

# **WOMEN'S ACCESS TO JUSTICE IN POLAND**

**Analysis of the barriers  
hampering access to justice for women  
who were denied the right to lawful abortion**

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This Report is a part of KARAT's regional initiative on women's access to justice that is being implemented in Azerbaijan, Kyrgyzstan, Tajikistan, Uzbekistan and Poland since 2010 in the context of the CEDAW Committee's decision to elaborate General Recommendation on the theme.



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## Summary

This Report examines the barriers hampering women's access to justice in cases of denial of the right to lawful abortion in Poland. It starts with the *Introduction*, which provides the background information about the KARAT's initiative on access to justice and presents its objectives. The following chapter *Access to lawful abortion – a taboo in Poland* elaborates on the impact of the restricted access to termination of pregnancy on women's lives and depicts the scale of violations in this area. In the *Methodology* the information on research tools that have been used to examine the barriers that hamper access to lawful abortion services, as well as access to justice has been provided.

The subsequent analysis focuses on the legislation related to abortion, and it follows with the analysis of women's experiences in struggling to access the lawful termination of pregnancy. This part of the Report depicts the real stories of women with the objective to identify the existing barriers and women's needs to overcome them. The final chapter present recommendations for the Government aimed at eliminating the barriers hampering women's access to justice.

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## Introduction

### Background information about the initiative

The following report presents the outcomes of the research conducted in Poland within the regional initiative implemented by women's rights organizations in Azerbaijan, Kyrgyzstan, Poland, Tajikistan and Uzbekistan. The initiative coordinated by KARAT Coalition aims at improving the knowledge about the reasons why the complaint mechanisms provided by the Optional Protocol to the CEDAW Convention are underused to counteract gender discrimination in the countries of Central and Eastern Europe and Central Asia. To date, there are only 17 decisions on the communications submitted under the Optional Protocol to CEDAW. Among the decisions there are 4 cases coming from three countries of the Central and Eastern Europe (Belarus, Bulgaria, Hungary) and none from the Central Asia.

KARAT's experience gained in the multi-year process of promoting the Optional Protocol through partnership with women's rights NGOs<sup>1</sup> in the Region<sup>2</sup> pointed to the need of giving more attention to the reality of women's access to justice at the national level. The requirement of exhausting domestic legal remedies prior to submitting a complaint under any procedure of international investigation or settlement means in practice that the barriers that hamper the use of the justice system at the national level in fact limit also the access to international justice system. Hence one of the important reasons for women not to submit complaints to Regional and International Human Rights Bodies might easily be related to not using by them at all the national legal system in case of the certain gender specific violations of their human rights.

Gender dimension of access to justice: In case of women's rights violations the victims' ability to use the domestic legal remedies is often strongly influenced by such conditions as the social and cultural position of women in the society, power relations in the family, women's economic subordination and by other forms of discrimination experienced by women, including intersectional discrimination. Tradition and religion significantly affect the position of women in the society. Their rights are often violated in the areas that are strongly intertwined with one or both of them as well as in these which are widely perceived as private spheres of life. These violations are deeply rooted in everyday reality and considered by the society as a "normal consequence of the natural gender roles". Hence the related forms of discrimination not only remain widely unrecognized but the concomitant women's rights violations become a part of the accepted value system. Questioning this system of patriarchal and/or religious values is a taboo – to break it a woman would need an unusual strength, courage and determination as it most likely would expose her to oppression and/or further discrimination. Some of them may be additionally discouraged from seeking justice by the attitude of the law enforcement institutions, which are often reluctant to "interfere" into so-called family issues or just mirror the social prejudices against women (e.g. violence against women within the family or intimate relations, sexual violence). Others may stem from the fear of the consequences which may embrace *inter alia* the social ostracism and exclusion from the family, which may result in the loss of livelihood.

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<sup>1</sup> The activities have been implemented with women's rights organizations in: Armenia, Azerbaijan, Belarus, Georgia, Kyrgyzstan, Moldova, Tajikistan, Ukraine and Uzbekistan

<sup>2</sup> Region of Central and Eastern Europe and Central Asia

### The subject and objectives of the research

In order to identify the barriers that prevent women from claiming their rights, to get better knowledge about their needs and to formulate recommendations aimed at improving women's access to justice, KARAT conducted a pilot study which focused on the exemplary type of women's rights violations – on denying women access to abortion services that are legal under the Polish law.

These violations, although having serious consequences for women, are unrecognized by the society and law enforcement in Poland and thus extremely difficult for women to address through using the legal remedies. In this case justice seeking becomes a real challenge which women usually do not dare to face being aware that it would lead to breaking a socio-cultural taboo and to consequences that might have a heavy impact on their lives.

Since the research conducted in Poland is a part of the regional initiative it might be interesting for the readers to learn about the types of violations identified as a taboo in terms of access to justice that had been explored in the other countries involved in the study. Similarly to Poland these pressing issues have been defined individually at the national level by KARAT partners<sup>3</sup> in Azerbaijan, Kyrgyzstan, Tajikistan and Uzbekistan and are respectively:

- violence against women in Azerbaijan and Tajikistan,
- bride kidnapping in Kyrgyzstan,
- trafficking in women in Uzbekistan.

In order to document the gender dimension of women's access to justice, including the reasons for not using the legal system, the study all countries included:

- the description of the background and socio-cultural context of the selected type of women's rights violations identified as a pressing issue to be addressed;
- the analysis of the laws and procedures that would allow to map those that could be used to litigate for women's rights but also to identify the gaps and weaknesses that limit women's access to justice in case of the violations under consideration;
- the analysis of women's experience based on specific case studies and identification of their needs in the context of the access to justice;
- developing the recommendations addressed to the relevant national and international bodies aimed at empowering women to claim their rights.

### Conclusions

The research conducted in Poland reveals the impact of the nature of the violation on women's ability to use the justice system to exercise and/or protect their human rights. Such relation was identified also in four other countries involved in the initiative. In all five of them the findings of the study indicate that the justice systems, national and thus also regional and international, often fail when it comes to addressing common, gender-specific violations of women's rights.

In order to facilitate the positive changes in the States Parties, the human rights bodies, and specifically the CEDAW Committee, should monitor the realization of the rule of equal access to justice through monitoring the numbers of lawsuits and cases reported to the national investigation bodies in the areas of women's rights violations that are identified as socio-cultural taboo by

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<sup>3</sup> Azerbaijan: Gender Association "Symmetry", Kyrgyzstan: Forum of Women's NGOs of Kyrgyzstan, Poland: KARAT Coalition – Poland, Tajikistan: Public Foundation "Panorama", Uzbekistan: "Istiqbolli Avlod".

women's rights advocates. CEDAW Committee should also support the process of breaking the taboo through more often use of the inquiry procedure. To make the international justice system more available to individual victims of women's rights violation, the CEDAW Committee and other human rights bodies, whenever possible, should approach the admissibility criterion of exhausting the domestic legal remedies in a gender-sensitive manner and take into account the reality of women's access to justice, as well as the State's obligation in this realm.

The outcomes of the research conducted in Poland and the remaining countries conclude that more attention should be given at the national level to systemic solutions that would effectively protect women's rights as well as empower them to use the justice systems which should become gender sensitive and thus adjusted to the needs of women. In order to support the process of improving women's access to justice at the national level, in each country the set of recommendations was developed on the basis of the findings of the research.

In Poland the most general, fundamental one aimed at ensuring that women will be able to exercise their human rights through accessing legal abortion states that no gynecological services should be financed from the State's budget if the given health care facility does not fulfill its obligation to provide the due abortion services within the set of services provided to women.

## Access to lawful abortion – a taboo in Poland

### The law and the practice

Polish Family Planning Act<sup>1</sup>, which bans abortion for the social reasons, allows the pregnancy to be terminated in three situations: when it constitutes a threat to women's life or health, when it results from an illegal act and when the fetus is heavily, irreversibly damaged or suffers from an incurable life threatening illness. Although the law seems to provide certain rights to legal abortion for women in desperate situations, there is a tremendous gap between what the law states and how it works in practice. Women's ability to exercise the rights, that seem to be provided by the Family Planning Act, is in fact seriously limited by numerous factors rooted deeply in gender stereotypes as well as in the social approach towards abortion and women's reproductive rights in general. The practice of questioning women's entitlement to legal abortion and of denying them access to the relevant medical services is so common that women often do not even try to use the laws and the formal health care system to fulfill their needs. Instead they share the experience of hundred thousands of women who, being not entitled to legal abortion, are pushed to either use the so-called abortion underground or to seek a way to solve their problem of unwanted pregnancy outside of Poland. The situation is well reflected by the official data on the yearly numbers of abortions in Poland.

#### Access to legal abortion – official data

The data presented to the Parliament in the yearly governmental reports on the implementation of the Family Planning Act confirm the grave problem that women in Poland have with access to legal abortion. The yearly numbers of legal abortions that have been performed since 1993, when the said Act came into force, have been dramatically low especially when compared to the number of women in reproductive age (15-49) which range from over 9.5 million (1991, 2009) to over 10 million (1999-2002)<sup>2</sup>. The yearly total number of legal abortions has dropped since 1993, when it amounted 1240. In 2001 it reached the lowest level of **124** and then increased to reach **538** in 2009<sup>3</sup>. The rate of pregnancy terminations in terms of legal grounds varies but is the lowest in case when performed to protect their health and life or when the pregnancy results from illegal act – for example in 2009 only **1** abortion was performed due to the criminal grounds and only **27** because the pregnancy constituted the threat to women's lives or health.

### The scale of violations of women's right to access lawful abortion

Even though it is quite obvious that women's right protected by the Family Planning Act is gravely violated, it is difficult to even roughly estimate the scale of the phenomenon. There are several reasons for that. Two highlighted below show additionally that the main actors responsible for putting the law into practice – the State authorities and the health care professionals – fail to facilitate women's access to justice in terms of legal abortion.

Lack of the monitoring mechanisms: The State authorities have never taken any effort to monitor the *de facto* implementation of the law, the observance of the relevant women's rights that it provides and the impact that the law itself and the way it works have on women's lives. The yearly governmental reports to the Parliament on how the Family Planning Act functions approaches the

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<sup>1</sup> The Law on Family-Planning, Protection of the Human Foetus and Conditions of Permitting Pregnancy Termination 7.01.1993

<sup>2</sup> Struktura Ludności, Główny Urząd Statystyczny, 3.11.2010; [www.stat.gov.pl/gus/ludnosc\\_PLK\\_HTML.htm](http://www.stat.gov.pl/gus/ludnosc_PLK_HTML.htm)

<sup>3</sup> The information does not include the year 1997 when abortion for social reasons was permitted on the basis of the law amendment in force only within that year.



issue of abortion only in terms of the compliance with and the violation of the restrictions introduced by the Act itself and by the regulations of the criminal code that refer to the termination of the pregnancy and to “threatening the life of the conceived child<sup>4</sup>”. Thus the only information and statistics related to abortion officially available are those that present on one hand the number of and reasons for legally performed abortions and on the other - the number of cases brought to the police, prosecutors and courts against people alleged of being involved in the illegal abortions<sup>5</sup>. The reports on the activities of the medical bodies<sup>6</sup> also do not bring the information on how women’s rights to legal abortion are observed. This means in fact that the official reports do not provide any information or statistics on the observance of women’s rights to legal abortion and on their access to justice in case their rights are violated.

*Questioning attitude of health care providers:* The ambiguity of the provisions of the Family Planning Act, which do not define precisely the conditions permitting pregnancy termination, is not only widely used to question women’s entitlement to legal abortion (despite the intention of the lawmakers) but also makes it impossible to assess the number of women entitled to terminate the pregnancy and to estimate the scale of the rights’ denial. In case of the medical grounds one shall never know whether the specific ailment or fetus impairment will be found grave enough by the individual doctors and the officials influencing access to abortion to recognize the entitlement to terminate the pregnancy. This effectively discourages women to officially claim their right to legal abortion because of the time limits imposed by the pregnancy and because of the unlikelihood of success .

