

Article

# Women's Reproductive Rights as a Political Price of Post-communist Transformation in Poland

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Abstract

Following Poland's change of regime in 1989, the country enacted Europe's most restrictive legislation on reproductive rights and steadily tightened this regime ever since. Later, a liberal Polish government was presented with the choice between liberalizing abortion law or Catholic Church support for the referendum to join the European Union. This article discusses the genesis and background of Polish law on reproductive rights in the context of public health as well as its enforcement, its near-irreconcilable conflicts with international human rights law and established precedent. It examines the economics of abortion and analyses the interests of politicians, the clergy and health care professionals.

## Introduction

Regardless of one's individual position in the global debate on reproductive rights, it behooves to explore the experience and precedent of foreign and international law. Even Justice Scalia recognized the importance of foreign and international law for judicial cognition and as auxiliary tools in the evolution of domestic legal standards: "Of course you consult foreign sources, see how it's worked, see what they've done, use their examples and so forth."<sup>1</sup> It would be challenging to think of more contrasting and instructive foreign examples in the arena of reproductive rights than the developments observable in post-communist Poland. This article portrays the legislative and regulatory development of reproductive rights and their practical application in the newly liberated country from 1932 onwards, the economics created in this period, and Polish society's long and difficult journey throughout it.

The Act on Family Planning, Protection of the Human Fetus and Conditions for the Lawful Termination of Pregnancy<sup>2</sup> of 1993 (known as the Anti-Abortion Act) inaugurated in Poland one of the most restrictive abortion policies in Europe. Its limitations on lawful abortions were tightened further by professional regulations of the Minister of Health, by the National

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<sup>1</sup> Justice Antonin Scalia, Discussion with Justice Stephen Breyer at the American University Washington 'College of Law: Constitutional Relevance of Foreign Court Decisions' (13 January 2005), at <http://www.wcl.american.edu/secle/founders/2005/050113.cfm> (accessed on 12 March 2013).

<sup>2</sup> Republic of Poland, *Journal of Laws of 1993*, no. 17, item 78 as amended.

Assembly of Doctors<sup>3</sup> as well as by the attitudes and practices of doctors who needed to balance legal mandates, public opinion and economic self-interest. Paradoxically, though, the absolute legal recognition of the sanctity of the life of the fetus above that of its pregnant mother as promulgated in this legislation endangers the life of the fetus itself since the survival of the fetus unconditionally depends on the life and health of the mother. This reverse order of priorities can also not be justified by rational argument in the pro-natalist policies and fundamentalist doctrines of the Roman Catholic and Lutheran Churches. Rather, the resulting paradox forms part of the political scene of Poland where women's rights in general have been the first disposable item to be sacrificed in ideological and religious battles waged by political and professional opportunists, virtually all of whom were male. As a consequence, matters concerning women's health and bodies found themselves usurped by a reconstituted patriarchal establishment for ideological and political purposes after 1989. Women's rights and interests became the first casualty on a path to democracy that has brought reproductive health laws which are far more restrictive than anything the population had endured under communism. To this day, the political right in Poland continues its struggle to introduce an absolute ban on all abortions, regardless of the already negligible lawful accessibility of the procedure, regardless of the risks of such a ban to pregnant women in special circumstances, and regardless of the widely known existence of an extensive – and expensive – underground abortion industry. Given that Polish far-right lawmakers continue to persist with introducing ever more radical reproductive legislation it is no wonder that Polish newspapers have sometimes referred to post-socialist Poland as “Europe's Iran.”<sup>4</sup>

## I. History of Abortion Legislation in Poland

Abortion legislation was first introduced in Poland in 1932, following the re-establishment of the Polish State in 1918 after 123 years of partition and occupation by Russia, Prussia, and Austria. Under each of these occupying powers, abortion had been illegal. First efforts to introduce a total ban on abortion in reconstituted Poland were dismissed by the Second Lawyer's Congress, prominent doctors and women activists. The Polish Penal Code of 1932 permitted abortion when the mother's health was at risk and in cases of pregnancies resulting from unlawful intercourse such as rape, incest or intercourse with a minor.<sup>5</sup> Restrictions and procedural requirements imposed on lawful abortions in 1932 were similar to those enacted by the legislation of 1993. Thus, in a legislative sense, the 1993 Act turned back the clock by sixty years to the standard of 1932, and yet even the 1993 Act proved to be more liberal than some of the amendments that have been proposed since.

In 1956, the communist regime of Edward Ochab enacted the Abortion Admissibility Law which authorized abortion in cases of “difficult living conditions.” This standard reflected chronic and severe housing shortages during the communist era and amounted to a *de facto* legalization of abortion on demand. The 1956 statute did not specify time limits during which an abortion could be lawfully performed and guaranteed the availability of free abortions in all public hospitals. A 1959 executive ordinance removed the remaining requirement to involve two different gynecologists, one to certify that legal requirements had been complied with

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<sup>3</sup> A. Ignaciuk, *Abortion Debate In Poland And Its Representation in Press*, unpublished MA thesis, University of Łódź 2007, p. 41, on file with the author, at [http://www.federa.org.pl/dokumenty\\_pdf/prawareprodukcyjne/mgr%20A.%20Ignaciuk.pdf](http://www.federa.org.pl/dokumenty_pdf/prawareprodukcyjne/mgr%20A.%20Ignaciuk.pdf) (accessed on 12 March 2013).

<sup>4</sup> W. Nowicka, ‘The Anti-abortion Act in Poland – The Legal and Actual State’ in *Reproductive Rights in Poland: The Effects of the Anti-abortion Law. Report*, Federation for Women and Family Planning, W. Nowicka ed. 2008, pp. 17-44, at 17.

<sup>5</sup> Ignaciuk 2007, supra note 3, pp. 34-36. *The Penal Code of 1932* (Pol), available at <http://www.wbc.poznan.pl/dlibra/docmetadata?id=oai:www.wbc.poznan.pl:77578&from=FBC/> (accessed on 12 March 2013).

and a second to perform the actual abortion.<sup>6</sup> Because contraceptives were virtually unavailable in Poland throughout the communist era, abortion turned into the principal method of family planning. Ironically, this happened despite of the fact that 95% of Poles identified themselves as Catholic and regardless of fervent condemnation of this practice by the Catholic Church. Its clergy also sought to prevail upon medical staff individually to refuse to perform abortion services by asserting conscientious objection.<sup>7</sup> Very few did.

As a result of the Catholic Church's substantial and persistent influence on Polish society in the matter even during its overall political disenfranchisement during the communist era and its persistent demand for an amendment of existing regulations by the Ministry of Health, the communist Jaruzelski government revised administrative requirements for abortion in 1981. These changes required doctors to provide more information about abortion and on its alternatives and risks, and to record a more detailed description of the circumstances on which the decision to abort was based in each individual case.<sup>8</sup>

Opposing the widespread use of abortion as a method of family planning<sup>9</sup> became an important conservative political tool in the years of democratic transformation that started in 1989. Throughout the communist era, the Catholic Church had remained a significant social force. It had gained stature during the period of national revival under martial law as an influential player that, in opposition to communist values, was able to shape a national identity.<sup>10</sup> The Catholic Church gave general political support to democratic opposition activists (such as Solidarity's Lech Wałęsa) while the martyrdom of Catholic priests (such as Father Jerzy Popiełuszko who ministered to the pro-democracy movement) resulted in the new democratic government harboring a sentiment of profound indebtedness and obligation vis-à-vis the Church. This created a sense of inevitability when it came to accommodating certain political demands of the Episcopate. The abortion issue was one of several areas where the Catholic Church exacted very substantial concessions in an effort to reverse the communist legacy with its separation of Church and State and secularization of society.<sup>11</sup> The atypical religious homogeneity of the Polish nation ensured that no competing religious interests could attempt to secure political clout in the new republic at the expense of the Catholic Episcopate with any prospect of significant success.<sup>12</sup>

It is more than mere coincidence that Poland is the only country in modern times that entered into a concordat with the Vatican even before it adopted a democratic constitution. A cleric even commented that the concordat was intended as a "preparation" for the constitution.<sup>13</sup>

<sup>6</sup> Ignaciuk 2007, supra note 3, p. 37.

