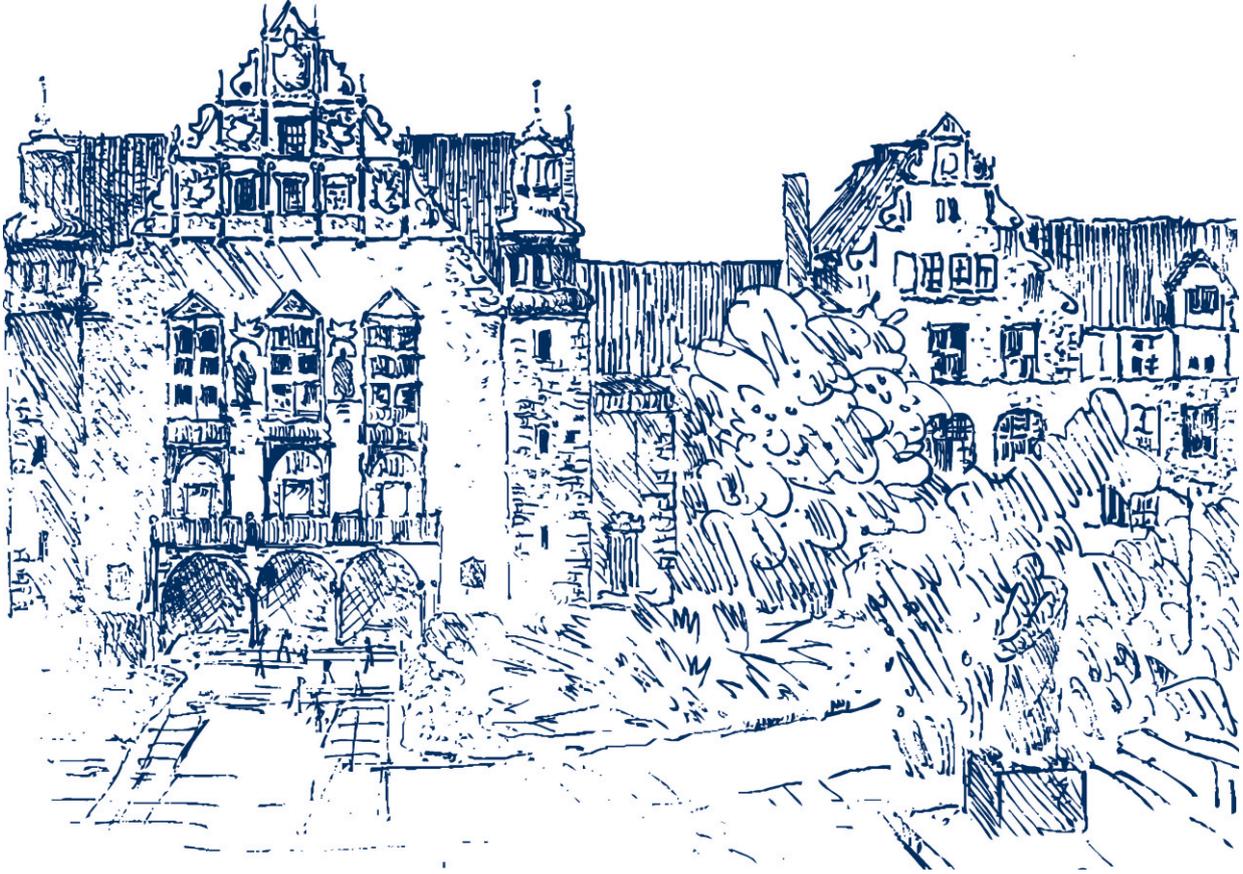




ADAM MICKIEWICZ UNIVERSITY IN POZNAŃ
Faculty of Law and Administration



Women's Reproductive and Socio-economic Rights from the Constitutional Perspective in Poland

Student Working Paper

**Under the supervision of Dr Julia Wojnowska-Radzińska
Faculty of Law and Administration**

Faculty of Law and Administration AMU,
al. Niepodległości 53, 61-714 Poznań, Poland,
e-mail: uamprawo@amu.edu.pl

www.prawo.amu.edu.pl

**WOMEN'S REPRODUCTIVE AND SOCIO-ECONOMIC
RIGHTS FROM THE CONSTITUTIONAL PERSPECTIVE
IN POLAND**

INTRODUCTION

Non-discrimination and equality between women and men are the fundamental principles contained in the Constitution of the Republic of Poland. The Polish Constitution recognises the right to gender equality in family, political, social and economic life (Article 33(1)). Article 32(1) of the Constitution also provides for equality before the law and the right to equal treatment by public authorities. However, it should be noted that the concept that men and women should be able to enjoy their human rights on an equal basis is present in all main international and regional human rights instruments. An explicit reference to the principles of non-discrimination and gender equality can be found not only in the UN treaties such as: the Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), but also in two basic European treaties, i.e. the Treaty on the European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU). It is noteworthy that Poland ratified these agreements and they have consequently become part of the of universally binding law of the Republic of Poland. As a result, the Polish Constitution aims to promote and protect the equal enjoyment of human rights by women in two ways: through the principles of non-discrimination and equality enshrined in its provisions and through implementing international and European provisions on this matter. Nevertheless merely providing women with formal equality is not enough to prevent women's inequality. Poland still has to fulfil its obligations to achieve gender equality in practice (substantive equality). Achieving substantive equality, as the CEDAW has reiterated, requires a change in attitudes, in gender roles and stereotyping that discriminate against or are disadvantageous for women.¹ Moreover, the CEDAW Committee requires that women should be given an equal start and "that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account".²

The Faculty of Law and Administration of the Adam Mickiewicz University in Poznań (Poland) has prepared this paper with a view to analyse the practical implementation of the women's rights concerning reproductive and sexual health and economic independence, which are addressed in the Polish Constitution. These particular research areas have been chosen because of their great importance for Polish women. The main aim of the research was

¹ CEDAW Committee, General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures), 2004, para. 38.

² Ibid., para. 8.

to examine whether Poland as a party to international conventions has taken appropriate measures, including legislation and policy, ensuring women guarantees of the exercise and enjoyment of their reproductive and socio-economic rights.

It is a great honour for the Faculty of Law and Administration Adam Mickiewicz University to be a vital part of the research initiative “**Global Gender Equality Constitutional Database**” which advances teaching and research in gender and constitution-making.

I would like to thank the Faculty of Law and Administration Adam Mickiewicz University, Vice-Rector for Student Affairs prof. B. Kaniewska, Vice-Rector for Research and International Cooperation prof. R. Naskręcki and the Adam Mickiewicz University Foundation for the funding provided, which enabled some of our students to participate in the “**Student Research Initiatives on Gender and Constitutions**” within the framework of the UN Women.

Dr Julia Wojnowska-Radzińska
Assistant Professor in the Chair of Constitutional Law
Faculty of Law and Administration
Adam Mickiewicz University

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IMPLEMENTATION OF WOMEN’S RIGHTS TO WORK AND SOCIAL SECURITY IN POLAND - HOPEFUL PROSPECTS OR WISHFUL THINKING?

“Women will only have true equality
when men will share with them
the responsibility of bringing up
the next generation”.

/Ruth Bader Ginsburg/

1. INTRODUCTION

It is commonly recognized that gender equality is essential for economic growth and poverty reduction “... ensuring equality between women and men is not only a necessity from a rights perspective, but it also makes sense from an economic perspective ... Women have massively entered the labour market and contributed to the EU’s economic growth and competitiveness”.³ Despite the fact that there is a positive trend towards a more gender-equal society and labour market, gender inequalities continue to exist, and affect mainly women. Among the persisting inequalities in the labour market is the gender pay gap. A lower pay means a lower pension in the future which inevitably leads to a higher risk of poverty for older women, and in consequence may create further inequality between the financial status of men and women after retirement. Young female employees are much more exposed to unequal treatment at work on the grounds of gender because, as U. Lembke notes, “they might become pregnant and, much more important, the expectation is that they will take the main responsibility for child care, stay at home for a long time and will generally be less reliable and committed to their work”.⁴ After career breaks due to family reasons women often find it difficult to catch up the salary of male employees. Combating gender inequalities on the labour market is a longer-term challenge and entails structural and behavioural changes as well as a redefinition of the roles of women and men. This research examines whether the current Polish legislation ensures effective implementation of women’s rights to equal pay for equal work or work of equal value, leading in effect to a comparable financial security, or pension upon retirement. It also provides the overview of what kind of affirmative action and steps should be taken by the Polish government to improve women’s economic position which subsequently has an impact on their social status.

³ S. Saastamoinen, Director for Equality at the European Commission's Directorate-General for Justice and Consumers, during a discussion on long-term trends in gender equality. The quoting comes from the Special Eurobarometer 428 “Gender Equality”, Conducted by TNS Opinion & Social at the request of the Directorate-General for Justice and Consumers, European Union, 2015, p. 3, available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/eurobarometer_report_2015_en.pdf [accessed: 20 January 2017]. See also: The United Nations Conference on Sustainable Development (“Rio+20”), 2012, General Assembly resolution 66/288, annex.

⁴ U. Lembke, *Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies*, European equality Law Review, Issue 2/2016, p. 53.

2. A MULTI-LEVEL STRUCTURE OF THE SOURCES OF POLISH LAW

Human rights, gender equality, welfare and democracy are established constitutional values in Poland. The Constitution of the Republic of Poland of 1997 explicitly prohibits discrimination in political, social or economic life for any reason whatsoever.⁵ Moreover the Polish Constitution guarantees equality between men and women, providing that “Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work of similar value, to social security, to hold offices, and to receive public honours and decorations”.⁶

Recognizing gender equality as a basic human right and a constitutional principle, Poland ratified key international treaties concerning equal socio-economic rights for men and women, i.e. the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁷ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)^{8,9} Article 87 of the Constitution of the Republic of Poland of 1997 clearly indicates the position of these agreements and provides that the ratified international treaties are the sources of universally binding law. This means that the ICESCR and the CEDAW can be applied directly. Under Article 91(2) in conjunction to Article 241(1) of the Polish Constitution, the provisions of an international agreement have precedence over a statute if the statute cannot be reconciled with the provisions of the agreement. In addition, Article 9 of the Polish Constitution additionally guarantees that the basic rights and freedoms of an individual enshrined in international treaties will be observed, providing that “the Republic of

⁵ Article 32(2) of the Polish Constitution, Journal of Laws of 1997, No. 78, item 483 as later amended.

⁶ Article 33 of the Polish Constitution.

⁷ Article 3 of the ICESCR states: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”.

⁸ Article 11(1) of the CEDAW states: ” States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to work as an inalienable right of all human beings;
- (b) The right to the same employment opportunities, including the application of the same criteria for selection in matters of employment;
- (c) The right to free choice of profession and employment, the right to promotion, job security and all benefits and conditions of service and the right to receive vocational training and retraining, including apprenticeships, advanced vocational training and recurrent training;
- (d) The right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work;
- (e) The right to social security, particularly in cases of retirement, unemployment, sickness, invalidity and old age and other incapacity to work, as well as the right to paid leave;
- (f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.”

⁹ See: S. Fredman, *Engendering socio-economic rights*, [in:] A. Hellum, H. Sinding Aasen, *Women’s Human Rights. CEDAW in International, Regional and National Law*, Cambridge University Press, 2013, pp. 217-241.

Poland shall respect international law binding upon it”. The Constitutional Tribunal in its judgment of 27 April 2005 stressed that “Article 9 of the Constitution is not only a grandiose declaration addressed to the international community, but also an obligation of state bodies, including the government, parliament and the courts, to observe the international law, which is binding for the Republic of Poland. Apart from the necessary changes in the national legal order, the implementation of this obligation may require the bodies of public administration to undertake specific actions within the scope of their assigned competencies”.¹⁰

It is noteworthy that Poland’s accession to the above-mentioned treaties involves accepting standards regarding women’s rights to equal pay for equal work or work of equal value and social security enshrined in their provisions and adopted by their treaty-monitoring bodies. Therefore, particular attention should be drawn to the findings of the Committee on the Economic, Social and Cultural Rights (CESCR) in relation to the right to work by ensuring equal pay for work of equal value and the right to social security set out in the Articles 7 and 9 of the ICESCR.¹¹ According to equal pay and working conditions, the Committee clarified that “Article 3, in relation to article 7 requires, *inter alia*, that the State party identifies and eliminates the underlying causes of pay differentials, such as gender-biased job evaluation or the perception that productivity differences between men and women exist. (...) The State party should adopt legislation that prescribes equal consideration in promotion, non-wage compensation and equal opportunity and support for vocational or professional development in the workplace. Finally, the State party should reduce the constraints faced by men and women in reconciling professional and family responsibilities by promoting adequate policies for childcare and care of dependent family members”.¹² The Committee addresses “the need for a comprehensive system of protection to combat gender discrimination and to ensure equal opportunities and treatment between men and women in relation to their right to work by ensuring equal pay for work of equal value. In particular, pregnancies must not constitute an obstacle to employment and should not constitute

¹⁰ Judgment of the Constitutional Tribunal of 27 April 2005, No. P 1/05.

¹¹ Article 7 of the ICESCR states: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
 - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
 - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.”; Article 9 of the ICESCR states: “The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance”.

¹² CESCR, General comment No. 16 (2005), The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2005, E/C.12/2005/4, para. 24.

justification for loss of employment”.¹³ Furthermore, the Committee indicates that the implementation of Article 3 in conjunction with Article 9 requires, for instance, equalizing the compulsory retirement age for both men and women, ensuring that women receive the equal benefit of public and private pension schemes, and guaranteeing maternity leave for women, paternity leave for men and parental leave for both men and women.¹⁴ In its General Comment No. 19, the Committee maintains that States parties should take steps to eliminate factors that prevent women from contributing equally to social security schemes that link benefits to contributions.¹⁵ The Committee pays considerable attention to differences in the average life expectancy of men and women need to be taken into account in the design of schemes, since they can lead to substantive discrimination, while women often have the sole responsibility for the care of their children.¹⁶

Poland’s accession to the European Union (EU) was a further step to contribute to a general enhancement of the legal framework for gender equality, including considerable adjustment of Polish law to the *acquis communautaire*. The equality between men and women and equal pay for equal work for women and men belongs to fundamental principles of the European Union, which are addressed by Treaty provisions¹⁷, the secondary legislation (directives), the case law of the Court of Justice of the EU (CJEU), soft law and EU policies. In addition, Article 23 of the Charter of Fundamental Rights of the EU provides that the “[e]quality between women and men must be ensured in all areas, including employment, work and pay. The principle of equality shall not prevent the maintenance or adoption of measures providing for specific advantages in favour of the under-represented sex”. The more detailed regulations regarding the discussed rights are included, in particular, in Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)¹⁸ and the Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men

¹³ CESCR, General Comment No. 18. (2005), The right to work (Article 6 of the International Covenant on Economic, Social and Cultural Rights), 24 November 2005, E/C.12/GC/186, para. 13.

¹⁴ CESCR, General comment No. 16 (2005), The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2005, E/C.12/2005/4, para. 26.

¹⁵ CESCR, General comment No. 19, The right to social security (art. 9), 4 February 2008, E/C.12/GC/19, para. 32.

¹⁶ Ibid.

¹⁷ See: Articles 2 and 3(3) of the Treaty of the European Union (TEU) and Articles 8, 19 and 157 of the Treaty of the Functioning of the European Union (TFEU).

¹⁸ Official Journal of the European Union of 2006, L 204/23. The provision of this Directive were implemented to Polish Labour Code (Labour Code Act of 26 June 1974, Journal of Laws of 2016, item 1666) and to the Act of 3 December 2010 on the implementation of some regulations of European Union regarding equal treatment respectively (Journal of Laws of 2010, No. 254, item 1700). The Directive stipulates that for the same work or for work of equal value, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated. In particular, where a job classification system is used for determining pay, it should be based on the same criteria for both men and women and should be drawn up so as to exclude any discrimination on grounds of sex.

and women in matters of social security.¹⁹ Moreover, the case-law of the CJEU has helped to clarify and further develop the interpretation and scope of the principle of equal pay.²⁰ Consequently, Member States are bound by the obligation to respect the principle of equal pay, which means that they are entitled to adopt provisions of a legal, economic or administrative nature in order to implement this obligation.²¹

3. THE CONCEPT OF THE RIGHT TO EQUAL PAY FOR WOMEN AND MEN FOR WORK OF EQUAL VALUE

The Polish Labour Code (hereafter: LC)²² provides for the right to equal pay for women and men for work of equal value. Importantly, it should be noted that employees have equal rights for the equal performance of the same duties, and these rights apply to in particular the equal treatment of men and women in the area of work under Labour Code.²³ Article 18^{3c}(1) of the LC explicitly provides that employees have the right to equal remuneration for the same work or for work of an identical value. Remuneration is understood to comprise all components of remuneration, regardless of their name or characteristics, as well as other work-related benefits granted to employees in cash or non-cash form.²⁴ The work of an identical value is defined as a work that demands from employees not only comparable professional qualifications, certified by documents provided for in separate provisions or by practice and professional experience, but also comparable responsibility and effort.²⁵ The Supreme Court clarified that “if the employer took into account criteria such as the length of service and qualifications while establishing the remuneration, she/he must prove that the particular skills and professional experience have special significance for the fulfilment of concrete the obligations conferred upon the employee”.²⁶ According to the case-law it is commonly acknowledged that in order to assess whether employees are performing the same work or work of equal value, it should be determined whether, having regard to a range of factors including the nature of the work and training and working conditions, those workers may be considered to be in a comparable situation. An employer violates the principle of equal treatment in employment if he/she treats an employee differently on one or more grounds, particularly if it leads to establishing disadvantageous conditions of

¹⁹ Official Journal of the European Communities of 1979, L 6/24. The provision of this Directive were mainly implemented in the Act of 13 October 1998 on the Social Insurance System.

