road for a change in the act, but also with the chance of effectively referring to the procedure of challenging the conditions of permissibility of termination of pregnancy contained in the act in the Constitutional Tribunal.

Status of the *nasciturus*

It is worth stressing in the introduction that all the experts writing opinions for the Extraordinary Commission agreed that the life of the *nasciturus* is protected in the Constitution on the basis of article 2 of the Constitution as an intrinsic value (good *sui generis*).

Therefore, the dispute concerned only whether the clear recognition that Article 38 of the Constitution, which confers protection of human life the character of a legal person, applies to the *nasciturus* and should have an influence on the scope of this protection⁹.

Among this group of expert opinions one can distinguish two groups of views. Representatives of the first of these (to which R. Trzaskowski and the author of this work belong) believe that the proposed amendment to the Constitution also signifies a change in the status of the embryo and foetus in the system of Polish law, with legal consequences that are difficult to foresee, in relation to all its fields.

The second group of experts (whose representatives were, among others, A. Zoll and W. Wróbel) denied this. At the same time, however, they admit that the answer to the question depends on the recognition of whether, on the basis of the Constitution in force, the life of the conceived child, despite the lack of a clear regulation, is subject to protection of Article 38 as human life or not. For supporters of the view that it is subject to protection, such as both of the above-mentioned authors, drafting an amendment of the content of Article 38 of the Constitution "will only mean the settlement of interpretational doubts, not signifying an actual change of a normative character"¹⁰.

However, what is common for both these groups of views is the conviction that the proposed amendment to the Constitution is not desirable, although for various reasons. For E. Zielińska this is the case because equating the legal status of the foetus with that of a human will represent the threat of a drastic restriction of the existing conditions permitting termination of pregnancy. For W. Wróbel, an amendment to Article 38 is undesirable because it does not lead to a rise in the constitutional standard of protection of life, but quite the opposite, to its lowering. It can therefore lead to interpretational doubts in the case of rights and freedoms of a constitutional character which a human is potentially entitled to other than life in the prenatal phase, in which the phrase "from the moment of conception" was not introduced. Then the view would be justified that this omission has the character of a conscious decision of the constitutional legislators, who did not want to introduce constitutional guarantees for *nasciturus* in this scope, which seems to be contrary to the intentions of the drafters¹¹.

The essence of the dispute on the legal consequences of the amendment of Article 38 of the Constitution

In characterising closer the above-mentioned groups of views, one should stress that in the assessment of E. Zielińska, equating the legal protection of the embryo with the legal protection of an already born human will not only signify a ban on termination of pregnancy, even in the situation where the continuation of the pregnancy constitutes a threat to the life of the woman (however not direct¹²), but will also mean the necessity of applying all the regulations of the Civil Code and other

⁹ Compare E. Zielińska (in:) Constitutional formula p. 11.

¹⁰ W. Wróbel (in:) Constitutional formula ...p. 21.

¹¹ W. Wróbel (in:) Constitutional formula ...p. 101.

¹² Because then the person who is terminating a pregnancy can escape responsibility on the basis of the regulations in the Criminal Code on acting in the case of a higher necessity.

acts serving the protection of personal interest and property rights to the embryo as well. As a result of this amendment, the embryo would obtain in Polish law the status of a legal person equal to a legal person already born. It would be entitled to the right to life and its protection as an international and constitutional right of a human¹³.

R. Trzaskowski draws a similar conclusion in his expert opinion, although less categorically, when analysing this problem from the perspective of civil law. According to this expert, if it is recognised that the drafted amendment of article 38 directly settles the dispute about whether a conceived human being is a human in the understanding of the Constitution, this would signify that not only will it enjoy the guarantee of protection of life, but also all the other constitutional guarantees. In particular, this will concern the ban on unfair discrimination. The amendment would therefore have significant practical results also in the field of civil law¹⁴.

According to W. Wróbel, regardless of whether the life of *nasciturus* is protected as a constitutional natural person or exclusively as an intrinsic constitutional value, the legislator is usually obliged to guarantee such protection, resolving possible collisions with other values and constitutional (freedom) rights. Therefore the acceptance that the life of the unborn child constitutes only a constitutional value does not implicate in a necessary way the limitation of protection of this life in the case of a collision with the constitutional right or freedom of a natural person¹⁵. As a consequence, the acceptance that *nasciturus* is covered by guarantees defined in Article 38 of the Constitution of the Republic of Poland does not automatically settle the necessity of amendments of the existing regulations defining the way of settling a collision between the protection of the life of the conceived child and other rights and freedoms of a constitutional character. All the more so, it does not settle the question of the intensity and character of the means of protection¹⁶.