## **Historical background of Polish law on abortion**

### Liberal law of 1956

Abortion on social grounds became legal in Poland in 1956. In 1959, due to the further legal amendments, women got the power to make their own decisions on the termination of the pregnancy and to exercise their rights regardless of their socio-economic position. The liberal law, widely accepted by the society, functioned for over 30 years and fully eliminated the demand for the backstreet abortions.

### Democratic reforms and new law on abortion (1993)

In 1980s the Roman Catholic Church, an extremely powerful political force in Poland, used the opportunity created by the democratic processes and intensified its campaign for complete ban on abortion. As a result in 1989-1992 several attempts were made by the fundamentalist forces in the Parliament<sup>7</sup> to dramatically restrict the law on abortion. The bills considered by Sejm<sup>8</sup> and Senat<sup>9</sup> stipulated that abortion should not be allowed even to save woman’s life and that both: abortion provider and the woman, should be punished by imprisonment. In 1992 one of the restrictive bills generated a strong grass-root social response – over 1.2 million people supported the call for the referendum on penalization of abortion. Despite that and the public opinion polls, according to which

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<sup>4</sup> „Conceived child” - a term, which in Poland stands for the “unborn child”, is also used in the Criminal Code (art. 152, 153, 157a).

<sup>5</sup> The group may include providers of the services acting with women’s consent, persons who assist women/girls within the whole process or people who force women to have abortion or terminate their pregnancy against their will.

<sup>6</sup> The yearly governmental reports include the information on the number of cases submitted and decided by regional medical courts (sprawdzić: okręgowe sądy lekarskie) and rzecznicy odpowiedzialności zawodowej (?) and on interventions by the Office for Patients Rights

<sup>7</sup> Parlament wybrany w pierwszych po drugiej wojnie światowej częściowo wolnych wyborach.

<sup>8</sup> Sejm - a Lower Chamber of Polish Parliament

<sup>9</sup> Senat - and Higher Chamber of Polish Parliament

the majority of the society opposed the criminalization of abortion, the call for referendum was ignored. In 1993 the law was passed that bans abortion on social grounds and stipulates that all violators of the law except for the woman shall be punished with imprisonment.

#### The situation after 1993

Since 1993 several attempts were made to decriminalize the termination of the pregnancy because of the social reasons. In 1994 the adequate amendment was vetoed by the president Lech Wałęsa. In 1996 the Parliament again accepted legal amendments easing the hitherto restrictions and allowing abortion for women in difficult economic and personal situation. However in 1997 the Constitutional Tribunal (CT) derived the constitutional protection of the human life from the moment of conception from the rule of democratic state of law and further stated that: “the recognition of the human life as a constitutional value implies the necessity to limit the rights of the *pregnant women*” (*Z istoty uznania życia ludzkiego za wartość konstytucyjną wynika konieczne ograniczenie praw kobiety ciężarnej*)<sup>10</sup>. The decision of CT has significantly affected the recognition of women’s reproductive rights within the society and has contributed to the violation of women’s rights to legal abortion.

#### **The political debate and women’s access to rights**

The political debate around the law on abortion in the ‘90s has played a predominant role in making the termination of the pregnancy a social taboo in Poland – an option that women should not really considered in any situation, even when legally permitted. The aggressive language of the Catholic Church and other fundamentalist opponents of women’s reproductive rights has hampered any pragmatic discussion. The authority of John Paul II, the Polish pope, was commonly used to strengthen their already strong political position. The liberal law on abortion was presented as a relic of the totalitarian system which aimed at the well-being of the whole nation. The fact that the state had not cared about providing access to contraception when abortion had been legal also worked against women who were blamed for using the pregnancy termination as a family planning method.

Given that the civil society, including the feminist organizations, was just starting to develop, there was no force prepared to oppose such a campaign, especially that it was a part of the broader process challenging the separation of the church and state. Additionally, the patronizing approach towards women in general resulted in excluding women from the public debates. The broadcasted discussions and interviews were largely dominated by male “experts”, mainly by politicians and priests, who did not hesitate to ask accusingly their female opponents (if present at all) whether they already had had an abortion. This common practice well illustrated one of the side effects of the political debate – the public perception of abortion changed and it was not longer perceived as a part of woman’s private life. The process was combined with the fast evolution of the language which became extremely judging. Additionally, women, who bore the consequences of the process, became more and more invisible in the public debate, including the media, as the word “woman” was gradually effaced while the “pregnancy”, “abortion” and “conceived child” gained the status of the independent subjects.

The judging approach towards pregnancy termination, the uneven power relation between women, the male experts and the church as well as the lack of gender sensitive media pushed women’s experience and needs out of the public sphere and, as a result, significantly blocked their access to justice when reproductive health services are concerned.

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<sup>10</sup> Decision of the Constitutional Tribunal of 28.05.1997, Akt K 26/96

### The role of the Roman Catholic Church

The Roman Catholic Church in Poland plays an active role in restricting women's and girls' rights to legally terminate pregnancy. Due to the privileged position of the religion professed by the majority of the society, the Church has at its disposal several tools and mechanisms which:

- enable the Church to exert direct or indirect influence on persons and institutions responsible for providing access to appropriate medical services and
- generate or perpetuate the condemnation of women who want to claim their right, particularly those who openly request it, thus breaking the taboo surrounding the termination of pregnancy.

The tools used by the Roman Catholic Church to actively block women's access to legal abortion include:

- Numerous Catholic media which shape and perpetuate the harmful discourse used to discuss abortion and people who, in any way, support women's rights in this sphere. Catholic radio broadcasting stations, daily newspapers and periodicals supported by right-wing media conduct campaigns directed *ad personam* at people who break the silence surrounding abortion. This is particularly painful for women whose private decisions are thus made public and undergo public scrutiny. The experience of Alicja Tysi c proves the threats faced by such women. Tysi c, after winning her case concerning refusal of access to a legal abortion at the European Court of Human Rights, had to use the court system to demand an apology from the Archdiocese of Katowice, the publisher of the periodical *Gość Niedzielny*, and from its editor-in-chief for infringement of personal interests in 10 articles published in the paper. Finally, the appellate court decided in her favor and required that the defendants apologize to the plaintiff for unjustly comparing her to Nazi war criminals and express their regret for using hate speech.<sup>11</sup>
- Making access to religious services such as burial, baptism, marriage, absolution or communion conditional on an individual's attitude to abortion (also when it is legal or a subject of public debate). The situation which took place after the death of well-known Catholic professor of gynecology and obstetrics Waclaw Dec proves this point. The local bishop refused to allow the burial of Prof. Dec in light of the physician's active support for the permissibility of abortion for social reasons during the public debate about changing Polish legislation regulating this issue. Prof. Dec died in 1997 in result of severe injuries suffered in a car accident. The refusal of a Catholic burial provoked a scandal but was also a clear signal for Catholics to stick to the Church's official doctrine on abortion rather than use their conscience. Catholicism is such a popular religion in Poland that even those who do not care about religious services usually have loved ones who find them important. Naturally, they do not wish for their family members to have to suffer in result of their actions. A situation experienced by the youngest daughter of Alicja Tysi c is an example of blaming family members of the person who entered into a conflict with the Catholic church. The girl has, for years, been refused the sacrament of baptism to punish her mother for breaking the taboo surrounding abortion.
- Influence of priests on decisions of hospital authorities  
Insufficient protection of medical confidentiality and female patients' right to privacy, often connected to value judgments placed on the procedure of terminating a pregnancy, makes it easy for Catholic priests, and for the Church as an institution, to exert pressure on physicians,

<sup>11</sup> M. Go lińska, Alicja Tysi c drugi raz wygrała z Gościem Niedzielnym, [Gazeta.pl Katowice](http://Gazeta.pl/Katowice), 5.02.2010

to interfere in decisions made by hospital authorities and to torment women or girls determined to take advantage of their right to a legal abortion. All of these factors make it impossible or almost impossible for the interested parties to claim their rights. Already in 1996 The Federation for Women and Family Planning recorded a situation proving this point.<sup>12</sup> In 2008 public opinion followed the dramatic fate of a fourteen-year-old girl, pregnant in result of rape. Even though her right to a legal abortion should not have been undermined,<sup>13</sup> the minister of health had to become personally involved in the process of finding a medical facility willing to carry out the procedure. The first hospital into which the girl was admitted, informed the priest about her situation and, without the girl's consent, initiated a meeting between the two during which the priest tried to influence the teenager to change her mind. When the girl, accompanied by her mother, transferred to a hospital in Warsaw, the priest together with a group of "pro-life" activists followed her and managed to convince yet another hospital to refuse to perform the procedure. The girl's ordeal was only made worse by a verdict of the family court which placed her in the custody of child services and forbade her to have any contacts with her mother, who in the meantime legally lost custody of the child. During that time the priest was working on placing the girl in a single mothers' home that he was operating. Bishops also became involved in the case and some of them called for excommunicating the minister of health. The pregnancy was finally terminated in circumstances much resembling an illegal abortion, in a hospital whose name has not been revealed. The case made its way to the European Court of Human Rights in 2008 and a communicate was issued to Poland in October 2010.<sup>14</sup>

- *Presence of religion classes in public schools (since 1990)*  
Even though religion classes (de facto, Catholic catechism classes) are not compulsory, they are treated as equal to other subjects. In result, the contents of these lessons are perceived as officially binding values. No wonder that young people, in result of such classes, become convinced that a woman's decision to terminate a pregnancy is not a private decision but one which can and should be morally evaluated. Such instruction necessarily shapes the attitudes of people who are later encountered by women trying to claim their right to a legal abortion.

### **The health care providers and women's access to legal abortion**

In all three situations in which abortion is permitted in Poland, a significant role in accessing a legal service is played, for obvious reasons, by health care employees, in particular by physicians and hospital authorities. In case of medical reasons for terminating a pregnancy, their role is further increased by the requirement of written confirmation of medical reasons for the procedure. This is a

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<sup>12</sup> In April 1995 a 41-year-old woman, 8 weeks pregnant, mother of seven children, was diagnosed with a brainstem glioma. In light of the patient's state of health and the required treatment, specialists-physicians decided that a termination of the pregnancy was necessary. However, the procedure was cancelled after a priest's intervention. The priest came into possession of information protected by physician-patient confidentiality and tried to influence the course of events by notifying the prosecution. Even though the prosecution did not commence any proceedings against the physicians, a consilium summoned for reconsidering the case, decided that even though the pregnancy endangers the woman's life, an abortion is not necessary. After permission for the abortion was revoked, the woman refused cancer treatment. She died a year later, several months after giving birth to her eighth child. Sources: Federation for Women and Family Planning, Effects of the Anti-Abortion Law, Report number 2, February 1996; NEUTRUM Association for Ideologically-Free State, Bulletin nr 19/20, May 31 1996.

<sup>13</sup> The pregnancy was at the same time a result of rape and of illegal activity, that is of sexual intercourse with a person under the age of 15 years (the age of sexual consent according to Polish law).