²⁰ See for instance: *Defrenne II*, Case No. C-43/75, Judgment of the Court of 8 April 1976; *Barber*, Case No. C-262/88, Judgment of the Court of 17 May 1990; *A.G. Lawrence and Others v Regent Office Care Ltd, Commercial Catering Group and Mitie Secure Services Ltd*, Case No. C-320/00, Judgment of the Court of 17 September 2002; *B. F. Cadman v Health & Safety Executive*, Case No. C-17/05, Judgment of the Court of 3 October 2006.

²¹ *Defrenne II*, Case No. C-43/75, Judgment of the Court of 8 April 1976.

²² Labour Code Act of 26 June 1974, Journal of Laws of 2016, item 1666.

²³ Article 11² of the LC. Moreover, the LC explicitly prohibits any discrimination, direct or indirect, in respect of gender in employment (Article 11³).

²⁴ Article 18^{3c}(2).

²⁵ Article 18^{3c}(3).

²⁶ Judgment of the Supreme Court of 22 February 2007, No. I PK 242/06.

remuneration of work.²⁷ Furthermore, an employer is obliged to apply objective criteria of evaluating employees and the effects of their work.²⁸

On a closer look, the Labour Code does not address the issue of transparency of remuneration and the job classification system used for determining remuneration. Thereby, employees have no legislative right to demand insight into fellow employees' salaries. Nevertheless, the public and private sectors differ in this respect as there are some regulations stating that the information about remuneration of certain groups of public servants or persons occupying decision-making positions is not classified.²⁹ The Supreme Court stressed that "disclosing information covered by a clause termed a 'salaries confidentiality clause' which is intended to prevent unfair treatment and wage-related forms of discrimination, could not in any way serve as a ground for the termination of the employment contract with the plaintiff".³⁰ The Supreme Court also presented the view that "the exercise by an employee of the rights resulting from violations of the principle of equal treatment in employment, including the attempt to investigate or to provide any form of support to other employees, aimed at preventing the potential application of wage discrimination by the employer, cannot constitute a reason for termination by the employer of the contract of employment, nor a dissolution without notice, regardless of the way the employee accessed the information, that may indicate a violation of the principle of equal treatment in employment or application of wage discrimination".³¹ In another landmark judgment the Supreme Court held that "the exercise of powers conferred by law in connection with the birth and upbringing of the child cannot be regarded as an objective reason for determining a lower remuneration compared to other employees".³²

If a person suspects unequal pay for work of equal value based on sex discrimination, he/she is entitled to lodge a complaint to the court and has also the right to compensation in an amount no less than the monthly minimum remuneration for work under Article 18^{3d} of the LC. At the same time, an employee who has exercised his/her rights due to a violation of the principle of equal treatment in employment may not be exposed to any disadvantageous

²⁷ Article 18^{3b}(1) point 2.

²⁸ Article 94.

²⁹ See for instance: Act of 3 March 2000 on remuneration of persons in charge of legal entities, Journal of Laws of 2000, No. 26, item 206.

³⁰ Judgment of the Supreme Court of 25 May 2011, No. II PK 304/10.

³¹ Ibid. The quoting comes from the COMMISSION STAFF WORKING DOCUMENT, Report from the Commission to the Council and the European Parliament on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, ANNEX 3: EXAMPLES OF LANDMARK NATIONAL CASE-LAW ON EQUAL PAY, SWD(2013) 512 final, Brussels.

³² Judgment of the Supreme Court of 8 January 2008, No. II PK 116/07. The quoting comes from the COMMISSION STAFF WORKING DOCUMENT, Report from the Commission to the Council and the European Parliament on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, ANNEX 3: EXAMPLES OF LANDMARK NATIONAL CASE-LAW ON EQUAL PAY, SWD(2013) 512 final, Brussels.

treatment or negative consequences, including termination of an employment relationship by an employer, with or without notice.³³ However, obscure pay structures and a lack of available information about pay levels of employees performing the same work or work of equal value causes in practice that the victims of pay discrimination face difficulties to establish the facts that give rise to the presumption of discrimination in order to shift the burden of proof to the employer.

4. THE CONCEPT OF THE RIGHT TO PENSION

In terms of the right to social security having attained retirement age, this right is stated in Article 67(1) of the Constitution of the Republic of Poland. It needs to be emphasized that this provision does not provide for any directives regarding the retirement age which may therefore be specified in a separate statute. The legislator has defined the content and form of the right, yet, the freedom in shaping the regulation is limited by constitutional principles (of proportionality, social justice and equality). A retirement pension is a benefit arising from employment that has the nature of a claim, based on the principle of reciprocity. The source of the benefit comprises the contributions to the pension fund made by the insured persons who, in this manner, collects money for their future subsistence upon termination of their professional activity. The amount of the benefit depends on the amount paid in the form of contributions.³⁴ The constitutional principle of equality provides that all persons shall be equal before the law and have the right to equal treatment by public authorities.³⁵ The Constitutional Tribunal maintains that the principle of equality requires that all entities characterised to an equal degree by a certain significant (relevant) feature be treated identically, that is, according to the same measure and without differentiation that could amount to discrimination or favouritism.³⁶ Moreover, the Constitutional Tribunal emphasizes that the interpretation of Articles 32 and 33 of the Constitution must take into account Poland's international obligations stemming, in particular, from Articles 1 and 11 of the CEDAW.³⁷

The principle of equal treatment for men and women in matters of social security is implemented in Article 2a of the Act of 13 October 1998 on the Social Insurance System which explicitly guarantees equal treatment of all the insured, regardless of their gender.³⁸ This regulations specifies that the principle of equal treatment shall refer, in particular, to: the

³³ Article 18^{3e}(1) of LC

³⁴ See: European Network of Legal Experts in the Field of Gender Equality (2010), *Direct and indirect gender discrimination in old-age pensions in 33 European countries*, European Commission, available at: http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/dgjustice_oldagepensionspublication3march2011_en.pdf, [accessed: 7 February 2017].

³⁵ Article 32(1) of the Constitution of the Republic of Poland.

³⁶ Judgment of the Constitutional Court of 8 March 1988, No. U 7/87.

³⁷ Judgment of the Constitutional Court of 5 December 2000, No. K 35/99. See also: Judgment of the Constitutional Court of 28 March 2000, No. K 27/99.

³⁸ Journal of Laws of 2009, No. 205, item 1585 as later amended.

requirements that must be met to participate in the social insurance system, the duty to calculate and pay the contributions towards social insurance, the calculation of the level of benefits, including the period of benefit payment and the maintenance of the right for benefits.³⁹ The insured person who believes to have been treated in an unequal manner, has the right to claim damages before a court.⁴⁰ In addition, Article 6 of the Act of 3 December 2010 on the implementation of some regulations of the European Union regarding equal treatment states that unequal treatment of natural persons due to, *inter alia*, sex with regard to the access to and conditions of benefitting from social security shall be prohibited. Currently, the retirement age in Poland is differentiated with regard to sexes and it is back at 60 years for women and 65 years for men.⁴¹ Without a doubt the recent lowering of the retirement age has a significant influence on the amount of the monthly benefit that may be expected in the future, due to (a longer life expectancy and entitlement to pension benefits) and a shorter period of retirement capital accumulation. Nevertheless, the Constitutional Tribunal expressed the view that in the light of the social reality that the maternal and educational functions served by women result very often in a weaker position that women are in when it comes to the calculation of the level of their retirement pension, there is a constitutional justification for implementing a different retirement age for women and men (perceived as a so-called compensatory privileged treatment) and the required insurance period for the two sexes: lower and shorter for women and higher and longer for men (the insurance period for men is 5 years longer than that for women), aiming at a reduction of the inequalities between men and women.⁴² Compensatory measures serve to ensure real equality of rights for subjects who would otherwise have been in a worse position. At the same time, the Constitutional Tribunal made it clear that the alleged discriminatory effect (women are generally granted lower pension benefits on account of their shorter service) is not related to the age differentiation but to the consequences of women's choice to avail themselves of the possibility to retire earlier.⁴³ The Constitutional Tribunal noted that women are able to work after 60 and increase their expected benefits.

It is also worth noting that the Constitutional Tribunal has repeatedly indicated that the provisions allowing an employer full discretion to decide on earlier termination of the employment relationship in the event the employee is a female not a male when it comes to

³⁹ Article 2a(2).

⁴⁰ Article 2a(3).

⁴¹ Article 24(1) of the Act of 17 December 1998 on Old-Age and Disability Pensions from the Social Insurance Fund, Journal of Laws of 1998, No. 162 item 1118 as later amended. However, it should be mentioned that in 2012 the previous government adopted the age of 67 and the retirement age, equal for women and men. The change of the retirement age introduced in 2012 raised constitutional doubts. The Constitutional Tribunal decided that the legislator had the right to increase the retirement age. See: Judgment of the Constitutional Tribunal of 7 May 2014, No. K 43/12.

⁴² Judgment of the Constitutional Tribunal of 15 July 2010, No. K 63/07. See also: I. Pużycka, J. Wojnowska-Radzińska, *Zasada równości i zakaz dyskryminacji w Konstytucji RP*, [in:] Z. Niedbała, *Prawo wobec dyskryminacji w życiu społecznym, gospodarczym i politycznym*, Warszawa, 2011, pp. 278-280.

⁴³ Judgment of the Constitutional Tribunal of 7 May 2014, No. K 43/12.

the different regulation of retirement ages for women and men, lead to a situation in which women are deprived of the possibility to continue their professional activity on an equal basis with men. This constitutes discrimination against women on the grounds of their gender, and thereby amounts to an infringement of Articles 32(2) and 33 of the Constitution.⁴⁴ The principle of equality does not require however that each case in which the legal situation of a female employee features privileged treatment in some respect vis-à-vis the position of a male employee be compensated for by the imposition upon female employees of obligations or restrictions that do not relate to male employees.⁴⁵

5. HIGHLIGHTING THE “INVISIBLE’ OBSTACLES AND HOW TO TACKLE THEM BY AN AFFIRMATIVE ACTION

Analysing the Polish legal framework, it can be said that much progress has been made in granting women equal socio-economic rights and getting them into the workforce. Women comprise more than fifty percent of the Polish population.⁴⁶ The general participation rate of women aged 20 to 64 in the Polish labour market in 2015 stood at 60.09% and it significantly increased in comparison with the 2005 where the employment rate of women was 51.07%.⁴⁷ The statistical data of Eurostat indicates that in Poland the gender pay gap stands at 7.7 %⁴⁸ (the average gender pay gap in the EU is 16.3 %).⁴⁹ It means that the Polish situation seems to be good in comparison with the other EU Member States. Attention should also be paid on the latest update of the “Women in Work Index. Closing the gender pay gap” published by PricewaterhouseCoopers (PwC).⁵⁰ According to this research, Poland stands out for achieving the largest annual improvement, rising from the 12th to the 9th position owing to the fall in female unemployment and an increase in the full-time employment rate.⁵¹

⁴⁴ Judgment of the Constitutional Court of 5 December 2000, No. K 35/99. See also: Judgment of the Constitutional Court of 28 March 2000, No. K 27/99.

⁴⁵ Judgment of the Constitutional Court of 5 December 2000, No. K 35/99.

⁴⁶ The data comes from the Polish Central Statistical Office.

⁴⁷ European Union (EU) employment statistics, Data from November 2016, available at:

[http://ec.europa.eu/eurostat/statistics-](http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics#Further_Eurostat_information)

[explained/index.php/Employment_statistics#Further_Eurostat_information](http://ec.europa.eu/eurostat/statistics-explained/index.php/Employment_statistics#Further_Eurostat_information) [accessed: 20 January 2017].

⁴⁸ This number refers to the unadjusted gender pay gap which is calculated as the difference between the average gross hourly earnings of male and female paid employees as a percentage of average gross hourly earnings of male paid employees.

⁴⁹ See: Gender pay gap statistics, Eurostat, available at:

<http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tsdsc340&plugin=1> Across Member States, the gender pay gap varied by 21 percentage points, ranging from 5.5 % in Italy and Luxembourg to 26.9 % in Estonia. See: Ch. Boll, J. Leppin, A. Rossen, A. Wolf, *Magnitude and Impact Factors of the Gender Pay Gap in EU Countries*, European Commission - Directorate-General for Justice, 2016, available at: http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/160316_factors_gpg_en.pdf [accessed at: 1 February 2017]

⁵⁰ Tong Jing Teow, S. Jain, *PwC Women in Work Index. Closing the gender pay gap*, February 2017, available at: <http://www.pwc.co.uk/economic-services/WIWI-2017/pwc-women-in-work-2017-report-final.pdf> [accessed: 1 March 2017].

⁵¹ *Ibidem*, p. 6.

Moreover, Poland “could see the gender pay gap fully close within two decades if historical trends continue”.⁵²

Nevertheless, Poland is among the EU Member States where the proportion of those who believe that gender inequalities are now more widespread than ten years ago (23%).⁵³ Of all respondents, 40% agree that the father ought to prioritise his career over looking after his young child,⁵⁴ while 68% respondents agree that family life suffers when the mother has a full-time job.⁵⁵ Only 15% of the respondents agree that recruitment procedures do not discriminate against women. Also 37% respondents indicate work as the most widely area of life where gender stereotyping is perceived to be widespread.⁵⁶ Furthermore, the gender gap in the level of pensions received by pensioners aged 65 to 79 is 24%.⁵⁷ This means that women pensioners face higher risks of poverty in old age than men, despite the fact that the prohibition of discrimination entitles women and men to equal conditions in respect to old-age pensions. The issue of the gender gap in pensions constitutes a logical extension of the concerns with remuneration inequalities. The CESCR and the CEDAW Committee pay considerable attention to these problems. In its latest report of Poland, the CESCR indicated that Poland should take further measures to address the difference of remuneration for work of equal value, among other things by: “enforcing legislation and strengthening the capacity of labour inspectorates with regard to monitoring wage differentials; developing assessment tools to oversee compliance with the principle of equal remuneration for work of equal value; enhancing transparency on wages, particularly in the public sector; and promoting policies favouring gender equality in the workplace”.⁵⁸ The Committee was also concerned about the lack of progress towards a unified pension system.⁵⁹ In a similar vein, the CEDAW Committee recommended Poland to “ensure equal remuneration for work of equal value, including through mandatory equality plans for public and private employers and labour inspections; and address the limited effectiveness of legal provisions on remuneration, in particular through the development of a methodology for the assessment of the wage gap in companies as well as awareness-raising within the State party’s associations of employers and trade-unions”.⁶⁰

Bearing in mind the above-mentioned figures, it is essential to point out that the existing legal provisions on the equal treatment of men and women (formal equality) in relation to their right to work by ensuring equal pay for work of equal value and the right to social security are inadequate for the elimination of all the existing inequalities. Parallel

⁵² Ibidem, p. 6.

⁵³ Special Eurobarometer 428, *Gender Equality Report*, March 2015, p. 9.

⁵⁴ Ibid., p. 19.

⁵⁵ Ibid., p. 16.

⁵⁶ Ibid., p. 29.

⁵⁷ European Commission, F. Bettio, P. Tinios, G. Betti, *The Gender Gap in Pensions in the EU*, 2013.

⁵⁸ CESCR, CESCR, *Concluding observations on the sixth periodic report of Poland*, 7 October 2016, E/C.12/POL/CO/6, para. 23.

⁵⁹ Ibid., para. 26.

