

POLAND

**BRIEFING TO THE UN
COMMITTEE ON
ECONOMIC, SOCIAL AND
CULTURAL RIGHTS**

**43RD SESSION, NOVEMBER
2009**

**AMNESTY
INTERNATIONAL**



Amnesty International Publications

First published in October 2009 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

© Copyright Amnesty International Publications 2008

Index: EUR 37/002/2009
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise without the prior permission of the publishers.

Amnesty International is a global movement of 2.2 million people in more than 150 countries and territories, who campaign on human rights. Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. We research, campaign, advocate and mobilize to end abuses of human rights. Amnesty International is independent of any government, political ideology, economic interest or religion. Our work is largely financed by contributions from our membership and donations

**AMNESTY
INTERNATIONAL**



CONTENT

Poland: Briefing to the UN Committee on Economic, Social and Cultural Rights.....	4
1. Introduction	4
2. The domestic legal framework, the principle of non-discrimination and the equal right of men and women (Articles 2.2 & 3)	5
2.1 The 1993 Family Planning Act	6
2.2 Criminalization of Performing or assisting in performing an abortion	6
2.3 Lack of effective remedies.....	7
3. The right to mental and physical health (Article 12)	7
3.1 Statistics, monitoring and evaluation	8
3.2 Legal barrier to women’s realization of their right to health	8
3.3 Impeded access to services under the existing legal framework	9
3.4 The criminalization of performing or assisting in performing an abortion.....	10
3.5 The lack of effective remedies	11
3.6 Prioritization of foetal health leading to denial of medical care to pregnant women	13
3.7 Harassment of persons who seek redress or promote respect for rights	14
4. Annex: Findings by other international and regional human rights bodies.....	15

POLAND: BRIEFING TO THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. INTRODUCTION

Amnesty International is submitting this briefing to the UN Committee on Economic, Social and Cultural Rights (the Committee) in view of its forthcoming examination of Poland's fifth periodic report on the implementation of the International Covenant on Economic, Social and Cultural Rights (the Covenant) during its 43rd session between 2-20 November 2009.

The briefing focuses on concerns about law, its implementation and policy in Poland which restrict the enjoyment by women and girls of their right to the highest attainable standard of physical and mental health, without discrimination, in particular their reproductive rights.

In Amnesty International's view, limitations on access to reproductive health care for women and girls; the criminalization of individuals for carrying out or assisting in carrying out abortions outside of these limits; and the lack of an effective remedy to challenge decisions of doctors effecting the rights of women to and girls to access to reproductive health services available within the law have all impeded the enjoyment by women of their rights to the highest attainable standard of health without discrimination, as well as their dignity, and their rights to life, to freedom from torture and other ill-treatment, and to private life.

The situation is such that:

- Women are having difficulty accessing abortion services within the health system when permitted by law. Women are experiencing pain and suffering, and in some cases loss of life, as a direct result of the deliberate denial of medically indicated treatment to pregnant women.
- Medical service providers and health institutions are not being held accountable for the denial of access to lawful health services and the consequences of that denial on the health and lives of women.
- Women are compelled to seek services for the termination of pregnancy outside the health sector, placing their health and lives at risk. The very low government figures for lawful abortion have been identified as a "warning signal" that "illegal abortions are taking place in high numbers".¹
- Women who are denied access to health services for termination of their pregnancy due to their inability to obtain necessary certification are also at risk of being denied access to an effective remedy by the designated medical review mechanism.
- Women seeking abortion services and human rights defenders advocating on this issue have themselves been attacked in the press.

Poland has enacted legislation that gives doctors and health care facilities the authority to

authorize access to safe abortion services as allowed by law in three situations; conversely, in the absence of such authorization, the law denies pregnant women and girls such access.

Polish legislation fails to ensure the availability of effective remedies for women to challenge the denial of such authorization in a timely manner and criminalizes those (including doctors) who perform or assist in performing abortions outside of the circumstances prescribed by the law.

Amnesty International considers that these laws not only violate Poland's international obligations including under the International Covenant on Economic Social and Cultural Rights, but also that the authorities are failing to ensure effective implementation of existing national legislation affecting women's rights.

In December 2002, the Committee expressed its concern "about the restrictive abortion laws, which have resulted in a large number of women risking their health by resorting to clandestine abortionists".² While the Committee had requested that the Polish government provide detailed information on this issue in the periodic report currently to be examined, the Polish government's report states that:

"In the opinion of the Polish Government, the provisions of the International Covenant on Economic, Social and Cultural Rights do not provide a basis for adopting a standard regarding performing abortions."³

Amnesty International is concerned that this statement illustrates the continuing lack of appreciation by the Polish authorities that their obligation to respect, protect and fulfil the rights enshrined in the Covenant and other international human rights treaties includes the obligation to ensure that women and girls can access, without discrimination, the highest attainable standard of health, including by accessing reproductive and sexual health services and information. Poland's failure in this regard is the subject of the present briefing.