<sup>7</sup> M. Fuszara, 'Legal Regulation of Abortion in Poland', *Signs Journal of Women in Culture and Society* 1991-17-1 (Autumn), pp. 117-128, at 122. Still, a national poll revealed in 1960 that only 25% of respondents were ready to accept such a refusal by a doctor as valid. Idem, p. 118.

<sup>8</sup> Fuszara 1991, supra note 7, p. 123.

<sup>9</sup> J. Hadley, *Abortion. Between Freedom and Necessity*, London: Virgo Press 1996, p. 39.

<sup>10</sup> M. Chałubiński, 'Polityka, Kościół, Aborcja' in *Polityka i Aborcja*, M. Chałubiński ed., Warsaw: Scholar 1994, pp. 89-153, at pp. 92-94.

<sup>11</sup> Concordat between the Holy See and the Republic of Poland signed on 28 July 1993, ratified 1 January 1998, enacted 25 April 1998, at <http://www.concordatwatch.eu/topic-1331.843> (accessed on 12 March 2013).

<sup>12</sup> See for statistical proportions P. Mazurkiewicz, 'Autonomy of the Church and Freedom of Religion in Poland' in *Church autonomy: A comparative survey*, Peter Lang & Gerhard Joppich eds., Frankfurt am Main: Peter Lang 2001, at <http://www.religlaw.org/content/blurf/files/Chapter%2016.%20Mazurkiewicz.pdf> (accessed on 12 March 2013).

<sup>13</sup> Fr. A. Boniecki, 'Co w nowym konkordacie jest szczególnie ważne?' (What in the new concordat is particularly important?) Interview in *Onet.com Wiadomości*, 19 March 2006, at <http://wiadomosci.onet.pl/jp2/5169.1704.1319956.text.html> (accessed on 12 March 2013).

There were doubts whether the concordat complied with the old 1952 constitution that was still in force with some amendments when the concordat was signed.<sup>14</sup> Polish secular humanists observed that the country's post-communist constitution of 1997<sup>15</sup> underwent no less than seven drafts to prevent any successful future challenge to the concordat that was signed four years prior to the constitution, although it was ratified four months after the new constitution entered into force.<sup>16</sup> "The intended provision on separation of Church and State was replaced with enigmatic language providing for their 'mutual impartiality.'"<sup>17</sup> Consequently, separation of Church and State does not really exist in Poland today.<sup>18</sup> The explicit language of public laws – especially of those controlling abortion – leaves no doubt about the hierarchical precedence of authority.<sup>19</sup>

Already in March of 1989 – even before the collapse of communism – the Polish Episcopate published in the Catholic magazine *Powiernik Rodzin* ("Families' Confidant") a first draft of the Unborn Child Protection Bill.<sup>20</sup> This document was also supported by the Lutheran Church. It called for an absolute ban on abortion and for severe prison sentences to be imposed on the

<sup>14</sup> Constitution of the People's Republic of Poland, *adopted on 22 July 1952* (known as the Stalin constitution). It was *amended in April 1989* after the Round Table Agreement (*Nowela kwietniowa*, or April Amendment), at <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19890190101> (accessed on 12 March 2013)), which reintroduced the Senate and the office of the President and was itself superseded by the December Amendment, *available at* <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19890750444> (accessed on 12 March 2013) that replaced statements about Poland being a communist and socialist State by declaring it a liberal democracy and market economy, and later by the Small Constitution of 1992 (*available at* <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19920840426> (accessed on 12 March 2013)). The Small Constitution was approved by Poland's first freely and democratically elected parliament since 1928. See *Elections in Europe: A data handbook*, Dieter Nohlen & Philip Stöver eds., Baden-Baden: Nomos Verlagsgesellschaft, 2010, p. 1491.

<sup>15</sup> Constitution of the Republic of Poland, *adopted by the National Assembly 2 April 1997, approved by national referendum 25 May 1997, entered into force 17 October 1997*, as published in *Dziennik Ustaw* no 78, item 483, available in English at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (accessed on 12 March 2013).

<sup>16</sup> Concordat between the Holy See and the Republic of Poland, *signed 28 July 1993, ratified 23 February 1998*. In late 2011, the present government of Donald Tusk announced plans to obligate the clergy to contribute to the public social security system even if ending this privilege required amending the concordat. 'Time to Tighten Belts, Says Tusk', *Warsaw Voice*, 21 December 2011.

<sup>17</sup> A. Dominiczak & H. Postek & B. Stanosz, 'The Outline of Problems Regarding Freedom of Conscience and Belief, Human Rights and Freedoms, the Separation of Church and State and Equality in Today's Poland: Letter to the European Union, Warsaw, 15 March 2001, written on behalf of the Polish Humanist Federation and the Polish Humanist Association', at <http://humanizm.free.ngo.pl/letter.htm> (accessed on 12 March 2013).

<sup>18</sup> The debate whether such a separation should even exist still appears to be entirely unsettled in Poland to date. M. Sobczyk, 'The Cross and the State', *Wall Street Journal* 3 August 2010, at <http://blogs.wsj.com/emergingEurope/2010/08/03/the-cross-and-the-state/> (accessed on 4 May 2013). See also P. Borecki, 'Kościół ma przewagę nad państwem' (The Church Dominates the State), *Trybuna*, 25 July 2009, reprinted in *Concordat Watch*, at [http://www.concordatwatch.eu/showtopic.php?org\\_id=931&kb\\_header\\_id=37751](http://www.concordatwatch.eu/showtopic.php?org_id=931&kb_header_id=37751) (accessed on 4 May 2013).

<sup>19</sup> Act of 7 January 1993 on Family Planning, Human Embryo Protection and Conditions for Lawful Termination of Pregnancy, *Internetowy System Aktów Prawnych*, at <http://isap.sejm.gov.pl/servlet/Search?todo=file&id=WDU19930170078&type=3&name=D19930078Lj.pdf> (accessed on 12 March 2013), states in art. 3.1. "The public administration and local governments shall cooperate with and assist the Catholic Church, other Churches, religious organizations and social organizations that organize care for pregnant women and foster families or assist in the adoption of children." See also art. 3.2.: "Extent, forms and procedures of providing assistance referred to in section 1 shall be determined by a directive of the Cabinet of Ministers."

<sup>20</sup> 'Projekt ustawy o prawnej ochronie dziecka poczętego' *Powiernik Rodzin* 1989-3, at <http://www.humanfamilies.com/Powiernik/89/nr0389.htm> (accessed on 9 June 2013).

aborting woman, the doctor who performed the abortion and any aider and abettor. At first opportunity, it was formally introduced as a bill by seventy-six deputies of the Sejm, the lower house of parliament.<sup>21</sup> Contemporaneous major changes in the composition and structure of the government during post-communist transformation enabled the proponents of this bill to sidestep normal parliamentary procedure that would have included public hearings and consultations. The outcome of this process might have been quite different if customary constitutional procedures had been followed in this instance, judging from the massive scale of public protests, media coverage and *ad hoc* establishment of several activist women's organizations. By December 1989, the new government was dominated by pro-life cabinet members with a background in the Solidarity movement and parliamentary deliberation of the abortion bill was resumed with high priority.<sup>22</sup>

An alternative avenue for restricting access to abortion was to amend applicable regulations by the Ministry of Health. Those were revised further in April of 1990 and now required multiple consultations and certifications from four different specialists and did not recognize social or economic grounds for abortion. This provision effectively barred women from rural areas and small towns from access to abortions.<sup>23</sup> Additionally, the 1990 regulations introduced a "conscience clause" that explicitly permitted doctors to refuse to carry out abortions.<sup>24</sup> The result was an almost instant wave of mass declarations of conscientious objections that ended *de facto* the availability of abortion throughout entire hospitals.<sup>25</sup> The conscience clause introduced an element of unreviewable subjectivity into the statutory criteria for the performance of a medical service that otherwise remained lawful on its face, albeit under certain conditions.