<sup>14</sup> [Case of P. i S. v Poland, 57375/08](#);

requirement for abortions carried out due to fetal impairment or because a pregnancy endangers a woman's health. The role played by physicians makes them able to influence whether and how women can access their right to a legal abortion. Unfortunately, in Poland they usually abuse their position in order to restrict women's rights, for example by:

- Refusing to issue the certificate required to obtain an abortion. Inadequate interpretation of the law is a frequent excuse. According to the legislation, endangerment of the woman's health/life or the "high probability" of fetal illness is sufficient for terminating a pregnancy. Meanwhile, physicians require confirmation that continuing the pregnancy would result in the woman's death or in grave consequences for her health. Similarly, in the case of the second reason, whenever possible, physicians undermine the possibility of the illness of the fetus. They are also inconsistent in their interpretation of the requirement that the illness should be incurable.
- Refusing to perform the procedure<sup>15</sup> on the basis of the "conscience clause" without referring the woman to another facility where she could obtain the service, even though this obligation is spelled out in the law.
- Referring patients (entitled to the procedure) to other hospitals,<sup>16</sup> which – in turn – refer them further, thus extending the process until the deadline for the permissibility of the procedure is reached.
- Misinforming or not informing patients about the conditions of permissibility of abortion. Lack of the state's information policy of any kind makes it possible for physicians to avoid claims by women who are legally entitled to the procedure and, therefore, to avoid problems and decisions connected with the need to terminate a pregnancy.

There exist numerous factors influencing the physicians' attitude. The most important ones include:

- Fear of the consequences, whether real or imaginary, connected to the physician's status or professional career, often connected to peer pressure and the atmosphere surrounding abortion.
- Conformity, that is the tendency to avoid problematic situations. Such situations include the necessity of decision-making and the possibility of the decision being undermined by a different physician.
- Fear of sanctions employed by the Roman Catholic church, as mentioned above.
- Condescending attitude to female patients and women in general, lack of acknowledgment of their health and lives as primary values and lack of recognition of the WHO definition of health.
- Caring about the hospital's image. Even these few hospitals which are willing to provide abortion services in exceptional cases do not want to publicize this fact, fearing an influx of female patients from the entire country.

### Media and women's access to justice

The media are also a significant factor influencing women's possibility of taking advantage of their right to a legal abortion. They can fill the information gap by providing knowledge of the rights

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<sup>15</sup> Medical abortion, enabling early termination of pregnancy, is not permitted in Poland.

<sup>16</sup> According to current legislation, a pregnancy can be terminated for medical reasons only in a hospital setting.

available to women. They may also help women by publicizing cases of severe infringements of women's rights. However, should they want to, they can have the opposite effect, for example by deterring women from openly demanding their right to a legal abortion, humiliating and tormenting women whose stories have already been revealed.<sup>17</sup> The threat of making public women's private decisions is tied to the additional risk that even the illegal termination of the pregnancy may become impossible. Recognition of this fact may also influence women to use the services of the abortion underground or to engage in abortion tourism, rather than claiming their right to legally terminate a pregnancy.

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<sup>17</sup> The experiences of Alicja Tysic and of the pregnant 14-year-old girl can be used as examples. Personal data of the teenager was revealed by right-wing media despite her lack of consent. The public character of this case did not result from the young woman's decision but from a breach of patient-physician confidentiality.

## Methodology

This qualitative research aims at mapping the barriers preventing women entitled to legal abortion from exercising their rights and at exploring the ways to improve their access to justice in this area. The study is based on three kinds of resources: the laws referring to abortion, the testimonies of individual women as well as the information and reflections from women's rights advocates.

The research consisted of two parts:

- 1) the analysis of the Polish laws addressing the issue of abortion in the context of effectiveness of the appealing mechanism enabling women to raise objection in case of the denial of legal abortion;
- 2) the analysis of women's experience focused on identifying the factors which discourage women eligible to legally terminate pregnancy from exercising their right to abortion.

### The analysis of the laws

The scope and the focus of the research was defined through consulting lawyers working in the area of women's reproductive rights. The need for a comprehensive study approaching the issue in the context of woman's right to raise objection to the doctor's opinion/decision depriving her of access to legal abortion service was identified.

The overall aim of the analysis of the laws and regulations addressing the issue of abortion is to:

- identify the gaps and weak points in the laws that limit women's access to legal abortion services and to justice in case of denial;
- map the laws that could be used to litigate for women's rights under consideration and thus contribute to improving the implementation of the law.

The analysis includes in particular:

- the Family Planning Act<sup>1</sup> defining the circumstances when abortion is legal;
- the Criminal Code regulations penalizing abortion;
- the medical law providing the doctors with the right to object on grounds of conscience (known as the "conscience clause");
- the jurisdiction addressing the right to legal abortion;
- the laws referring to discrimination, including gender discrimination;
- the appealing mechanism implemented to protect women's right to legal abortion (developed as a consequence of the verdict of the European Court of Human Rights in the case *A. Tysiac vs. Poland*).

### The analysis of women's experience

The framework for the research was defined in the process of consulting women's rights advocates with the expertise in reproductive rights. The analysis combines the experience of the individual women with that of the NGOs providing support in the situations when legal abortion services are denied to women.

The overall goals of the analysis include:

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<sup>1</sup> The Law on Family-Planning, Protection of the Human Foetus and Conditions of Permitting Pregnancy Termination 7.01.1993

- naming the barriers that prevent women from seeking justice in terms of access to legal abortion and identifying women's needs in this area;
- formulating the recommendations addressed to the relevant national and international bodies aimed at improving women's access to justice in case of the violation of the rights under consideration.

The following aspects to be considered during the research were identified due to the expertise of the women's rights advocates working in the area of the reproductive rights:

- the possible problems with reaching women who were entitled to legal abortion but did not even try or failed to exercise their right due to the low social awareness, or lack of recognition, of the conditions under which abortion in Poland is legal (some women might not even suspect that they have the right to terminate the pregnancy legally, others might be misled by the health care providers);
- the feelings about abortion (or demand for it) which – for different reasons – women might find painful and thus not easy to recall or discuss;
- the influence that the illegal status of abortion has on women's decision to exercise their right to legally terminate the pregnancy;
- the critical need for using the expertise of women's rights organisations and advocates providing the consultations on access to legal abortion as an important source of knowledge about women's experience gathered throughout their everyday work.

The following resources were used in order to include all aspects listed above:

- the stories of women denied access to legal abortion well documented over the years and presented in the publications of the Federation for Women and Family Planning: "Women's Hell – Cotemporary Stories", "Women's Hell Continues", reports on the functioning of the Family Planning Act;
- interviews with women entitled to legal abortion;
- interviews with women's rights advocates working in the area of reproductive rights;
- interviews with women who had illegal abortions;
- stories shared by women on internet discussion forums;
- the reports of PONTON Group of Sex Educators;
- other publications on the issue of abortion in Poland.

The analysis performed on the basis of the resources listed above covers the experience of women related to accessing legal abortion over the years since the Family Planning Act came into force. Hence it refers to the situations before and after the implementation of the appealing mechanism that is due to empower women to exercise their right to terminate the pregnancy when permitted by the law.

The following information related to their experience were given special attention:

- did the woman consider taking steps to exercise her right to legal abortion and to what extend? if no – why? if yes – why?
- what was her experience with the health care providers?
- did she take legal steps to claim her rights? if yes, what kind of steps? if no – why?
- were those steps successful?
- what was her experience with the justice system?
- what kind of support did the woman receive throughout the process?
- how did the woman feel about the whole situation?
- did the socio-economic status of woman influence her experience/decision?
- did other factors influence her decision? if yes, what kind of them?



The research allowed to define the women's needs related to access to justice in the area under consideration and thus provided the basis for formulating the relevant recommendation presented in the report.

## Analysis of the legal framework

### The right to legal therapeutic abortion in Poland

In the years 1999 – 2007, from 26 and 200 abortion-related crimes were recorded in cases where the woman had consented to the procedure<sup>i</sup>.

Abortion in Poland is, on principle, illegal. Carrying out an abortion with the woman's consent; abortion after the fetus has reached viability; abortion resulting in the death of the pregnant woman; and aiding and abetting a pregnant woman to abort all carry custodial sentences ranging from 6 months – 10 years imprisonment. The Penal Code does not, however, penalize the woman who undergoes an abortion.

Penalizing abortion raises the risks for physicians who carry it out – even in cases allowed by the law. It gives abortion the stigma of a criminal offence and strengthens social taboos surrounding the procedure.

Three legal exceptions exist to the ban on abortion in Poland<sup>ii</sup>:

*A. Pregnancy “imperils the life or health of the pregnant woman”* (art. 4a, par. 1, item 1). The phrasing of this provision appears to allow abortion if there is any health risk to the woman – whether a physical or psychological health risk, minor or significant, and regardless of the probability of the negative consequences associated with the risk. However, in practice, physicians use a very narrow interpretation of health to apply the provision arbitrarily against women.

Only physicians specializing in the relevant medical field can certify whether the pregnancy constitutes a risk to the woman's life or health. It is therefore unclear whether a general practitioner treating a woman suffering from several health conditions can do so. This lack of clarity may restrict women's rights to access abortion.

From 2002 – 2007, in a country with 40 million people, the number of abortions under this exception varied from 37 to 82 a year.

*B. “Prenatal tests or other medical premises point to the high risk of grave and irreparable impairment of the fetus or of an incurable illness threatening its life”* (art. 4a para. 1 item 2).

The number of abortions carried out in connection to prenatal fetal impairment in the period 2002-2007 ranged between 82 and 282.

This exception is permissible only until the fetus reaches viability. Further, legal cases reveal a pattern whereby court appointed medical experts interpret the conditions of “grave” and “irreparable” in such a subjective way as to refuse, even in the most evident cases, to recognize medical errors committed by members of the professional society to which they belong by law. In one case, the woman's physician denied that Down syndrome constituted grave fetal impairment<sup>iii</sup>. The common practice of restricting women's access to prenatal screening also effectively prevents the possibility of taking advantage of the right to terminate a pregnancy with a high risk of genetic defects.

#### **R.R. v Poland, complaint 27617/04, decision dated May 26 2011**

The European Court of Human Rights stated that limiting a pregnant woman's access to prenatal testing in cases of the probability of a genetic defect of the fetus, fulfilled the conditions for inhuman and degrading treatment, therefore violating Art. 3 of the Convention on Human Rights and Basic Freedoms.

C. "There are reasons to suspect that the pregnancy results from an unlawful act".

In the period 2002-2007 the number of abortions resulting from an unlawful act ranged from 3 to 12.

The Prosecutor must acknowledge this but the Act does not provide a specific appeals procedure against the refusal of the Prosecutor to do so and existing appeal procedures do not provide women with an appropriate remedy. Further, women usually do not find out they are pregnant until the 5<sup>th</sup> week or later but the Prosecutor is not required to present an opinion within a particular time limit and abortion is only permitted until the 12<sup>th</sup> week of pregnancy. It can also be assumed that the trauma resulting from the crime can prevent women from seeking to undergo a medical procedure.

**Language of the Act – implications for accessibility of abortion**

The language of the Act does not recognize women's right to abortion or directly formulate her right to make the decision. Women cannot, therefore, require a physician to carry out the procedure, even where it is legal, if the physician is unfavourably disposed to abortion. Although the case law has, so far, interpreted the provision as recognizing women's right to abortion, the Supreme Court has only reached five such verdicts to date and its decisions are, as a rule, only binding for the court giving the decision in a given case. The view that there is no 'right' to abortion is predominant in literature and it can be expected that it may appear in court verdicts<sup>iv</sup>.

In addition, judicial remedies only provide a solution after the fact and we can say that better educated women, women who are more aware of their rights or who have better access to obtaining information, have higher chances of enforcing their right to an abortion through the courts. The functioning of the Act is unfavorable for women who are not as well educated, have worse access to information and live in smaller towns.

**Conscience clause**

The law on the profession of the physician and dentist entitles physicians to refrain from carrying out medical services which violate his conscience (art. 39). Information about which physicians in a given public health care facility refuse to perform particular reproductive rights services are not generally available.