The strategy of testing the statutory conditions for permitting termination of pregnancy

A. Zoll and W. Wrobel have the position that the recognition of constitutional protection of the right to life of the *nasciturus* gives the basis for a critical analysis of the existing legislation, also without a change to the Constitution. However, the assessment of the pertinence of the solutions to situations of conflict arising between defined values, rights or constitutional freedoms, which were accepted by the ordinary legislator, should be above all made before the Constitutional Tribunal. W. Wróbel proposes the following strategy of action: "(...) after the possible questioning by the Constitutional Tribunal of the existing regulations of the act on family planning, it will be possible to define the constitutional standard in force in the scope of protection of individual rights and freedoms of man in the prenatal phase, also including the right to life in the context of rights and freedoms. Only then will it be legitimate to consider, in the perspective of the axiological assumptions accepted by the constitutional legislator, whether this standard is sufficient or whether it needs to be raised by a change in the appropriate constitutional regulations"¹⁷.

The fragment of opinion above was quoted *in extensor* due to the fact that it does not seem to be entirely comprehensible. It is not clear whether submitting the Act of 1993 to constitutional control should lead to an amendment of the regulations of the act which the Tribunal recognises as contrary to the constitutional standard of protection of the right to life of the *nasciturus*, remaining in collision with the constitutionally protected rights and freedoms of the woman, or whether on the basis of the act, the constitutional standard itself should be tested in the direction of whether it needs to be raised

¹³ E. Zielińska (in:) Constitutional formula ...p. 11.

¹⁴ Trzaskowski. (in:) Constitutional formulap. 35-47

¹⁵ W. Wróbel (in:) Constitutional formulap. 23.

¹⁶ W. Wróbel (in:) Constitutional formula ...p. 23.

¹⁷ W. Wróbel (in:) Constitutional formula... p.99

through a change in the appropriate constitutional regulations. It seems that W. Wróbel had in mind the second situation. Translated into the language of reality, this means that if the Tribunal recognises that the existing regulations of the act are in accordance with the Constitution, then all the worse for the Constitution, because the Constitution should be changed. Irresistibly, the idea comes to mind that it would be sufficient to change the composition of the judges of the Tribunal.

At the same time both of the quoted authors arbitrarily settle in their opinions which regulations of the Act should be recognised as contrary to the Constitution as well as in what scope the Criminal Code and the regulations of other acts do not guarantee sufficiently, from the constitutional point of view, the standard of protection of the conceived child. It is worth taking a closer look at their views because it cannot be excluded that they will determine the direction of legislative changes in the future.

The right of the foetus to life versus the rights of the woman

Health indications for termination of pregnancy

In W. Wróbel's assessment, the abstract comparison of the value of life of the conceived child and the alleged values and interests standing at the base of the accepted conditions permitting abortions to be carried out, leads to the conclusion that some of them do not fulfil the requirement arising from the principle of proportionality. This concerns, in particular, the case in which the termination of the pregnancy is justified by the danger (whatever it be) to the health of the child's mother, especially as the termination of the pregnancy by referring to the danger to the health of the woman is possible even when the foetus has reached the ability of independent life outside the organism of the mother. In such a situation the legalisation of abortion due to any threats to the health of the woman exceeds, in his opinion, the condition of necessity (because this danger could be avoided in another way, e.g. by caesarean section). He therefore concludes this part of the argument with the statement: "Therefore not every threat to health can be equal to the value, which is the life of the conceived child"¹⁸. A. Zoll shares the doubts of W. Wróbel that today's formulation of this condition does not constitute adequate security for the life of the conceived child. In his assessment only the life-threatening indications of termination of pregnancy do not raise doubts¹⁹.

It is striking that the authors quoted above feel authorised to make such categorical judgements without any reference to medical knowledge on the subject of the dangers to health connected with each pregnancy, and in particular, pathological pregnancies, their development, and without analysing the content of the constitutional right of women to make autonomous decisions in matters concerning their health and the right to its protection. A lack of confidence in women also perforates this argument, expressing suspicions that women have resorted to termination of pregnancy for trivial reasons. From the statements of A. Wróbel concerning caesarean section, one can also draw the conclusion that this operation (always connected with risk not only to the health, but also to the life of the woman) can also be carried out against the will of the woman in order to save the life of the foetus.