In July 1990, a slightly liberalized draft of the Unborn Child Protection Bill was approved by two Senate committees. It ensured that women who had obtained abortions were not to be prosecuted, justification of abortion on medical and criminal grounds such as rape or incest was recognized, and it also provided lower prison sentences for aiding and abetting, at a maximum of three years.<sup>26</sup> Although this draft had been rejected by a majority of the Polish Senate's Committee on Human Rights, it was accepted by the full Senate in its September 1990 session.<sup>27</sup> In January 1991, the Sejm established an *ad-hoc* committee dominated by pro-life legislators to deliberate on the bill. This committee polled public opinion by inviting citizens to write to their representatives. A mass mobilization of parishes and Catholic

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<sup>21</sup> H. Jankowska, 'Abortion, Church and Politics in Poland', *Feminist Review* 1991-39, pp. 174-181. The Sejm has 460 members.

<sup>22</sup> Ignaciuk 2007, *supra* note 3, pp. 39-41.

<sup>23</sup> Jankowska 1991, *supra* note 21, p. 177.

<sup>24</sup> Rozporządzenie Ministra Zdrowia i Opieki Społecznej z 30 IV 1990 r. w sprawie kwalifikacji zawodowych, jakie powinni posiadać lekarze dokonujący zabiegu przerywania ciąży, oraz trybu wydawania orzeczeń lekarskich o dopuszczalności dokonania takiego zabiegu (Dz. U. Nr 29., poz. 178) at <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19900290178> (accessed on 9 June 2013)

<sup>25</sup> Ignaciuk 2007, *supra* note 3, p. 39. Conscience clauses exist in many U.S. jurisdictions as well. They permit doctors, pharmacists or other medical staff to refuse to assist women with obtaining contraception, abortions, or other medical services through regular medical channels. See Guttmacher Institute, *State Policies in Brief, Refusing to Provide Health Services* (1 August 2012), at [http://www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf) (accessed on 12 March 2013). Since the same doctors in the same hospitals had performed hundreds of thousands of abortions annually only a few years earlier, it is clear that 'conscience' served merely as a convenient rationalization for yielding to social, clerical and certain media pressures. It is those pressure groups that had seized the opportunity not only to exist but to engage in activism, and this factor shows a clear and direct correlation to invocation of conscientious objections.

<sup>26</sup> Penal Code, Arts 18 and 152-154 (Pol).

<sup>27</sup> Jankowska 1991, *supra* note 21, p. 178.

organizations resulted in the appearance of a groundswell of support for the proposed legislation in 80% of the received letters,<sup>28</sup> even though independent polls suggested an exactly opposite sentiment harbored by the population at large.<sup>29</sup>

Even before the Unborn Child Protection Bill passed into law, the National Assembly of Doctors proposed a new Code of Medical Ethics in December 1991 that made it a violation of medical ethics to perform an abortion for reasons other than rape, incest, or risk to a woman's health. Violations of the Code of Ethics were grounds for disciplinary proceedings and for possible suspension of a doctor's medical license.<sup>30</sup> This new and controversial Code was not introduced through a vote of elected regional medical councils, the regular channel, but was instead adopted by acclamation at the second National Congress of Doctors in Bielsko-Biała.<sup>31</sup> This effectively banned all socially motivated abortions as a matter of medical ethics,<sup>32</sup> although they nominally still remained lawful from a statutory perspective – except that any doctor who would, in fact, perform one now faced the loss of his professional license. An appeal to the Constitutional Tribunal promptly made by the national ombudsman met with determined protests from the Catholic Church. Although the Constitutional Tribunal eventually ruled in March 1993 that the laws of the land superseded the Medical Code of Ethics, this judgment had little or no practical consequence since the Code remained in force for purposes of the medical profession's self-policing, as a "professional guide" for doctors and also, most importantly in its chilling effect on the practice, as a basis for abortion-related disciplinary sanctions.<sup>33</sup>

In November 1992 an even more restrictive draft bill on abortion was accepted by a Special Parliamentary Commission. It re-introduced penalties for women who had self-induced abortions and included a complete ban on contraceptives and *in vitro* fertilization. A grassroots Committee to Create a Referendum was formed in response. It quickly gathered 1.3 million signatures, even though only 50,000 signatures were constitutionally required to ensure a referendum. Regardless of this overwhelming expression of popular will, president Lech Wałęsa and Prime Minister Hanna Suchocka simply refused to hold a referendum on the issue. The Sejm rejected the referendum proposal, as well as another draft bill permitting socially-motivated abortions, even though independent polls showed that 70% of Poles firmly opposed an abortion ban.<sup>34</sup>

Instead, a bill only slightly less restrictive than the November 1992 draft was approved in January 1993 and entered into force in March 1993. It became known as the Act on Family Planning, Human Embryo Protection, and Conditions for the Lawful Termination of

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<sup>28</sup> Ibid, p. 294.

<sup>29</sup> See, e.g., Ośrodek Badań Opinii Publicznej (Center for Public Opinion Studies), 'Opinie o Projekcie Ustawy o Ochronie Dziecka Poczętego. Komunikat z badań. Październik 1990' (Opinions on the draft of the Bill on Protection of the Conceived Child. Poll Report. October 1990). TNS OBOP, at <http://www.tns-global.pl/archive-report/id/1101> (accessed on 12 March 2013). However, over time, ceaseless pro-life propaganda in conjunction with social pressure may have affected public statements in polls, with some pro-life organizations claiming as recently as September 2011 that 76% of Poles aged 15-24 favored a total ban on abortion. D. Bohon, 'Polish Abortion Ban Defeated; Pro-Life Leaders Optimistic' at <http://www.thenewamerican.com/world-news/europe/item/8837-polish-abortion-ban-defeated-pro-life-leaders-optimistic> (accessed on 12 March 2013).

<sup>30</sup> J. P. Holc, 'The Purest Democrat. Fetal Citizenship and Subjectivity in the Construction of Democracy in Poland', *Signs Journal of Women in Culture and Society* 2004-29-3, pp. 755–782.

<sup>31</sup> Ignaciuk 2007, supra note 3, p. 41.

<sup>32</sup> Equality Now, Poland, 'Medical Society Bars Doctors from Performing Legal Abortions', at <http://www.equalitynow.org/node/85> (accessed on 12 March 2013).

<sup>33</sup> Chałubiński 1994, supra note 10, p. 116.

<sup>34</sup> Ignaciuk 2007, supra note 3, pp. 42-43.

Pregnancy. This Polish abortion statute is currently in force. It prohibits all abortions, except in case of danger to a woman's life or health, if the pregnancy resulted from a duly reported criminal act, and in the event of an incurable deformity of the fetus.<sup>35</sup>

The statutory language is unmistakably pro-life. Instead of referring to a 'fetus' the Act speaks of 'the unborn child.' Many of its terms are remarkably general and vague, although it enumerates very specifically the authorities whose concurring certification is required in order to perform a lawful abortion, namely three doctors or one doctor and a public prosecutor.<sup>36</sup> It also restricts access to other services such as prenatal testing through additional provisions that were incorporated as an amendment to the Polish Penal Code. More importantly, the Act introduced certain changes to other statutes, including the Polish Civil Code:

Art. 8: § 2. A conceived child shall also have legal capacity; however, it shall enjoy its property rights and obligations provided it is born alive.

Art. 446: Upon birth, the child may demand redress for damages suffered before birth.