**Legal measures to facilitate access to abortion and/or achieve redress**

Violation of the right to legal abortion infringes on the equal treatment rights with regard to exercising constitutional rights such as dignity (art. 30 of the Constitution), freedom (art. 31 of the Constitution), life and health (art. 38 and 68 of the Constitution), the right to self-determination and the right to make decisions about one's personal life (art. 47 of the Constitution). Certain legal avenues are open to women but they are subject to obstacles which make them frequently ineffective.

Where a hospital refuses to perform an abortion, women (or parents) can file for damages on a number of grounds. However, obstacles to these claims are great and include the burden of proving damage and that it was caused by the refusal to carry out the procedure; the length of civil proceedings; and the need for costly professional legal representation to deal with the scale of difficulty of launching an effective civil action.

Although the penal law does not criminalize the act of preventing a pregnant woman from having a legal abortion, it may be possible to prosecute such action as a crime against health and life, in particular negligent homicide and causing a severe bodily injury. However, in practice, the criminal proceedings conducted so far have either been dismissed or have not resulted in any decisions.

Since 2009, a patient can appeal to a Medical Board against the physician's opinion or medical statement if this opinion or statement carries consequences for the patient's rights or responsibilities under the provisions of the law. However:

- Women have no say regarding the composition of the Board and physicians who have previously invoked the conscience clause are not excluded;
- The Board has 30 days to examine the appeal, which carries the risk that it will be too late for the woman to legally terminate the pregnancy or that the procedure will be performed at an advanced stage of the pregnancy, resulting in additional health risks for the woman;
- Women must prove the legal basis for their appeal which will, in practice, discriminate against women based on material status or education because the appeal process will be primarily available for well-off women who will be able to secure professional, paid legal services, or better educated or more resourceful women, who will be able to access the necessary information on their own;
- The legislature imposes a 30-day time limit on the right to appeal; and
- The Board is not required to provide reasons for its decision yet the decision is final and binding. This creates a risk that the Board's decisions will be arbitrary.

## Conclusions

To summarise, in Poland, access to the justice system in order to exercise one's right to terminate pregnancy should be evaluated as very ineffective.

Therefore, the question arises as to whether the limited access to the domestic justice system will limit options for pursuing justice at international institutions, and in particular at the European Court of Human Rights and the Committee on the Elimination of Discrimination against Women. One of the conditions both of these institutions demand be fulfilled in order to file an appeal is to exhaust the available domestic procedures. However, the obstacles discussed above may lead women to abandon the effort of pursuing justice in domestic institutions or, having gone through such an attempt, to withdraw, for example, after the first instance court has pronounced its verdict, discouraged with how difficult, expensive and time consuming the process is, and how slim are the chances of success.

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<sup>i</sup> Statistics gathered by the Central Police Headquarters: *2007 Report of the Council of Ministers on the implementation of the Act of January 7 1993 on Family-Planning, Protection of the Human Embryo and Conditions of Legal Pregnancy Termination and the Effects of the Act*, Sejm record 1606, from p. 56.

<sup>ii</sup> Act of January 7 1993 on Family-Planning, Protection of the Human Embryo and Conditions of Legal Pregnancy Termination.

<sup>iii</sup> Case of Bożena Kleczkowska.

<sup>iv</sup> See, for example, dissenting opinion to the verdict of the Supreme Court dated October 13 2005 (court record IV CK 161/05) and M. Gałązka and K. Wiak in an opinion on the verdict of the ECHR of March 20 2007 in the case *Tysiąc vs Poland* (complaint number 5410/03).

## Analysis of the barriers that hamper women's access to lawful abortion

*Access to justice means a real chance to have one's rights protected.(...) It is also about developing and implementing practices that are strong enough to effectively protect women's rights.(...) In an ideal world, access to justice would mean that the potential victims are protected before they get harmed.*

*Participants of Training and Strategic Development:  
Optional Protocol to CEDAW and Women's Access to Justice, Warsaw, May 2011<sup>1</sup>*

In 2005, Wanda Nowicka, the president of Federation for Women and Family Planning (FWFP) wrote that "it takes nearly a miracle for women to access legal abortion" <sup>2</sup>. She further stated that: "In seeking to exercise their legal right, even women who meet the legal criteria for abortion usually encounter obstacles that are impossible to overcome"<sup>3</sup>. FWFP is a leading Polish non-governmental organization monitoring the implementation of effects of the anti-abortion law in Poland. It has 20 years' worth of experience in providing over-the-phone counseling for women. Among its activities there are also legal interventions and awareness abortion law.

In order to enumerate barriers hindering access to lawful abortion, the current study quotes stories of women (gathered mainly by the Federation for Women and Family Planning), who experienced coercion to continue their pregnancies against their will, even though they were entitled to legal abortion.

The analysis starts with reviewing the barriers that impede access to lawful abortion at institutional level depending on the ground for the legal pregnancy termination. It illustrates them with examples that may shed some light on where they originate from. Subsequently, other barriers, mainly of cultural and socio-economic nature, are elaborated.

### 1. Barriers at institutional level

#### 1.1. Pregnancy termination as women's health- and life-saving treatment

According to the Polish law, abortion is permitted at any stage of the pregnancy when the life or health of the woman is threatened. The lack of official health definition in Polish regulations as well as lack of the listed conditions entitling to pregnancy termination should direct the medical staff and the authorities to apply the WHO definition of health for identifying grounds for lawful abortion. Nevertheless, **the experience of women and the low number of abortions on medical grounds<sup>4</sup> indicate that in this case health is understood extremely narrowly.** In practice, women who are likely to survive the pregnancy and delivery have almost no chance to access lawful abortion services in order to protect their health and life. While trying to exercise their right, they encounter a series of obstacles on both stages towards the pregnancy termination: obtaining the referral for abortion and getting access to the procedure.

<sup>1</sup> Organised in Warsaw, 18-21 May 2011, by KARAT Coalition for women's rights advocates from Azerbaijan, Kyrgyzstan, Poland, Tajikistan, Uzbekistan.

<sup>2</sup> Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.5

<sup>3</sup> ibidem

<sup>4</sup> 27 abortions in 2010 and in 2009 (the lowest number since 1993 when Family Planning Act came into force) according to the Governments Report on the implementation of the Family Planning Act in 2010 (*Sprawozdanie Rady Ministrów z realizacji oraz o skutkach stosowania w roku 2010 ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży*).

### 1.1.1. *Obtaining the referral*

*Legal staff assisting women calling the Federation for Women and Family Planning's hotline repeatedly hear stories where doctors have no problem with hinting at abortion in informal conversations, but seem unable to provide a written certificate that will entitle the woman to get a lawful termination.*

*FWFP staff member*

Doctors do not want to take responsibility even for consenting to a legal abortion and they seem to do everything to avoid issuing the appropriate referrals. As a result, women who experience serious health problems wander from one doctor to another, undergo consultations that are not really necessary, and are usually misinformed about their health, as well as about the availability of legal pregnancy termination. Since the law deprives them of subjective right to decide whether they want to take a risk in case the pregnancy threatens their life or health, they have no power to overcome even the first barrier – obtaining the certificate that would entitle them to legal abortion. Moreover, they might not even be aware that by continuing the pregnancy they are in fact risking their life.

Joanna, a young lawyer in her twenties, suffering from ulcerative colitis (UC) was consistently denied diagnostic services and adequate treatment for her disease while she was pregnant. The medical staff of various health institutions that she checked into during the pregnancy was reluctant to provide the necessary examination and treatment without even explaining the reason for such approach. As a consequence Agata was forced to endure unbearable suffering for months. She died of sepsis three weeks after the Cesarean section performed to remove the dead fetus from her

*Prioritizing the fetus over women's life and health:* The mother of Joanna<sup>5</sup> reports that doctors responsible for the treatment “were constantly talking about chances of saving the pregnancy”<sup>6</sup>. Their attitude towards Joanna suggests that they refrained from effective treatment because they were afraid to harm the fetus. She was denied the adequate testing and treatment even though she continuously suffered from the ulcers that badly needed surgical intervention. When her mother tried to draw the doctors' attention to her condition, one of them said that the young woman was “too interested in her arse and too little in the pregnancy”<sup>7</sup>. Another one, with whom Joanna's mother pleaded to examine her child as “nobody knew what was wrong with her”, after some hesitation decided against performing the endoscopy saying “my conscience won't let me do it”<sup>8</sup>. Further requests from the mother and fiancé to save Joanna's life regardless of the consequences that it would have for the fetus also remained without response. When the pain became unbearable and the woman was begging for painkillers, she was given paracetamol “due to the best interest of the baby”<sup>9</sup>. Ultimately, after being hospitalized in three different cities of Poland over a four-month period and only after the fetus died in her womb, she was provided a Cesarean section. During the next three weeks she underwent numerous surgeries, including hysterectomy, but the sepsis infection had already taken over her body. As a result, she died after months of inhuman suffering.

<sup>5</sup> The real name has been changed.

<sup>6</sup> Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.7

<sup>7</sup> ibidem

<sup>8</sup> ibidem.

<sup>9</sup> ibidem.

Her family who assisted her with her hospital odyssey was not aware of the real source of all the problems emerging.

**Doctors' tendency to withhold services and information that could trigger demand for abortion:** The doctors' indifference towards Joanna's health condition confirms the general observation of women's rights activists that it is more convenient for medical staff not to take any actions that may require pregnancy termination (or result in it) than to provide a woman with the treatment necessary to save her health or life. As a result, women and their families are being misinformed or not given enough information about the pregnant woman's physical condition. They often do not even suspect that the real reason of the doctors' approach to woman's health problems is in fact rooted in their attitude towards abortion.

**Legal proceedings:** Some time after her daughter's death, the mother of Joanna filed criminal charges against the doctors and the hospitals responsible for the treatment. However, the investigation proved to be ineffective and ultimately the case was dismissed. The public prosecutor focused on whether Joanna really needed pregnancy termination in order to be properly treated instead of on establishing responsibility for her death. In 2008 Joanna's mother brought the case to the European Court of Human Rights. One of the complaints she raised was that the doctors did not provide her nor her daughter with reliable and timely information about her daughter's health<sup>10</sup>.

Grażyna, a mother of seven, was referred for abortion because of the suspicion of a brain tumor. However, under the pressure from a Catholic priest, a special medical expert consultation was called upon – it confirmed in writing that the pregnancy constituted the threat for the women's life but nonetheless withdrew the referral for abortion. When Grażyna learned about it she did not consent to the surgery. The doctors continued treating her disease as if she were not pregnant. After some time they presented her with the choice of either undergoing a risky operation or checking out of the hospital. This in fact pushed her to check out.

Grażyna was not given the possibility to terminate the pregnancy that contributed to the worsening of her health and in fact was forced to give birth to her 8<sup>th</sup> child. Her physical condition deteriorated severely. She died several months after delivery.<sup>11</sup>

**Doctors' reluctance to confirm in writing that they "support" abortion:** The referral necessary to obtain an abortion must be presented in writing and though there are no special requirements concerning its format and content, it is expected that it will include clear recommendation for the pregnancy termination. The information about the health consequences, even grave ones, is being treated as insufficient. In case of Grażyna<sup>11</sup>, suffering from the brain glioma, the document issued by the expert group in fact deprived her of the opportunity to exercise the right to lawful abortion as it stated - *"although the pregnancy constitutes danger, it is not necessary to perform the termination"*. Her husband told the representative of FWWP: *"The doctors were afraid to even touch her; they did not know what to do with her. If not for the pregnancy some additional steps could be taken:*

<sup>10</sup> Z v. Poland, ECtHR, Appl. No. 46123/08.