⁶⁰ CEDAW Committee, *Concluding observations on the combined seventh and eighth periodic reports of Poland*, 7 November 2014, CEDAW/C/POL/7-8, para. 33.

action must be taken by the Polish government to prevent the biased effects on women in employment stemming from social attitudes, behaviour and structures. This is also in line with Article 5(a) of the CEDAW according to which State Parties are obliged to take all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and the customary and all other practices based on the idea of the inferiority or the superiority of either of the sexes or on the stereotyped roles for men and women. It is noteworthy that the CESCR also addresses “gender-based assumptions and expectations [which] generally place women at a disadvantage position with respect to substantive enjoyment of rights, such as freedom to act and to be recognized as autonomous, fully capable adults, to participate fully in economic, social and political development, and to make decisions concerning their (...) conditions”.⁶¹ Therefore, equal enjoyment of the social and economic rights for men and women can be achieved in practice by, *inter alia*, understanding equality in the substantive manner. The CESCR clarifies that “[f]ormal equality assumes that equality is achieved if a law or policy treats men and women in a neutral manner. Substantive equality is concerned, in addition, with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience.”⁶² Furthermore, the CESCR emphasizes that the “[s]ubstantive equality for men and women will not be achieved simply through the enactment of laws or the adoption of policies that are gender-neutral on their face. (...) State parties should take into account that such laws, policies and practice can fail to address or even perpetuate inequality between men and women, because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women”.⁶³ S. Fredman notes that “substantive equality aims to redress disadvantage in its specifically gendered context, including women’s subordinate position in the family and reproduction, in the paid workforce and in other relationships of power. In particular, substantive equality contemplates different treatment in order to redress disadvantage”.⁶⁴ In other words, taking affirmative action measures in favour of women can be required in order to suppress conditions that perpetuate discrimination.⁶⁵ Under Polish law, regulations providing different minimum retirement ages for men (65) and women (60) are an example of such an affirmative action. Poland, as a State Party to the

⁶¹ CESCR, General comment No. 16 (2005), The equal rights of men and women to the enjoyment of all economic, social and cultural rights (Art. 3 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2005, E/C.12/2005/4, para. 14. See also: A. Timmer, *Gender Stereotyping in the case law of the EU Court of Justice*, European Equality Law Review, Issue 1/2016, pp. 37-46.

⁶² *Ibid.*, para. 7.

⁶³ *Ibid.*, para. 8.

⁶⁴ S. Friedman, *op. cit.*, p. 226. See also: U. Lembke, *Tackling sex discrimination to achieve gender equality? Conceptions of sex and gender in EU non-discrimination law and policies*, European equality Law Review, Issue 2/2016, pp. 46-55.

⁶⁵ CESCR, General comment No. 16 (2005), The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the International Covenant on Economic, Social and Cultural Rights), 11 August 2005, E/C.12/2005/4, para. 15.

ICESCR has a margin of discretion in adopting appropriate measures in complying with its primary and immediate obligation to ensure the equal right of men and women to the enjoyment of all their economic and social rights.⁶⁶ As the CESCR specifies, these measures “should be based on systematic identification of policies, programmes and activities relevant to the situation and context within the State”.⁶⁷ According to the view of public opinion, almost 74% of Polish citizens do not accept the equal retirement age.⁶⁸ As E. Zielińska indicates, “supporters of maintaining a diversified retirement age on grounds of sex often rely on the fact that the retirement age of 60 is not an obligation for women, and that they will be able to continue their careers for longer, thereby increasing the amount of their pension”.⁶⁹ Another argument is that the “lower retirement age for a woman allows her to fulfil her duties as a grandmother which often plays an important role in educating a new generation in Polish society.”⁷⁰

To sum up, the Polish authorities should pay a particular attention to ensuring that women can make an effective use of their social and economic rights. Poland as a State Party to international human right treaties and a Member State of the EU is obliged “to eliminate all forms of discrimination against women with a view to achieving women’s de jure and de facto equality with men in the enjoyment of their human rights and fundamental freedoms”.⁷¹

6. CONCLUSIONS

The economic independence is a prerequisite for enabling both women and men to exercise their right to control their lives and to make informed choices. Poland as a Member State of the UN and the EU has made considerable legislative work to ensure that women could exercise their rights to equal pay for equal work or work of equal value and social security having attained the retirement age, without discrimination based on sex. However, it is not enough to tackle the socio-economic inequalities between men and women. The Polish government should take long-term efforts to reduce the persisting gender pay and pension gaps and address the root causes of the gender pay and pension gaps which require a multi-faceted approach. Comprehensive and continuous gender equality policies are part of the appropriate measures that need to be undertaken in order to ensure that women enjoy equal economic independence. Therefore, it is highly recommended that the government should

⁶⁶ Ibid., para. 32.

⁶⁷ Ibid., para. 33.

⁶⁸ CBOS, *WIEK EMERYTALNYKobiet I MĘŻCZYZN – TAKI SAM CZY RÓŻNY*, Komunikat badań BS/49/2010, p. 1.

⁶⁹ European Network of Legal Experts in the Field of Gender Equality (2010), *Direct and indirect gender discrimination in old-age pensions in 33 European countries*, European Commission, p. 278, available at: http://ec.europa.eu/justice/gender-equality/files/conference_sept_2011/dgjustice_oldagepensionspublication3march2011_en.pdf, [accessed: 1 February 2017].

⁷⁰ Ibid.

⁷¹ CEDAW Committee, General Recommendation No. 25: Article 4, paragraph 1, of the Convention (temporary special measures), 2004, para. 4.

cooperate with the equality bodies and labour inspectorates in implementing policies with relation to:

- drawing up job classification systems free from gender prejudice in order to measure and compare the jobs which are different but are of equal value.
- Adoption of objective criteria to assess the value of work including the differences between women and men in reconciling work and family responsibilities;
- raising awareness of the whole society that family and care responsibilities are still not equally shared;
- educating women that taking an early retirement should be a conscious choice of a lower benefit, when compared to a benefit the person would have received after the attainment of a common retirement age.

SEXUALITY EDUCATION IN POLAND - IS IT DONE THE RIGHT WAY?

1. INTRODUCTION

Sexuality education has never been an easy topic in Polish society and for the Polish government. Despite some regulations which exist in domestic law and the international regulations that bind Poland, the situation (in practice) is very complex. The reason is Polish mentality, culture and the influence of the Catholic religion. Although it has been more than one hundred years since the first social movement of sexuality education pioneers was created⁷², there are still a lot of difficulties and practical problems to overcome.

It should be stressed that 'sexuality education does not encourage children and young people to have sex'.⁷³ According to the Standards for Sexuality Education in Europe, sexuality education is widely understood as: 'Learning about the cognitive, emotional, social, interactive and physical aspects of sexuality. Sexuality education starts early in childhood and progresses through adolescence and adulthood. For children and young people, it aims at supporting and protecting sexual development. It gradually equips and empowers children and young people with information, skills and positive values to understand and enjoy their sexuality, have safe and fulfilling relationships and take responsibility for their own and other people's sexual health and well-being'.⁷⁴

The key problem is that in Polish schools sexuality education is called 'family life education'. This name emphasizes its stronger connotations with a traditional family model. However, the main goal of this subject should be passing information about methods of contraception and sexually transmitted diseases. Therefore, there are doubts whether these issues should only be presented from the biological point of view or whether sexuality education should also include mental aspects of human's sexuality. It should be indicated that there is a conflict between supporters of 'family life planning' and 'sexuality education' which concerns the content of the subject taught in the class, the order in which it is presented, and the methodology of teaching⁷⁵. Another important question that needs to be answered is whether the curriculum should include topics that may be taught differently depending on personal beliefs of a teacher. In practice, it is very difficult to find an impartial teacher whose beliefs do not have an influence on the passing of knowledge and whose

⁷² E. Pęczkowska, E. Wejbert-Wąsiewicz, *Problemy edukacji seksualnej w Polsce*, Przegląd Socjologiczny, No. 3/2009, Łódzkie Towarzystwo Naukowe, p. 173.

⁷³ Sexuality Education Policy Brief No. 1, p. 1, available at: <http://www.ippfen.org/sites/ippfen/files/2016-12/Policy%20Brief%20n%201%20on%20Sexuality%20Education.pdf>, [accessed: 28 February 2017].

⁷⁴ WHO Regional Office for Europe and BZgA. *Standards for Sexuality Education in Europe: A framework for policy makers, education and health authorities and specialists*. Cologne, 2010, available at: http://www.oif.ac.at/fileadmin/OEIF/andere_Publikationen/WHO_BZgA_Standards.pdf, [accessed: 28 February 2017].

⁷⁵ E. Pęczkowska, E. Wejbert-Wąsiewicz, *Problemy edukacji seksualnej w Polsce*, Przegląd Socjologiczny, No. 3/2009, Łódzkie Towarzystwo Naukowe, p. 181.

attitude will not arouse controversy among parents. Due to a highly specific matter as well as the difficult time of adolescence, students frequently experience problems with accepting the teacher responsible for their sexuality education. Moreover, there is lack of properly educated staff who could pass knowledge on reproductive health and sexuality⁷⁶.

2. THE MEANING OF SEXUALITY EDUCATION

One of the most problematic issues concerning ‘sexuality education’ is misunderstanding what should be defined by this term. The concept of sexuality education cannot be distorted. It should be stressed that the definition and requirements of sexuality education are commonly accepted by international human rights law and have been specified in many international documents concerning human rights. Moreover, it should be indicated that: ‘International human rights standards require that governments guarantee the rights of adolescents to health, life, education and non-discrimination by providing them comprehensive sexuality education in primary and secondary schools that is scientifically accurate and objective, and free of prejudice and discrimination’.⁷⁷ Sexuality education is related to the right to health and the right to education. A proper sexuality education should provide information on reproductive health and sexuality. An individual shall only be able to protect his or her life and health if he or she has received a comprehensive education.

2.1 INTERNATIONAL INSTRUMENTS

The key international treaty that has a significant influence on the Polish legal system is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Convention was adopted in 1979 by the UN General Assembly and since then it has been perceived as an international bill of rights for women. The basic aim of this Convention is to put an end to all forms of discrimination against women. Poland ratified the CEDAW in 1980.

Article 10(h) of the CEDAW provides that States Parties are obliged to ensure women, *inter alia*, ‘access to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning’. Nevertheless, in order to broaden the importance of sexuality education, the Committee on the Elimination of Discrimination against Women adopted the General Recommendation No 28⁷⁸, which clearly recognizes the obligation of States Parties to provide sexuality education and develop programs about reproductive health, prevention of HIV/AIDS, pregnancies and sexual exploitation. The Recommendation also underscores the specific needs of adolescent girls.⁷⁹

⁷⁶ Ibid., p. 173.

⁷⁷ An International Human Right: Sexuality Education for Adolescents in Schools, September 2008, p. 1.

⁷⁸ Committee on the Elimination of Discrimination against Women, General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, 19 October 2010, (CEDAW/C/2010/47/GC.2).

⁷⁹ Ibid, para. 21.

The United Nations Convention on the Rights of the Child (UNCRC) is another international treaty which explicitly refers to sexuality education. Poland ratified the UNCRC on 7 June 1991. Article 13(1) of the Convention on the Rights of the Child expresses the right to receive and impart information of all kinds. Article 24(2f) provides that State Parties are obliged to ‘develop preventive health care, guidance for parents and family planning education and services’. Despite the fact that Poland was one of the most active supporters of the Convention, it ratified it with reservations. The government of the Republic of Poland declared that family planning education and services should be performed in accordance with the rules of morality under Article 24(2f) of the Convention. What is more, the Polish government decided also that the provisions of Articles 12 to 16 should respect parental authority, the Polish customs and traditions and general convictions about the place of a child in a family and outside the family.

The Committee on the Rights of the Child (CRC) has recognized the importance of sexuality education in its additional documents. In General Comment No. 4 the Committee emphasized that: ‘(...) States parties have not given sufficient attention to the specific concerns of adolescents as rights holders and to promoting their health and development’.⁸⁰ Moreover, the General Comment No. 4 recognizes the obligation to ‘(...) provide adolescents with access to sexual and reproductive information, including on family planning and contraceptives, the dangers of early pregnancy, the prevention of HIV/AIDS and the prevention and treatment of sexually transmitted diseases (STDs)’.⁸¹ The CRC also recalls a need for proper methods of passing information on sexuality education and encourages State Parties to involve adolescents in ‘(...) the design and dissemination of information through a variety of channels’.⁸²

Moreover, General Comment No. 15⁸³ gives additional guidelines for sexual and reproductive education and its scope. The CRC clarifies that sexual education: ‘(...) should include self-awareness and knowledge about the body, including anatomical, physiological and emotional aspects, and should be accessible to all children, girls and boys’.⁸⁴ Furthermore, ‘States should ensure that adolescents are not deprived of any sexual and reproductive health information or services due to providers’ conscientious objections’.⁸⁵ It is also worth mentioning the latest General Comment⁸⁶ of the CRC. The Committee stresses the importance of sexuality education, calling for: ‘Age-appropriate, comprehensive and inclusive

⁸⁰ Committee on the Rights of the Child, General comment No. 4 (2003), Adolescent health and development in the context of the Convention on the Rights of the Child, July 2003, CRC/GC/2003/41.

⁸¹ Ibid., para. 24.

⁸² Ibid.

⁸³ Committee on the Rights of the Child, General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), 17 April 2013, CRC/C/GC/15.

⁸⁴ Ibid., para. 60.

⁸⁵ Ibid., para. 69.

⁸⁶ Committee on the Rights of the Child, General comment No. 20 (2016) on the implementation of the rights of the child during adolescence, 6 December 2016, CRC/C/GC/20.

sexual and reproductive health education, based on scientific evidence and human rights standards and developed with adolescents (...).⁸⁷

The recognition of sexual education was also expressed in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Covenant was ratified by Poland on 3 March 1977. The general standards for sexuality education are expressed in Article 12(1): ‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’ and in Article 13(1) which recognizes the right of everyone to education that ‘(...) shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms’.

The Committee on Economic, Social and Cultural Rights (CESCR) has consistently expressed the need for providing sexuality education. Its remarks can be found in General Comment No. 14, which is dedicated to the Right to the Highest Attainable Standards of Health.⁸⁸ The Committee interprets ‘the right to health, as defined in Article 12(1), as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to (...) health-related education and information, including on sexual and reproductive health’.⁸⁹ The Committee clearly indicated in General Comment No. 22⁹⁰ ‘the right to sexual and reproductive health is an integral part of the right of everyone to the highest attainable physical and mental health’.⁹¹ Moreover, the CESCR stresses that unavailability of sexual and reproductive education cannot be an obstacle ‘(...) due to ideologically based policies or practices (...)’.⁹² It should be mentioned that the Committee stipulates that sexual education ‘(...) must be respectful of the culture of individuals (...)’⁹³ but at the same time it emphasizes that: ‘(...) this cannot be used to justify the refusal to provide tailored facilities, goods, information and services to specific groups’.⁹⁴

The other international treaty providing sexuality education is the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) adopted in 2006. The Republic of Poland ratified the Convention in 2012. According to the UNCRPD States Parties are obliged to: ‘Provide persons with disabilities with the same range, quality and standard of free or affordable health care and programs as provided to other persons, including in the area

⁸⁷ Ibid., para. 61.

⁸⁸ Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), Adopted at the Twenty-second session of the Committee on Economic, Social and Cultural Rights, 11 August 2000, E/C.12/2000/4.

⁸⁹ Ibid., para. 11.

⁹⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 22 (2016) on the Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights), 1 May 2016, E/C.12/GC/22.

⁹¹ Ibid., para. 11.

⁹² Ibid., para. 14.

⁹³ Ibid., para. 20.

⁹⁴ Ibid., para. 20.

of sexual and reproductive health and population-based public health programs'.⁹⁵ The Committee on the Rights of Persons with disabilities highlights that women with disabilities may also be denied access to information and communication, including comprehensive sexuality education, based on harmful stereotypes that assume that they are asexual and do not therefore require such information on an equal basis with others.⁹⁶

2.2 REGIONAL INSTRUMENTS

Regarding the regional instruments it is essential to mention the European Convention on Human Rights (ECHR)⁹⁷. Despite the fact that the Convention does not mention sexuality education, this issue was analyzed by the European Court of Human Rights (ECtHR), *inter alia*, in cases of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*⁹⁸ and *W., A. and D. Dojan v. Germany*⁹⁹.