This amendment conferred citizenship rights on the fetus and created a conflict between the rights of the mother and those of the fetus, in which the rights of the fetus may supersede those of the mother.<sup>37</sup>

In September 1993 an attempt to liberalize this statute was undertaken by a newly elected parliament dominated by a left-wing majority. The Medical Code of Ethics was also liberalized slightly, especially with regard to prenatal testing. However, the January 1994 amendment to the Act that allowed socially motivated abortion was strongly opposed by still-sitting right-wing president Lech Wałęsa who threatened to veto the bill. The presidential elections of 1995 brought left-wing candidate Aleksander Kwaśniewski into office. Under his auspices a liberalized abortion bill was enacted by parliament in August 1996. The Act not only provided a lawful abortion on social and economic grounds and ended the monopoly of State hospitals with regard to all abortion procedures, but it also removed the preamble of the Act that took the protection of human life from conception, its pro-life verbiage and the given civil rights to the embryo in the Civil Code.<sup>38</sup> The revised statute further provided for sexual education in schools and affordable birth control.<sup>39</sup> However, as the medical association did

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<sup>35</sup> Act of January 7, 1993 on Family Planning, Human Embryo Protection and Conditions for Lawful Termination of Pregnancy. Internetowy System Aktów Prawnych, available at <http://isip.scjm.gov.pl/servlet/Search?todo=file&id=WDU19930170078&type=3&name=D19930078Lj.pdf> (accessed 12 March 2013).

<sup>36</sup> If one were to assume that gathering concurrent medical opinions in all of Poland could not present an insurmountable obstacle, one would ignore the social, religious and professional pressures doctors are exposed to by the Catholic hierarchy, sensationalist media, and activist groups, as became apparent in the case of *S and P v Poland* discussed below. Law of 7 January 1993 on Family Planning, Human Embryo Protection, and Conditions of Legal Pregnancy Termination *amended as of* 23 December 1997, art. 4a.1 (1-3). It also begs the question why under the circumstances of rape or incest certified by a public prosecutor a medical certificate would be required at all.

<sup>37</sup> See <http://isap.scjm.gov.pl/DetailsServlet?id=WDU19930170078> (accessed on 12 March 2013).

<sup>38</sup> Ignaciuk 2007, *supra* note 3, pp. 44-45.

<sup>39</sup> United Nations Population Division. Department of Economic and Social Affairs, *Abortion Policies. A Global Review. Volume III Oman to Zimbabwe* 37-40 (United Nations Publications 1999) (ST/ESA/SER.A/129 and Add 1-2).

not change its policies and standards, the implementation of this new legislation remained problematic.<sup>40</sup>

In May 1997 this liberalized statute of 1996 was challenged before the Constitutional Tribunal,<sup>41</sup> shortly before parliamentary elections that were expected to bring the right wing back to power. The petitioner's rationale was that the liberalized Abortion Act violated the rights of the fetus, who was deemed a Polish citizen with full constitutional rights who was simply temporarily unable to exercise his or her constitutional and human rights. Following this line of argument, the Constitutional Tribunal held that abortion, especially on social grounds, was impermissible in consideration of the constitutionally protected human rights of the fetus.<sup>42</sup> To override the ruling, parliament would have needed to secure a two-thirds majority, which did not happen before new elections returned a pro-life majority to power. In December 1997, further amendments were made to the 1993 Abortion Act by the newly elected conservative government of Jerzy Buzek based upon the Constitutional Tribunal's ruling of May 28, 1997. Paragraph 4(a) of the amended Act provides:

1. An abortion may be carried out only by a physician where
  - 1) pregnancy endangers the mother's life or health;
  - 2) prenatal tests or other medical findings indicate a high risk that the fetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;
  - 3) strong grounds support the belief that the pregnancy resulted from a criminal act.
2. In the cases listed above under 2), an abortion may be performed until the fetus is capable of surviving outside the mother's body; in the cases listed under 3) above, that time shall be until the end of the twelfth week of pregnancy.
3. In the cases listed under 1) and 2) above the abortion shall be carried out by a physician working in a hospital. (...)
5. Circumstances in which abortion is permitted under paragraph 1, subparagraphs 1) and 2) above shall be certified by a physician other than the one who is to perform the abortion, unless the pregnancy entails a direct threat to the woman's life.

On January 22, 1997 the Minister of Health issued an ordinance setting forth the requisite qualifications of doctors to perform abortions. The ordinance contains just two substantive sections. Paragraph 1 defines which qualifications doctors should possess to perform abortions while paragraph 2 addresses the requirement of expert certification:

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<sup>40</sup> A. Kramer, 'The Abortion Debate in Poland: Opinion Polls, Ideological Politics, Citizenship, and the Erasure of Gender as a Category of Analysis' in *Living Gender After Communism*, J.E. Johnson & J.C. Robinson eds., Bloomington: Indiana University Press 2007, pp. 63-79, at p. 65.

<sup>41</sup> The ruling of the Polish Constitutional Tribunal of 28 May 1997 (Sign Act K 26/96), at [http://www.trybunal.gov.pl/eng/Judicial\\_Decisions/1986\\_1999/K\\_%2026\\_96a.pdf](http://www.trybunal.gov.pl/eng/Judicial_Decisions/1986_1999/K_%2026_96a.pdf) (English version) and at <http://isap.sejm.gov.pl/RelatedServlet?id=WDU19930170078&type=10&isNew=true> (Polish version) invalidated certain amendments of June 1994 to the Polish (Pol) that had liberalized abortion rights. This case also raised separation of powers issues. Cf. R. Teitel, 'Post-Communist Constitutionalism: A Transitional Perspective', *Columbia Human Rights Law Review* 1994-26, pp. 167-190, at p. 178.

<sup>42</sup> A. Titkow, 'Poland', in *From Abortion to Contraception: A Resource to Public Policies and Reproductive Behavior in Central and Eastern Europe from 1917 to Present*, H.P. David ed., Westport, Connecticut: Greenwood 1999, pp. 165-189, at p. 166.

“The circumstances indicating that pregnancy constitutes a threat to the woman's life or health shall be attested by a consultant specializing in the field of medicine relevant to the woman's condition.”<sup>43</sup>

The framework providing for lawful abortions was further restricted by prison sentences for damages caused to “the body of the conceived child” or to its health,<sup>44</sup> which resulted in further practical limitation of the availability of prenatal testing.<sup>45</sup> In addition, a 1999 amendment to the Polish Penal Code introduced penalties for infanticide that remain in force to date.<sup>46</sup> However, the nexus between this amendment to the Penal Code and the practical consequences of anti-abortion legislation was never publicly acknowledged.<sup>47</sup> Around that time in 1999, the UN Human Rights Committee noted “with concern... [Poland's] strict laws on abortion which lead to high numbers of clandestine abortions with attendant risks to life and health of women.”<sup>48</sup>

The left returned to power in the September 2001 elections. But despite campaign promises to liberalize abortion law, the new Sejm did not address this issue at any time in any way. The reason was an ultimatum issued by the Catholic Church to the incoming government of Leszek Miller and his ruling coalition: the Polish Episcopate's support in the referendum on the accession of Poland to the European Union<sup>49</sup> was exchanged by Miller's incoming government for its silence and inactivity on abortion.<sup>50</sup> The Polish Episcopate's petition forced the Polish government to raise the issue of abortion during its accession negotiations with the European Union,<sup>51</sup> especially in the context of the Resolution of the European Parliament on Sexual and Reproductive Health and Rights.<sup>52</sup>

Elections in September 2004 brought a coalition of Catholic parties into office that strove to introduce a total ban on abortion. The new governing coalition certainly did not shy away from testing the limits of international law on abortion bans. One coalition party, the League of Polish Families, headed by Roman Giertych, proposed in 2006 a constitutional amendment

<sup>43</sup> Cited in *TysiŃc v. Poland*, 45 ECHR 42 (2007) at para. 40.

<sup>44</sup> Penal Code of 6 June 1997 (Pol), art. 157a. Journal of Laws 1997, no.88, item 553 as amended.

<sup>45</sup> W. Nowicka, ‘The Anti-Abortion Law in Poland. The Functioning, Social Effects, Attitudes and Behaviours. The Report’, Warsaw: Federacja na Rzecz Kobiet i Planowania Rodziny 2000, ., at ., - [http://www.federa.org.pl/index.php?option=com\\_content&view=article&id=400%3Austawa-antyaborcyjna-w-polsce-wrzesie-2000&catid=81%3Araporty&Itemid=75&showall=1](http://www.federa.org.pl/index.php?option=com_content&view=article&id=400%3Austawa-antyaborcyjna-w-polsce-wrzesie-2000&catid=81%3Araporty&Itemid=75&showall=1) (accessed on 12 March 2013).