<sup>11</sup> Source: *Experiences of some women*. in: The Report on the Effects of the anti-abortion law., 1996, p.11, available at: [http://www.federa.org.pl/index.php?option=com\\_content&view=article&id=235&Itemid=147](http://www.federa.org.pl/index.php?option=com_content&view=article&id=235&Itemid=147)

<sup>11</sup> Source: *Experiences of some women*. in: The Report on the Effects of the anti-abortion law., 1996, p.11, available at: [http://www.federa.org.pl/index.php?option=com\\_content&view=article&id=235&Itemid=147](http://www.federa.org.pl/index.php?option=com_content&view=article&id=235&Itemid=147)

*radiation therapy, surgery... but they just waited for her to die so the problem would disappear on its own*".<sup>12</sup>

Alicja, a mother of two, decided to terminate her third pregnancy because of health reasons - her retina was degenerated and she suffered from serious myopia, she had undergone two Cesarean sections and her general health condition was poor. Her two ophthalmologists refused to provide her with referral although earlier they had warned her that another pregnancy could contribute to further deterioration of her eyesight. When she finally received the necessary document for pregnancy termination from her general practitioner (GP) and presented it to the doctor who was supposed to perform abortion, he destroyed it by writing on it that there were no contraindications to continuing her pregnancy. There was no procedure through which she could appeal against this decision and as a result she did not manage to obtain access to a lawful procedure to which she believed she was entitled. She also could not afford the illegal abortion that she considered. After giving birth Alicja experienced retinal hemorrhage, which has left her with even more limited eyesight.

Alicja's case was judged by the European Court of Human Rights. The decision pressed Polish authorities to introduce appeal mechanism which however proves to be ineffective.

Alicja's<sup>13</sup> experience covers in fact both stages towards exercising the right to legal abortion: obtaining the referral for the service as well as getting access to it.

*Narrow interpretation of the statutory phrase "when the pregnancy threatens the life or health...":* Doctors interpret the term "threatens" as tantamount to the certainty that, by continuing the pregnancy, the woman will lose her health or life. What is more, they want to be sure that this loss will be caused by the pregnancy itself and they seem to expect the woman to prove it. *"Both my ophthalmologists refused to provide me with the needed certificate, explaining that they could not say with certainty that my pregnancy would result in blindness"*<sup>14</sup> – Alicja said in an interview for FWFP. When asked if the exertion of the pregnancy might carry the risk of retinal detachment, one of the doctors said: "It might detach or it might not. The placenta might detach, too, nothing is without risk."<sup>15</sup>

The previously mentioned narrow understanding of health and prioritizing the fetus rather than women's health leads to doctors commonly disputing the importance of women's health issues and the potential consequences of continuing the pregnancy. One of the ophthalmologists who refused to issue a certificate had previously – a few years earlier, when Alicja was also pregnant – advised her to terminate the pregnancy due to eyesight problems. Later, when the current law had already been in effect for years, she did not want to remember it anymore. And, even though both doctors had previously warned Alicja not to get pregnant again, during the hearings conducted for the investigation they claimed that the Cesarean section is a sufficient means of preventing the loss of eyesight.

<sup>12</sup> *ibidem*.

<sup>13</sup> Source: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.7

<sup>14</sup> They Have Their Own Laws. Alicja Tysic in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.9

<sup>15</sup> *Moje zdrowie moim prawem*. In: *Pieko kobiet, historie wspoczesne*, Polish Federation for Women and Family Planning, Warsaw, 2001.



Narrow criteria for doctors eligible to issue the referral for lawful abortion: According to the law, the medical doctor issuing the referral must have specialization in the field that constitutes the medical grounds in the case under consideration. However, in Alicja's case, it was her GP who issued the required certificate, citing ophthalmology, gynecology and obstetrics reasons (2 previous Cesarean sections). She additionally stated that Alicja should "avoid physical exertion, which is completely impossible when taking care of two little children"<sup>16</sup>. The GP supported Alicja request for lawful abortion because she was aware of her other health problems and of her generally poor physical condition. However, her referral could have been questioned on the grounds that she was neither an ophthalmologist nor gynecologist.

It seems that in the case of women suffering from various, overlapping health problems, it would make more sense to accept the opinion of a general practitioner. Narrowing the qualifications of the medical doctors entitled to provide referral for abortion contradicts the WHO's definition of health. It creates an additional barrier for women who are in generally bad health condition and/or who suffer from yet unidentified health problems. Such women are often being treated by General Practitioners and not by doctors specializing in a more specific branch of medicine.

Legal proceedings: After childbirth Alicja pressed criminal charges against the doctor who denied her the right to lawful abortion but the investigation was discontinued by the public prosecutor. While waiting for the prosecutor's decision Alicja successively filed the complaints to the Medical Chambers at regional and national level. However, no fault on the doctor's part was found there either and the case was closed. Since she did not obtain redress at national level, she brought her case to the European Court of Human Rights<sup>17</sup>. In 2007, the European Court of Human Rights decided that the State violated her right to respect for private life (art. 8, European Convention on Human Rights) by not providing the institutional safeguards enabling women to access lawful abortion. As part of the execution of the Tribunal's verdict, the Sejm adopted the act on patient rights and Patient Rights Ombudsman, which establishes the option of lodging an appeal against the doctor's decision or report. Women can also exercise this right if they are denied access to legal abortion. However, the procedure is not adapted to the particular needs of women who want to terminate their pregnancy (e.g. the long waiting period) and therefore it is not used.

Anna, a single mother of three, wanted to terminate her pregnancy because of serious venous insufficiency. Since she was convinced that abortion in Poland was completely illegal and not aware that she might be entitled to lawful abortion, she decided to terminate the pregnancy illegally. However, she soon discovered that she could not afford the illegal procedure. When she called the Federation for Women and Family Planning, she was advised to obtain referral from the clinic where she was treated for her varicose veins. The doctor had no problem with stating that Anna's health deteriorated with each pregnancy and that her life might be at risk in the event of thrombosis but refused to put in writing that the continuation of pregnancy posed a risk to her health. The national consultant for gynecology and obstetrics refused to support the woman's attempt to get referral. The woman was forced to give birth to a baby that she had to put up for adoption because of her dramatically poor socio-economic situation. The experience left her with feeling of humiliation and helplessness.

<sup>16</sup> *ibidem*.

<sup>17</sup> *Tysic v. Poland*, ECtHR, Appl. No. 5410/2003

Chilling effect that the risk of criminal liability for illegal abortion (including the possible consequences for women's health) has on doctors: Anna's<sup>18</sup> case adds to the already mentioned barriers that women face when attempting to get the referral certifying the need for abortion. It sheds more light on the doctors' motives to refuse. It proves that doctors make contradictory comments regarding women's health condition and that it takes extreme strength not to give up in the quest for the necessary document. "I asked the doctor to add one sentence to his diagnosis: Continuation of the pregnancy poses a risk to patient's health. I left the room crying. He wouldn't write it. He didn't want to go to jail because of me"<sup>19</sup>. It is worth noting that Anna was accompanied by a journalist from *Gazeta Wyborcza*<sup>20</sup> who asked for the doctor's opinion a moment later. He stated that "the varicose veins themselves do not put Anna's life at risk although there might be such a risk in case of complications such as thrombosis. He did not know, however, if thrombosis would occur"<sup>21</sup>. He also shared another concern: "The risk of blood clots in the case of this patient is lower than risks associated with labor. There may be complications during the abortion. Then the court would ask who gave the patient referral for an abortion. And what would happen then?"

The fears that he might face charges in such case may be justified: the national consultant for gynecology and obstetrics, whom FWFP asked for intervention, stated that even thrombosis is not a sufficient reason for abortion and questioned the vascular surgeon's opinion since "surgeons know nothing about pregnancy".<sup>22</sup> It is highly likely that this opinion would play a role in the case of investigation had it ever happened.

Lack of respect for women's right to privacy and to participate in the decision making process: For the doctor, the risk Anna would have to take due to the refusal to legally terminate her pregnancy was not a good enough reason to take her opinion into account when formulating his judgment. Unfortunately Anna's experience is not isolated. It has been shared by women whose stories are presented in the report as well as others who unsuccessfully attempted to exercise their right to lawful abortion in each situation when it is lawful. Although these are the women who bear the consequences of the pregnancy continued against their will – be it health deterioration, death, or giving birth to a severely ill baby – their opinion is never taken into account. This situation hasn't changed despite the decision of the European Court of Human Rights in the case of *Alicja Tysi c v. Poland*.

Lack of recognition for the right to psychological health: The psychological aspects and emotional consequences of forcing pregnant women to risk their health or life are never taken into account by medical doctors. Apparently mental well-being is not being understood as an integral component of pregnant women's health.

### **1.1.2. Access to the abortion services**

Once the referral is obtained, a series of new problems emerges.

<sup>18</sup> When the Country is Ruled by Those Who Can Afford Children. Anna in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.14

<sup>19</sup> ibidem

<sup>20</sup> One of most popular Polish daily newspapers.

<sup>21</sup> When the Country is Ruled by Those Who Can Afford Children. Anna in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.14

<sup>22</sup> ibidem

Maria was seven weeks pregnant and had a referral for an abortion for health reasons because of her HIV positive status and treatment she was receiving. In the referral, the doctor stated that continuation of the pregnancy presented a health risk for the patient. Despite this it turned out that it is extremely difficult to identify a hospital that would perform the procedure. Maria was assisted by the Federation for Women and Family Planning in her search and due to the received support eventually managed to obtain abortion.

*Seeking excuses for not performing abortion:* While the cases mentioned in previous section pinpoint the difficulty of obtaining the referral for abortion, HIV-positive Maria's<sup>23</sup> story shows that obtaining the service is practically impossible in Poland: after she received the certificate entitling her to lawful abortion, several hospitals refused to provide the procedure and questioned the opinion issued by her doctor. FWFP, to whom Maria turned for help, sent letters to 12 hospitals in Warsaw and the surrounding area asking them to perform the lawful termination based on the referral. Different hospitals presented the whole array of excuses for not performing abortion starting with the lack of septic ward, through to the lack of beds. The hospital directors expressed concerns of pressure from anti-choice circles and demonstrated the lack of knowledge regarding the legal status of therapeutic abortion. One of them – the Regional Consultant for Gynecology and Obstetrics - used the *general statement on the issue of abortion and HIV-positive women* issued by an HIV/AIDS expert to question Maria's referral<sup>24</sup>. When FWFP explained that in fact the referral had been issued by said expert, the hospital staff changed their reason for the denial to the lack of the septic ward. The pregnancy was eventually terminated but only due to the support of a women's right organization.

*Questioning the referral by doctors responsible for providing abortion:* Although the doctors are not entitled to questioning the referrals issued by other physicians, they do not seem to be aware of it. Maria's experience is not an exception. Alicja's, whose story was quoted before, additionally well illustrates the arrogance women have to deal with: "When I presented this certificate at the gynecology and obstetrics clinic, Doctor D. – without examining me or consulting other doctors – placed a few stamps on the back of it and wrote a note saying there were no contraindications to continuing the pregnancy. By doing this, he destroyed my certificate, and I could not use it anymore. Through this, he forced me to give birth to a child"<sup>25</sup>. When - shortly after giving birth - she checked into the emergency room because of the severe condition of her eyes, the first question she heard was "Who allowed you to be pregnant?"<sup>26</sup>. Ironically, this happened in the very same hospital that had denied her the abortion after she presented the referral issued by her GP.

*General denial of abortion services in cases of health indications:* Discrediting the health reasons entitling women for legal abortion, including the already issued referrals for abortion, is unfortunately the general practice. The stories of Alicja and HIV-positive Maria are blatant examples of the powerless position of women when confronted with the doctors and hospitals. The dramatically small number of abortions performed on the grounds of protecting women's life or

<sup>23</sup> Source: If AIDS is Not Enough. What is? Maria's Story. Related by Wanda Nowicka and Monika Tajak in Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.27

<sup>24</sup> The document defined the circumstances when the pregnancy could have a negative impact on the health of HIV positive woman.