Eugenic indications

In the opinion of the above-quoted author, also in the case of so-called eugenic indications colliding with the protection of life of the *nasciturus*, the interest of the woman cannot be *in abstracto* recognised as standing higher in the hierarchy of constitutional values. This is connected with the fact that the legislator does not connect these indications with a specific situation of the pregnant

¹⁸ W. Wróbel (in:) Constitutional formula...p.31

¹⁹ A. Zoll (in:) Constitutional formula...p.105

woman, but *a priori* assumes that the protection of the life of the conceived child should be restricted then. Such a solution raises – in his opinion – doubts not only from the point of view of the principle of proportionality, but also of adequacy. "(...) The very fact of a defect of the foetus (untreatable illness) cannot independently determine the permissibility of the termination of pregnancy in the constitutional perspective. Neither the care for the quality of the genetic code which is passed on (eugenic indications *sensu stricto*), nor regard for the possible discomfort of the life of the ill child can justify the decision to undertake action aimed at causing its death. The Constitution does not allow a decision to be taken which would allow one to take away a life due to its low "quality" in the sense of mental discomfort. For this reason euthanasia is punishable according to Polish law (article 150 of the Criminal Code). Alleged constitutional values form the grounds for the permissibility of performing a termination of pregnancy for so-called eugenic reasons, therefore they must be tied to the person of the pregnant woman herself²⁰. According to W. Wróbel, regard for the protection of freedom of the woman cannot independently determine the restriction of protection granted to the life of the conceived child. It is a similar situation in the case of regard for the mental state of the woman, which can be subject to disruption when she is aware that the developing foetus is damaged or incurably ill. When these disruptions have an essential character, they would enter the scope of medical-health indications permitting termination of the pregnancy. Eugenic indications, as far as they are to have some kind of intrinsic significance, must therefore concern such situations in which one cannot yet speak about a threat to health (including mental health of the pregnant woman). However, "(...) the value, which is the defined mental comfort of the pregnant woman during pregnancy and childbirth does not have such an essential character in order to justify the permissibility of denying the life of the conceived child. Also, one cannot in this case speak of the law placing requirements on the woman the fulfilment of which would mean her being treated instrumentally with respect to the necessity of sacrificing her own health for the protection of the child developing in her organism. Therefore the restriction of the legal protection of the life of the conceived child by invoking the constitutional regulations concerning human dignity or inhuman treatment is excluded in this case(...). For the settlement of the collision of constitutional values, the circumstance connected with the burdens on the pregnant woman, which could arise from the necessity of care for a disabled or ill child, have no significance. The legal system in force does not foresee the absolute duty of the mother to care for a child after birth. After giving birth to the child she can, without any legal consequences, give up the obligations of guarantor(...)"²¹ At the same time the above-quoted author stresses that the lack of obligation to apply persistent therapy also concerns the foetus, which means that a pathological pregnancy should not be maintained at all costs.

In this state of affairs, the above-quoted author recognises that eugenic indications should not constitute reasons for legalising a termination of pregnancy²². This opinion is shared by A. Zoll, additionally raising the argument that they create the impression of "permitting eugenic selection of children being born" and for this reason they could raise doubts as to the compliance with such standards of protection as are contained in the European Union Charter of Basic Rights²³.

It is not possible to refrain from commenting that if the quoted experts can define as lack of "mental comfort" and not as torture or inhuman treatment the many months of the woman's torment and suffering connected with the awareness that the child she is going to give birth to is inflicted with a grave or irreversible disability or an incurable life-threatening illness, and at the same time they recognise that the value of "discomfort" is not of such a significant character for the woman to decide on maintaining or terminating the pregnancy, then this testifies not only to a lack of empathy, but even a lack of moral qualifications to speak out on these types of matters.

²⁰ W. Wróbel (in:) Constitutional formula...p.32

²¹ W. Wróbel (in:) Constitutional formula...p.32

²² W. Wróbel (in:) Constitutional formula...p.33

²³ A. Zoll (in:) Constitutional formula...p.105

The statements of W. Wróbel on the possibility of handing the child over to the state after its birth are also testimony to the instrumental treatment of women as a necessary "environment for the development of the child"²⁴ and a lack of responsibility for the public good. In this context, the argument referring to the lack of obligation to use persistent therapy, meaning abandoning the maintenance of a pathological life, sounded even cynical.