<sup>46</sup> Penal Code, art. 149 (Pol), at <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19990640729> (accessed on 12 March 2013).

<sup>47</sup> F. Girard & W. Nowicka, ‘Clear and Compelling Evidence: The Polish Tribunal on Abortion Rights’, *Reproductive Health Matters* 2002-10-19, pp. 22-30, at p. 26.

<sup>48</sup> Human Rights Committee, *Concluding Observations: Poland*, para. 10, UN Doc CCPR/C/79/Add.110 (1999).

<sup>49</sup> Following a referendum on 7 and 8 June 2003, Poland signed the Treaty of Accession to the European Union on 16 April 2003 at Athens that became effective as of 1 May 2004, at <http://eur-lex.europa.eu/en/treaties/dat/12003T/htm/12003T.html> (accessed 12 March 2013).

<sup>50</sup> R. Markowski & J.A. Tucker, *Pocketbooks, Politics and Parties: The 2003 Polish Referendum on EU Membership* pp. 12-13, fn. 20 and 21, at [http://www.princeton.edu/~smeunier/Markowski\\_Tucker\\_2003.pdf](http://www.princeton.edu/~smeunier/Markowski_Tucker_2003.pdf) (accessed on 4 May 2013). Cardinal Primate Józef Glemp made a barely veiled statement early in the debate. See *BBC News Europe*, 27 December 2002, at <http://news.bbc.co.uk/2/hi/europe/2609763.stm> (accessed on 4 May 2013). At the Polish referendum on 7 and 8 June 2003, accession to the European Union was approved by 77.45% of the participants.

<sup>51</sup> Ignaciuk 2007, supra note 3, pp. 48-49.

<sup>52</sup> Resolution of the European Parliament on Sexual and Reproductive Health and Rights 2001/2128 (INI), available at -<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2002-0223+0+DOC+PDF+V0//EN> (accessed on 12 March 2013).

stating that “the Republic of Poland protects the life of its citizens ‘from the moment of conception.’”<sup>53</sup> This amendment was endorsed by the president of the Polish Conference of Catholic Bishops. Though otherwise inconsequential, Giertych’s initiative set off an avalanche of further proposals of pro-life bills and constitutional amendments by various fundamentalist parties and individual politicians including then-president Lech Kaczyński. Although none of them were ever enacted, they were extensively and impassioned debated and voted on in parliament throughout its 2006-2007 term.<sup>54</sup>

## II. The Economics of Hypocrisy

Today, the 1993 Act on Family Planning, Human Embryo Protection, and Conditions for Lawful Termination of Pregnancy remains in force in Poland. By eliminating abortion on demand as well as social and economic grounds for abortion, this statute outlawed 97% of abortions that had been performed.<sup>55</sup> The official position of the medical profession is pro-life, a stance reflected by the many public declarations of conscience by entire medical wards<sup>56</sup> as well as by a vast majority of individual hospital directors and doctors.<sup>57</sup> It is also reflected by government statistical records of lawful abortions actually performed.

Published figures ranged between 124-685 abortions per year, in a nation of about 38 million.<sup>58</sup> Still, considering the fact that lawful abortion remains theoretically available in case of danger to a woman’s life or health as well as in cases of pregnancy resulting from certain felonious acts including rape, incest, and intercourse with an underage or mentally incapacitated person, these figures obviously misrepresent the true scale of abortions. For example, 1829 reported rapes occurred in 2006 of which 172 or 9.4% were gang rapes. Presumably, a multiple of this number went unreported due to social pressures and notoriously ineffective law enforcement. Only 12 abortions were officially carried out on grounds of a reported rape.<sup>59</sup> It is implausible that almost none of the victims who were impregnated as a result of rape would have sought abortion instead of opting to give birth and raise a child resulting from a violent crime.

The disparity between the numbers of statistically expected and lawfully performed abortions is particularly striking when one compares statistical data of procedures performed before and after the enactment of the strict abortion legislation and professional regulations. In the 1980’s, about 150,000 abortions per year were performed in public hospitals. Since private abortions were neither regulated nor reported, but were nonetheless by far the most sought-after option, it is safe to estimate that the number of actual abortions performed under communism could have been twice or even three times as large as the reported figures. That

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<sup>53</sup> E. Siedlecka, ‘Antyaborcyjna gra o pietruszkę’, *Gazeta Wyborcza*, 13 April 2007, p. 6.

<sup>54</sup> Ignaciuk 2007, *supra* note 3, p. 51.

<sup>55</sup> W. Nowicka, *Raport na temat skutków ustawy aborcyjnej*, Warsaw: Federacja na Rzecz Kobiet i Planowania Rodziny 1994, at [http://federa.org.pl/dokumenty\\_pdf/raporty/raportaborcyjny1994.pdf](http://federa.org.pl/dokumenty_pdf/raporty/raportaborcyjny1994.pdf) (accessed on 12 March 2013).

<sup>56</sup> It should be noted that blanket refusals by entire hospitals to perform certain medical services are, in fact, unlawful according to existing legislation. See E. Zielińska, ‘Review of Polish Legal Regulations on Reproductive Rights’ in *Reproductive rights in Poland: the effects of the anti-abortion law. Report*, W. Nowicka ed., Warsaw: Federation for Women and Family Planning 2008, pp. 9-16, at p. 16. ,

<sup>57</sup> A. Domaradzka, ‘Report of Expert Research With Gynaecologists and Midwives’ in *Reproductive rights in Poland: The effects of the anti-abortion law. Report*, W. Nowicka ed., Warsaw: Federation for Women and Family Planning 2008, pp. 65-79, at p. 66.

<sup>58</sup> Nowicka 2008, *supra* note 4, p. 20. These numbers exclude a spike reaching 3047 abortions in 1997 when social and economic reasons were briefly permissible grounds for procuring the procedure.

<sup>59</sup> *Ibid*, p. 22.

means it could easily have amounted up to 300,000-450,000 per year.<sup>60</sup> The only credible explanation for this drop to almost zero, within a very short time without any discernible improvement of availability of other birth control options, is the presence of a vast, immensely profitable, underground abortion industry that, although rarely prosecuted, often falls far short of providing women with quality medical care.

Judging from the ubiquity of barely veiled abortion ads in Polish newspapers, on the internet and from the estimated numbers of illegal procedures reaching 80,000-200,000 per year,<sup>61</sup> Poland's underground abortion industry is booming. The 1993 statute is effectively enforced only to the extent of making the lives of women who cannot financially afford the cost of illegal abortions exceedingly difficult. The law has certainly not eliminated or reduced abortion in Poland, as the statistics appear to suggest. The nationwide birth-to-abortion ratio continues to hover at approximately 2:1.<sup>62</sup> And since the vast majority of illegal abortion procedures are performed by certified gynecologists in their private surgeries, it follows that most of those who ostensibly refuse to perform lawful abortions are still performing illegal ones in a private setting, without the benefits of regulation, supervision and the possibility of medical malpractice claims. The Abortion Act is therefore not only ineffective, but it promotes hypocrisy and outright 'criminal' conduct. Facing public pressure to conform to the prevailing pro-life rhetoric,<sup>63</sup> doctors are at least strongly encouraged to engage in unlawful practices in order to provide medical services that are routinely performed world-wide – even in cases where the woman is legally entitled to them. Thus, on its face, the 1993 Act on Family Planning, Human Embryo Protection, and Conditions for Lawful Termination of Pregnancy is considerably more restrictive *de facto* than it is *de iure*. Two years after the European Court of Human Rights' *Tysic* decision, the Council of Europe's Commissioner for Human Rights still concluded in 2007 "that access to legal abortion [...] in Poland is frequently hindered." Therefore he requested the "government to ensure that women falling within the categories foreseen by the law are allowed, in practice, to terminate their pregnancy without additional hindrance or reproach."<sup>64</sup> This situation encourages a booming underground abortion industry that negates the purported social and ethical values and objectives of the Act. Very limited enforcement<sup>65</sup> further incentivizes Poland's vast illegal abortion industry.