2. THE DOMESTIC LEGAL FRAMEWORK, THE PRINCIPLE OF NON-DISCRIMINATION AND THE EQUAL RIGHT OF MEN AND WOMEN (ARTICLES 2.2 & 3)

Amnesty International considers that laws and policies in effect in Poland are inconsistent with the state's obligations under Articles 2(2) and 3 to guarantee the rights enunciated in the Covenant without discrimination, including on the basis of sex, and to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set out in the Covenant.

As highlighted by the Committee in General Comment No. 14 (on the right to the highest attainable standard of health), the realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health, and further requires that states abstain from discriminatory practices relating to women's health.⁴

On a similar note, in its General Recommendation No. 24 (on women and health), the UN Committee on the Elimination of Discrimination Against Women (CEDAW) has said that: "The duty of States parties to *ensure, on a basis of equality between men and women, access to health care services, information and education* implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations."⁵ The

CEDAW went on to say that “the obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health goals” and that “barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.”

While the Polish Constitution (Article 68) guarantees the right of all persons to have their health protected and the right of citizens to equal access to health, restrictive laws and policies on abortion, about which the Committee expressed concern in 2002, remain in force. These laws in effect deny women and girls their right to the highest attainable standard of health, without discrimination.

2.1 THE 1993 FAMILY PLANNING ACT

The 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act (hereafter the 1993 Act) states: “The right to life shall be subject to protection, including in the prenatal phase, to the extent provided in the Act”.⁶

The Act permits termination of pregnancy only in the three following circumstances:

- 1) the pregnancy endangers the mother's life or health;
- 2) “until such time as the foetus is capable of surviving outside the mother's body” in cases where “prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease”;
- 3) “until the end of the 12th week of pregnancy” in cases where “there are strong grounds for believing that the pregnancy is a result of a criminal act”.

In cases falling under the first two categories, the health-related risks must be certified by a physician other than the one performing the abortion. In cases falling under category 3, certification of a prosecutor is required. However, as noted by the Council of Europe Commissioner for Human Rights in 2007, “even when they [doctors] do issue a certificate, the doctor who performs the termination can question the certificate's validity and refuse the service.”⁷

A 1996 amendment to the 1993 Act had also permitted abortion in a fourth circumstance, namely for “women who find themselves in difficult living conditions or a difficult personal situation”. For this category of women, the law required a three day waiting period for a woman to act on her decision to terminate pregnancy. Although the provision for access to abortion for socio-economic reasons - and thus also the requirement of a three day waiting period - was rescinded in 1997 following a ruling of the constitutional court, Amnesty International is aware of at least one case in which a hospital has denied an abortion with reference to the three day waiting period.⁸

Commenting on the Polish law in June 2007, the Council of Europe Commissioner for Human Rights stated: “The Polish law on termination of pregnancy is one of the most restrictive in Europe”.⁹

2.2 CRIMINALIZATION OF PERFORMING OR ASSISTING IN PERFORMING AN ABORTION

While the law does not criminalize a woman who seeks or obtains an abortion, those who

perform or assist in performing an abortion that does not meet the conditions set out in the 1993 Act are subject to prosecution under Article 152 § 1 of the Criminal Code. Those convicted for having terminated or assisting the termination of a pregnancy outside of the three circumstances permitted under the 1993 Act are subject to punishment of up to three years' imprisonment.

As elaborated further below in Section 3, Amnesty International shares concerns expressed by the European Court of Human Rights and the UN Special Rapporteur on the right to the highest attainable standard of mental and physical health that - when paired with the restrictive conditions for access to lawful abortion services set out in the 1993 Act - the criminalization of the performance of abortions outside the 1993 Act may have a chilling effect on doctors, predisposing them against finding women eligible for access to reproductive health services otherwise allowable by law, and may impede a woman's access to safe abortion.

2.3 LACK OF EFFECTIVE REMEDIES

As elaborated in Section 3 below on the right to mental and physical health, Amnesty International is concerned that the administrative mechanism available to challenge decisions of medical professionals, as established under the Patients Rights and the Ombudsperson for Patients' Rights Act, is not an effective remedy for women and girls to challenge decisions made by doctors that may impact on their right to access to reproductive health services. It is not easily and equally accessible to all; it does not guarantee a timely enough decision for women and girls who may need it; it denies the woman and girl the right to participate actively in the decision; and the decision itself is not subject to further appeal.

The lack of an effective remedy for women and girls to challenge decisions made by doctors that impact on their enjoyment of their right to the highest attainable standard of health is inconsistent with Poland's obligations under both Articles and Article 2(2) and 12 of the Covenant. As the Committee has clarified in its General Comment No. 20 (on non-discrimination) "national legislation, strategies, policies and plans should provide for mechanisms and institutions that effectively address the individual and structural nature of the harm caused by discrimination in the field of economic, social and cultural rights... These institutions should adjudicate or investigate complaints promptly, impartially, and independently and address alleged violations relating to article 2, paragraph 2, including actions or omissions by private actors".¹⁰

3. THE RIGHT TO MENTAL AND PHYSICAL HEALTH (ARTICLE 12)

Amnesty International is concerned that the laws noted in Section 2 of this briefing are inconsistent with obligations of Poland under Article 12 of the Covenant to ensure the rights of women and girls to the highest attainable standard of mental and physical health, without discrimination. These laws, their implementation and the lack of an effective remedy interfere with the rights of women and girls to sexual and reproductive health and constitute impediments leading to undue denial of or delay in access to the right to health. Such impediments include the issues touched upon briefly in Section, namely the criminalization of the performance of or assisting in the performance of abortion and the lack of effective remedies, as well as the protection of the prioritization of foetal health leading to denial of

medical care to pregnant women and the harassment of persons who seek to redress their rights or promote respect for rights.