Criminal indications

However, W. Wróbel is in favour of maintaining the so-called legal indications for terminating pregnancy, with the justification that "the law cannot impose obligations which in their execution would cause excessive suffering(...). Forcing such a standard could lead to inhuman treatment of the given person, which is absolutely prohibited by article 40 of the Constitution²⁵. Regarding the legal indications, A. Zoll limits himself to stating that this reason "(...)is from the human point of view the most difficult"²⁶.

It is difficult to understand why, in the case of eugenic indications, forcing a woman to continue the pregnancy with the knowledge that the child is gravely disabled should not be treated as incompatible with the dignity of the woman or inhuman treatment, whilst in the case of criminal indications it can be.

Nevertheless it is good that the author at least in this one situation recognises – in the light of constitutional standards – the permissibility of "freeing the mother of the obligation to protect the life of the child".

The question of punishability of women

In his expert opinion, W. Wróbel takes a position on the question of whether resigning from the punishability of pregnant women for termination of pregnancy against the conditions of the act constitutes a violation of the constitutional principles, including the constitutional obligation of legal protection of life. In his assessment this is not the case, since "applying penal sanctions for the achievement of protection planned by the act must take into consideration the real social assessment regarding the punishability of the defined type of behaviour. The use of penal sanctions in the situation where there is a lack of sufficient social acceptance could lead to opposite results than what is intended, i.e. lead as a consequence to the weakening of social conviction as to the need for protection of the given good (value)"²⁷. At the same time, however, he warns that the situation can of course change together with the growing acceptance in social opinion for the protection of the life of the conceived child and the growing conviction of the need also of legal-penal protection in this scope.

The possibility of a liberalisation of the act after the amendment of article 38 of the Constitution

To the question of whether the amendment of Article 38 would secure against the possibility of a deeper liberalisation of the act, W. Wróbel gave a partly evasive answer. In his assessment, undoubtedly the introduction to Article 38 of the Constitution of a phrase clearly imposing the treatment of the conceived child as a human excludes the possibility of such an interpretation, in accordance with which life in the prenatal phase remains beyond the scope of protection of the constitu-

²⁴ W. Wróbel (in:) Constitutional formula...p.27

²⁵ "The situation in which the pregnancy is a result of... activity against the wishes of the woman (most often rape...) has a special character and is also connected, as a rule, with a special emotional situation of the pregnant woman. She could feel that the pregnancy is a continuation of the aggression which is violating her fundamental good, which in effect can lead to such a tangle of negative emotions... , which in a significant way can threaten the psychological health of the woman...These emotions also connect with the real feeling of suffering and indignity". W. Wróbel (in:) Constitutional formula...p. 33.

²⁶ A. Zoll (in:) Constitutional formula...pp.104-105

²⁷ W. Wróbel (in:) Constitutional formula...p.26

tion. However, it is not possible to state *a priori*, which of the possible solutions of the ordinary legislator will remain at variance with the above-mentioned principles or other regulations of a constitutional character referring to the way of solving a collision of constitutional values²⁸.

It should be mentioned that this statement smells of hypocrisy, since taking into account the statements of this expert which have been presented above and which already recognise in the light of the existing Constitution the impermissibility of the majority of the conditions for termination of pregnancy provided for by the act, it is obvious that the further liberalisation of these would be seen to be at variance even more so.

The influence of a possible amendment to the Constitution on other legal regulations concerning life and health.

Both W. Wróbel and A. Zoll are in favour in their opinions not only of the necessity of amending the Act of 1993, but also of changing the Criminal Code and other acts. Moreover, in the assessment of these and other experts²⁹ the lack of regulation in the Polish system of law of such questions as, for example, *in vitro* fertilisation, interference with the human gene, cloning, experiments on embryos and foetuses, should as a result of the amendment to the Constitution, be perceived as failure of the constitutional legislator to carry out the positive obligation of protection of human life and health. One should add that, without going into the details of the proposal, the tone of these statements is unambiguous; the aim of the future regulations should be to introduce many bans and restrictions. These would also concern assisted reproduction and would lead to a serious restriction of reproductive rights.