<sup>25</sup> They Have Their Own Laws. Alicja Tysi c in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.9

health – 27 in 2009 and in 2010 - is also a telling indicator of how difficult it is to exercise one's right to abortion in this case.

## 1.2. Termination of pregnancy in the case of severe and irreversible fetal impairment

According to the law, abortion is permitted until the point of viability of the fetus when there is a high probability of its severe or irreversible impairment. The analysis of the cases belonging to this category point to several barriers that impede women's access to lawful pregnancy termination under this regulation.

Firstly, the access to prenatal testing is significantly limited, and in some regions of Poland, practically non-existing. It also often takes a lot of effort to persuade a doctor to provide referral for the testing in a timely manner. Even if a woman succeeds in obtaining the tests before the time limit for abortion, the waiting period for the results may make lawful pregnancy termination impossible.

Nevertheless, out of 641 legal abortions registered in 2010, those performed because of fetus impairment are the most frequent (614 abortions)<sup>27</sup>. This may be caused by the fact that it is easier to prove the necessity of terminating the pregnancy than in the case of health reasons, and there is a greater possibility of winning the case in civil court in case of refusal.

### 1.2.1. Access to prenatal testing

*Having such tests done is not easy in our country...  
Interviewee, who got pregnant at the age of 39  
but was not referred for prenatal tests by the doctor.*

Barbara's first child was born with an incurable illness, a severe case of hyperchondroplasia. Over a year later Barbara realized that, despite using contraceptives, she got pregnant. Even though she did not yet, at the time, have the results of genetic tests regarding the child's illness, it was very likely that her next child could be born with the same illness. Fearing that, Barbara decided to terminate her pregnancy. In the petition for legal abortion she filed with the hospital, she also invoked the second premise for the lawful pregnancy termination: the risks another pregnancy carried for her health – doctors had previously "forbidden" her to get pregnant due to her numerous health problems. In the next few weeks, when she was trying to exercise her right to legal abortion, she was consistently refused referral to prenatal tests. In October 1999 she gave birth to her second child who suffers from the same disease as the older one.

Barbara's story and the legal proceedings against the doctors and the hospital that followed her complaint to the civil court were widely covered by the media and publicized women's right to abortion on these grounds.

*Biased approach to prenatal tests:* Since 1999 access to the ultrasound scans has significantly improved and the ultrasonic examinations are now part of the routine prenatal care over the pregnant women. Nevertheless, the biased approach towards prenatal tests and treating them as a pretext for abortion is still present when access to genetic examinations is concerned. The next story – the story of R.R. – which happened 3 years after that of Barbara's, further illustrates the problem.

<sup>27</sup> Sprawozdanie Rady Ministrów z wykonywania oraz o skutkach stosowania w roku 2010 ustawy z dnia 7 stycznia 1993 roku o planowaniu rodziny, ochronie płodu ludzkiego i warunkach przerywania ciąży, Warszawa 2011

*Narrow interpretation of the law:* The Family Planning Act states that the pregnancy can be legally terminated in case of high likelihood or a severe fetus impairment<sup>28</sup>. The likelihood might be indicated by the prenatal examinations as well as by "other medical conditions". Yet the doctors tend to interpret „likelihood" as „certainty" and to ignore other medical conditions that may point to the high risk of the fetus's malformations or its incurable illness. In Barbara's case this risk was quite high even when not supported by the results of prenatal tests. The next story (the story of R.R.) adds to the quite common experience of women in Poland dealing with physicians who add further requirements in order to confirm the impairment. In R.R.'s case the results of ultrasonic examinations indicating serious fetus impairment were found insufficient to document the risk and the results of further genetic examination were demanded from her.

*Lack of clear knowledge about the law on abortion among the doctors and hospital managements:* Barbara reports: "After waiting for two hours, I briefly presented my case to Doctor L.P. in the hallway (I was not let into consultation room). He told me that both I and the doctor who referred me [for abortion] were talking nonsense, because abortion does not exist in Poland. [...] After a while he called me into his consultation room and tried to explain to me that I must be mad if I thought that one could have a legal abortion in Poland"<sup>29</sup>. Although Barbara's painful personal experience led to improving the doctors' knowledge about the law on abortion, women are still misinformed about their rights. Therefore, women considering legal pregnancy termination and calling FWFP are always advised to thoroughly know the text of the law while visiting the doctors. This, however, might not be enough in view of the doctors' approach towards abortion and the chilling effect that the unclear legal situation has on them (e.g. controversy over specific fetus conditions allowing for pregnancy termination and the risk of criminal charges in case abortion is found illegal).

*Lack of respect for women and their rights, including right to informed decision, to reliable information and to health services:*

Barbara, who informed the doctor about her son's condition, recounts: "he did not seem to listen to my explanations but told me that I was neurotic, that my son was healthy and that I just fabricated his illness [hyperchondroplasia] in order to 'get rid' of another pregnancy"<sup>30</sup>.

When she reported to deputy director of the hospital her problems with getting access to the tests and asked for intervention, she heard that the latter "could not force the doctor to make such a decision" and that "even if the tests showed impairment of the fetus, nobody would perform an abortion anyway. Therefore, she added, there was no point in performing such expensive tests"<sup>31</sup>.

Even after the ultrasound examination, which was performed in the late stage of the pregnancy, confirmed Barbara's expectations, the doctor insisted on saying that [the ultrasound] "did not indicate any defects or abnormality and that the child would be healthy"<sup>32</sup>.

<sup>28</sup> "Pregnancy termination can be performed (...) when: (...) pre-natal examinations or other medical conditions indicate that there is a high likelihood of a severe and irreparable handicap of the fetus or an incurable illness threatening its life", Act of 7<sup>th</sup> January, 1993, on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, translation by Polish Federation for Women and Family Planning.

<sup>29</sup> When the Hospital Does Not Want Problems. Barbara Wojnarowska in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.17

<sup>30</sup> When the Hospital Does Not Want Problems. Barbara Wojnarowska in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.18

<sup>31</sup> When the Hospital Does Not Want Problems. Barbara Wojnarowska in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.19

<sup>32</sup> When the Hospital Does Not Want Problems. Barbara Wojnarowska in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.19

In 2004 another woman, Agnieszka, gave birth to a baby suffering from phocomelia – her daughter was born without legs, a stump of left hand and a partly developed right hand. Due to regular ultrasonographic examinations during her pregnancy, she believed that the fetus was developing well. After the baby had been born, her doctor, whom she had really trusted before, admitted that he suspected the disorder. *“He did not inform us, the parents, treating us as people least entitled to know the condition with which our child is going to be born - Agnieszka stated - “By not informing us, the doctor denied us the right to make decisions regarding the pregnancy. (...) if we had known the truth earlier, we would have prepared ourselves better. We would have found out in advance about the problems our newborn would have.”*<sup>33</sup>

When R.R. was 18 weeks pregnant the ultrasound scan revealed a cyst on the fetus's neck which indicated the likelihood of some malformation. In order to determine the nature of the problem, the amniocentesis was recommended. However, despite being legally entitled to genetic examination, R.R. was consistently denied the necessary referral. During the weeks when she attempted to exercise her right to the medical procedure, she was hospitalized twice (with no particular reason), underwent 5 ultrasound scans and saw a number of doctors, including doctors in two other cities of Poland 150 and 300 kilometers away, respectively. Meanwhile, she learned that the fetus might be suffering from Edward or Turner syndrome. She managed to get the tests in the 23<sup>rd</sup> week of pregnancy due to a stratagem she had been advised to resort to. Being seriously concerned over the fetus's condition and aware that the results will be available over the time limit for lawful abortion, she officially requested pregnancy termination at the local hospital. However the response was delayed until it was too late for abortion since the fetus became viable. She gave birth to a girl with Turner Syndrome.

*Unjustified prolongation of the procedures:* The experience of R.R. and of Barbara is not unique. Redirecting women to other centers or specialists, knowing that those visits are already doomed, is a common practice among doctors. Doctors from the local hospital that referred R.R. to the university hospital in Kraków (150 km) had to know that she will get no help there, because this hospital takes pride in not conducting or facilitating abortions. The doctor who saw her there openly said that in 150 years, no pregnancy was terminated in this hospital and criticized her for considering such an option. He added that he doesn't see the need for genetic testing in her case. However, in her release form, he confirmed the fetal defect and recommended such tests.

The interviewed lawyer of the Federation for Women and Family Planning tells that when she negotiates with hospitals that refuse women access to prenatal examination, she often senses that they attempt to delay the examination until the fetus is viable and abortion becomes unlawful. Waiting period for results of the tests also contributes to exceeding the time limit for lawful abortion (e.g. R.R.'s case).

*Requirements regarding referral for genetic testing:* Access to genetic testing has recently improved slightly due to implementing, in 16 out of 17 voivodeships, the prophylactic program in which a closed catalogue of criteria qualifying women for this service was adopted. However, in order to take advantage of the program, it is necessary to obtain a referral from the doctor overseeing the pregnancy. As the doctors continue to refuse to issue the required certificate, R.R.'s story could still happen again today. The limitations regarding the qualifications of the doctors issuing the referrals for genetic testing covered by the health insurance significantly prolong the procedure which, due to the nature of the pregnancy, should take as little time as possible. The woman has the right to lodge an appeal, but due to the time factor, such a solution is not convenient (the wait for the response

<sup>33</sup> The doctor had Only a suspicion. Agnieszka Szymańska in : Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.34

can take up to 30 days). A simpler, though also stressful and time-consuming, way is to change one's doctor.

**Legal proceedings:** After the childbirth R.R. filed criminal charges against the doctors responsible for her treatment yet the investigation was discontinued. She also filed a civil case against a doctor who revealed to the media the confidential information about her health and private life and was awarded a compensation. The civil proceedings against the doctors and hospitals concerned resulted, after her appeal in the Supreme court, in redress which she found unsatisfactory. In 2004 she filed a complaint against Poland before the European Court of Human Rights. In 2011 ECHR decided that there had been a violation of her rights to freedom from torture or inhuman or degrading treatment (art. 3) and to respect for private and family life (art. 8)<sup>34</sup>.

### 1.2.2. Access to abortion services

Bożena, 44-years old at the time, was referred for abortion after prenatal tests revealed that the fetus had Down syndrome. Before being accepted to the hospital she was asked to provide additional referral from regional consultant for gynecology and obstetrics. Although the request was unlawful, she obtained the document and checked into the hospital. After postponing the abortion for two days the head of the ward called upon her again, this time demanding that she provides consent from the national consultant for gynecology and obstetrics. The doctor further argued that Down syndrome is not sufficient grounds for abortion as it is not a lethal illness. As a consequence, Bożena left the hospital without the termination. She was overwhelmed by the humiliation that she experienced in the hospital but decided to search for another facility and finally found the hospital

**Questioning the referral and misinterpreting the law:** According to the FWFP, Bożena's<sup>35</sup> experience of being confronted with medical staff's argumentation that fetal impairment is not a serious enough reason for abortion is a recurrent theme of women's stories. The 39-old woman with the fetus's diagnosis of Down syndrome reports: *"We called numerous hospitals in an attempt to have a legal abortion but encountered extreme difficulties. Usually we heard that the law is on our side but..."*<sup>36</sup>. Women's experiences prove that reasons for misinterpreting the law are often rooted in personal views and prejudices of the medical staff. In November 2011 the media covered the dispute between the medical experts on whether the Down syndrome constitutes grounds for abortion or not. The dispute started after the denial of abortion by the hospital in one of the largest Polish cities (Poznań). The hospital, supported by the president of *Medical University Commission on developmental abnormalities and genetic counseling*, ignored part of the regulation on the conditions for legal pregnancy termination<sup>37</sup>, which says that abortion is lawful also in case of irreparable handicap of the

<sup>34</sup> R.R. v. Poland, ECtHR, Appl. No. 27617/2004/2003

<sup>35</sup> More: Right to Life in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.36-40

<sup>36</sup> Right to Life in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.38

<sup>37</sup> "Pregnancy termination can be performed (...) when: (...) pre-natal examinations or other medical conditions indicate that there is a high likelihood of a severe and irreparable handicap of the fetus or an incurable illness threatening its life", Act of 7<sup>th</sup> January, 1993, on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, translation by Polish Federation for Women and Family Planning.

fetus (which Down syndrome is). Instead they stated that abortion is lawful only if the fetus suffers from a lethal illness.