3.1 STATISTICS, MONITORING AND EVALUATION

In its fifth periodic report to this Committee, the government indicated that, in 2005 (the last year for which information was provided), 225 abortions were performed in compliance with the 1993 Act.¹¹

At the end of his visit to Poland in May 2009, the UN Special Rapporteur on the right to the highest attainable standard of mental and physical health noted with regret that “authorities could not provide information on the extent of illegal abortions and their effects on women” and that “official statistics available only show that legal abortions are less accessible in public medical centres. However, the estimates on illegal abortions performed in Poland that I have received are very worrying as the number varies between 80,000 -180,000 of terminations of pregnancies per year”.¹²

Similarly, in 2007, the Council of Europe Commissioner for Human Rights stated: “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.”¹³

Amnesty International is concerned that the statistics available indicate a likelihood that a great number of women are seeking abortion services outside of the framework of the 1993 Act – and thus clandestinely. This has an impact on their enjoyment of their right to the highest attainable standard of health, without discrimination.

The lack of official data hampers analysis, including on the impact of impediments to the exercise of the rights to reproductive health occasioned by the laws in force in Poland.

3.2 LEGAL BARRIER TO WOMEN'S REALIZATION OF THEIR RIGHT TO HEALTH

As the Committee has highlighted, states have an obligation to remove legal barriers to health, including in the area of sexual and reproductive health, and to remove legal and other obstacles that prevent men and women from accessing and benefiting from healthcare on a basis of equality.¹⁴

Also, in a statement issued at the end of his visit to Poland in May 2009, the UN Special Rapporteur on the right to the highest attainable standard of mental and physical health stated that “sexual and reproductive health rights (SRHR) are integral elements of the right to health. They encompass both freedoms, such as freedom from discrimination or freedom to control one's health and body, and entitlements, such as a right to a functioning health system.”¹⁵

As noted above, the 1993 Act limits the legality of termination of pregnancy to three situations; in each of these three circumstances, the approval of another person (a doctor or a prosecutor) is required. This, in Amnesty International's view, is a legal barrier to women's realization of their rights to the highest attainable sexual and reproductive health.

In 2004 the Human Rights Committee raised “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”, calling on the authorities “to liberalize its legislation and practice on abortion.”¹⁶

To date the government has failed to respond comprehensively to this recommendation.

3.3 IMPEDED ACCESS TO SERVICES UNDER THE EXISTING LEGAL FRAMEWORK

In addition to its concern about the legal barrier to the realization of women’s right to health caused by restrictive laws, Amnesty International is concerned at reports indicating that the government is failing to ensure the unimpeded access of women and girls to the services that are legally available in the three prescribed circumstances under the 1993 Act.

According to the Polish Federation for Women and Family Planning, “...the [1993] Act is realized in practice in an even more restrictive way [than its language suggests] 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”.¹⁷

The government itself has recognised that women do not fully benefit from the provisions of the 1993 Act. Thus, in its fifth periodic report on its implementation of the Covenant, the government of Poland recognised the ongoing concern regarding women’s enjoyment of their reproductive rights. The government refers to a letter written by the Minister of Health to the provinces with the aim of reinforcing the message that public health establishments, which provide gynaecological and obstetric services, have an absolute obligation to implement the provisions of the 1993 Act. According to the government, this letter was:

"intended to prevent women’s difficulties in pursuing their rights to: (a) Terminate pregnancies in the cases provided for in the Act; (b) Free of charge abortion in a public health-care establishment in the events provided for by the Act, if the woman is entitled to free health care under separate provisions regarding free health care; (c) Free access to information and prenatal tests, particularly in the event of higher risk or suspicion of the incidence of a genetic or developmental malformation of the foetus or an incurable disease threatening the life of the foetus; (d) Free access to methods and means of conscious procreation”.¹⁸

While the letter is a welcome step, Amnesty International considers that the authorities must take further measures, such as the adoption of regulations, to ensure that the conscientious objection of doctors does not in practice undermine women’s right to health. Such measures should also ensure the timely and transparent oversight, through the monitoring and evaluation of the law; the findings of such monitoring should be published and regularly evaluated.

The following case illustrates impediments which a 14 year old girl faced in 2008 in accessing services to which she was entitled under the 1993 Act.

The Agata case

A 14-year-old girl from Lublin, identified by the media under the pseudonym Agata, was subjected to delays in accessing legal abortion services. According to media reports, the

prosecutor's office in Lublin certified that Agata had been a victim of crime under Article 200 of the Criminal Code which prohibits intercourse with a person under 15 in all cases. As a result, Agata was legally entitled to termination of pregnancy. However, even though she met the legal indication for abortion access, hospitals in Lublin and Warsaw refused to perform the abortion.