Available data permit the conclusion that the necessity for women to obtain an abortion outside the legal framework has created a sizable underground economy, and an anything but negligible source of income for doctors whose official wages in the public health care system remain very modest by OECD standards. After outlawing abortion 1993 in 97% of cases (i.e. all those based on social and economic grounds), demand for abortion services remained unchanged while the supply of this service reduced dramatically. Understandably, this led to a sharp price increase for abortions. In 2005, the average monthly wage was PLN2500 (\$770), while the average price of a surgical abortion was PLN3000 (\$930) and for a pharmacological abortion PLN900 (\$280). Assuming further that about one-third of illegal abortions are done by pharmacological means, this would indicate an underground industry of approximately PLN184-460 million (\$57 million-\$142 million), depending on estimates of the number of

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<sup>60</sup> Ibid, p. 29.

<sup>61</sup> Girard & Nowicka 2002, supra note 47, p. 25 and Nowicka 2008, supra note 4, p. 27.

<sup>62</sup> Girard & Nowicka 2002, supra note 47, p. 25.

<sup>63</sup> Ibid, p. 26. Domaradzka 2008, supra note 57, p. 74.

<sup>64</sup> Council of Europe, Commissioner for Human Rights, Memorandum to the Polish Government: Assessment of the Progress Made in Implementing the 2002 Recommendations of the Council of Europe Commissioner for Human Rights para. 98, 13 CommDH (2007), 20 June 2007.

<sup>65</sup> Ignaciuk 2007, supra note 3, p. 57.

abortions performed that range between 80,000-200,000 a year.<sup>66</sup> Considering that in 2003 there were only 1,000-1,500 licensed gynecologists in Poland,<sup>67</sup> a nation of over 38 million that includes about 10 million women of reproductive age,<sup>68</sup> revenues from underground abortions create a very powerful economic incentive for this small number of doctors to maintain the legal status quo on abortion. If one considers that an underground “gross abortion product” of \$57 million-\$142 million is distributed to 1,500 gynecologists, the resulting mean income from unlawful abortion practice is \$38,000 – \$95,000 per year in a country where the average annual wage is \$9,240. This means that the average Polish gynecologist draws approximately 4-10 times the average wage from unlawful abortion practice, in addition to his lawful income. But that may still be a low estimate:<sup>69</sup> since doctors as an educated group are not with any statistical likelihood more religious, or more accepting of official Church doctrine than the Polish population as a whole, their staunch support of maintaining and, in fact, increasing *de facto* barriers to accessible abortion by exercising their personal discretion based on the “conscience clause”<sup>70</sup> can be at least partly explained by their vested interests in the substantial financial benefits derived from it. Deregulation would destroy this extremely lucrative business model. Enabled by the complete lack of oversight over the exercise of conscientious objection, doctors typically refuse to make referrals in order to avoid potential complications for themselves. They are exposed to strong pressure not to facilitate even lawful abortions from the Catholic hierarchy and from hospitals concerned with their reputation. The conscientious objection of a doctor is therefore not always, indeed probably rarely, genuine, since many gynecologists offer women illegal abortions at a high price in private.

Another strategy for escaping the restrictions of current abortion legislation is to seek an abortion abroad. In the case of Poland, it initially took the form of organized bus trips to Belarus, Ukraine, and Russia,<sup>71</sup> where abortions were not only legally available to foreigners but also considerably cheaper than in Poland. But following a highly publicized crackdown by law enforcement on some specialized travel agencies during the 1990's, abortion tourism shifted to individual travel arrangements and reoriented itself towards the West. For a number of reasons it is very difficult to estimate the actual scale of current abortion tourism, but it appears that there are few abortion clinics, especially in Germany and in the UK, that do not trace significant business volume to patients from Poland in search of safe and lawful abortion services.<sup>72</sup> Cost, language barriers, and logistics still constitute obstacles for many Polish women hoping to secure an abortion abroad, especially for poor women with a rural background.

### III. International Determinants of Reproductive Rights

<sup>66</sup> Girard & Nowicka 2002, *supra* note 47, p. 25. Nowicka 2008, *supra* note 4, p. 27.

<sup>67</sup> Cf. R. Kulik, ‘Rozmowa z doc. dr hab. Romualdem Dębskim – redaktorem naczelnym Wiadomości Położniczo–Ginekologicznych’, *Wiadomości Ginekologiczno-Położnicze: Specjalizacja 2003-20*, at <http://www.libramed.pl/wpg/NumeryArchiwalne/20/03.html> (accessed on 12 March 2013).

<sup>68</sup> Nowicka 2008, *supra* note 4, p. 21.

<sup>69</sup> For example, the above calculation assumes that all gynecologists actually engage in unlawful abortion practices. Given social opprobrium including pressures and risks of adverse publicity by Polish priests who have been known to disclose the names of abortion practitioners from their pulpit, as well as various other personal and professional reasons, the number of involved gynecologists is likely lower. This pushes per-gynecologist income of individuals performing abortions to even higher levels.

<sup>70</sup> Medical Profession Act of 5 December 1996, art. 39 (Pol), *available at* <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970280152+1999%2408%2417&min=1> (accessed on 12 March 2013).

<sup>71</sup> Nowicka 1994, pp. 2-3, at [http://federa.org.pl/dokumenty\\_pdf/raporty/raportaborcyjny1994.pdf](http://federa.org.pl/dokumenty_pdf/raporty/raportaborcyjny1994.pdf) (accessed on 12 March 2013).

<sup>72</sup> Nowicka 2008, *supra* note 4, p. 26.

Procedural requirements under Polish law are biased against lawful abortions even in those rare cases where a woman actually seeks to take the difficult formalistic road to secure a lawful abortion, typically because she cannot afford the cost of an abortion underground. Current law does not provide women with an effective appeal, much less an expedited review of the requisite three concurring medical expert opinions. This *de facto* denial of substantive due process resulted in a landmark conviction of Poland for a violation of the European Convention of Human Rights.<sup>73</sup> No wonder that one of the approaches to protect the narrowly defined right to abortion under Polish law, restricted as it is by countless requirements, had to focus on procedural due process.

*Tysic v. Poland*<sup>74</sup> became a major test case for international law on reproductive rights. Alicja Tysic, the applicant, had sought to obtain a legally required certificate to terminate her pregnancy. Due to her medical condition, including severe myopia and two preceding caesarean sections, she was at grave risk of losing her sight if she were to go through with delivery. Polish law permits abortion regardless of the stage of pregnancy if “the pregnancy endangered the mother’s life or health.”<sup>75</sup> Because the three physicians required by statute to certify her medical prognosis failed to agree on her prognosis, Tysic was unable to get an abortion. As had been predicted, her sight deteriorated rapidly after her delivery and she was rendered virtually blind. Having exhausted domestic remedies to no avail, Tysic filed a complaint in the European Court of Human Rights. She alleged, *inter alia*, that Poland had violated art. 8 of the European Convention on Human Rights.<sup>76</sup> The Court held that Polish law, and in particular its application in Tysic’s case, violated art. 8 of the Convention which provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>77</sup>

The Court concluded that the Polish government had failed to meet its obligation under art. 8 “to safeguard the applicant’s right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion,”<sup>78</sup> a treaty provision

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<sup>73</sup> Formally known as the European Convention for the Protection of Human Rights and Fundamental Freedoms, CETS no 005, 213 UNTS 222, *signed at Rome* 4 November 1950, *entered into force* 3 September 1953, available at <http://www.hri.org/docs/ECHR50.html> (accessed on 12 March 2013). Despite acceding to the European Union on 1 May 2004, Poland had already become a member of the Council of Europe on 26 November 1991 and had ratified the ECHR on 19 January 1993. See <http://www.coe.int/country/poland> (accessed on 12 March 2013).

<sup>74</sup> 45 ECHR 42 [2007].

<sup>75</sup> 45 ECHR 42 [2007] at para. 35.

<sup>76</sup> 45 ECHR 42 [2007] at paras. 105-130.