The appraisal of the regulations of the existing criminal code – from the perspective of the constitutional principles of the protection of human life – are dealt with in more detail by A. Zoll. The problem, in his opinion, lies not in the fact that in the code various concepts (man, person, child, conceived child) are used to define the subject of the act of crime against life or health, but in the mutual relations between these ideas. This means, in particular, whether the conceived child is to be found under the protection of, for example, Article 155 of the Criminal Code concerning causing unintentional death or Article 160 of the Criminal Code speaking of subjecting man to direct danger of loss of life or a serious damage to health. The Supreme Court recently issued a principally negative reply in relation to Article 166 of the Criminal Code. According to Zoll, a condition for the regulation of the Criminal Code to be able to be recognised as guaranteeing comprehensive protection of life and health without any legal loopholes, and so in accordance with Articles 30 and 38 of the Constitution, is the necessary acceptance that the notion "man" has an overriding significance over other terms characterising the object of certain types of crimes. Therefore the recognition that "(...)in chapter XIX of the Criminal Code [grouping crimes against life and health – EZ] the term "man" excludes the term "conceived child", is a conclusion that indicates a contradiction of these solutions in Article 30 and 38 of the Constitution"³⁰. One should add something that A. Zoll did not raise, which is that if we were to accept that all the crimes against life and health of man also apply to the embryo or foetus, it would be necessary to recognise that a pregnant woman can be criminally responsible even if she unintentionally causes direct danger of loss of life or serious damage to its health, not to mention unintentionally causing its death.

Another example of lack of unambiguous axiological foundation on which the regulations of the Act on the Physician's Profession are based concerns medical experiments, which cannot be carried out on the conceived child, whilst they can be carried out on the pregnant woman (article 26 par. 1 and 3)³¹.

²⁸ W. Wróbel (in :) Constitutional formula...pp.25-26

²⁹ In particular L. Boska, compare Constitutional formula...p.63 and 75

³⁰ A.Zoll (in:)Constitutional formula...p.104

³¹ A.Zoll (in:)Constitutional formula...p.105

Conclusion

From the analysis of the expert opinions of W. Wróbel and A. Zoll, we see that in their assessment also *de lege lata* regulations of Article 30 and 38 of the Constitution of the Republic of Poland create a fully fit, and in their content, a complete standard which could serve to assess the constitutionality of the regulations of the act. Indeed, as long as the instrument of constitutional control of the act is not used, one should – in accordance with the principle of supposed compliance of the normative act with the constitution – consider the regulations in force as in compliance with the constitutional standards³². However, the arguments presented in their opinions favouring the recognition of the unconstitutionality of the majority of the conditions for permitting the termination of pregnancy provided for in the act, constitute a special kind of "instructions for use" of this instrument, which raises justified fears that the very debate on the subject of the amendment to the Constitution has increased the threat to the reproductive rights of women.

³² A.Zoll (in:)Constitutional formula...p.105

International institutions on the state of respect for reproductive rights in Poland

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

12. The Committee notes that restrictions have recently been imposed 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.

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 health-care 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 par-

ticular 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.

Memorandum to the Polish Government (20 June 2007)

Assessment of the progress made
in implementing the 2002 recommendations of
the Council of Europe Commissioner for Human Rights

X. Women and Reproductive rights

92. In his 2002 report, the first Commissioner for Human Rights recommended that the Polish authorities promote an adequate knowledge of reproductive health through school curricula. The Commissioner also urged the authorities to ensure that medical professionals, the police and prosecutors respect the provisions under which termination of pregnancy is allowed under the current law.

93. Reproductive health education is taught in Polish schools under the theme of *Education for life in the family*. Provision of sexual education is obligatory for all types of primary schools, gymnasiums, and post-gymnasiums. According to the Ministry of Education, sexual education supports the educational role of the family, and shapes a pro-family, pro-health and pro-societal attitude. NGOs with whom the Commissioner met were of the opinion that sexual education in schools was often misleading and sometimes inaccurate, for example stating that oral contraception leads to female infertility. The Ministry of Education rejects this opinion. According to the Ministry, teachers are obliged to convey objective, scientifically verified knowledge in line with the core curriculum of general education.

94. The Polish law on termination of pregnancy¹ is one of the most restrictive in Europe. It permits a termination in three defined conditions: if the pregnancy endangers the mother's life or health, or where there is a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease, or if there are strong grounds to believe that the pregnancy is a result of a criminal act. The Polish Parliament is currently discussing a proposed amendment to the Polish Constitution (Article 38) which would guarantee life from conception.