The first case *Kjeldsen, Busk Madsen and Pedersen v. Denmark*¹⁰⁰ concerns the freedom of parents to educate their children according to their religious and philosophical convictions as guaranteed by Article 2 of Protocol 1 to the ECHR.¹⁰¹ Denmark introduced sexuality education to primary schools as a response to a growing rate of unwanted pregnancies and abortions among young people. Parents objected to the idea of integrating compulsory sexuality education at schools. They claimed that their children were indoctrinated. The Court had to decide 'whether the introduction of integrated, and consequently compulsory, sex education in State primary schools by the Danish Act of 27 May 1970 constitutes, in respect of the applicants, a violation of the rights and freedoms guaranteed by the European Convention on Human Rights, and in particular those set out in Articles 8, 9 and 14 of the Convention and Article 2 of the First Protocol'.¹⁰² The ECtHR held that the parents' rights were not violated by the domestic legislation indicating that: '(...) the disputed legislation in itself in no way offends the applicants' religious and philosophical convictions (...)'.¹⁰³ Moreover, the Court stated that the Danish legislation prescribing sexual education did not amount to indoctrination or

⁹⁵ Article 25(a) of the UNCRPD.

⁹⁶ Committee on the Rights of Persons with disabilities, General Comment No. 3 (2016), Article 6: Women and girls with disabilities, 2 September 2016, CRPD/C/GC/3.

⁹⁷ European Convention on Human Rights as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 6, 7, 12 and 13.

⁹⁸ ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Application No. 5095/71; 5920/72; 5926/72.

⁹⁹ ECtHR 13 September 2011, *W., A. and D. Dojan v. Germany*, Application No. 319/08.

¹⁰⁰ ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Application No. 5095/71; 5920/72; 5926/72.

¹⁰¹ Article 2 of Protocol No. 1 to the ECHR prescribes that: 'No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.

¹⁰² ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Application No. 5095/71; 5920/72; 5926/72. para. 46.

¹⁰³ *Ibid.*, para. 54.

advocacy of a specific kind of sexual behaviour, as information was presented in an objective, critical and pluralistic manner.¹⁰⁴

The second case *W. A. and D. Dojan v. Germany*¹⁰⁵ concerned a similar problem. The applicants were very religious people and they questioned the authorities' refusal to exempt their children from the mandatory sexual education classes and other school activities. They invoked a violation of the same provisions as the applicants in the case *Kjeldsen, Busk Madsen and Pedersen v. Denmark*. The applicants emphasized that they were bringing up their children in accordance with the rules of their religion, in modesty, and that their children were not mature enough to receive proposed information on sexuality education. The Court found that: '(...) there was no indication that the education provided had put into question the parents' sexual education of their children based on their religious convictions or that the children had been influenced to approve of or reject specific sexual behaviour contrary to their parents' religious and philosophical convictions'.¹⁰⁶ Moreover, the ECtHR stressed that parents remained free to educate their children after school as they wished. In other words 'compulsory primary-school attendance did not deprive the applicant parents of their right to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions'.¹⁰⁷

3. POLISH LAW

3.1 CONSTITUTIONAL BACKGROUND

The Constitution of the Republic of Poland¹⁰⁸ was adopted on 2 April 1997 and came into effect on 17 October 1997. The Constitution is the most important Polish legal act which presents fundamental rules and represents the main ideas that Poland is to follow.

The Constitution refers to God in the Preamble: 'We, the Polish Nation - all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, (...)' but also 'Recognizing our responsibility before God or our own consciences (...)'. Although the text of the Preamble does not indicate that Catholicism is the official religion in Poland, (as can be seen) the bonds with Catholic Church are very strong.

The main provision on sexuality education that can be found in Polish Constitution is Article 48. It states that: '1. Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions. 2. Limitation or deprivation of parental rights may be effected only in the instances specified by statute and

¹⁰⁴ Ibid., para. 53.

¹⁰⁵ ECtHR 13 September 2011, *W., A. and D. Dojan v. Germany*, Application No. 319/08. However, the ECtHR declared the application inadmissible.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Journal of Laws of 1997, No. 78, item 483.

only on the basis of a final court judgment’.

However, it is also essential to mention two other provisions of the Constitution that express the position of international law in the Polish legal order. One of them is Article 9 which indicates that: ‘The Republic of Poland shall respect international law binding upon it.’ The second is Article 87, providing that ‘1. The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations’. This means that the Polish law has to be in line with international treaties to which Poland is a party.

3.2 POLISH LEGISLATION

The issue of sexuality education is included in the Act of 7 January 1993 on Family Planning, Protection of Human Fetus and Conditions for the Lawful Termination of Pregnancy.¹⁰⁹ Article 4 of this Act specifies that knowledge of human sexuality should be a part of a school’s curriculum. The Polish legislator prescribes that the aim of this subject is to focus on sexuality, responsible parenthood, importance and value of family life, knowledge about prenatal life as well as methods of procreation. The more detailed provisions concerning sexual education are included in the Regulation of the Minister of National Education of 12 August 1999 on the manner of school teaching and the scope of content regarding knowledge on human sexual life, the principles of planned and responsible parenthood, value of family, life in prenatal phase and methods and means of planned procreation contained in the core curriculum of general education.¹¹⁰ It should be mentioned that so far this regulation has been amended six times. The regulation discussed, provides that a subject entitled ‘family life education’ should be introduced at school. This subject should be conducted in the fifth and sixth grades of primary schools but also in middle schools, basic vocational schools, secondary schools, profiled secondary schools and in 1-3 grades of technical colleges, including special schools for children and adolescents, public and non-public school with public school authorizations.¹¹¹ This means that children in Poland begin their sexuality education at the age of eleven or twelve. The second paragraph of the Regulation decides that the curriculum should be coherent with the educational and precautionary goals of the school and provides that the curriculum should support the educational role of a family, and promote the integral concept of human’s sexuality. It further indicates the need to promote pro family, pro health, and pro society attitudes. Teachers are given fourteen hours per school year to realize the curriculum and additional five hours for lessons to be conducted in gender divided groups. There should be no more than twenty-eight students in a group. Schools which are not public may plan more hours for realizing a curriculum of sexual education.

¹⁰⁹ Journal of Laws of 1993, No. 17, item 78 as later amended.

¹¹⁰ Journal of Laws of 2014, No. 2014, item 395.

¹¹¹ *Ibid.*, para. 1.

According to the Regulation of the Minister of National Education, participation in the classes dedicated to ‘family life education’ is not mandatory. If the parents do not want the school to educate their children on this matter the latter are under no obligation to attend the course. In such a situation parents have to submit their children’s resignation from family life education classes. The same right is given to the adult students of legal age, which under Polish law is eighteen. It should also be mentioned that students do not receive grades upon the realization of the program.

The Regulation of the Minister of National Education requires a family life education’s teacher and a class tutor to organize at least one parents’ meeting to present information about the curriculum and the methods in which the subject will be or is being taught.

It should be mentioned that on its website the Polish Ministry of Education suggests topics for the family life education classes¹¹². They include *inter alia*: choosing a partner, falling in love, the relationship between a girl and a boy, saying ‘no’ to the sexual pressure, realizing dreams, secrets of happy marriages or how to give a birth to a healthy child. There is nothing about discovering sexual identity, STDs or birth control methods. A lot of attention is given to the identification as a girl or boy, recognizing differences among genders and acceptance of those distinctions.¹¹³

4. RECOMMENDATIONS OF THE INTERNATIONAL BODIES

Despite the fact that Poland is bound by international treaties, the Polish government does not fulfill its duties to provide sexual education in an objective, critical and pluralistic manner. There are several international bodies, *inter alia*, the UN treaty-monitoring bodies¹¹⁴ which have raised concerns about the scope of sexuality education in Poland.

The *Concluding observations on the combined seventh and eighth periodic reports of Poland* prepared by the Committee on the Elimination of Discrimination against Women are worth mentioning.¹¹⁵ This document is based on a previous periodic report sent by the Polish government. The Committee expresses its concern about ‘(...) the persistence of deep-rooted gender stereotypes concerning the roles and responsibilities of women and men in the family and society, which continue to be present in the media, education materials, and are reflected by the traditional educational choices of women and their disadvantaged position in the labour

¹¹² Ministerstwo Edukacji Narodowej, Ośrodek Rozwoju Edukacji, *Wychowanie do życia w rodzinie. Scenariusze zajęć*, Warszawa 2015, available at: https://men.gov.pl/wp-content/uploads/2015/10/poradnik2_scenariusze.pdf, [accessed: 22 February 2017].

¹¹³ *20 lat tzw. Ustawy antyaborcyjnej w Polsce, Raport 2013*, Federacja na rzecz Kobiet i Planowania Rodziny, p. 46.

¹¹⁴ The UN treaty-monitoring bodies ‘make periodic observations and recommendations to each state party about its compliance or lack of compliance with a particular treaty. They also issue general comments that elaborate on the content and scope of the rights enshrined in the treaties’. See: *An International Human Right: Sexuality Education for Adolescents in Schools*, September 2008.

¹¹⁵ Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of Poland*, 7 November 2014, CEDAW/C/POL/CO/7-8.

market, as well as by widespread violence against women'.¹¹⁶ The Committee also refers to the Polish Catholic Church's campaign against 'gender ideology', and 'the absence of a mandatory comprehensive age appropriate education on sexual and reproductive health in school curricula'.¹¹⁷ The Committee notices '(...) the barriers adolescent girls may face accessing information and reproductive health services including contraception'.¹¹⁸ The Committee recommends the Polish government to 'provide mandatory comprehensive age appropriate education on sexual and reproductive health and rights to girls and boys, as part of the regular school curricula, including responsible sexual behaviour, prevention of early pregnancies and sexually transmitted diseases, taught by appropriately trained personnel'.¹¹⁹

In turn, the Committee on the Rights of the Child noted a problem of insufficient reproductive health education and advised to: '(...) institute health education and awareness programs specifically for adolescents on sexual and reproductive health'.¹²⁰

It is also important to mention the UN Economic and Social Council (ECOSOC) latest *Concluding observations on the sixth periodic report of Poland*. The Council discerned the problem with sexuality education in Poland and recommended to: 'Promote comprehensive and age-appropriate sexual and reproductive education for both sexes in schools and informal settings'.¹²¹ This problem was also noted in the Human Rights Committee's report from 2004 emphasizing '(...) the lack of free family planning services and the nature of sexual education are also of concern to the Committee'.¹²² Similar results were presented in the Human Rights Committee's observation from 2010.¹²³ The Committee expressed its concern about the denied access to reproductive health services.

The Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health also indicates the problem with sexuality education in Poland¹²⁴. The Rapporteur positively assesses some progress in ensuring access to health-related services but also implies that certain issues still leave much to be desired. One of them is the right to sexual and reproductive health. The Special Rapporteur notes that: 'Family life courses focus narrowly on marriage and family and touch only to a very limited extent on issues of sexuality and procreation, merely promoting abstinence and traditional

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Committee on the Rights of the Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, 30 October 2002, CRC/C/15/Add.194.

¹²¹ Concluding observations on the sixth periodic report of Poland, ECOSOC, 26 October 2016, E/C.12/POL/CO/6.

¹²² Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant. Concluding observations of the Human Rights Committee, Poland, 2 December 2004, CCPR/CO/82/POL.

¹²³ Human Rights Committee, Consideration of reports submitted by State parties under Article 40 of the Covenant. Concluding observations of the Human Rights Committee, 27 October 2010, CCPR/C/POL/CO/6.

¹²⁴ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 20 May 2010, available: A/HRC/14/20/Add.3 <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/134/03/PDF/G1013403.pdf?OpenElement> [accessed 22 February 2017].

methods of family planning'.¹²⁵ The Special Rapporteur recommends Poland to adopt: '(...) mandatory, age-appropriate, comprehensive, science and evidence-based, non-discriminatory and gender-sensitive sexuality education taught by appropriately trained personnel, including non-judgmental information and education on healthy relationships and family life, sex and relationships, and comprehensive sexual and reproductive health'.¹²⁶

5. ROOM FOR IMPROVEMENT

The common anxiety present in Polish society is arises from the misunderstanding what sexuality education means and the fear that it may lead to premature sex behaviors. However, 'studies in several European countries have shown that the introduction of long-term national sexuality education programs has led to a reduction in teenage pregnancies and abortions and a decline in rates of sexually transmitted infections (STIs) and HIV infections among young people aged 15-24 years'.¹²⁷ It is often indicated that proper sexuality education may also help to create better relationships among people. What is more, a better recognition of socially accepted sexual behaviors reduces the probability of a child becoming a pedophile's victim. It is especially important for children at preschool age. Moreover, the traditional approach to women's and men's roles in the relationships needs rethinking. It is especially important during teaching on sexual violence including rape. Education concerning these particular issues often focuses on '(...)[reinforcing] women as passive non-sexual or reluctant subjects with men [being] the assertive sexual aggressors'.¹²⁸ This method of teaching may be inefficient, as it places woman in a passive position and '(...) can result in reinforcing traditional gender expectations using danger and the threat of rape (...)'.¹²⁹ Not even to mention the lack of insufficient information on same-sex relations, also in the context of sexual violence. M. Carmody points to the fact that in such an approach knowledge is merely passed without the concept of a '(...) pleasurable ethical sexual intimacy'¹³⁰ and this is why it is necessary to work '(...) with young people around the negotiation of sexual intimacy'.¹³¹ What is more, a certain amount of time of sexuality education classes should be devoted to homosexuality issues, especially since school age is the time when teenagers discover their sexuality and may feel intimidated by what they feel. There is also a problem of aggression and prejudice against homosexual students. As Ch. Kennedy and K. Covell stress 'sexual prejudice appears to be related to a lack of knowledge about homosexuality and no experience with homophobic-supportive

¹²⁵ Ibid.

¹²⁶ Ibid., Article 85(b).

¹²⁷ WHO Regional Office for Europe and BZgA. *Standards for Sexuality Education in Europe: A framework for policy makers, education and health authorities and specialists*. Cologne, 2010, available at: http://www.oif.ac.at/fileadmin/OEIF/andere_Publikationen/WHO_BZgA_Standards.pdf, [accessed: 28 February 2017].

¹²⁸ M. Carmody, *Preventing Adult Sexual Violence Through Education?*, Current Issues in Criminal Justice, Vol. 18 (2006-2007), p. 346.

¹²⁹ Ibid.

¹³⁰ Ibid., p. 351.

¹³¹ Ibid., p. 352.

classroom behaviors’.¹³² The problem of homosexuality is currently given no notice in Polish schools and homosexual students often are victims of verbal or physical aggression. Neither do they receive support from their teachers. NGOs and politicians have reported an ‘increasing acceptance of LGBT persons by society and the government but discrimination [is] still common in schools, workplaces, hospitals, and clinics’.¹³³ ‘Schools that promote or maintain sexual prejudice against students of sexual minority status are schools that are not respecting the rights of the child’.¹³⁴ According to the research conducted by the Educational Research Institute¹³⁵ ‘because of the attitudes of teachers, between 40% to 65% of young people never dared to mention any of the following problems during a family life class: sexual violence, risky sexual behaviors, sexual initiation, sexual abstinence, sexual intercourse, libido, early parenthood, masturbation, abortion, right to intimacy, moral issues in sexual relations, sexuality as a source of satisfaction, orgasms, pornography’.¹³⁶ This shows that Polish family life classes avoid topics involving sexuality even though students claim they want and feel a need to talk about the above-mentioned with their teacher. According to the research of adolescents feel intimidated and afraid to talk about their sexual life with their parents.¹³⁷ The Polish Government also reported that: ‘According to the Center for Reproductive Rights, sexuality-related counseling services for young persons are not available’.¹³⁸ Studies from 2007-2011¹³⁹ show the lowest attendance on family life education in high schools, which is the usual time when young people start being sexually active. It is reported that adolescents do not want to attend classes where only a traditional, conservative family life model and approach to sexuality are presented.¹⁴⁰

What also needs to be mentioned is the evaluation of sexuality education.¹⁴¹ As M. Carmody claims: ‘The issue of evaluating the effectiveness of prevention education is a complex one’.¹⁴² It is not only the program of sexuality education that has to be properly

¹³² Ch. Kennedy, K. Covell, *Violating the Rights of the Child through Inadequate Sexual Health Education*, International Journal of Children’s Rights Vol. 17 (2009), p. 151.

¹³³ United States Department of State, *2014 Country Reports on Human Rights Practices - Poland*, 25 June 2015, available at: <http://www.refworld.org/docid/559bd54628.html> [accessed 23 January 2017].

¹³⁴ Ch. Kennedy, K. Covell, *Violating the Rights of the Child through Inadequate Sexual Health Education*, International Journal of Children’s Rights 17 (2009), p. 151.

¹³⁵ Instytut Badań Edukacyjnych, *Zagadnienia warte opracowania w postaci materiałów dla nauczycieli WDŻ i dyrektorów szkół*, Warszawa, 20 July 2015, p. 15, available at: <http://www.ibe.edu.pl/images/materialy/rekomendacje-IBE-ekd.pdf>, [accessed: 22 February 2017].

¹³⁶ Ibid.