### 1.3 Criminal act as grounds for lawful abortion

When the pregnancy is a result of unlawful sexual intercourse (e.g. incest, rape, or sex with a minor), abortion is permitted during the first 12 weeks and - contrary to the other two premises for legal abortion - does not have to be performed in the hospital. Despite this, there are almost no lawful abortions performed on this basis (1 in 2010, 0 in 2009).

The stories of women who tried to get legal abortion after rape, quoted below, well illustrate why victims of sexual violence restrain from seeking lawful abortion and thus from facing the humiliating procedures which, in addition, are not effective.

14-year-old Agata was raped by her peer. She and her mother reported the crime to the police. When it turned out the girl was pregnant, they decided that the best solution would be to terminate the pregnancy. With the prosecutor's certificate stating that the pregnancy was the result of a crime - intercourse with a minor under the age of 15 - they checked into the hospital where they were incorrectly informed that they should present an additional certificate from a specialized doctor.

This caused a delay, after which Agata was admitted to the hospital, where she waited for the head of the gynecology ward to return from vacation. After her return, the head of the ward tried to change her and her mother's decision. When the mother left, the doctor confronted the girl with a Catholic priest who pressured her to continue the pregnancy. It was also then that she was given a statement that the girl signed, because - as she explained later - she didn't know how to politely refuse. After another conversation with the doctor, supported by the priest, Agata and her mother left the hospital and went to Warsaw. There, with the help of the Federation for Women and Family Planning, they found a hospital that was supposed to carry out the procedure, but due to unrequested information from the local hospital and the pressure from anti-choice activists it started to delay the procedure. At the hospital, Agata was visited by the already familiar Catholic priest, as well as other people. When Agata and her mother, resigned, left the hospital, anti-abortion activists blocked their access to a taxi. When the police was called, they were taken to a police station for a 6 hour long interrogation.

During the interrogation, the police received information that the family court limited the mother's parental rights and decided that Agata should be placed in a children's emergency shelter. For 6 hours, in the middle of the night, the police was driving the girl around - first to various shelters in Warsaw, and then, due to the lack of available space, to Lublin, 170 km away. There she had her cell phone taken away, was placed in a locked room, and was again confronted with a priest. She started to bleed, so she was admitted to the already known hospital. There, a few days later, she was interviewed, after which the court revoked its

The real name of Agata<sup>38</sup>, whose story was followed and widely commented by the media, is confidential. In spite of that, her identity was revealed by the right wing websites which would not happen had the health services providers observed the right to privacy of women seeking lawful abortion. Agata's experience depicts barriers that can be added to those already listed in the report and faced by women on their way to justice when lawful abortion is concerned:

*Lack of services, including information system for victims of rape, which would prevent them from misinformation and manipulation:* although Agata reported the crime, she was not informed about

<sup>38</sup> Agata's real name is confidential.



her rights, neither as a rape victim nor as a minor entitled to legal abortion in case she got pregnant. This includes denial of information about the procedure as well as about her right to terminate the pregnancy outside of public hospitals, e.g. private clinics or surgery. Moreover, although she reported the crime in due time, she was not offered the emergency contraception which would have allowed her to avoid pregnancy.

*Inadequate protection of her rights as a minor:* The law permits pregnancy termination if the girl becomes pregnant under the age of 15. Due to that Agata was entitled to legal abortion and she should not be manipulated to prove that she had been raped to get access to it. Although she was issued the certificate referring to her right as a minor, during the interrogations related to her request for lawful abortion, she was expected to persuade the police and the judge that she had been forced into the sexual act. Paradoxically, after she had already had the abortion, the legal proceedings against her were launched for having the sexual intercourse with a minor as the boy who raped her was also under 15.

*Perverting the course of law to deprive women entitled to abortion of the assistance from their supporters:* The law that penalizes people who help women in having illegal abortion affects women's right to lawful pregnancy termination by putting them at risk of losing support from their kin, friends and women's rights advocates. When Agata was trying to exercise her right to a lawful medical procedure, the district prosecutor launched legal proceedings against her mother and father as well as two women's rights supporters from the Federation for Women and Family Planning. The proceedings were only discontinued almost a month after the pregnancy termination.

*Lack of protection of freedom of conscience of women and girls:* The tolerance for imposing the so-called Catholic values on women and girls is not the only example of the State's failure in this area. The other one is the legal imbalance between approach to forcing women to have abortion and forcing them to continue the pregnancy. While the first one is penalized, the second is not. This encourages not only the anti-choice activists, but also other individuals (e.g. doctors) and institutions (e.g. hospitals) to harass women and girls seeking lawful abortion and thus is a serious barrier on their way to exercise their rights.

*Lack of respect for parents' rights to support their children* which, in case of abortion, interlinks with the two previous barriers.

*Institutional violence:* the restrictive law on abortion and its criminalization encourages institutional violence which girls under 18 are the most vulnerable to as it may be observed in Agata's case.

**Legal proceedings:** The allegations raised by Agata's mother of the pressure that a number of people exerted on her daughter to continue the pregnancy were dismissed by the prosecutor as the criminal code does not penalize such actions. In 2009 Agata and her mother, supported by the lawyers from FWFP, submitted the complaint to European Court of Human Rights claiming the violation of a number of their rights, including the right to be free from inhuman, degrading treatment and from discrimination, the right to privacy, to effective remedies as well as to freedom of thought, conscience and religion<sup>39</sup>.

Malgorzata became pregnant after being brutally raped. She reported the crime but the perpetrator stayed unidentified and the investigation was discontinued. The doctor, whom she asked to refer her for abortion on the grounds of rape, stated that she was 11 weeks pregnant and issued the requested document. However, after the examination in the hospital, the medical staff questioned the stage of the pregnancy and accused the woman of trying to abuse the law to get rid of it. The medical staff indicated that she was already 14 weeks pregnant. As a result, the hospital authorities refused to grant consent to carry out an abortion and asked for an expert opinion on the real age of the fetus. As a result the time limit defined by law was exceeded and the woman was forced to give birth. Ultimately, it turned out that the hospital's refusal was illegitimate as the assessment of the fetus development proved to be incorrect.

*Patriarchal and patronizing approach towards women* based on the conviction that female sexuality, and therefore also women's reproductive choices, are subject to society's control. This control (as illustrated not only by Małgorzata's experience) is to be justified by the assumption that it is common for women to only look for excuses to escape their "natural" reproductive functions. As a result, it is a common experience of women who want to exercise their right to legally terminate pregnancy (or e.g. to receive prenatal tests) to feel like they have a status of people suspected of, at the very least, fraud. They can also get a similar impression when trying to exercise their rights in the justice system - Alicja when interviewed by FWFP stated: *"I wanted to fight for justice in the Polish courts and prove that the doctors were wrong, that my rights were violated. During the whole time, however, I did not feel like the victim but like the accused."*<sup>40</sup>

Patronizing attitude towards women often underlies the doctors' arbitrary decisions on whether abortion will or will not be performed. The following example recalled by women's rights advocate might well illustrate the issue: *"after the ultrasound examination revealed serious defects of fetus's abdominal walls, the very same practitioner made it possible for one couple to undergo the pregnancy termination and refused the lawful abortion to the second one. As a result, the second couple was pushed to terminate the pregnancy abroad"*.

Such treatment of women is humiliating and effectively discourages them from exercising their right to legally terminate pregnancy, or to take advantage of the justice system.

*Privileged position of the doctor – authority on matters relating to pregnancy:* A woman's word is nothing against the "scientific proofs" (or lack thereof) that a doctor has at their disposal and which they can use to support their prejudice against her. The consequences of an error are born by the woman, and the potential winning of a lawsuit is a compensation after the fact and does not balance out the harm done. Małgorzata's case is not an exception, but rather confirms the general rule. *"I heard many times how condescending the doctors, whom I contacted on behalf of women legally entitled to pregnancy termination, were with regard to their testimonies, opinions and fears"* the former FWFP staff member said during an interview. *"One of them went so far as to say of a woman, who already was a mother and knew when she became pregnant again, <<What can she even know about it?>> It really shook me then."*

*Narrow interpretation of the law and lack of sensitivity to the situation of women – victims of sex crimes:* Doctors do not want to understand how traumatic the perspective of having a child whose biological father is, or can be, a rapist, can be for a woman. This is why the potential doubts regarding the origin of the pregnancy should always be treated as a woman's personal dilemma. It would be in accordance with the current law, which, unfortunately, tends to be interpreted in a too narrow way and to the detriment of women also in the case of this premise. The perspective of not being understood and of being treated in a humiliating way and with suspicion stops women, whose pregnancy is the result of a prohibited act, from exercising their right to terminate it legally.

**Legal proceedings:** The Supreme Court ruled twice in the lawsuit Małgorzata filed in 2000, regarding damages due to infringement of her patient's rights. In 2003, the Supreme Court conceded the possibility of maintaining the claim for damages on the grounds of the infringement of personal rights, which in this case might be, in a broad sense, a woman's freedom. In 2006, the Court gave verdict regarding the child support costs, stating that the party responsible for preventing a legal termination of pregnancy in the case of rape bears the costs concerning the warranted needs of the child that the mother cannot satisfy.

<sup>40</sup> They Have Their Own Laws. Alicja Tysięc in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.11

#### 1.4. Other barriers at institutional level

Conscience clause: One serious barrier making it more difficult for women to exercise their right to legal pregnancy termination, and claiming damages if this right is infringed, is the conscience clause and the way doctors use it. The stories of women quoted in this report illustrate the general practice used by doctors – usually they do not officially invoke the appropriate regulation and do not fulfill the associated requirement of providing the woman with a real possibility to receive the service. Instead, they stress their right to refuse, making it seem as if this very fact justifies the refusal. In the experience of women and the advocates for their rights, the very right doctors have under the regulations leads to their contempt of the patients' rights. This is because it gives the doctors power and an unfounded sense of moral superiority over the women, probably because their own right to act in accordance with their conscience is legally sanctioned, and the women's right is not.

Lack of effective Appeals Mechanism: Women lack information about the existing appeal mechanism and when informed about it (FWFP's campaign, 2010-2011) they express doubts regarding its efficiency. They are further discouraged by the waiting period. According to the *Law on the Protection of Patient Rights and the Patients Rights Ombudsman* (2009), a patient who disagrees with the doctor's decision on the provision of healthcare (incl. abortion), may file an appeal with a Commission of Physicians, which has to issue an opinion within 30 days. However, because of the strict time limits for abortion in cases of fetal impairment and when the pregnancy resulted from a crime, a 30 day period to issue an opinion is excessive and undermines women's legal right to access abortion. Federation for Women and Family Planning has not yet recorded any effective and successful use of the mechanism.