95. The current law is criticised by NGOs who claim that while the law allows termination of pregnancy where the health of the mother is threatened, in reality, doctors in Poland are hesitant to perform such terminations because of the highly charged nature of the debate. Doctors often refuse to

¹ Act of 1993 on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy and other legal acts connected with it.

issue a certificate required for termination of pregnancy (relying on the 'conscience clause'). Even when they do issue a certificate, the doctor who performs the termination can question the certificate's validity and refuse the service. A decision made by a doctor to refuse a termination cannot be appealed. According to the Ministry of Health, invocation of the conscience clause by doctors refusing to carry out a legal termination of pregnancy does not constitute a risk to the patient because a hospital in which all doctors invoke the conscience clause has to have a contract with another facility that provides the service.

96. This issue has recently been taken to the European Court of Human Rights in the case of *Tysic v Poland* (2005). In this case, the woman in question suffered from severe myopia and requested a termination of pregnancy on the grounds that her disability would worsen after a third pregnancy. She was refused a termination of pregnancy and alleged that her sight had worsened. In its judgment of 20 March 2007, the Strasbourg Court examined the complaint from the standpoint of the State's positive obligation under Article 8 to secure the physical integrity of mothers-to-be. The Court noted that once the legislature had decided to allow a termination of pregnancy, it must not structure its legal framework in such a way as to limit the use of that possibility. Furthermore, it should ensure some form of procedure before an independent and competent body, which after having had the opportunity to hear the pregnant woman in person, issued prompt and written grounds for its decision. In the applicant's case, the Court found that Polish law did not contain any effective mechanism capable of determining whether the conditions for obtaining a lawful termination had been met. Poland had therefore failed to safeguard Ms. Tysic's right to the effective respect for her private life.

97. The UN Committee on the Elimination of Discrimination Against Women, in its comments on 2 February 2007, expressed concerns as regards the unavailability of termination of pregnancy in practice, as well as regards the lack of adequate sexual education. According to the Ministry of Health an estimated figure for illegal terminations of pregnancy in Poland may be 10,000 per year (although there are no official Ministry of Health data on the number of illegal terminations of pregnancy)², while NGO sources believe that the true figures are dramatically higher. This is in stark comparison to the official figure for legal terminations of pregnancy which was 230 in 2005.

98. The Commissioner notes that access to legal abortion for women in Poland is frequently hindered. He urges the Polish government to ensure that women falling within the categories foreseen by the law are allowed, in practice, to terminate their pregnancy without additional hindrance or reproach. The very low number of legal abortions is a warning signal to the Polish authorities that illegal abortions are taking place in high numbers. Illegal abortions increase the risks for the woman undergoing the intervention and carry with them the stigma of breaching the law. Following the Strasbourg Court's judgment in *Tysic v Poland*, the Polish authorities should consider creating an appeal or review procedure whereby the decision of a doctor not to issue a certificate permitting the abortion to be practiced legally can be subject to review. Furthermore, the Commissioner encourages the Polish government to undertake activities aimed at ensuring effective sexual education in schools.

² The Minister of Health only has at his disposal data on the number of illegal abortions identified as a crime and prosecuted on the basis of Polish law. 56 such cases were reported in 2006.

³ Here it is worth presenting the position of the government of the Republic of Poland on this matter:

Commentary to paragraph 92:

The Minister of Health is tasked, on behalf of the Council of Ministers, with preparation of reports on the fulfilment of the 1993 Act on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy. In March 2003 and March 2005, the Minister of Health sent written instructions to the voivodes (province heads) concerning the obligation to rigorously implement the provisions of the cited law.

Commentary to paragraph 93:

Polish schools work in accordance with the mandatory core curriculum of general education, which elaborates the goals, tasks, content and achievements of the respective classes, including those on education for life in the family. The curricula and textbooks, before being put on the list by the Minister of National Education and endorsed for school use, are reviewed by experts.

The uniform core curriculum ensures that classes in a given subject across the whole country cover the same subject matter.

School work in the given subject is detailed in the appropriate curriculum. A textbook is a teaching aid in the implementation of the core curriculum. It is the teacher who chooses the textbook and curriculum and selects the information conveyed to the pupils.

The textbooks and curricula approved by the Ministry of National Education do not contain any misleading or inaccurate information.

In 2003 the textbook that provoked the greatest controversy was deleted from the list of textbooks, while corrections were introduced in several others.