¹³⁷ E. Pęczkowska, E. Wejbert-Wąsiewicz, *Problemy edukacji seksualnej w Polsce*, Przegląd Socjologiczny, No. 3/2009, Łódzkie Towarzystwo Naukowe, p. 188.

¹³⁸ United States Department of State, *2015 Country Reports on Human Rights Practices - Poland*, 13 April 2016, available at: <http://www.refworld.org/docid/5716122015.html> [accessed 23 January 2017].

¹³⁹ *20 lat tzw. Ustawy antyaborcyjnej w Polsce, Raport 2013*, Federacja na rzecz Kobiet i Planowania Rodziny, p. 40.

¹⁴⁰ Ibid.

¹⁴¹ The lack of a proper evaluation mechanism was emphasized in the Report prepared by Polish NGO “Federa” which indicates an absence of regular and consistent monitoring of the progress achieved and the difficulties to be solved.

¹⁴² M. Carmody, *Preventing Adult Sexual Violence Through Education? Current Issues in Criminal Justice*, Vol. 18 (2006-2007), p. 345.

planned, but there is also a need for adopting an effective evaluation mechanism to know the impact of education on the teenagers and their behaviors. This is the only way to improve sexual education and adjust to adolescents' needs. It should be mentioned that a proper evaluation mechanism is also recommended by the UNAIDS: 'Programme evaluation should be grounded in a solid study design and valid and appropriate statistical techniques'.¹⁴³ Finally, it is necessary to mention the importance of women's empowerment and a way in which it can be achieved. Women should be given a solid knowledge of how to exercise effectively their rights to which they are entitled, stressing the right to decide about their life.

The Committee on Economic, Social and Cultural Rights and the Committee on the Elimination of Discrimination against Women have both clearly indicated that the women's right to health includes their sexual and reproductive health. This means that Poland has obligations to respect, protect and fulfil rights related to women's sexual and reproductive health, *inter alia*, sexual education. It has to be admitted that: 'This historical perception of women as less valuable and hyper-sexualized beings has contributed to the objectification and, subsequent, mistreatment of women in our society today'.¹⁴⁴ The current situation can be changed by providing a comprehensive sexual education presented in an objective, critical and pluralistic manner instead of the provision of poor-quality courses. Sexuality education at Polish schools must present women as rights holders who have a right to decide about their life freely. It should also provide information about contraceptive measures and their use, which should be scientifically accurate and free from discrimination. Moreover, it is crucial to point '(...) that children of both sexes should be taught gender respect from a young age'.¹⁴⁵ Summing up, in the twenty first century when women's rights are universally recognized as human rights, the Polish civil society should rethink the relationship between the government and the Catholic Church.

6. RECOMMENDATIONS

Taking into considerations the legal, religious and social dimension of sexual education in Poland it is recommended to:

- Establish a group of impartial professional experts in different fields, *inter alia* psychologists, teachers, lawyers and doctors, so as to develop an objective curriculum which combines knowledge about birth control methods and sexually transmitted diseases with mental aspects of human's sexuality and ways of preventing sexual violence.
- Cooperate with non-governmental organizations which concentrate their activity on sexuality education and may share with teachers their best practices.

¹⁴³ Impact of HIV and sexual health education on the sexual behaviour of young people: a review update, UNAIDS Best Practice Collection 1997, p. 29.

¹⁴⁴ S. Patel, *Gender Respect Education: A Proposal To Combat Commercial Sexual Exploitation*, Journal of Gender, Social Policy & the Law, Vol. 23 (2015).

¹⁴⁵ *Ibid.*, p. 408.

- Change the common belief what sexuality education means, which can be achieved by social campaigns and promoting protection of human rights and gender equality.
- Ensure wider cooperation with parents who should be actively involved in sexual education of their children.
- Provide only scientifically proven information about sexual health. Do not base any knowledge on stereotypes and prejudices.
- Employ only well-educated impartial teachers whose personal beliefs will not have any influence on passing knowledge on sexuality and who have proper pedagogical background and approach.
- Start sexuality education classes early in childhood but adjust their content and methodology of teaching for the children' age and maturity.
- Establish effective evaluation mechanisms.

Luiza Nadstazik

ACCESS TO ANTENATAL CARE IN POLAND – BETWEEN THE THEORY AND PRACTICE¹⁴⁶

1. INTRODUCTION

Access to antenatal diagnosis is a vital issue within the principle of gender equality under the Polish Constitution. Women have the right to the antenatal diagnosis which means that there exists a possibility of detecting and diagnosing fetus's congenital defects. It should be stressed that antenatal care is a part of the right to the highest attainable standard of health which is one of the fundamental human rights.¹⁴⁷ This right is guaranteed by legislation both at the national and international level.

Without a doubt medicine is one of the fastest growing types of science, responding every year to new challenges. Thereby, law should follow the development of prenatal medicine and should be adjusted to new medical technologies. However, despite the fact that access to antenatal diagnosis is provided in many national legal orders, its implementation in practice leaves much to be desired. The statistics presented by the UN Women indicate that still about 800 women die all over the world every day (99% of all such cases occur in developing countries) from preventable causes related to pregnancy.¹⁴⁸ According to the WHO's report, antenatal care helps to reduce these disturbing figures.¹⁴⁹ Therefore, States should take proper steps to fulfil the women's right to the highest attainable standard of health, including antenatal care.

Referring to Polish data, the number of maternal deaths per 356 200 live births amounted to 85 in 2004. Figures from 2015 show a fall in the maternal death rate which was only 3 deaths per 100 000 live births.¹⁵⁰ At the same time the infant mortality rate totalled almost 1 500 babies.¹⁵¹ The Polish Supreme Chamber of Control indicates that the number of surviving babies is the highest among those born by mothers at the age between 25 to 29 years old (89.2‰).

¹⁴⁶ The authoress would like to thank Julia Wojnowska-Radzińska for valuable comments and for the language assistance.

¹⁴⁷ J. Wojnowska-Radzińska notes that antenatal diagnosis is a part of reproductive rights which shall include all the rights concerning sexuality and human reproduction. See: J. Wojnowska-Radzińska, *Komentarze do wykonywania orzeczeń Europejskiego Trybunału Praw Człowieka w sprawach zdrowia reprodukcyjnego Polek*, [in]: *Kobieta i płęć w dyskursie aksjonormatywnym. Narracje interdyscyplinarne*, (edited) J. Wojnowska-Radzińska, Poznań-Kalisz 2014, p. 80.

¹⁴⁸ Video *Maternal health: Where are we today?*, available at: http://www.unwomen.org/en/digital-library/videos?videoid=W_20kbLJBDk [last visit: 01.11.2016].

¹⁴⁹ WHO and UNICEF report, *Antenatal Care in Developing Countries. Promises, achievements and missed opportunities. An analysis of trends, levels and differentials, 1990-2001*, WHO 2003, pp. 29-31.

¹⁵⁰ Global Health Observatory data repository, Maternal mortality, Data by country, available at: <http://apps.who.int/gho/data/node.main.15> [last visit: 01.11.2016].

¹⁵¹ *Zgony niemowląt według płci i wieku zmarłych niemowląt oraz wieku matki*, available at: http://swaid.stat.gov.pl/Demografia_dashboards/Raporty_predefiniowane/RAP_DBD_DEM_12.aspx [last visit: 28.01.2017].

Fetus's diseases and malformations occur approximately in 3.5% of the diagnosed cases.¹⁵²

It is estimated that much about 2 000 fetuses annually (that is 0.5% of the birth rate) require therapy which may end successfully.¹⁵³ Prenatal care increases the chances to detect malformations at more than 2 000 pregnancies annually. This means that antenatal diagnosis' programmes may reduce the maternal death rate significantly.

During pregnancy women experience considerable somatic and mental changes in their health.¹⁵⁴ Thus, it is crucial that the domestic law should provide pregnant women with specific and comprehensive regulations enabling them to receive adequate prenatal and postpartum care. The aim of this research was to analyse Polish legislation regarding access to antenatal tests and to verify its practical implementation. The research was expected to improve the knowledge of the antenatal care by identifying gaps, legal uncertainties and inadequate safeguards under Polish law.

The Republic of Poland is a Member State of the United Nation Organization, the Council of Europe and the European Union. Article 9 of the Polish Constitution states that the basic rights and freedoms of an individual enshrined in international treaties will be observed and provides that "the Republic of Poland shall respect international law binding upon it". The constitutional principle of respect of international law plays a significant role in assessing the influence of international law on the Polish legal system. In its judgment of 11 May 2005, the Constitutional Tribunal stated that: "the legal consequence of Article 9 of the Constitution is the assumption that, in the territory of the Republic of Poland, apart from the norms (provisions) enacted by the national legislator, the regulations (provisions) originating outside the national (Polish) system of legislative bodies also apply. The constitution-maker has decided that the system of law which is binding in the territory of the Republic of Poland will have a multi-faceted character, and will encompass, apart from legal acts constituted by Polish legislative bodies, acts of international and Community law".¹⁵⁵

2. THE MEANING OF ANTENATAL CARE

One of the most important concepts frequently referred to in this paper is the concept of antenatal diagnosis. M. Wielgoś defines antenatal diagnostic tests as "tests which are carried out during the first and/or second trimester of pregnancy in order to detect and identify foetus congenital diseases during the first and/or second trimester of pregnancy".¹⁵⁶ In turn, the term prenatal/antenatal diagnosis embraces both the examination and the knowledge about the

¹⁵² The NIK report, *The information about control results: Antenatal diagnosis in Poland (Informacja o wynikach kontroli: Badania prenatalne w Polsce)*, 29.04.2016, pp. 12-13, entire report available at: <https://www.nik.gov.pl/plik/id,10793,vp,13126.pdf> [last visit: 14.02.2017].

¹⁵³ *Ibid.*, p. 13.

¹⁵⁴ J. Dzierżanowska-Peszko, *Wpływ straty dziecka w okresie prenatalnym na funkcjonowanie psychologiczne matek i ojców oraz kolejnych dzieci.*, [in:] *Ciąża i narodziny fundamentem przyszłości dziecka. Zagadnienie interdyscyplinarne*, (edited) E. Lichtenberg-Kokoszka, E. Janiuk, Kraków 2012, p. 83.

¹⁵⁵ Judgment of the Constitutional Tribunal of 11 May 2005, No. K 18/04.

¹⁵⁶ M. Krajewska-Walasek, A. Jezela-Stanek, *Trendy w przedurodzeniowej diagnostyce chorób genetycznych*, [in:] *Diagnostyka prenatalna z elementami perinatologii*, (edited) M. Wielgoś, Gdańsk 2009, p. 1.

scientific and practical issues of diagnosing foetus' diseases in the early stage of pregnancy.¹⁵⁷

It is crucial to mention that the diagnosis of fetal abnormalities is not only possible during a given time, but at each stage of pregnancy.¹⁵⁸ Moreover, an early diagnosis allows to administer the quickest possible *in utero* therapy and to prepare parents for any potential consequences, including a birth of a sick or disabled child.¹⁵⁹ Furthermore, when *in utero* therapy turns out to be impossible, the doctor can decide for a delivery in a special neonatal intensive care unit, where the baby will receive a specialist medical treatment immediately.¹⁶⁰ According to the Polish Gynaecological Society (PGS) the level of prenatal diagnostic services in Poland is high, and the detection of chromosome aberrations accounts for 75% of cases, with only 5% error rates.¹⁶¹

The methods of prenatal testing may be divided in two groups: the non-invasive¹⁶² and invasive ones. The non-invasive prenatal tests encompass: ultrasonography, fetal echocardiography, biochemical diagnostic and detection of fetal DNA from a maternal blood sample (this test is burdened by a low percentage of error and it can replace the invasive methods).¹⁶³ In turn, invasive methods include, *inter alia*: chorionic villus sampling (a prenatal test in which a sample of chorionic villi is removed from the placenta for testing), genetic amniocentesis tests, percutaneous umbilical cord blood sampling and fetoscopy (direct visual assessment of foetus build).¹⁶⁴

According to the PGS's recommendations concerning the procedures of prenatal diagnosis, the number of invasive antenatal tests should be reduced as they can carry a real risk of complications, including miscarriage and be only performed in the event of high-risk pregnancies. Otherwise, as a principle, prenatal tests should be based on the examination of every pregnant patient using non-invasive methods, such as screening.

3. LEGAL GUARANTEES OF ACCESS TO ANTENATAL TESTS

The Constitution of the Republic of Poland is the supreme law (Article 8), which means that any other legal act must be in conformity with the Constitution. Special attention should be given to Article 68 of the Polish Constitution which provides that: "1. Everyone shall have the right to have his health protected. 2. Equal access to health care services, financed from public funds, shall be ensured by public authorities to citizens, irrespective of

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ J. Haberko, *Cywilnoprawna ochrona dziecka poczętego a stosowanie procedur medycznych*, Warszawa 2010, p. 206.

¹⁶¹ Recommendation of the Polish Gynaecological Society concerning procedure of prenatal diagnosis, April 2009, [in:] *Rekomendacje Polskiego Towarzystwa Ginekologicznego 2006-2011*, (edited) M. Spaczyński, Poznań 2012, p. 114.

¹⁶² This method is described as a method to screen for certain specific chromosomal abnormalities in a developing baby.

¹⁶³ P. Sieroszewski, E. Baś-Budecka, *Diagnostyka prenatalna*, [in:] *Położnictwo i ginekologia. Położnictwo tom I*, (edited) G. H. Bręborowicz, Warszawa 2015, pp. 485-489.

¹⁶⁴ Ibid., pp. 489-490.

their financial situation. The conditions for, and the scope of, the provision of services shall be established by statute. 3. Public authorities shall ensure special health care to children, pregnant women, disabled people and persons of advanced age. (...)”.¹⁶⁵

In the light of the above-mentioned provision, pregnant women belong to a privileged group, which means that they should remain under extraordinary State’s protection, and be able to exercise their right to prenatal diagnosis. This requires access to medical facilities that shall be: “(a) available in adequate numbers; (b) accessible physically and economically; (c) accessible without discrimination; and (d) of good quality”.¹⁶⁶ It is worth noting that the Committee on Economic, Social and Cultural Rights (CESCR) clarified that “the provision of maternal health services is comparable to the core obligation which cannot be derogated from under any circumstances, and State parties have the immediate obligation to take deliberate, concrete and targeted steps towards fulfilling the right to health in the context of pregnancy and childbirth”.¹⁶⁷

Moreover, Article 71(2) of the Polish Constitution prescribes that: “A mother, before and after birth, shall have the right to special assistance from public authorities, to the extent specified by statute”. The value of family and motherhood is an established value under Polish law. Furthermore, the respect and duty of taking care of a pregnant women is entrenched in Polish legal culture. It is commonly adopted that a pregnant woman is a “blessed state” which means in some way “holy”, because she will bring a child into the world. In turn, Article 38 of the Polish Constitution provides that “the Republic of Poland shall ensure the legal protection of the life of every human being”. This implies that no one should be deprived of life, moreover, human life should be respected. The Polish Constitutional Tribunal held in one of its judgments that “the obligation of public authorities to take measures aiming at protection of life stems from Article 38 of the Constitution”.¹⁶⁸

According to Article 47 of the Polish Constitution “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”. Under this provision women are provided with the right to decide freely on their motherhood. In order to exercise this right women should have a real access to accurate and reliable information about their health state and the health of the foetus. The Polish Supreme Court held that the right to prenatal testing “stemmed from the right of a pregnant woman to information concerning the health condition of the foetus, its possible

¹⁶⁵ The Constitution of the Republic of Poland of 2nd April 1997, Polish Journal of Laws of 1997, No. 78, item 483 as later amended.

¹⁶⁶ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 13 September 2006, A/61/338, p. 6, para. 17, available at: http://www.who.int/medicines/areas/human_rights/A61_338.pdf [last visit: 27.02.2017].

¹⁶⁷ CESCR, The General comment No. 14 (2000) on the right to the highest attainable standard of health (Art. 12), adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 (Contained in Document E/C.12/2000/4). See also: Women’s Rights Are Human Rights, United Nations High Commissioner New York and Geneva, 2014, p. 52, available at: <http://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf> [last visit: 05.03.2017].

¹⁶⁸ Judgment of the Constitutional Tribunal of 23 March 1999, No. K 2/98, para. 3.

diseases and defects as well as the possibilities of curing them before the birth (...). A right to prenatal tests should be distinguished from a right to legal abortion".¹⁶⁹

The Act of 7 January 1993 on Family Planning, Protection of Human Foetus and Conditions for Lawful Termination of Pregnancy (hereinafter: the Act on Family Planning)¹⁷⁰ specifies that authorities are obliged to ensure pregnant women the medical, social and legal care, *inter alia*, by providing prenatal care for a foetus and medical care for a pregnant woman (Article 2(1)), easy access to information and prenatal testing, especially when there is an increased risk or suspicion of a genetic or developmental defect of the foetus or of an incurable disease imperilling the foetus's life (Article 2(2a)).