Agata was eventually admitted to a hospital in Warsaw on 3 June 2008. The Warsaw hospital authorities delayed the procedure stating there was a three day waiting period for access to abortion services in her circumstances. As explained in Section 2, Polish law does not actually provide for a three day waiting period.¹⁹ Shortly after her arrival in Warsaw, Agata's personal details appeared on the internet, and she received text messages and phone calls from abortion opponents, a number of whom attempted to visit her at the hospital. The Warsaw hospital informed Agata and her mother that they would not provide abortion services to Agata, reportedly out of fear for the hospital's reputation.

Following the intervention of the Health Minister, Agata obtained an abortion four weeks after her initial request for the procedure and only one week before the end of the 12-week gestational limit on legal access to abortion.

3.4 THE CRIMINALIZATION OF PERFORMING OR ASSISTING IN PERFORMING AN ABORTION

As noted above in Section 2, Polish law criminalizes those who perform or assist in performing an abortion in violation of the Provisions of the 1993 Act.

Amnesty International shares concerns expressed that, when paired with the restrictive conditions for access to lawful abortion services set out in the 1993 Act, the criminalization of the performance of abortions outside the 1993 Act may have a chilling effect on doctors, predisposing them against finding women eligible for access to reproductive health services otherwise allowable by law.

Most recently, at the end of his visit to Poland in May 2009, the UN Special Rapporteur on the right to the highest attainable standard of mental and physical health, stated that: "A woman's need to have an abortion is not dependant on whether abortion is legal or not. However, her access to safe abortion is impacted by criminalization of abortion."²⁰

This concern was also expressed by the European Court Human Rights in its judgment of *Tysi c v Poland* (20 March 2007).²¹ The Court stated that:

"the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156(1) of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case."²²

The Court further stated:

"The provision regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides to allow abortion, it must

not structure its legal framework in a way which would limit the real possibilities to obtain it.”²³

Amnesty International recommends that the authorities in Poland repeal all laws that criminalize medical practitioners for providing abortion services that are safe, but not within the 1993 Act.

3.5 THE LACK OF EFFECTIVE REMEDIES

Whereas the enactment of the Patients Rights and the Ombudsperson for Patients' Rights Act' (hereafter the 2009 Act), is meant to provide a mechanism for challenging decisions of health professionals, Amnesty International is concerned that Poland continues to fail to meet its obligations to ensure access to effective remedies at the national level aimed at ensuring women's right to the highest attainable standard of health, without discrimination.²⁴

The 2009 Act, in force since June 2009, allows any patient to file an objection against a physician's opinion or ruling. The Act was adopted more than a year after the judgment of the European Court of Human Rights in the case of *Tysi c v. Poland*.

The Tysi c case:

In its judgment in the case of *Tysi c v. Poland*, the European Court of Human Rights concluded that the absence of timely and effective domestic measures to review doctors' decisions for denying access to abortion services, including consideration of the concerned woman's views and submission of written grounds for the review decision, could be "said to amount to the failure of the State to comply with its positive obligations" under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (right to respect for private life). The Court stated that post-factum reviews of decisions to deny access to abortion services (including tort actions for damages or criminal complaints against doctors) would be inadequate.²⁵

The Court considered that, in reaction to access to therapeutic abortion available under the 1993 Act, the authorities had failed to ensure effective institutional and procedural mechanisms to ensure adjudication and resolution of disputes between pregnant women and doctors on "whether the conditions for obtaining a lawful abortion had been met" in specific cases.²⁶

It noted that concepts of lawfulness and the rule of law required that the review mechanism should be timely; independent; allow the woman to be heard in person and for her views to be considered during the review procedure; that written grounds for decisions made should be issued.²⁷

The 2009 Act institutes a complaint mechanism - the Medical Board - that allows any patient to file an objection against a physician's "opinion or ruling [which] affects the patient's rights or obligations under the law."²⁸ The Act's scope is general, and not specific to continuation or termination of pregnancy.

The Medical Board is entitled to return a patient's objection unanswered unless the objection has been "justified" and has indicated the law from which the rights or obligations arise

which the patient wishes to claim. The patient has 30 days from the date on which the physician's opinion or ruling was issued to lodge an appeal against it. The Medical Board also has up to 30 days from the date of receiving the complaint to issue its findings and decision. The findings and decision are to be based on medical records and "if necessary, an examination of the patient".

Amnesty International considers that the complaints mechanism is flawed for the following reasons:

- *The complaint mechanism is inaccessible*

The 2009 Act requires a legal justification for a patient's objection regarding refusal of treatment.

In Amnesty International's view, this requirement renders the complaints mechanism inaccessible because it puts patients intending to make a complaint under pressure to seek legal advice. Low- or middle-income patients may not be able to afford legal advice. In circumstances of denial of a medical certificate which blocks a woman's access to abortion services under Polish law, this may lead to a double disadvantage for low- or middle-income women, who are recognized as being at a higher risk of being denied access to lawful abortion.²⁹

Because the Medical Board is not obliged to inform the complainant that the complaint did not meet the obligation to provide legal justification and references, complainants are also deprived of the opportunity to amend and re-submit their complaint.