Commentary to paragraph 94:

The assertion that "The Polish law on termination of pregnancy is one of the most restrictive in Europe" is, in the opinion of the Ministry of Health, subjective and unsubstantiated by any official comparisons or research known to us. It is hard to determine if that opinion corresponds to reality, especially since similar regulations are in force elsewhere, e.g. Malta and Ireland.

As concerns the statement that "The Polish Parliament is currently discussing a proposed amendment to the Polish Constitution (Article 38) which would guarantee life from conception", it should be pointed out that Parliament had conducted work on amending Article 38 of the Constitution, but the proposed amendments did not gain a parliamentary majority and were rejected by the Sejm.

Commentary to paragraph 95:

In 2006, the national obstetrics and gynaecology consultant did not receive any reports or complaints concerning refusals to terminate an abortion compatible with the law. The Patients' Rights Bureau attached to the Minister of Health did not receive such complaints either.

The Regulation of the Minister of Health of 6 October 2005 on the general conditions of contracts for the provision of health services (Journal of Laws No.197, item 1643 – entered into force on 10 October 2005) regulates the question of the right to reproductive services (including legal abortion) in the event of the conscience clause being invoked by a doctor who refuses to perform the abortion (possibility to refuse in the situation specified in Article 39 of the Law of 5 December 1996 on the professions of physicians and dentists – Journal of Laws of 2002 No.21, item 204, as amended). Under the Regulation, a doctor who works on the basis of labour or service relation and invokes the conscience clause is obligated to indicate a realistic possibility of the abortion being performed in another facility. The medical service-provider is obligated to have a contract with another medical facility prepared to provide the given service. The provision also applies when the mentioned circumstances appear in the course of carrying out the contract for the provision of health services.

In the instructions cited above in the comments to paragraph 92, the Minister of Health also pointed out that the conscience clause could be invoked only by a specific doctor in a specific case and that it could not be applied by an entire medical facility as a manifestation of collective conscience, affirmed through general declarations by the management of the facility. Under Polish law the conscience clause cannot be invoked in an informal way, because of the obligation to maintain medical records and inform superiors, i.e. a need to fulfil procedures laid down in the law.

Commentary to paragraph 96:

Poland wishes to underline that the judgement of the European Court of Human Rights of 20 March 2007 in the case of *Tysic v. Poland* is not final and the appeal period has not yet expired. The Polish Government is planning such an appeal. In this connection, the measures recommended by the Commissioner will be enacted if the Court upholds its judgment of 20 March 2007.

Commentary to paragraph 97:

It can be assumed that the conclusions in the Commissioner's report are largely based on a subjective assessment made by one of the NGOs and presented at the UN in January 2007 (as a shadow report). Poland, in its report on the implementation of the UN Convention on discrimination against women refuted those accusations. The UN Committee on the Elimination of Discrimination Against Women accepted the explanations of the Polish Government regarding the availability of abortion in Poland.

The data on illegal abortions in Poland are not official data of the Ministry of Health and constitute estimates by medical specialists. No official statistics on illegal abortions are prepared in Poland, so the Ministry of Health only has data on the number of illegal abortions identified as offences and prosecuted under Polish law. These data are published in the form of reports on the implementation of the cited law.

Commentary to paragraph 98:

This point in the Commissioner's report constitutes a summing-up and its respective provisions have already been addressed above.

Regardless of the divergences of position identified above, Poland is open to multilateral dialog on the reproductive rights of women, even though any domestic measures in this sphere must comply with internal law and the consensus reached in the framework of the European Union. As noted above, the Minister of Health is striving to ensure adherence to the regulations on the reproductive rights of women and thus, the fulfilment of the inalienable right to freedom, legal protection of private and family life, maternity and health.

About the Federation for Women and Family Planning

Since 1992 the Federation for Women and Family Planning has been campaigning for the liberalisation of Polish law in the scope of reproductive rights and an appropriate state policy in this sphere. It conducts counselling, legal interventions, educational publishing and awareness raising campaigns. It conducts permanent monitoring of the observance of human rights in Poland and informs public opinion and the relevant institutions in the country and abroad of the results.