The Act of 27 August 2004 on healthcare services financed from public funds¹⁷¹ is of vital importance as it ensures special care to pregnant women and mothers. According to this regulation a woman during her pregnancy and at birth, even if she is not insured, has a right to medical services (*inter alia* prenatal care¹⁷²), medicines, and other medical products pursuant to the rules applicable to be insured. In such circumstances these services are financed by the State (Article 13).¹⁷³

In turn, the Regulation of the Minister for Public Health of 6 November 2013 on guaranteed benefits from the scope of medical programs¹⁷⁴ indicates the criteria to be met by pregnant women to be entitled to prenatal testing. It is sufficient to fulfil one of the following criteria:

- 1) over 35 years of age;
- 2) if a woman has had a previous pregnancy with fetal abnormality;
- 3) if the structural chromosome abnormalities have occurred in the pregnant woman or the child's father;
- 4) if there is a higher risk of having a baby affected by monogenic multi-factorial determined disease;
- 5) results of the ultrasound scan carried out during the pregnancy indicate an increased risk of the foetus being affected with a chromosomal aberration or other malformation.¹⁷⁵

According to prenatal tests, their scope embraces: firstly, counselling and biochemical tests, secondly, counselling and ultrasound test of a foetus in the direction of diagnosing malformations, thirdly, counselling and genetic tests including cytogenetic testing and molecular biology's methods, fourthly, taking fetal material for genetic tests.¹⁷⁶ It should be mentioned that to perform prenatal tests it is necessary to have a referral from the doctor. The

¹⁶⁹ Judgment of the Supreme Court of 12 June 2008, No. III CSK 16/08.

¹⁷⁰ Journal of Laws of 1993, No. 17, item 78 as later amended.

¹⁷¹ Journal of Laws of 2004, No. 210, item 2135 as later amended

¹⁷² Article 15(2) point 13 of the Act of 27 August 2004 on healthcare services financed from public funds.

¹⁷³ M. Nesterowicz, *Prawo medyczne, op. cit.*, p. 283.

¹⁷⁴ Journal of Laws of 2013, item 1505.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

doctor has the duty to issue a referral for prenatal tests, if at least one of the above-mentioned requirements is met.

As it has been emphasized, the invasive prenatal tests can carry a small but real risk of losing the pregnancy. Therefore, it is necessary to inform a patient what kind of complications may occur. Under Article 31(1) of the Act of 5 December 1996 on the Professions of Physicians and Dentists¹⁷⁷ doctors are required to provide a patient, or his or her representative, with comprehensible information about his or her health, diagnosis, proposed and possible diagnostic and therapeutic methods, foreseeable consequences of a decision to have recourse to them or not, and about possible results of therapy and prognosis.

On 19 January 1993 Poland ratified the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (also known as the European Convention on Human Rights, ECHR).¹⁷⁸ Article 8(1) of the ECHR guarantees the right to the respect for private and family life, which the European Court of Human Rights (ECtHR) has also interpreted as “the right to personal autonomy and personal development”.¹⁷⁹ The ECtHR specified that the notion of private life concerns subjects such as gender identification, sexual orientation and sexual life, (...) a person’s physical and psychological integrity¹⁸⁰ and it “applies to decisions both to have or not to have a child or to become parents”.¹⁸¹ Each individual has the right to file individual complaint to the ECtHR against a State that has violated his/her rights or freedoms guaranteed by the Convention.

Furthermore, it is also vital to refer to the statement on the “Ethical Issues Concerning Prenatal Diagnosis of Disease in the Conceptus” adopted in 1991 by the International Federation of Gynaecology and Obstetrics (FIGO), according to which: “Prior to undertaking diagnostic procedures, women should be counselled about the risks and benefits of the technique to be used. Such counselling should be factual, respectful of the woman's view, and non-coercive. Consent should be obtained for the use of the procedure. (...) Women should not be denied the availability of prenatal diagnosis. (...) Information acquired from prenatal diagnosis must be kept and maintained in strict confidence to the parents and the individual concerned. This is particularly essential in respect to gene mapping which may reveal a propensity for disease in later life with wide implications for the individual in matters such as choice of career, employment, personal insurance and marriage. (...) Equity requires that these important diagnostic services are made as widely available as possible.”¹⁸²

¹⁷⁷ Journal of Laws of 1997, No. 28, item 152 as later amended.

¹⁷⁸ Journal of Laws of 1993, No. 61, item 284.

¹⁷⁹ ECtHR, 6 February 2001, *Bensaid v. the United Kingdom*, No. 44599/98, para. 47.

¹⁸⁰ ECtHR 29 April 2002, *Pretty v. the United Kingdom*, Application No. 2346/02, para. 61; ECtHR 20 March 2007, *Tysi c v. Poland*, Application No. 5410/03, para. 107.

¹⁸¹ ECtHR 10 April 2007, *Evans v. the United Kingdom*, Application No. 6339/05, para. 71.

¹⁸² Information available at: <http://www.figo.org/> [last visit: 15.01.2017].

4. IMPLEMENTATION OF THE ACCESS TO ANTENATAL TESTS

Without a doubt prenatal diagnosis has become an established service in the care of pregnant women in Poland. It needs to be emphasized that in order to protect the women's freedom of choice about their pregnancy they should be fully informed and educated about the availability of the reasons for prenatal tests. Under Polish law, the results of prenatal tests provide, *inter alia*, a possibility to seek termination of pregnancy. According to the provisions of the Act of 7 January 1993 on the Family Planning, a lawful abortion can be performed when prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or will suffer from an incurable life-threatening disease.¹⁸³ However, it very often happens that, in spite of meeting the criteria for a lawful abortion, women, *de facto*, do not have real access to affordable, acceptable and appropriate abortion services. In other words, ensuring woman an effective and accessible procedure to prenatal tests and a justified abortion, meaning that a pregnant woman can exercise all of the measures lawfully open to her – leaves much to be desired.

It is worth referring that despite obvious shortcomings, there have been cases where courts ruled for the plaintiff. One is the judgment of the Court of Appeal in Kraków.¹⁸⁴ In this case a doctor failed to fulfil his duty of care during a fetal ultrasound examination. Moreover, he did not inform a pregnant patient about fetal malformation. As a result the woman could not make conscious decision about her pregnancy and was forced to give birth to a very sick baby, whose state of health required 24-hours care.¹⁸⁵ The Court ruled that she was entitled to receive a compensation related to the need to bear additional costs of raising a disabled child.

In a similar case the Court of Appeal in Białystok stressed that “in the case where prenatal examinations or any other medical findings indicate a significant probability of a grave and irreversible retardation of the foetus the parents have a right to an informed decision about whether they want to burden themselves and their family with the consequences of the birth of a disabled child”.¹⁸⁶ The Court further specified that “in such a case [the parents] have a right to decide about terminating the pregnancy. If the negligent breach of that right leads to the birth of a disabled child against their will, they can claim pecuniary compensation for the violation of their personal rights under Article 448¹⁸⁷ of the Civil Code”.¹⁸⁸

¹⁸³ Article 4a para. 1 point 2 of the Act of 7 January 1993 on the Family Planning Protection of the Human Foetus and Conditions Permitting Pregnancy Termination, Journal of Laws of 1993, No. 17, item 78 as later amended.

¹⁸⁴ Judgment of the Court of Appeal in Kraków of 12 May 2015, No. I ACa 204/15.

¹⁸⁵ *Ibid.*

¹⁸⁶ Judgment of the Court of Appeal in Białystok of 4 July 2008, No. I ACa 278/08. See: M. Nesterowicz, E. Bagińska, A. den Exter, *Medical Law in Poland*, Kluwer Law International, 2011, p. 110.

¹⁸⁷ Article 448 of the Civil Code of 23 April 1964 states: “In the event of infringement of one's personal interests the court may award to the person whose interests have been infringed an appropriate amount as monetary recompense for the harm suffered or may, at his demand, award an appropriate amount of money to be paid for a social cause chosen by him, irrespective of other means necessary to remove the effects of the infringement. Article 445 § 3 applies”.

¹⁸⁸ Judgment of the Court of Appeal in Białystok of 4 July 2008, No. I ACa 278/08.

In another case examined by the Supreme Court¹⁸⁹ the doctor failed to inform the pregnant patient of fetal malformation and refused to issue her a referral to antenatal tests. Thus she was deprived of the right to decide freely on the pregnancy and the right to plan a family. The Supreme Court found that the doctors had violated the claimant's right to plan a family and her right to lawful abortion as a pregnant woman was denied to receive a referral to antenatal tests, even though there were medical grounds. The Court found that although the criteria for an abortion under Article 4a para. 1 point 2 of the Act of 7 January 1993 on the Family Planning had been met, the woman could not undergo a legal abortion to which she was entitled.¹⁹⁰

Another case involved a prenatal test performed by the doctor, in which a diagnostic error occurred. The parents were not informed about the risk of serious fetus abnormalities. At the same time the pregnant woman did not meet the requirements to qualify for a legal abortion. She gave birth to a sick baby who died after a few years, having suffered from a rare, incurable disease. The court had to examine if the doctors had committed malpractice in the medical treatment during antenatal tests. It turned out that all procedures were implemented correctly. Therefore, the claimant was not entitled to receive compensation. In the court's view: "It is unacceptable to assume the hospital's guilt during the performance of antenatal tests which did not confirm the genetic disease, as these tests, their methodology and their results were not caused by the doctor's malpractice. In principle, it cannot be assumed, that the results of the antenatal tests will always lead to detect genetic defects".¹⁹¹

It should be emphasized that one of issues which has a significant impact on providing women with the access to prenatal tests is the "conscience clause" which medical doctors may invoke. Article 38 of the Act of 5 December 1996 on the Professions of Physicians and Dentists¹⁹² stipulates that a doctor may refuse to carry out a medical service stating as a reason his or her objections on the ground of conscience provided however, that the delay in ensuring health services in urgent cases requiring immediate treatment, will not cause any risk to patients' life or health. A doctor is obliged to inform the patient where the medical service concerned can be obtained and to register the refusal in the patient's medical records. Doctors employed in health care institutions are also obliged to inform their supervisors of the refusal in writing. It should be emphasized that while doctors have a right to conscientious objection, the protection of that right must not infringe the women's right to accurate and objective information on prenatal tests and their right to access to legal abortion. It is unethical for a doctor to exercise pressure on the pregnant woman with a view to her accepting a particular option. The Act on the Family Planning allows for an abortion to be carried out before the foetus is capable of surviving outside the mother's body if prenatal tests or other medical

¹⁸⁹ Judgment of the Supreme Court of 6 May 2010, No. II CSK 580/09.

¹⁹⁰ Judgment of the Supreme Court of 13 October 2005, No. IV CK 161/05.

¹⁹¹ Judgment of the Court of Appeal in Białystok of 24 April 2013, No. I Aca 787/12.

¹⁹² Polish Journal of Laws of 1997, No. 28, item 152 as later amended.

findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffer from an incurable life-threatening disease. Thus, access to full and reliable information on the foetus' health is not only important for the comfort of the pregnant woman but also a necessary prerequisite for a legally permitted possibility to have an abortion.¹⁹³ In other words, the decision on abortion has to be made within due time. After the period referred to in Article 4a para. 2 of the Act has been expired, a woman has no choice but to carry her pregnancy to term. In fact, she may give birth to a baby with malformation or genetic defects. Nevertheless, the Supreme Court has reiterated that "a refusal of prenatal tests in circumstances where it could be reasonably surmised that a pregnant woman run a risk of giving birth to a severely and irreversibly damaged child, that is to say in circumstances set out by section [4a(1)2 of the Act on the Family Planning], gives rise to a compensation claim."¹⁹⁴

A turning point so far has been, beyond any doubt, the judgment of the European Court of Human Rights in *R.R. v. Poland*.¹⁹⁵ When we take into consideration the discussed issue, this judgment is of major importance, mainly because it is the first judgment which concerns explicitly the right of Polish women to access prenatal testing. The case was filed by the Polish citizen who complained that her right to respect for her private life under Article 8 of the ECHR had been violated by the "Polish authorities' failure to provide her with access to genetic tests to determine whether the foetus was affected with a genetic disorder and also by the absence of a comprehensive legal framework to guarantee her right."¹⁹⁶ The applicant and the doctors suspected a severe genetic defect in the foetus, but the doctors withheld the tests until the legal time-limit for abortion had expired under Polish law. She tried desperately to obtain the relevant genetic tests under which she may have had the opportunity to make an informed decision about whether or not to terminate her pregnancy.¹⁹⁷ When the genetic tests had finally been performed, their results confirmed her suspicions that the foetus had been affected by the Turner syndrome. In fact it was too late to carry out a lawful abortion. The ECtHR presented the view that "in the present case the essential problem was precisely that of access to medical procedures, enabling the applicant to acquire full information about the foetus' health".¹⁹⁸ The Court specified that: "the right of access to [a medical diagnostic service] falling within the ambit of the notion of private life can be said to comprise, in the Court's view, on the one hand, a right to obtain available information on one's condition. The Court further considers that during pregnancy the foetus' condition and health constitute an element of the pregnant woman's health (...). The effective exercise of this right is often decisive for the possibility of exercising personal autonomy, also covered by Article 8 of the

¹⁹³ Article 4a para. 2 of the Act of 7 January 1993 on the Family Planning, Protection of the Human Foetus and Conditions Permitting Pregnancy Termination, Journal of Laws of 1993, No. 17, item 78 as later amended.

¹⁹⁴ Judgment of the Supreme Court of 13 October 2005, No. IV CK 161/05.

¹⁹⁵ ECtHR 28 November 2011, *R.R. v. Poland*, Application No. 27617/04.

¹⁹⁶ B. Rainey, E. Wicks, C. Ovey, *The European Convention on Human Rights*, Oxford University Press, 2014, p. 399.

¹⁹⁷ ECtHR 28 November 2011, *R.R. v. Poland*, Application No. 27617/04, paras. 30-33.

¹⁹⁸ *Ibid.*, para. 198.

Convention (...) by deciding, on the basis of such information, on the future course of events relevant for the individual's quality of life (e.g. by refusing consent to medical treatment or by requesting a given form of treatment)".¹⁹⁹ The Court implied that there were no objective reasons why the genetic tests were not carried out immediately after the suspicions as to the foetus' condition had arisen but only after a lengthy delay.²⁰⁰ Furthermore the Court noted that "prenatal genetic tests serve various purposes and they should not be identified with encouraging pregnant women to seek an abortion. Firstly, they can simply dispel the suspicion that the foetus was affected with some malformation; secondly, a woman carrying the foetus concerned can well choose to carry the pregnancy to term and have the baby; thirdly, in some cases (although not in the present one), prenatal diagnosis of an ailment makes it possible to embark on prenatal treatment; fourthly, even in the event of a negative diagnosis, it gives the woman and her family time to prepare for the birth of a baby affected with an ailment, in terms of counselling and coping with the stress occasioned by such a diagnosis".²⁰¹ The Court stressed that "(...) if the domestic law allows for abortion in cases of foetal malformation, there must be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus' health is available to pregnant women."²⁰² (...) Effective implementation of [4a(1)2 of the Act on the Family Planning Protection of the Human Foetus and Conditions Permitting Pregnancy Termination] would necessitate ensuring to pregnant women access to diagnostic services which would make it possible for them to establish or dispel a suspicion that the foetus may be affected with ailments".²⁰³ The Court found that in the present case it has not been established that such services were unavailable.²⁰⁴

The discussed cases illustrate the existence of a misconception in medical practice in that all women seeking to undergo prenatal genetic examination do so solely for the purpose of terminating their pregnancies. It is essential to highlight that not every pregnant woman who demands antenatal diagnosis will terminate the pregnancy and – as has already been indicated – the prenatal testing is applied to confirm or exclude whether a foetus is affected by a specific disorder.²⁰⁵ Thereby, a doctor should under no condition try to impose his or her convictions on the pregnant women being counselled, but inform and advise them on pertinent facts and choices. Nevertheless, some doctors present false diagnostic or clinical reasons to decline to afford patients indicated care to which they object. It happens quite often that women are *de facto* denied timely access to prenatal testing. It should be emphasized that the relevance of the information which women seek to obtain by way of prenatal testing to the decision concerning continuation of their pregnancy has a "profound effect on a woman's private life, including her physical and moral integrity, any interference with this decision

¹⁹⁹ Ibid., para. 197.

²⁰⁰ Ibid., para. 198.

²⁰¹ Ibid., para. 205.

²⁰² Ibid., para. 200.