- *The complaint mechanism does not guarantee timely decisions*

The 2009 Act says that the Medical Board should decide on the complaint immediately, but no later than 30 days from the date of receiving the complaint.

Amnesty International is concerned that this 30 day period may render the complaints mechanism ineffective for women complaining that they have improperly been denied access to legal abortion services. Depending on the date that the physician makes the finding being questioned, and the date on which the complaint is filed, this 30 day period may mean that the Medical Board may not rule on the complaint until very late in the concerned woman's pregnancy, potentially too late for her to access termination of pregnancy.

In the situations in which Polish law allows abortions, time is of the essence. A delay in medically indicated treatment is a violation of the right to health.

- *The mechanism does not provide for active participation of the complainant*

The 2009 Act does not provide for the woman's participation in the review of the doctor's decision. In contrast to the Committee's General Comment No. 14 (on the right to health), which states that the right of individuals to participate in decision-making processes must be an integral component of any effective review mechanism, the procedures under the 2009 Act do not provide the complainant with an opportunity to be heard in person and have her views considered.³⁰ The only involvement of the

complainant is to draft the complaint. The Medical Board has the discretion to request that she be medically examined, but this treats the woman as an object of adjudication not as a rightsholder.

- *The independence and impartiality of the decision makers is not guaranteed*

The 2009 act stipulates that the review body should be comprised of only medical professionals. There is no provision allowing for other individuals to sit on the review body, such as those advocating for patient's rights and interests or human rights, including lawyers or human rights defenders. Further, the 2009 Act does not ensure that Medical Board membership excludes individuals who hold conscientious objections to abortion which constitute a bias prejudicing fair consideration of a woman's entitlement to access to abortion services under existing Polish law.

- *The decisions of the review body cannot be appealed*

The 2009 Act specifically excludes the complainant's right to appeal against the Medical Board's findings and decision, thus reinforcing the risk of denial of an effective remedy.

Given its shortcomings - some of which were also the subject of questions by the Council of Europe's Committee of Ministers' Deputies in September 2009 in the course of their supervision of Poland's implementation of the *Tysiak* judgment - Amnesty International considers that the 2009 Act fails to create an effective remedy for women at risk of being denied access to termination of pregnancy available under Polish law.³¹ This failure can result in a separate violation of the rights of women who are seeking to ensure their rights to sexual and reproductive health without discrimination in Poland, namely the violation of their right to an effective remedy.

The organization is concerned that, as long as the complaints mechanism remains ineffective, doctors and health institutions will continue to enjoy impunity for violations of women's rights to health.

Amnesty International urges the Polish authorities to take immediate measures to ensure women's right to health by repealing the penal code provision related to doctors, by creating clear, legally binding regulation for the implementation of the 1993 Act and by modifying the terms of the Medical Board to ensure effective and timely review. Furthermore, the state should collect data on provision and denial of abortion services and on the basis of such data and analysis, revise as necessary relevant laws and policies to ensure women's right to health and life and right to an effective remedy.

3.6 PRIORITIZATION OF FOETAL HEALTH LEADING TO DENIAL OF MEDICAL CARE TO PREGNANT WOMEN

Article 38 of the Polish Constitution states: "The Republic of Poland shall ensure the legal protection of the life of every human being." In April 2007, the Parliament rejected a proposed constitutional amendment which would have enshrined the legal protection to protection of life "from conception".³² However, Article 1 of the 1993 Act states that the right to life shall be subject to protection "including in the prenatal phase".

The application of these provisions in Poland put at risk women's human rights where doctors

cite reasons relating to foetal well-being, not only to refuse to provide or to refer women for abortion services (which would be lawful under the 1993 Act), but also to deny them access to other forms of medical care. The case of Z illustrates these concerns:

The case of "Z"

According to information available to Amnesty International, a 25-year-old pregnant woman (known as Z) died as a result of hematosepsis in 2004. She was diagnosed with an ulcerative colitis which she developed prior to or early during her pregnancy. Later she was diagnosed with an abscess, and three operations to remove it were performed. However, during her stay at a hospital in Łódź, her doctor refused to perform a full endoscopy referring to his fear of endangering the life of the foetus and stating: "My conscience does not allow me [to do this]". The family of the woman urged the doctor to commence any necessary treatment, irrespective of the consequences for the life of the foetus, to save Z's life. The doctor refused, and Z miscarried in the fifth month of her pregnancy on 5 September 2004. Z died on 29 September 2004, reportedly as a result of shock caused by sepsis.

The woman's mother has made a complaint to the European Court of Human Rights alleging the violation Z's rights under Articles 8 (right to private life), 14 (prohibition of discrimination), 2 (right to life) and 3 (prohibition of torture and inhuman or degrading treatment or punishment) under the European Convention on Human Rights.³³

A context of abortion criminalization and political contestation relating to abortion and the state's duty to protect foetal interests make it imperative for the Polish authorities to take measures to ensure that health professionals do not prioritize concern for the foetus over their duty to provide treatment to pregnant women. Failure to do so leads to violations of the equal rights of women and girls to the highest attainable standard of health, among other rights.