<sup>77</sup> This provision follows closely art. 12 of the Universal Declaration of Human Rights, GA Res 217A (III), art. 8, UN Doc A/810 (12 December 1948), available at <http://www.un.org/en/documents/udhr/> (accessed on 12 March 2013), which states:

“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”

<sup>78</sup> 45 ECHR 42 (2007) at para. 128.

intended “to protect the individual against arbitrary interference by public authorities.”<sup>79</sup> The panel based this finding explicitly on the government's failure to establish an effective procedure through which the applicant could have appealed her doctors' refusal to grant her request for an abortion. The Court prescribed some key elements which a satisfactory procedure must include: it should guarantee to a pregnant woman the right to be heard in person and have her views considered, the body reviewing her appeal should give written grounds for its decision and, observing that “the time factor is of critical importance” in all decisions involving abortion, the Court mandated that the procedure had to ensure that such decisions are timely made. The applicant was awarded EUR25,000 for pain and suffering.

However, the Polish government only superficially complied with the order of the *Tysic* Court to amend Polish law. In a perfunctory exercise that appears to have been calculated to appease the Court without having to facilitate significantly effective access to lawful abortion, parliament enacted the Law on the Protection of Patient Rights and the Patient Rights Ombudsman,<sup>80</sup> which became effective in 2009. Any patient who disagrees with her doctor's decision on the provision of health care, including abortion, now has a right of appeal to a Commission of Physicians which then has 30 days to issue a dispositive opinion.<sup>81</sup> But on first impression, the UN Special Rapporteur on the Highest Attainable Standard of Health promptly identified the grave inherent and foreseeable problems with this legislation. He concluded that “a panel composed exclusively of medical professionals has an inbuilt structural bias, affecting its impartiality.”<sup>82</sup> The UN Human Rights Committee noted that, given the strict statutory time limit on abortion under Polish law when pregnancy resulted from a crime, a 30 day period to issue an appellate opinion that is required for a lawful abortion is excessive and again undermines women's right to abortion<sup>83</sup> since it would come after previous unsuccessful attempts to obtain the required medical certification. The Polish government has yet to clarify whether a woman has an opportunity to be heard in person and whether the Commission is required to state the reasoning for its opinions in writing under the 2009 Patient Rights Act. The Committee of Ministers, overseeing the implementation of judgments of the European Court of Human Rights, has not yet been satisfied that the new law complies with *Tysic*.<sup>84</sup>

The *Tysic* decision acknowledged that procedural standards could still fall short of protecting an individual's substantive right to privacy, including the right to abortion. In this regard, the Court's approach showed striking analogies with the practice of U.S. courts in addressing procedural and substantive aspects of the U.S. Constitution's Fifth and Fourteenth Amendment's due process clauses. In some situations, the U.S. Supreme Court has used procedure to secure substantive rights, while on other occasions it has found substantive

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<sup>79</sup> 45 ECHR 42 (2007) at para. 109.

<sup>80</sup> Available at <http://isap.sejm.gov.pl/DetailsServlet?id=WDU20090520417+2009%2406%2405&min=1> (accessed on 12 March 2013).

<sup>81</sup> Center for Reproductive Rights, Selected Polish Laws and Court Decisions Related to Abortion, Litigation Briefing Series, at <http://reproductiverights.org/en/rr-v-poland-st-v-poland-z-v-poland#> (accessed on 12 March 2013).

<sup>82</sup> *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, Report on Mission to Poland, para. 45, UN Doc A/HRC/14/20/Add.3 (2010).

<sup>83</sup> Human Rights Committee, *Concluding Observations: Poland*, para. 12, CCPR/CPOL/CO/6 (2010).

<sup>84</sup> Council of Europe, *Current State of Execution* (2008). The Department for the Execution of Judgments of the European Court of Human Rights serves the Committee of Ministers as its permanent staff in monitoring compliance and periodically updates information about the status of implementation of each judgment. The Committee of Ministers receives reports related to enforcement from NGOs and other interested parties as well as from the government. See also in the *Tysic* case:

<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=1869415&SecMode=1&DocId=1745898&Usage=2> (accessed on 12 March 2013).

rights in the due process clause itself.<sup>85</sup> The European Court recognized that even the best procedure cannot safeguard a substantive right in an atmosphere hostile to that right.

Poland did not fare better in the next landmark case before the European Court of Human Rights. In *R R v. Poland*,<sup>86</sup> the applicant was repeatedly refused diagnostic care during her pregnancy after a routine sonogram detected a deformity, a cyst on the fetal neck. As doctors repeatedly stalled genetic testing, this prevented the applicant from timely obtaining meaningful information about the health of her fetus and seeking a medically justified lawful abortion. This ruling was important for three reasons. For the first time, the Court recognized a violation of art. 3 (“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”) in an abortion-related case,<sup>87</sup> in addition to finding a violation of art. 8<sup>88</sup> analogous to the *Tysic* case. Also for the first time, an international human rights body recognized a right of access to prenatal examinations in the context of abortion.<sup>89</sup> Finally, in line with *Tysic*, the Court found that the Convention obligates States to regulate the exercise of conscientious objection by requiring them to “organize the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.”<sup>90</sup> Concerning the alleged violation of the Convention’s art. 3, the Court found that denial of available services placed the applicant in a vulnerable position in which she was profoundly humiliated. With regard to art. 8, the Court held that Poland failed to meet its obligations under *Tysic* to ensure timely access to lawful services. This because Poland did not reform its criminal law, to remove its chilling effect on doctors to perform lawful medical services, and because of its failure to ensure effective access to relevant and complete information about the health of applicant’s fetus.

The chilling effect of Polish abortion legislation, noted by the Court in *R R*, and the defensive posture the medical profession had assumed as a result of it<sup>91</sup> were central themes in *Z v*

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<sup>85</sup> The continually evolving relationship between procedural due process and substantive due process in the context of the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution is reviewed by G Edward White, *The Constitution and the New Deal* 244-46 (Harvard University Press 2000) and Bryan Hawkins, ‘The Glucksberg Renaissance: Substantive Due Process Since *Lawrence v. Texas*’ in 105 *Michigan L. Rev.* 409, 412 (2006). Cf. also *Goldberg v. Kelly*, 397 US 254 (1970); *Griswold v. Connecticut*, 381 US 479, 481-82 (1965); *Nebbia v. New York*, 291 US 502, 525 (1934); *Lochner v. New York*, 198 US 45, 53-54 (1905).

<sup>86</sup> [2007] ECHR no 27617/04 (*decided* 26 May 2011, *final* as of 28 November 2011)- *available at* [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104911#{"itemid":\["001-104911"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-104911#{) (accessed on 4 May 2013).

<sup>87</sup> The Court’s finding that willful denial of medical care aggravated the inhuman and degrading treatment suffered by the applicant reinforces the standard developed in *K L v Peru*, where such denial was described at para. 6.3 as having the effect of “add(ing) further pain and distress.” *K L v Peru*, Human Rights Committee, Communication no 1153/2003, para. 6.3, UN Doc CCPR/C/85/D/1153/2003 (2005).

<sup>88</sup> The applicant in *R R* had also alleged violation of art. 13 (right to effective remedy) which the Court found to overlap with the art. 8 claim and therefore did not address separately, and of art. 14 (right to be free from discrimination) which the Court did not address at all. ECHR no 27617/04 (2007).

<sup>89</sup> The Court held that the applicant’s suffering was aggravated “by the fact that the diagnostic services which she had requested early on were at all times available and that she was entitled as a matter of domestic law to avail herself of them.” *R R v Poland* [2007] ECHR no 27617/04 at para. 160.

<sup>90</sup> *R R v Poland* [2007] ECHR no 27617/04, at para. 206.