²⁰³ Ibid., para. 213.

²⁰⁴ Ibid.

²⁰⁵ Ibid., para. 175 and para. 205.

must be analysed in light of the woman's right to privacy".²⁰⁶ Without information about whether a foetus is healthy or severely malformed, a woman cannot make crucial decisions regarding prenatal treatment or whether to carry the foetus to term. According to the above-mentioned "Ethical Issues Concerning Prenatal Diagnosis of Disease in the Conceptus" for doctors who have to enable parents to reach an appropriate decision, "the primary concern should be the quality of life and the longevity of the individual. A second consideration must be the effect that the birth and life of a [sick] child might have on the woman herself and on her family. In this regard consideration must also be given to the effect of the termination of the pregnancy on the physical and/or psychological health of the woman and her family. A third concern is the availability of resources and support for long-term care."²⁰⁷

In April 2016 the Supreme Chamber of Control issued a report on "The antenatal tests in Poland"²⁰⁸ which is the result of the control conducted in Polish hospitals.²⁰⁹ The Supreme Chamber of Control indicates that the antenatal tests' programme, in place since 2004, has contributed to the decline the perinatal and infant mortality rate.²¹⁰ Between 2012-2014 the percentage of women who were embraced by this programme increased from 14% to 19%.²¹¹ Moreover, the amount of the money spent on the antenatal tests' programme was consistently increasing, from PLN 22 million in 2009 to over PLN 46 million in 2014.²¹² The Supreme Chamber of Control also found that the criterion "over the age of 35" for pregnant woman is inadequate and medically not justified since more children with malformations are being born by women under 35.²¹³ Furthermore, the Supreme Chamber of Control positively assessed the following issues: access to information about the antenatal tests ensured by the hospitals it controlled; gradual year to year increase in the number of women performing prenatal tests; issuance of referrals for women who meet the requirements to obtain antenatal tests; information provided to women about the possibility of performing prenatal tests for the fee if they do not meet requirements prescribed by the law. Regarding irregularities, the Chamber indicated, *inter alia*, the failure by the Minister for Health to ensure to women who have been so far excluded from this possibility, access to antenatal testing and the lack of prenatal care plans.

²⁰⁶ ECtHR 28 November 2011, *R.R. v. Poland*, Application No. 27617/04, third parties' submissions, Special Rapporteur's report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the office of the United Nations High Commissioner for Human Rights, para. 122.

²⁰⁷ Information available at: <http://www.figo.org/> [last visit: 15.01.2017].

²⁰⁸ The NIK report, *The information about control results: Antenatal diagnosis in Poland (Informacja o wynikach kontroli: Badania prenatalne w Polsce)*, 29.04.2016.

²⁰⁹ *Ibid.*, p. 6.

²¹⁰ *Ibid.*, p. 8.

²¹¹ *Ibid.*, p. 15.

²¹² *Ibid.*, pp. 25-26.

²¹³ *Ibid.*, pp. 8-9.

5. RECOMMENDATIONS

- Prenatal tests are an important source of information on foetal's health. Pregnant women need real access to prenatal testing in order to obtain detailed and reliable information about their own health and the health of the foetus, in particular when there are other indications of genetic malformation. Polish authorities are obliged to allow women to make health care decisions in an active and informed manner. Accurate knowledge of a pregnant woman's health status is necessary to enable her to understand the health care options and protect her bodily integrity by deciding which health care treatment she will choose as best for herself. This is why the legislator should aim to adopt comprehensive and transparent legal regulations that would without delay when required, provide women with access to information and access to prenatal testing.
- The right of doctors to invoke the "conscience clause" must be carefully regulated and balanced so that it does not effectively deny a woman the right to obtain prenatal care services which are guaranteed by the Polish Constitution. A good solution would be conducting special courses for doctors dedicated to women's reproductive rights.

ATTACHMENT:

It may be interesting to look at the antenatal diagnosis' programme in place at the Gynaecological-Obstetrics Clinical Hospital of the University of Medical Sciences in Poznań.

Table No. 1: The implementation of a national antenatal diagnosis program on the example of the Gynaecological-Obstetrics Clinical Hospital of the University of Medical Sciences (*Ginekologiczno-Położniczy Szpital Kliniczny Uniwersytetu Medycznego im. Karola Marcinkowskiego*) in Poznań between 2015-2016.

GYNAECOLOGICAL-OBSTETRICS CLINICAL HOSPITAL OF THE UNIVERSITY OF MEDICAL SCIENCES IN POZNAŃ		
THE NAME OF THE MEDICAL SERVICE	THE NUMBER OF PATIENTS 2015	THE NUMBER OF PATIENTS 2016
Amniocentesis – a programme implemented by the National Health Fund	56	94
Biochemical diagnosis - BETA-HCG	1828	1979
Biochemical diagnosis - ESTRIOL	0	1
Biochemical diagnosis – PAP P-A	1826	1980
Genetic tests including the molecular and biochemical assessment of the foetal material – a programme of the National Health Fund	56	93
Ultrasound of the 1st trimester	1855	2004
Ultrasound of the 2nd trimester	985	1053
Genetic advice	21	17

Source: created by the authoress on the basis of the information received from the National Health Fund – Regional Branch in Poznań (*Narodowy Fundusz Zdrowia Wielkopolski Oddział Wojewódzki w Poznaniu*).

The above data are promising and indicate a positive trend, because the number of pregnant patients undergoing antenatal tests (with the exception is genetic advice) has increased. Regarding the amniocentesis programme, the number of patients examined within its framework increased by more than 47% within one year. The Hospital's data do not indicate whether the number of foetus abnormalities has grown, but a greater awareness of specialists and pregnant women of the access to the health technology has been observed. The State's financial support for the antenatal diagnosis' programme has also increased to ensure every pregnant woman the real possibility of undergoing a prenatal examination which allows early detection of congenital defects in order to start an appropriate treatment, or in some cases, to give the mother a chance to decide whether to continue pregnancy.

ABORTION LAW IN POLAND

1. INTRODUCTION

The Constitution of the Republic of Poland explicitly provides that: “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 therefore shall be the obligation of public authorities.”²¹⁴ After decades of violations of human rights under the communist regime, the aim of the above-mentioned provision is to ensure that the dignity of each person and a person itself is the centre of new, democratic legislation. Unfortunately, for the last twenty years when it comes to reproductive rights, women’s dignity has been repeatedly violated by Polish authorities.

It should be indicated that there is no legal definition of “reproductive rights” under Polish law. Lately, the Polish government has even stated that reproductive rights are not clearly defined in conventions to which Poland is a party and these rights should not be perceived as human rights.²¹⁵ Without a doubt the above statement is false as Poland ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which is the only human rights treaty affirming the reproductive rights of women. Moreover, it is commonly recognized that women’s reproductive health is related to multiple human rights, including the right to life, the right to be free from torture, the right to health, the right to privacy, the right to education and the prohibition of discrimination. It should be mentioned that all these rights are explicitly guaranteed by the Polish Constitution.²¹⁶

Nevertheless, Poland has one of the most restrictive abortion laws in the European Union. The Act on Family Planning, Protection of the Human Fetus and Conditions for the Lawful Termination of Pregnancy²¹⁷ allows to carry out an abortion by medical doctor only in three cases.²¹⁸ Even when certain instances meet the requirements set by this regulation, it is

²¹⁴ Journal of Laws of 1997, No. 78, item 483 as later amended, Article 30.

²¹⁵ Komisarz Rady Europy wzywa PiS do respektowania praw reprodukcyjnych kobiet. Rząd odpowiada, że nie wie co to jest, available at: <http://natemat.pl/182663,komisarz-rady-europy-wzywa-pis-do-respektowania-praw-reprodukcyjnych-kobiet-rzad-odpowiada-ze-nie-wie-co-to-jest> [last visit: 27 January 2017].

²¹⁶ Article 32 of the Constitution states: “All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities. No one shall be discriminated against in political, social or economic life for any reason whatsoever“. Article 38 of the Constitution states: “The Republic of Poland shall ensure the legal protection of the life of every human being“. Article 40 of the Constitution states: “No one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited“. Article 47 of the Constitution states: “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“. Article 68(1) of the Constitution states: “Everyone shall have the right to have his health protected“.

²¹⁷ The Act on Family Planning, Protection of the Human Fetus and Conditions for the Lawful Termination of Pregnancy, Journal of Laws of 1993, No. 17, item 78 as later amended.

²¹⁸ These are: 1) the pregnancy endangers the life or health of the woman; 2) prenatal examinations or other medical procedures indicate that there is a high probability of a severe and irreversible fetal defect or incurable illness that threatens the fetus’s life; 3) when the pregnancy results from a crime.

very hard to lawfully terminate pregnancy and, what is more, it is nearly impossible to go through the medical proceedings with dignity.

Furthermore, for centuries Poland existed as a State with patriarchal society based on stereotyped roles for men and women which have had a significant impact on the legal system. Some parts of Polish society, including politicians and deputies (members of parliament) still refuse to acknowledge the existence of gender.

This paper argues that the current restrictive abortion law in Poland violates women's reproductive rights while these rights are human rights. The aim of this paper is to analyse access to legal abortion under Polish law, and examine examples of violations of international law by Poland as a consequence of the lack of effective procedures under which women could exercise their right to legal abortion.

2. POLISH REGULATIONS CONCERNING LAWFUL ABORTION

The provisions of the Act on Family Planning, Human Fetus Protection, and Conditions for Lawful Termination of Pregnancy (hereinafter: the Act on Family Planning) stipulates circumstances in which an abortion procedure can be performed. Article 4(a) of this Act provides:

“1. An abortion may be carried out by a doctor solely when:

- 1) the pregnancy endangers the mother's life or health;
- 2) prenatal tests or other medical findings indicate a high risk that the fetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;
- 3) there is reasonable suspicion that the pregnancy is a result of unlawful act”.²¹⁹

The afore-mentioned provision specifies that in the first case the termination of pregnancy is permissible before the foetus becomes capable of living by itself outside the organism of the pregnant woman. In the second and third case pregnancy termination is permissible if no more than 12 weeks have elapsed since the beginning of the pregnancy.²²⁰ In the first two cases abortion should be confirmed by a medical doctor other than the one who is to perform the abortion, unless the pregnancy entails a direct threat to the woman's life.²²¹

It should be mentioned that the Act on Family Planning excluded abortion on request, leaving *de facto* women, who are not legally entitled to access abortion, between a rock and a hard place.²²² Currently, a woman who is not able to access legal abortion, can only choose one from three available options, which are (i) undergo clandestine and unsafe termination of

²¹⁹ Journal of Laws of 1993, No. 17, item 78 as later amended.

²²⁰ Article 4(a) para. 2 of the Act on Family Planning.

²²¹ Article 4(a) para. 5 of the Act on Family Planning.

²²² Supplemental Information on Poland for the Periodic Review by the Human Rights Committee as its 118th Session (17 October 2016 – 4 November 2016), report on reproductive rights in Poland, drawn up by Polish NGO's (22 September 2016), available at: https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Joint_NGO_Submission_on_Poland_Oct_2016_FINAL.pdf [last visit: 27 January 2017].

pregnancy in Poland, (ii) travel abroad at her own expense, to a country where abortion is accessible on request, or (iii) carry an unwanted pregnancy to term.²²³

Furthermore, it should be stressed that the Act on Family Planning influenced profoundly other regulations within the Polish legal system, and criminal law in particular.²²⁴ According to the Polish Penal Code²²⁵ “whoever, with consent of the woman, terminates her pregnancy in violation of the law shall be the subject of the penalty of deprivation of liberty for up to 3 years”.²²⁶ The provision prescribes further “the same penalty shall be imposed on anyone who renders assistance to a pregnant woman in terminating her pregnancy in violation of the law or persuades her to do so”.²²⁷ However, a longer term of imprisonment is prescribed for performing an abortion after the fetus is capable of living outside the pregnant woman’s body.²²⁸ The Penal Code provides for up to ten years of imprisonment for performing an abortion that causes the death of the pregnant woman.²²⁹ Moreover, the Penal Code criminalizes prenatal harm in Article 157a which reads that “one who causes bodily injury to a child conceived or health disorder, threatening the child’s life, is liable to a fine, restriction of liberty or imprisonment for up to 2 years”. However, this provision guarantees that “no offence is committed by a doctor who causes bodily injury or health disorder to a child conceived as a result of treatment required to save the life or health of the pregnant woman or the child conceived”.

It should be noted that the current Penal Code together with the Act on Family Planning are leading to the tightening up of the legislation concerning reproductive health. The Act on Abortion Admissibility from 1956, adopted during the communist time in Poland, allowed abortion in case of “difficult living conditions”.²³⁰

The Act on Family Planning allows to carry out an abortion, *inter alia*, in case of “pregnancy endangers mother’s life or health”. However, there are no guidelines what may constitute a threat to women’s life or health.²³¹ The Polish legislator somewhat burdened doctors with an obligation to decide (on their own) whether there is a threat to the women’s life or health in the particular case. Fearing criminal prosecution, doctors frequently ask women to run some additional tests²³² which often take weeks. Such practice is *de facto* an

²²³ Ibid., p. 2.

²²⁴ Some serious changes were also incorporated into private law. As we read in Polish Civil Code: Upon birth, the child may demand redress for damages suffered before birth (Polish Civil Code of 24 April 1964, art. 4461, Journal of Laws 1964, No. 16, item 93 as later amended).

²²⁵ Penal Code of 6 June 1997, Journal of Laws of 1997, No. 88, item 553 as later amended.

²²⁶ Article 152 para. 1 of the Penal Code.

²²⁷ Ibid., Article 152 para. 2.

²²⁸ Ibid., Article 152 para. 3.

²²⁹ Ibid., Article 154 para. 1.

²³⁰ J.D. Caytas, *Women’s Reproductive Rights as a Political Price of Post-communist Transformation in Poland*, Amsterdam Law Forum, Vol 5, No. 2 (2013), p. 56, HeinOnline.

²³¹ Alternative report on the implementation of the Convention on the Elimination of All Forms of Discrimination Against Women, Poland 2014, p. 53, available at: http://tbinternet.ohchr.org/Treaties/CEDAW/SharedDocuments/POL/INT_CEDAW_NGO_POL_16521_E.pdf

²³² For example, to perform lawful abortion, some hospitals require opinion from two different doctors or even joint consultation, although Act on Family and Planning requires opinion only from one doctor, „Dzień

attempt to avoid responsibility for issuing a referral to carry out an abortion, since under the binding provisions lawful termination can be performed only until the end of the twelfth week of pregnancy. Such practice leads to a situation where women are often unable to access abortion to which they are entitled. What is more, the Regulation issued by the Minister of Health on the qualifications of doctors authorised to perform abortions²³³ stipulates only that “the circumstances indicating that pregnancy constitutes a threat to the woman’s life or health shall be attested by a consultant specialising in the field of medicine relevant to the woman’s condition”. This lack of clarity in the discussed provisions has caused, *inter alia*, that some doctors do not consider any threat to women’s life/health as long as she is likely to survive the delivery of the child.

Despite strict legal requirements included in the Act on Family Planning, the number of clandestine abortions, which may put the women’s lives and health at risk, is still high.²³⁴ However, those abortions are being consistently ignored by the Polish government, hence the lack of official data. According to the Ministry of Health, in 2014 hospitals performed only 1812 lawful abortions, while in 2015 this number was significantly smaller, as it dropped to only 1044 pregnancy terminations.²³⁵ It is obvious that in a nation of about 38 millions of citizens these figures misrepresent the true scale of abortion, especially when compared with about 150,000 abortions performed in public hospitals in the 1980s.²³⁶

Without a doubt, the biggest obstacle for women to exercise effectively the access to lawful abortion to which they are entitled is the “conscience clause” that allows doctors to refuse to terminate pregnancy in accordance with law. “Conscience clause” is part of the freedom of conscience and religion which is guaranteed by the Polish Constitution.²³⁷ More detailed regulations concerning the “conscience clause” can be found in the Act on Medical and Dental Professions.²³⁸ According to Article 39 a doctor may refuse to carry out a medical service, invoking his or her objections on the ground of conscience provided, however, that the delay in ensuring health services in urgent cases requiring immediate treatment, may not cause any risk to patients’ life or health. At the same time a doctor is obliged to inform the patient where the medical service concerned can be obtained and to register the refusal in the patient’s medical records. Doctors employed in health care institutions are also obliged to

dobry, chcę przerwać ciążę...”. O procedurach dostępu do legalnej aborcji w polskich szpitalach. Raport z monitoringu (2016), p. 18.

²³³ Regulation of the Minister of Health of 22 January 1997, Journal of Laws of 1997, No. 9, item 49.