Denial of or delay in treatment means that the concerned woman may suffer continuation (and potentially aggravation) rather than alleviation of physical suffering for serious health conditions. As a result, she may also be exposed to the continuous anxiety of not being able to access appropriate medical care in a timely manner and the fear of health injury and death as a result of continuing pregnancy. The severity of suffering caused by denial of medical treatment to pregnant women may amount to a violation of prohibition of torture and other cruel, inhuman and degrading treatment and may lead to violations of their right to life.³⁴

3.7 HARASSMENT OF PERSONS WHO SEEK REDRESS OR PROMOTE RESPECT FOR RIGHTS

Amnesty International is concerned that individual women seeking abortion services, as well as human rights defenders advocating on this issue, have been attacked in the press.

The experience of Agata detailed above is a case in point: As mentioned, shortly after her arrival in Warsaw from Lublin in 2008, 14-year-old Agata's personal details appeared on the internet. She received text messages and phone calls from abortion opponents, and some also tried to visit her at the hospital. Agata and her mother were informed that the hospital would not provide abortion services to Agata, reportedly because there were fears for the reputation of the hospital. Agata received the required medical services, as authorised under

the 1993 Act, only after the intervention of the Health Minister.

At the end of his visit to Poland in May 2009, the UN Special Rapporteur on the right to the highest attainable standard of mental and physical health expressed concern “about reports indicating that non-State actors are interfering with the access to legal and safe abortions.”³⁵

Amnesty International notes that the exercise of the right to freedom of expression and freedom of religion and conscience must be carried out in a manner that has regards for the rights of others.

In September 2009, Alicja Tysiac won a court case against the publisher and editorial staff of the Catholic weekly newspaper *Gosc Niedzielny* in relation to a series of articles claiming that she attempted to kill her baby and had received compensation ordered by the European Court of Human Rights for not having done so.³⁶ Reportedly, the article also compared abortion to the experiments of Nazi war criminals at Auschwitz.

Alicja Tysiac had claimed that the newspaper had unlawfully disrupted her life by publishing her photo and writing that she did not want her child. The court in Katowice ordered the publisher and editorial staff to apologize and pay 30,000 zloty (€ 7100) in damages to her.³⁷ The judge is reported to have said that Catholics have the right to express their disapproval of abortion and even call it murder, but they did not have the right to vilify individuals.³⁸

4. ANNEX: FINDINGS BY OTHER INTERNATIONAL AND REGIONAL HUMAN RIGHTS BODIES

Since the Committee’s last examination of Poland in 2002, a number of human rights institutions and authorities have called on the government of Poland to meet its human rights obligations in regard of women’s access to lawful abortion services.

At the time of his May 2009 visit to Poland, the UN Special Rapporteur on the right to the highest attainable standard of mental and physical health stated that sexual and reproductive health rights are among the issues of concern that Polish authorities need to address. He stated:

“The respect of physical integrity and freedom to control their own bodies is one of the fundamental rights of all human beings, including women. Undoubtedly, the ultimate decision on whether or not to give birth should be made by the women concerned, who should have the means of enjoying that right effectively.

Despite the Polish Government's ratification of numerous human rights treaties, access of women to certain reproductive health services, such as contraception, pre-natal testing abortion, is seriously impeded. For example, reports and personal testimonies indicate that women, even when abortion is legal, encounter serious difficulties to have it performed. I appreciate that Poland is a country with long and deeply rooted traditions, and I understand that the question of abortion raises complex issues for the Government to which there are no quick solutions. However, these issues need to be addressed.

A woman's need to have abortion is not dependant on whether abortion is legal or not. However, her access to safe abortion is impacted by criminalization of abortion. I must emphasize and add that - when abortions are legal, they must be, apart from being safe, made accessible. In this context, the role of health professionals, both doctors and nurses, is of great importance. ... However, I note with particular concern numerous reports, and personal testimonies from women who indicated that some doctors, invoking conscientious objection, refuse to perform a legal abortion. In addition, I am also concerned about reports indicating that non-State actors are interfering with the access to legal and safe abortions. Health providers have a right to respect for their freedom of thought, conscience or religion. In such cases, it is a guiding principle that the State has a legal obligation to ensure the enjoyment of the human right, without hindrance or bureaucratic delay. The State is obliged to have in place a system, which while respecting the conscientious objector, will ensure the access to safe abortion, where legal.”³⁹

Similarly, in a June 2007 memorandum to the government, the Council of Europe Commissioner for Human Rights noted:

94. The Polish law on termination of pregnancy 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 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 taken 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.