Time limits: The restrictions concerning the time limits for the option of terminating pregnancy put women in a particularly vulnerable situation not only because doctors prolong the procedures or manipulate the age of the pregnancy to prevent legal abortion. Another serious problem, also in claiming damages, can be the vague, arbitrary approach to establishing the moment when the fetus is viable (in cases when the woman has the right to terminate her pregnancy due to fetal impairment). This can also be seen in the court verdicts: in Barbara's case, the Appellate Court ruled that pregnancy could have been terminated up until the 20<sup>th</sup> week. The Supreme Court disagreed and set this limit at 24 weeks<sup>41</sup>.

## 2. Other barriers

The below section elaborates on additional factors contributing to creating oppressive regulatory framework that violates women's right to lawful pregnancy termination, endangers their health and lives, and forces them to undergo clandestine abortions. It should be noted that the barriers listed in the report often overlap, making women's situation even more difficult.

Lack of trust towards health care system: Numerous examples of doctors and institutions disclosing confidential information about women's attempt to obtain abortions to the media or anti-choice circles had led to the situation in which women have limited trust in medical institutions. Moreover, getting media attention that can help exercising one's rights in some cases can also lead to the situation in which obtaining abortion in the underground will be more difficult or even impossible as it often results in disclosure of woman's personal data and, subsequently, to anti-choice bullying and stigmatization.

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<sup>41</sup> Analiza spraw sądowych dotyczących braku dostępności świadczenia przerywania ciąży w Polsce. A. Bodnar in: Prawa Reprodukcyjne w Polsce. Skutki ustawy antyaborcyjnej, Raport 2007. Federation for Women and Family Planning, Report, September 2007. p. 61

*Stigmatization of abortion:* Women who underwent the lawful procedure or who attempt to exercise their right are often stigmatized. The case of Alicja, whose has been a target of attacks from the (mainly catholic) media, is an example "from the big city". In smaller towns the pressure is exercised by local church and community to stigmatize women who underwent pregnancy termination. Since women always have to consider that their decision to have abortion will be revealed, those who have Roman Catholic relatives have the reason to fear that the Church will deny religious services to their kin just like it happened in Alicja's daughter's case (she was refused the baptism ceremony). In some cases it may also lead to losing economic assistance from the Roman Catholic Church which may be painful for women and their families in difficult economic situation.

*Lack of support:* Among main complains that women seeking lawful abortion express is lack of support organizations and consulting services. Moreover, they often mention lack of understanding and support within family and circle of friends. This is especially acute in the situation of minors who need parental consent for getting contraception and abortion. In addition, the law in force contributes to isolating women since it provides grounds for penalizing those who support them in getting abortion. Although it refers to the illegal procedure cases, the experience of 14-year old Agata proves that it is being used to discourage assistance also in case of legal pregnancy termination.

*The mother and child relations:* The Roman Catholic Church hierarchy, which has a strong influence on Polish public life, perpetuates patriarchal approach to motherhood which is constructed as women's primary obligation towards the state and society. As a result, women are expected to act in the interest of their pregnancy and give birth even if it could negatively affect their physical or mental health. This expectation fuels in particular the judgmental approach towards women who, like those whose stories are quoted in the report, would decide to seek justice at national or international level after giving birth. They would have to be prepared for sharing the experience of Alicja and Małgorzata of the widespread accusations, publicized by media and internet forums, that they are bad mothers not caring about the feelings of their children born out of the unwanted pregnancies. They should be prepared to face opinions that they do not love them which might be particularly painful for the latter. All this may effectively prevent women from claiming their rights after childbirth unless their poor economic situation forces them to seek compensation.

*Practical aspects of claiming rights:* All the procedures foreseen within the existing legal system are time-consuming. Moreover, the common knowledge about defective nature of the system further contributes to the fact that women who can afford it prefer to use clandestine abortion in Poland or go abroad in order to protect their privacy and save time. One of the interviewees, Jolanta<sup>42</sup>, when the possibility arose that the fetus has Down syndrome, decided to go abroad for prenatal testing in order to avoid two-weeks waiting for prenatal tests results in Poland. The results obtained in the UK served as a base for lawful termination that has been performed in Poland within the non-public insurance system unavailable for women with lower income. When asked about her decision of going abroad for the examination, Jolanta explained "*For me, and I believe that also for other women in similar situation, it was extremely important to have abortion in the earliest possible stage of pregnancy. I was also afraid that waiting for testing results in Poland will lead to exceeding the time limit for lawful procedure*".

*Misinformation about the legal status of pregnancy termination:* One of the most significant barrier in accessing legal abortion is the lack of precise knowledge about the law in force. Many women contacting FWFP confess that they are afraid of being sent to the jail for having abortion. Women are often intimidated by the legal procedures. The fact that the doctors do not know them either further

complicates the situation. There are only very few trustworthy sources of legal information available. This is especially worrying in the context of rural women who do not always have access to the internet. One of the women who contacted FWFP confessed: *"I am not very familiar with legal issues. I thought (just as many other Poles do) that abortion was completely illegal in Poland, and that it was done only in the abortion underground, and that women who are found out go to jail"*<sup>43</sup>. Other examples confirm the existence of erroneous presumptions related to penalization of abortion in Poland: *"There [in Federation], for the first time, I heard that abortion is legal if the pregnancy poses a risk to the health of the woman"*<sup>44</sup>.

Financial aspects of claiming one's right: Women who call Federation for Women and Family Planning calculate cost of pregnancy termination both in PLN and in working hours and they often decide that one effective trip for abortion to Germany is cheaper than attempting to get this service in Poland. Claiming lawful abortion can be an extremely costly procedure. Women are forced to travel long distances in order to obtain the necessary services which additionally engages their working time. In case of single mothers, travelling to obtain legal services may also involve the cost of the child care.

Geographical barriers: Depending on whether a woman lives in a city, town or village, she faces different obstacles with regard to access to abortion. In most cases, extensive travels are involved in exercising one's right to abortion or prenatal screening. Both prenatal screening and abortion services are inaccessible in some parts of the country (e.g. the experience of R.R.). Geographical barriers are easier to overcome for women who have access to information, know their rights, and have financial resources to travel (e.g. Jolanta).

Stress: Women entitled to lawful abortion are under extreme stress regardless of the grounds for it. They all share the justified fear that they will not be able to exercise their right to a lawful medical procedure. Those who are victims of sexual violence additionally have to deal with the consequences of the humiliating atmosphere surrounding the rape. For them, the need of reporting the crime becomes a serious barrier to exercising their right to pregnancy termination. One of pregnant rape victims who contacted FWFP in 2010 confessed that reporting the crime *"was enough hassle"* and instead of claiming legal abortion she prefers to get a clandestine one. Women entitled to lawful abortion on other grounds are more exposed to the condemnation for not wanting to sacrifice for their children either with their health/life or with their wellbeing in case of fetus impairment.

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<sup>43</sup> When the Country is Ruled by Those Who Can Afford Children. Anna in: Contemporary Women's Hell. Polish Women Stories. Polish Federation for Women and Family Planning, Warsaw, 2005. p.14

<sup>44</sup> ibidem

## Recommendations

### **The Principal Conclusion: Coercive continuation of pregnancy as a form of violence against women**

In the light of the analysis of women's experiences in struggling to access the lawful abortion in Poland, it needs to be concluded that restricting entitlement to the termination of pregnancy by legal terms, results in practice in violating women's right to make fundamental choices concerning their bodies, health and lives, even in the cases where the letter of law guarantees respect for these rights. The analysis also shows that if a woman is forced to depend on the opinions of other actors (e.g. doctors, prosecutors) to access the abortion services, her overall well-being is effectively damaged. Moreover, women's stories depicted in the analysis, disclose the forced continuation of pregnancy as a form of institutional violence, similarly to the forced abortion which according to the Beijing Platform of Action (point 115) has been recognized as violence against women.

Thus the critical recommendation for the Government of Poland is to:

*Take action to decriminalize abortion and adopt "Act on Conscious Parenthood and Other Reproductive Rights" drafted by the civil initiative called "Yes for Women!", stipulating, among others, the full right of a woman to terminate the pregnancy until 12 weeks gestation, and in later terms in cases when the pregnancy poses a threat to woman's health or life, the fetus is impaired, and when the pregnancy is a result of criminal offence.*

### **Improving women's access to lawful abortion in the context of the existing restrictive legislation**

The implementation of critical recommendation that women should decide freely whether to continue or terminate the pregnancy requires the liberalization of the existing legislation. This, however, can be hardly possible in the current political context, given the fact that abortion became such a huge social taboo in Poland in the last twenty years. Therefore there is an urgent need to improve women's access to lawful abortion in cases stipulated by the law that is in force.

Thus the following recommendations call upon the Government to take urgent steps aimed at eliminating barriers that hamper women's access to lawful abortion services. In the context of the fact that public healthcare facilities deny on a systematic basis the provision of lawful abortion services, the Government needs to:

*Take the full accountability for ensuring that the public healthcare facilities, whose gynecological and obstetric wards are subsidized from the National Health Fund (NFZ), provide with no constraints client-friendly lawful abortion services.*

In order to fulfill the above recommendation, the Government (and specifically the Ministry of Health), needs to take the following pro-active steps:

- *Monitor in a systematic way the accessibility of lawful abortion in public healthcare facilities, whose gynecological and obstetric wards are subsidized from the National Health Fund;*
- *Provide for women the mechanism for reporting irregularities as regards accessing lawful abortion;*
- *Withdraw the subsidy from the National Health Fund from the healthcare facilities that limit the accessibility of lawful abortion services.*

The Government should also take action to eliminate the specific barriers that hamper access to lawful abortion at different stages of the process (e.g. obtaining the required referral, access to the

service) and that are characteristic for the type of legal ground entitling women to the termination of pregnancy. The below recommendations were developed basing on women's needs identified in the analysis of their experiences.

**In order to improve the legal framework the Government should:**

- *Introduce definition of health of the World Health Organization into legislation, stipulating that "Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity";*
- *Abolish the eligibility criteria of doctors who are entitled to issue the referral for abortion ;*
- *Introduce the 24 weeks gestation time limit for pregnancy termination when the fetus is impaired and ensuring access to abortion with no time restrictions in case of the fatal illness of the fetus;*
- *Ensure access to abortion for girls under the legal age of consent by abolishing the requirement to provide the prosecutor's statement;*
- *Establish the effective appeal mechanism adjusted to the needs of women who are in need of terminating the pregnancy;*
- *Adopt anti-discrimination legislation that includes the definition of discrimination (including intersectional discrimination), as specified in Art. 1 CEDAW, and which protects women from discrimination in all spheres of life, including access to healthcare.*

**In order to eliminate institutional barriers the Government should:**

- *Implement training programmes for doctors and medical students focused on promoting holistic approach to women's health and rights, including sexual and reproductive health and rights, as well as women's subjectivity and patients' rights in general;*
- *Carry out campaigns promoting the definition of health of the World Health Organization;*
- *Improve access to prenatal testing;*
- *Register the list of doctors who use conscience clause in relation to performing abortion and ensure access to this information for women seeking the service;*
- *Monitor and evaluate the effectiveness of the appeal mechanism.*

**In order to eliminate social and cultural barriers the Government should:**

- *Carry out information campaigns about existing legislation on termination of pregnancy and women's right to lawful abortion;*

- *Incorporate to school curricula compulsory, comprehensive, age-appropriate, evidence- and gender equality -based sex education;*
- *Ensure access to user-friendly planned parenthood services, including counseling;*
- *Ensure access to contraception, including emergency contraception, especially for young women and girls;*
- *Formulate and implement, in cooperation with women's organizations, the National Programme of Action for Women, that would encompass, among other, the area of sexual and reproductive health and rights;*
- *Eliminate gender stereotyping in public media through monitoring of their content and proactive interventions in cases of irregularities.*