²³⁴ Concluding observations on the seventh periodic report of Poland (CCPR/C/POL/CO/7), Human Rights Committee, 23 November 2016, p. 4.

²³⁵ Total number of lawfully performed abortions is even lower: 669 in 2011, 752 in 2012, available at: <http://www.zdrowie.abc.com.pl/artykuly/w-2014-roku-rozliczono-z-nfz-ponad-1-8-tys-legalnych-aborcji,11158.html> [last visit: 27 January 2017]

²³⁶ J.D. Caytas., *Women’s Reproductive Rights as a Political Price of Post-communist Transformation in Poland*, p. 73.

²³⁷ Article 53(1) of the Constitution states “Freedom of conscience and religion shall be ensured to everyone”.

²³⁸ The Act of 5 December 1996 on Medical and Dental Professions, Journal of Laws of 1997, No. 28, item 152 as later amended.

inform their supervisors of the refusal in writing.²³⁹ In the light of these provisions women are, in fact, denied access to the legal abortion procedure when doctors invoke their legal right to decline to perform it on moral or religious grounds. It is worth mentioning that the issue of the “conscience clause” was analysed by the Polish Constitutional Tribunal. The Tribunal found that the first sentence of Article 39 of the Act on Medical and Dental Professions” is inconsistent with the Polish Constitution. Nevertheless, this judgment met with criticism on the part of some judges of the Tribunal who presented their dissenting opinions.²⁴⁰

Moreover, it should be stressed that until 2008 there were no effective remedies to question the refusal of abortion on medical grounds. This was changed with the adoption by the Polish Parliament²⁴¹ of the Act on Patient’s Rights and Patient’s Right Ombudsman.²⁴² The Act on Patient’s Rights provides for a complaint procedure which allows to challenge a doctor’s opinion that a woman does not qualify for a legal abortion under the Act on Family Planning. The appeal is being examined by the medical commission whose decisions are final. However, the procedure provides a general mechanism only, applicable to all patients and, therefore, it is particularly inadequate to improve women’s access to legal abortion in practice.²⁴³ In 2015 the medical commission looked into only one objection.²⁴⁴ This proves that the mechanism is not an effective remedy for pregnant women. Bearing in mind the time pressure in proceedings regarding legal abortion,²⁴⁵ there is a significant lapse of time between making a complaint and issuing a decision by the medical commission (30 days). The problem with the lack of an effective and fast procedure will certainly not be rectified by shortening the deadline for the medical commission to issue a decision in answer to a patient’s complaint to 21 days.²⁴⁶ It seems that such a problem could only be solved by implementing a new procedure, tailored to the specific needs of pregnant women, which would allow them

²³⁹ Ibid.

²⁴⁰ S. Biernat, S. Wronkowska-Jaśkiewicz, A. Wróbel, the Judgment of the Constitutional Tribunal of 7 October 2015, No. K 12/14, pp. 66-81.

²⁴¹ This Act was a result of the European Court of Human Rights judgment in case of *Tysic v. Poland*. ECtHR 24 September 2007, *Tysic v. Poland*, Application No. 5410/03. Full coverage of this case is given in the part 2 of this paper.

²⁴² The Act of 6 November 2008 on Patient Rights and Patient’s Right Ombudsman, Journal of Laws of 2009, No. 53, item 417 as later amended.

²⁴³ Supplemental Information on Poland for the Periodic Review by the Human Rights Committee as its 118th Session (17 October 2016 – 4 November 2016), report on reproductive rights in Poland, drawn up by Polish NGO’s, p. 3 (22 September 2016), available at:

https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Joint_NGO_Submission_on_Poland_Oct_2016_FINAL.pdf [last visit: 27 January 2017].

²⁴⁴ Sprawozdanie dotyczące przestrzegania praw pacjenta na terytorium Rzeczypospolitej Polskiej, p. 43,

²⁴⁵ According to the Article 4(a) para. 1 legal abortion may be performed only until the end of twelfth week of pregnancy (if it resulted from criminal act) or until the fetus is capable of surviving under outside the mother’s body.

²⁴⁶ Ministry of Health, Draft amendments to the Act on Patient’s Rights and Patient’s Rights Ombudsman and Commissioner for Patient’s Rights (Pol.), No. 1218, available at: <http://legislacja.rcl.gov.pl/projekt/12287853/katalog/12367917#12367917> [last visit: 27 January 2017].

to receive a decision within 10 days.²⁴⁷ In many cases the three-weeks due time might still be too long to carry out a lawful abortion which is limited by virtue of the age of the fetus.

Summing up, under the binding law in Poland, Polish women are *de facto* divested of their autonomy to make decisions and choices about their reproductive health. Such autonomy can only be provided by effective access to accurate information concerning the sphere of reproductive health as well as an access to good quality reproductive health-care services. However, women in Poland continuously struggle against restrictive abortion laws, which reflects systemic violation of women's right to reproductive health which is key to women's health.

3. INTERNATIONAL LAW

Poland ratified international and regional treaties concerning women's reproductive rights, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and, the European Convention on Human Rights (ECHR). Article 87 of the Polish Constitution clearly indicates the position of these conventions in Polish sources of law and states that ratified international treaties are the sources of the universally binding law. This means that these treaties can be applied directly. Article 9 of the Polish Constitution gives an additional guarantee that basic rights and freedoms of an individual enshrined in international treaties will be observed, according to which "the Republic of Poland shall respect international law binding upon it".²⁴⁸ It should be indicated that Polish strict legal framework on abortion and its negative impact on women's reproductive rights, has been the matter of concern for international bodies focusing on human rights.

3.1 REGIONAL HUMAN RIGHTS INSTRUMENTS

The legal system of the Council of Europe is of crucial importance for the protection of women's rights and preventing discrimination based on sex. The European Convention on Human Rights constitutes one of the most efficient tools for establishing standards for the protection of women's rights. Despite the fact that the ECHR does not include detailed provisions on the protection of women's reproductive rights, it has been adopted and implemented in the spirit of equal rights for men and women and the prohibition of discrimination. The potential power of the Council of Europe in the area of protecting women's rights is also evidenced by the jurisdiction of the European Court of Human Rights (ECtHR) in Strasbourg. In the event when any State that is a party to the Convention violates

²⁴⁷ Federation for Women and Family Planning's stance concerning draft amendments to the Act on Patient's Rights and Patient's Rights Ombudsman and Commissioner for Patient's Rights, available at: <http://obserwatoriumdemokracji.pl/wp-content/uploads/2016/09/stanowisko-Federacji-ws.-projektu-nowelizacji-ustawy-o-prawach-pacjenta-i-RPP.pdf>

²⁴⁸ Journal of Laws of 1997, No. 78, item 483 as later amended.

its provisions, a woman may lodge an individual complaint with the Court, regardless of citizenship. There are two landmark cases concerning Polish abortion laws that should be discussed: *Tysic v. Poland* and *P. and S. v. Poland*.

The first case concerns a Polish woman who suffered from severe myopia for many years.²⁴⁹ When she got pregnant for the third time in 2000 she sought medical advice, as she was anxious that her pregnancy might affect her health. Numerous doctors decided that the pregnancy and delivery posed a serious health risk, but refused to issue a referral for the pregnancy to be terminated.²⁵⁰ By the second month of her pregnancy, the applicant's myopia had already significantly deteriorated in both eyes. She was examined by the head of the gynaecology and obstetrics department of a public hospital, Dr R.D., who found no medical grounds for performing a therapeutic abortion.²⁵¹ Thus, the applicant had no choice but to carry her pregnancy to term.²⁵² Following the delivery, her eyesight further deteriorated as a result of a retinal haemorrhage.²⁵³ In 2001 the applicant was qualified as significantly disabled, who needs "constant care and assistance in her everyday life".²⁵⁴ In the application to the ECtHR she complained that not having been allowed to terminate her pregnancy despite the risks to which she was exposed, amounted, *inter alia*, to a violation of Articles 8²⁵⁵ and 13²⁵⁶ of the ECHR. She further implied that no procedural and regulatory framework had been implemented to enable her to assert her right to a therapeutic abortion. The ECtHR held that Poland failed to provide Tysic an effective access to a lawful abortion in the case of a health risk, even though she was entitled to such termination under Polish regulations. The Courts emphasized 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. The provisions 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 real possibilities to obtain it".²⁵⁷ Moreover, the Court found that Polish abortion law did not include any effective mechanisms capable of determining whether the conditions for

²⁴⁹ ECtHR 24 September 2007, *Tysic v. Poland*, Application No. 5410/03.

²⁵⁰ *Ibid.*, para. 10

²⁵¹ *Ibid.*, para. 113 and 14.

²⁵² *Ibid.*, para. 15.

²⁵³ *Ibid.*, para. 18.

²⁵⁴ *Ibid.*

²⁵⁵ Article 8 of the ECHR states: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

²⁵⁶ Article 13 of the ECHR states: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

²⁵⁷ ECtHR 24 September 2007, *Tysic v. Poland*, Application No. 5410/03, para. 116.

obtaining a lawful abortion had been met in her case. This, in turn, created a situation of prolonged uncertainty for the applicant. As a result, the latter suffered “severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health”.²⁵⁸ Finally, the ECtHR recommended that Poland needs to establish an effective and quick procedural mechanism to review cases where there is a disagreement as to whether the conditions for lawful abortion have been met or not. Such a procedure should guarantee a pregnant woman a possibility to have her views considered.

In turn, the case of *P. and S. v. Poland*²⁵⁹ concerns a Polish teenager (first applicant) and her mother (second applicant). The first applicant was 14 years old in 2008 when she was raped by a classmate and became pregnant as a result. She obtained a certificate from the prosecutor confirming that her pregnancy resulted from unlawful sexual intercourse, and thus she had a right to legal abortion under the provisions of the Act on Family Planning. Nevertheless, her access to abortion was severely obstructed. Supported by her mother, she visited three different hospitals, receiving contradictory information about the requirements for accessing an abortion due to conscience-based refusal invoked by the doctors.²⁶⁰ Instead of help she was seeking for, she was removed from her mother’s custody and put in a juvenile shelter. Eventually, after the Ministry of Health intercession, an abortion was performed in a hospital, located about 500 kilometres from applicants’ home. Although the abortion was lawful, it was carried out in a clandestine manner. However, “when the applicants came back home, they realized that information about their journey to Gdańsk had been put on the Internet by the Catholic Information Agency that day at 9 a.m.”²⁶¹ In their application to the ECtHR, they complained about the violation of their right to respect for their private and family life under Article 8 of the ECHR and the violation of P.’s physical and moral integrity resulting from the absence of an effective and timely legal framework that would have guaranteed her access to abortion under the conditions set out by the domestic law.

As in *Tysic v. Poland* the ECtHR once again clarified that the “State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion”.²⁶² The ECtHR held that the legal framework was not applied correctly in this particular case. First of all, the ECtHR stressed that States are obliged to organize their health system in a way that reconciles the freedom of conscience of health professionals with patient’s right to lawful services.²⁶³ Nevertheless, medical “staff involved in applicants’ case did not consider themselves obliged to carry out the abortion expressly requested by the applicants on the strength of the certificate issued by the prosecutor”.²⁶⁴

²⁵⁸ Ibid., para. 124.

²⁵⁹ ECtHR 30 January 2013, *P. and S. v. Poland*, Application No. 57375/08.

²⁶⁰ Ibid., para. 102.

²⁶¹ Ibid., para. 41.

²⁶² Ibid., para. 99.

²⁶³ Ibid., para. 106.

²⁶⁴ Ibid., para. 108.

Article 8 of the Convention was violated as the applicants' personal and medical data was disclosed to the general public by the one of the hospitals. Although States enjoy a certain margin of appreciation in deciding what is "private"²⁶⁵, in this particular case there was no explanation how the disclosure of information about unwanted pregnancy and about the refusal to carry out an abortion could be justified by media interests.²⁶⁶ The Court concluded that the first applicant was treated by Polish authorities in a "deplorable manner".²⁶⁷ The ECtHR was "particularly struck" by the fact that the Polish authorities decided to start proceedings against a victim of sexual abuse and thereby showing a "profound lack of understanding of her predicament".²⁶⁸ All the above-mentioned facts along with the hindrance to obtain legal abortion were declared by the ECtHR as a breach of the right to be free from torture and cruel, inhuman or degrading treatment.²⁶⁹

3.2 UN HUMAN RIGHTS INSTRUMENTS

The United Nations has created a system of universal human rights based on international treaties ratified by the States Parties. Some of them, particularly the CEDAW and the ICCPR, guarantee rights to reproductive health. The implementation of the UN treaties is being monitored by the committees of independent experts – presently there are ten human rights treaty bodies. Some of these treaty bodies have been highlighting issues arising from the Polish abortion law since 1990s. In this context, reports drawn up by the CEDAW Committee and the Human Rights Committee (HRC) require special attention.

The Human Rights Committee which monitors the fulfilment of the provisions of the ICCPR by States Parties, including Poland, noted "with concern [Polish] strict laws on abortion which lead to high numbers of clandestine abortions with attendant risk to life and health of women".²⁷⁰ In 2004 the Committee's observations were extended to the concern about "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".²⁷¹ The improper use and performance of so-called "conscience clause" by the doctors was also indicated in 2010. Polish abortion laws were described by the HRC as "restrictive" and "anti-abortion"²⁷², and Poland was requested to keep statistics regarding illegal abortion.²⁷³ The latest report shows that Poland has not as yet fulfilled the above-mentioned recommendations. The statistics concerning illegal abortion are not kept by Polish

²⁶⁵ Ibid. para. 133.

²⁶⁶ Ibid.

²⁶⁷ Ibid., para. 168.

²⁶⁸ Ibid., para. 165.

²⁶⁹ Article 3 of the ECHR states: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

²⁷⁰ Human Rights Committee, Concluding Observations: Poland, CCPR/C/79/Add. 110, para. 11.

²⁷¹ Human Rights Committee, Concluding Observations: Poland, CCPR/CO/82/POL, para. 8.

²⁷² Human Rights Committee, Concluding Observations: Poland, CCPR/C/POL/CO/6, para. 12.

²⁷³ Ibid.

authorities and women still face procedural and practical obstacles when trying to access lawful abortion.²⁷⁴ Moreover, the HRC expressed its concern about the judgment of the Constitutional Tribunal of October 2015 under which “there is no reliable referral mechanism for access to abortion following the exercise of conscientious objection”.²⁷⁵

Similar observations can be found in the reports prepared by the CEDAW Committee. This Committee mentioned that “as a result of the restructuring of the health sector, there has been a decrease in the number of clinics and health services available to women, in particular in rural areas”.²⁷⁶ The Committee asked Poland to conduct research into illegal abortion and its impact on women’s health and life. The Committee also requested Poland to “strengthen the 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 about different methods of family planning”.²⁷⁷

In 2014 report, the CEDAW Committee positively assessed efforts to improve the Act on Patient Rights including a new time limit for acting on complaints”. However, at the same time, the Committee stressed that this would not solve the obstacles that women face when confronted with an unwanted pregnancy.²⁷⁸ The key recommendation of the Committee was to establish “clear standards for a uniform and non-restrictive interpretation of the conditions for legal abortion so that women can access it without limitations owing to the excessive use of so-called conscientious objection clause by doctors and health institutions”.²⁷⁹ The Committee, in order to enhance women’s access to reproductive health services, recommended amendments to the Act on Family Planning, to make conditions for abortion less restrictive.²⁸⁰

4. RECOMMENDATIONS

In order to provide women with their reproductive rights, Poland should observe the provisions of the international treaties such as the ICCPR, the CDEAW, the ICESCR and the ECHR. Therefore, the Polish authorities should make the following steps:

- Adopt effective measures to ensure full compliance with the European Court of Human Rights’ judgments in *Tysic v. Poland*, and *P. and S. v. Poland*;
- Decriminalize abortion to avoid the “chilling effect” amongst medical doctors;
- Establish clear standards for the interpretation of the conditions for lawful abortion as well as a dignified standard of performing lawful abortions;

²⁷⁴ Human Rights Committee, Concluding observations on the seventh periodic report of Poland, CCPR/C/POL/CO/7, para. 23, 24.

²⁷⁵ Ibid.

²⁷⁶ *Concluding comments* of the Committee on the Elimination of Discrimination against Women: Poland, CEDAW/C/POL/CO/6, para. 24.

²⁷⁷ Ibid., para. 25.

²⁷⁸ Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Poland, CEDAW/C/POL/CO/7-8, para. 36.

²⁷⁹ Ibid., para. 37(b).

²⁸⁰ Ibid., para. 37.

- Amend the Act on Patient Rights to establish a new, timely and effective complaint procedure, which will improve women's access to legal abortion in practice;
- Organize the reproductive health care service in a way which guarantees that women's access to abortion services is not restricted by the conscience-based refusals.