97. ...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), 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.⁴⁰

In 2007, the UN Committee on the Elimination of Discrimination against Women voiced concern in relation to Poland's obligations under Article 12 of the Convention on the Elimination of all forms of Discrimination Against Women on women's equal right to the highest attainable standard of health, calling specifically for "concrete measures to enhance women's access to health care, in particular to sexual and reproductive health services", including research on the scope, causes and consequences of illegal abortion and its impact on women's health and life, measures to ensure women's access to legal abortion services and measures against limitation of such access "by the use of the conscientious objection clause".⁴¹

Similarly, in its concluding observations in 2004 on Poland's implementation of the International Covenant on Civil and Political Rights, the UN Human Rights Committee expressed "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", "the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape" and "the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions."⁴²

¹ Memorandum to the Polish Government, *Assessment of the progress made in implementing the 2002 recommendations of the Council of Europe Commissioner for Human Rights*, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1155005&Site=CommDH&BackColorInternet=FEC65B&BackColorInternet=FEC65B&BackColorLogged=FFC679>, (Council of Europe Commissioner for Human Rights Memorandum), para 98.

² UN Committee on Economic, Social and Cultural Rights, *Concluding Observations on Poland*, UN Doc. E/C.12/1/Add.82, (CESCR Concluding Observations on Poland) para 29.

³ CESCR Concluding Observations on Poland, paras. 29 and 51; and *Poland's Fifth periodic report to the UN Committee on Economic, Social and Cultural Rights*, UN Doc. E/C.12/POL/5 (Poland's 5th periodic report to CESCR), para 1015.

⁴ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000): The right to the highest attainable standard of health (Article 12)*; UN Doc. E/C.12/2000/4; (CESCR General Comment No. 14), para 21.

⁵ UN Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 24; 20th session, 1999 (article 12: women and health)*; (CEDAW General Recommendation No. 24), para. 13 (The Committee's emphasis).

⁶ Article 1, 1993 Family Planning Act.

⁷ Council of Europe Commissioner for Human Rights Memorandum, at para 95.

⁸ For information on the provisions for the fourth category of abortions, see Wanda Nowicka, 'The Anti-abortion Act in Poland – the legal and actual state', in: Federation for Women and Family Planning, Reproductive Rights in Poland – the effects of the anti-abortion law, 2008, available at http://www.federa.org.pl/publikacje/report%20Federa_eng_NET.PDF. See the information on the Agata case for an example of an abortion being denied with reference to the three day waiting period.

⁹ Council of Europe Commissioner for Human Rights Memorandum, para 94.

¹⁰ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20 (Non-Discrimination in Economic, Social and Cultural Rights; Art 2, para 2)*, UN Doc. E/C.12/GC/20, (CESCR General Comment No. 20), para 40.

¹¹ Poland's 5th periodic report to CESCR, para 1021.

¹² UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Press Release, *Visit to Poland: Preliminary conclusions and observations*, 11 May 2009 (UN Special Rapporteur on the right to health – Press release on visit to Poland) accessible at <http://www.unhcr.ch/hurricane/hurricane.nsf/view01/F1269CA5311CDAF3C12575B50041AEBE?opendocument>

¹³ Council of Europe Commissioner for Human Rights Memorandum, para 98.

¹⁴ The Committee has explained in General Comment No. 14 that states have an obligation to remove legal barriers to health access, pointing out that “the realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health”. The Committee has further clarified in General Comment No. 16 that “article 12 of the Covenant requires at a minimum, the removal of legal and other obstacles that prevent men and women from accessing and benefiting from healthcare on a basis of equality. This includes, inter alia, addressing ... the removal of legal restrictions on reproductive health provisions...”. See UN Doc. E/C.12/2000/4; CESCR General Comment No. 14 (The right to the highest attainable standard of health), and UN Doc. E/C.12/2005/4; CESCR General Comment No. 16 (The equal right of men and women to the enjoyment of all economic, social and cultural rights).

¹⁵ UN Special Rapporteur on the right to health – Press release on visit to Poland.

¹⁶ *Concluding observations of the Human Rights Committee: Poland*, UN Doc. CCPR/CO/82/POL, 2 December 2004, para 8.

¹⁷ Central and Eastern European Women's Network for Sexual and Reproductive Health and Rights, Legal commitments to gender equality and SRHR issues in Albania, Macedonia, Georgia, Poland and Ukraine, available at: <http://www.astra.org.pl/PAI%20astra%20report%202009.pdf>

¹⁸ Poland's 5th periodic report to CESCR, para 1019.

¹⁹ As explained in Section 2 on the 1993 Act, there was a provision in law for a three day waiting period for women wanting to terminate pregnancy under the category allowing abortions for socio-economic reasons. However, this provision applied only to the category of abortions that was struck out following the High Court ruling.

²⁰ UN Special Rapporteur on the right to health – Press release on visit to Poland.

²¹ *Tysi c v Poland*, judgment of the European Court of Human Rights of 20/03/200, para 116. In this case, the European Court of Human Rights ruled that the failure to ensure any effective mechanisms

capable of determining whether the conditions for obtaining a lawful abortion had been met constituted a violation of the Poland's positive obligation to secure the applicant's right to private life secured by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²² *Tysi c v Poland*, judgment of the European Court of Human Rights of 20/03/2007, para 116.

²³ *Tysi c v Poland*, judgment of the European Court of Human Rights of 20/03/2007, para 116.