The activities of the Federation cover:

Hotline for Women

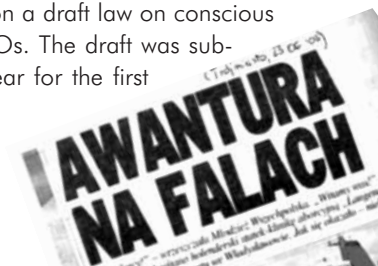
The Hotline has been operating since 1992. During the 15 years of its existence it has provided 27,000 pieces of advice. The most common issues in conversations concerned: contraception, gynaecological problems, counselling connected with pregnancy, as well as abortion and legal problems.

Legal interventions

The Federation helps women pursuing their rights before Polish or international jurisdiction (the case of Alicja Tysiąc, Barbara Wojnarowska, Agata Lamczak) and intervenes in cases of refusal of access to services in the scope of protection of reproductive health.

Draft law on conscious parenthood

In July 2003 the Federation prepared a preliminary draft law on rights and reproductive health. This was widely consulted in women's circles and became the basis of work on a draft law on conscious parenthood prepared by the Parliamentary Group of Women and NGOs. The draft was submitted to the Marshall of the Parliament in 2004. After waiting one year for the first reading, the MPs finally prevented a debate on this subject.



Publications

The Federation has a rich publishing programme:

- **publishing series:** a regular Bulletin *Mam Prawo (I have a Right)*.
- **Polish reports:** on the effects of the anti-abortion law in force (1994, 1996, 2000), on the reproductive health of women in Poland (1996, 1997).
- **Reports to international organisations,** including to the Committee on Economic, Social and Cultural Rights, the UN Human Rights Committee, and the UN Committee on the Elimination of Discrimination against Women.
- **the cycle – History of Women:** *Women's Hell – Contemporary History; Women's Hell continues;* (also in English and French).
- **Educational-informational publications:** Material on: contraception, abortion, sexual education; *Guide for organisations and people campaigning for reproductive rights and women's health - Law and reproductive and sexual health.*
- **Educational publications:** Leaflets and brochures on health and reproductive rights for women and young people, including: *Health means life. How to take care of your health – a guide for girls and women; What happens with a girl/boy during puberty?; Protection of reproductive health. Health services.*

Educational campaign of the Federation concerning medical abortion. In 2004 the Federation published *Medical abortion* and translated and published the publication of the World Health Organisation *Safe Abortion – Technical and Policy Guidelines for Health Systems*.

Conferences, seminars, training

The Federation has organised a whole series of Polish and international conferences, training courses, workshops, and trainings aimed at various professional groups; nurses, doctors, social workers, teachers, journalists, NGOs etc.

Tribunal for women's right to self-determination

In the years 2001, 2004 the Federation organised two tribunals for women's right to self-determination, during which women told about the functioning of the anti-abortion law and problems with access to contraception, prenatal tests and sexual education. In 2006 the Public hearing on the abortion ban *Women have a voice – Women's Hell continues* was organised as part of the campaign entitled: *End women's hell. We demand legal abortion.*

Federation online

The Federation runs a website www.federa.org.pl. Not only is basic information concerning its mission and activities placed on this, but also the majority of its publications, as well as the legal acts in force regarding reproductive health and practical hints for women who have problems with executing their reproductive and sexual rights.

Public actions

Visit of the ship Langenort of the Dutch foundation of Women on the Waves. The Federation coordinated the operations of the "Ster Committee – Women Decide", the Polish partner of the project which invited Women on the Waves to Poland (Władysławowo, summer 2003).

Exhibition "My life – my decision". In 2002 the Federation organised the exhibition devoted to the promotion of reproductive and sexual rights. It was presented in Warsaw, Zabrze, Poznań, Władysławowo, Katowice, Kraków, Sosnowiec, Wrocław, Łódź, Słubice and in the Parliament of the Republic of Poland.

In 2005 the Federation organised a poster competition with the same title. The exhibition of winning posters was shown many times.

Youth group Ponton. A group of young advisers on sexual education, together with the Federation, runs sexual education and counselling for young people on the question of puberty, contraception and reproductive health. The group organises street happenings, meetings with young people, as well as counselling on a hotline as part of the Hotline for Women and the Ponton Holiday Hotline devoted to young people.

Coordination of the regional network ASTRA. In 1999 the Federation initiated and since then has coordinated the ASTRA Network, in other words the International Network of Women in Central and Eastern Europe acting for Health and Reproductive and Sexual Rights, in whose framework it publishes numerous publications in English, and recently made a documentary film: Breaking the silence (www.astra.org.pl)

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