²⁴ E.g. in its General Comment No. 14, the Committee has stated "any person or group victim of a violation of the right to health should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation". Also, the UN Special Rapporteur on the right to health, has said: "Without mechanisms of accountability, the obligations arising from the right to health are unlikely to be fully respected. This applies equally to the integral elements of sexual and reproductive health. Thus, all initiatives for the promotion and protection of sexual and reproductive health must include effective, accessible and transparent mechanisms of accountability in relation to all duty-bearers." See UN Doc. E/C.12/2000/4, CESCR General Comment No. 14, para 59 and report of the Special Rapporteur on the right to health, UN Doc. E/CN.4/2004/49, para. 49.

²⁵ *Tysi c v. Poland* (App. No. 5410/03), judgment of the European Court of Human Rights of 20/03/2007, para 118.

²⁶ *Tysi c v. Poland*, judgment of the European Court of Human Rights of 20/03/2007, para 124

²⁷ *Tysi c v. Poland*, judgment of the European Court of Human Rights of 20/03/2007, paras 117-118.

²⁸ 'Patients Rights and the Ombudsperson for Patients' Rights Act' Chapter 8: The Patient's Rights to File an Objection to a Doctor's Opinion or Ruling

²⁹ "[W]omen who are well informed and possess adequate financial means can often obtain legal and safe abortions more easily." Parliamentary Assembly of the Council of Europe, resolution 1607 (2008) on "Access to safe and legal abortion in Europe", para 2.

³⁰ CESCR General Comment No. 14, para 34 reads: "States should refrain ...from preventing people's participation in health-related matters." See also *Tysi c v. Poland*, para 117: "In circumstances such as those in issue in the instant case such a [review] procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered".

³¹ See *Annotated Agenda of the Committee of Ministers' Deputies, 1065th meeting (DH), 15-16 September 2009*. The Ministers's Deputies asked the authorities to clarify whether the a woman seeking a therapeutic abortion would be heard in person and have her views considered by the Commission of Physicians; whether the decisions of the Commissions would contain written grounds and whether the the decisions will be delivered in a timely manner so as to limit or prevent damage to a woman's health that might be occasioned by a late abortion. The Deputies will resume consideration of the issues no later than March 2010. Available at [https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH\(2009\)1065&Language=lanEnglish&Ver=section4.2public&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383](https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Del/OJ/DH(2009)1065&Language=lanEnglish&Ver=section4.2public&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383)

³² Kaiser Daily Women's Health Policy, *Roman Catholic Bishops in Poland Support Proposal To Include Antiabortion Language in Constitution*, 16 March 2007, available at: http://www.kaisernetwork.org/Daily_reports/rep_index.cfm?DR_ID=43630; Wanda Nowicka, *Recent trends in regarding Sexual and Reproductive Rights in Central and Eastern Europe with special Focus on*

Poland, Public Hearing in European Parliament, 29 January 2008, available at:
<http://www.astra.org.pl/PH/WN.doc>

³³ *Z. v. Poland*, case application number: 46132/08, lodged in the European Court of Human Rights on 16 September 2008, available at:
<http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=852028&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>. Amnesty International has been given leave by the Court to file written submissions in the case.

³⁴ See Amnesty International, *Nicaragua: The impact of the complete ban of abortion in Nicaragua: Briefing to the United Nations Committee against Torture* (Index AMR 43/005/2009), 29 April 2009, available at <http://www.amnesty.org/en/library/info/AMR43/005/2009/en>. Also see UN Committee against Torture, *Concluding Observations on Nicaragua*, UN Doc. CAT/C/NIC/CO/1, para 16: "The Committee urges the State party to review its legislation on abortion ... The State party should, in accordance with the guidelines issued by the World Health Organization, guarantee immediate and unconditional treatment for persons seeking emergency medical care. The State party should also avoid penalizing medical professionals for the exercise of their professional responsibilities.

³⁵ UN Special Rapporteur on the right to health – Press release on visit to Poland.

³⁶ These articles can be accessed at:
<http://goscniedzielny.wiara.pl/?grupa=6&art=1253712824&dzi=113390279&idnumeru>

³⁷ Polskie Radio, 'Catholic weekly fined in high-profile abortion case', 23 September 2009, http://polskieradio.pl/thenews/national/artykul116482_catholic_weekly_fined_in_high_profile_abortion_case.html; BBC News, 'Award for Poland abortion woman', 23 September 2009, <http://news.bbc.co.uk/1/hi/world/europe/8271895.stm>

³⁸ BBC News, 'Award for Poland abortion woman', 23 September 2009, <http://news.bbc.co.uk/1/hi/world/europe/8271895.stm>

³⁹ UN Special Rapporteur on the right to health – Press release on visit to Poland.

⁴⁰ Council of Europe Commissioner for Human Rights Memorandum, paras 94, 95 and 98.

⁴¹ UN Committee on the Elimination of Discrimination against Women, Concluding Comments on Poland, UN Doc. CEDAW/C/POL/CO/6, para 25.

⁴² UN Human Rights Committee, Concluding Observations on Poland, UN Doc. CCPR/C/SR.2251, para 8.