<sup>91</sup> The ECHR has recognized in *Tysic* 45 ECHR 42 [2007], para. 116 that the harsh penalties of up to three years imprisonment pursuant to Penal Code Arts 18 and 152-154 (Pol) facing a physician or any other person assisting a woman in the unlawful termination of her pregnancy, including providing transport, advice or information, have indeed a “chilling effect” on medical professionals. Conscience has an additional dimension in Poland: a doctor who performs an abortion that is deemed to not have had a basis in law is

*Poland*.<sup>92</sup> In this case, brought by the victim's mother, health care providers had denied diagnostic care to a pregnant woman suffering from ulcerative colitis, primarily because they were afraid that proper treatment of her condition might harm the fetus. Numerous hospitals and doctors refused to provide medical care on grounds of "conscience," resulting in a miscarriage and ultimately in the woman's preventable death.<sup>93</sup> This pending case alleges violations of the Convention in respect of art. 2 (right to life), art. 3 (right to be free from cruel, inhumane and degrading treatment), art. 8 (right to respect for private life), art. 13 (right to an effective remedy) and art. 14 (right to be free from discrimination). Settled jurisprudence of the European Court of Justice,<sup>94</sup> the UN Committee on Economic, Social and Cultural Rights,<sup>95</sup> and the Committee on the Elimination of Discrimination against Women<sup>96</sup> has established that differential treatment based on pregnancy status is a form of sex discrimination.

The case of *P and S v Poland* presented a comprehensive portrayal of the obstacles surrounding a decision to seek a lawful abortion in Poland.<sup>97</sup> P was raped in 2008 at the age of 14 by a classmate. The next day, P and her mother (S) filed a police report and P was referred to a medical clinic for a rape examination. At the clinic, P was not provided with emergency contraception to prevent a pregnancy from occurring, this regardless of the fact that she was not only below the age of consent but, moreover, had been raped. When her pregnancy was confirmed, P sought an abortion – to which she was legally entitled – with her mother's consent and support. Upon a hearing in Family District Court, P was given a certificate confirming that her pregnancy was the result of a crime, a formality required to obtain a lawful abortion. But neither the prosecutor nor the police provided P with any further procedural information. Her mother S went with P to a number of hospitals in Lublin, their hometown, to obtain the intended procedure. She was told that a medical referral was also necessary for an abortion and that only a small number of specialists were authorized to provide such a referral. Despite judicial certification of her rape, all specialists identified by Lublin hospitals declined to provide P with a referral.<sup>98</sup> The Chief of Obstetrics and Gynecology at one hospital told P and her mother that P was in need of a priest, not an abortion. He arranged an unrequested and unwelcome meeting between P and a Catholic priest where P discovered that confidential information about her pregnancy had been disclosed to the priest without her or her mother's prior consent. Increasingly pressured due to the passage of time, P and her mother travelled to Warsaw where representatives of an NGO, the Federation for Women and Family Planning, assisted her in finding a doctor who did provide the requisite referral. Yet, although P had secured the legally required referral, the doctor who was to perform the abortion now expressed serious personal reservations when the priest and others contacted the hospital in Warsaw where he worked, falsely

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subject to criminal prosecution, and, out of fear of prosecution based on innuendo or on a professional review, most doctors avoid legal and reportable abortions.

<sup>92</sup> *Z v Poland* [2011] ECHR App no 46123/08.

<sup>93</sup> 'Factsheet – Reproductive Rights,' European Court of Human Rights, at [http://www.echr.coe.int/NR/rdonlyres/4B7D24F7-F9EF-4749-B16B-68E650B95C5A/0/FICHES\\_droits\\_procr%C3%A9ation\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/4B7D24F7-F9EF-4749-B16B-68E650B95C5A/0/FICHES_droits_procr%C3%A9ation_EN.pdf) (accessed on 12 March 2013).

<sup>94</sup> *Dekker v. VJV-Centrum*, ECJ judgment of 8 November 1990, C-177/88 (1991) IRLR 27, para. 12-13, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61988J0177:EN:HTML> (accessed on 12 March 2013).

<sup>95</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 20, Non-discrimination in Economic, Social and Cultural Rights*, paras. 11, 20, UN Doc E/C.12/GC/20 (10 June 2009).

<sup>96</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No 24, Women and Health*, paras. 11, 14, UN Doc A/54/38/Rev 1, chap. I (1999).

<sup>97</sup> *P and S v Poland*, [2008] ECHR App no 57375/08, Judgment of 30 October 2012.

<sup>98</sup> Which, under the circumstances of an already judicially certified rape, should have been a mere rubber-stamp formality.

claiming that P was being coerced by her mother and actually did not want the abortion. Hospital staff proceeded to manipulate the relationship between P and S, with the objective of forcing P to forgo her court-authorized abortion. Upon leaving the hospital, P and her mother were mobbed and harassed by anti-abortion activists and had to seek police protection. In lieu of protection, Warsaw police questioned them for more than six hours. The police further violated the Family Court's order by removing P from her mother's custody and placing her in a juvenile center where she was kept for a week as a ward of the State. During that week, P's mobile phone was taken from her, she was locked up in a room and timely medical treatment was withheld despite her complaints of severe pains and bleeding. Eight hours after she first complained, she was taken to the hospital for treatment. At the hospital, P faced further harassment by journalists and anti-abortion activists who apparently were notified of her whereabouts. Months after the rape occurred, and only several days before the 12 week deadline for permissible abortions in cases of rape expired, the Ministry of Health intervened and P. was able to obtain an abortion at a hospital in Gdańsk, 300 miles from her home. Yet, although the abortion was supported by all required documents, the hospital refused to register P as a patient. Her abortion was carried out in a highly secretive and rushed manner. P was neither provided information about the medical procedure nor about post-abortion care. She received general anesthesia without prior warning. As soon as the procedure was completed, P was directed to leave the hospital.<sup>99</sup> The Court in *P and S v Poland* had little choice but to follow its own precedent in *R R v Poland*: once a State decides to permit abortion, "it must not structure its legal framework in a way which would limit real possibilities to obtain it."<sup>100</sup> Referring to the broad European consensus on allowing abortion,<sup>101</sup> the Court reinforced its stance in *Tysic* that States have tangible affirmative obligations to ensure that lawful abortion is also accessible in practice. In *P and S v Poland*, the Court found violations of the Convention's Articles 3, 5 § 1, and 8.<sup>102</sup> The panel remarked that

"[t]he Court has been particularly struck by the fact that the authorities decided to institute criminal investigation on charges of unlawful intercourse against the first applicant who, according to the prosecutor's certificate and the forensic findings referred to above should have been considered to be a victim of sexual abuse. The Court considers that this approach fell short of the requirements inherent in the States' positive obligations to establish and apply effectively a criminal-law system punishing all forms of sexual abuse (see, *M.C. v. Bulgaria*, no. 39272/98, § 184, ECHR 2003-XII). The investigation against the applicant was ultimately discontinued, but the mere fact that they were instituted and conducted shows a profound lack of understanding of her predicament."<sup>103</sup>

In 2009, The UN Committee on Economic, Social and Cultural Rights urged Poland to ensure that women do not have to "resort to clandestine, and often unsafe, abortion because

<sup>99</sup> See the detailed factual account of the events at 'Litigation Briefing Series,' at <http://reproductiverights.org/en/rr-v-poland-st-v-poland-z-v-poland> (accessed on 12 March 2013).

<sup>100</sup> *R R v Poland* [2007] ECHR no 27617/04 at para. 200.

<sup>101</sup> *R R v Poland* [2007] ECHR no 27617/04 at para. 196.

<sup>102</sup> *P and S v Poland* [2008] ECHR App no. 57375/08, Judgment of 30 October 2012, at 41. The Court's holding was unanimous except for a partial dissent of Maltese Judge Vincent A De Gaetano who, for purposes of clarification that the ECHR did not itself confer a right to abortion, would have preferred to deal with the first applicant's art. 8 claim under art. 6 (right to fair trial) instead, as he had already stated in his partial dissenting opinion in *R R v Poland*. [2007] ECHR no 27617/04 at para. 43.

<sup>103</sup> *P and S v Poland* [2008] ECHR App no. 57375/08, at para. 165.

of refusal of physicians and clinics to perform the legal operations [...]”<sup>104</sup> In 2010, the UN Special Rapporteur on the Right to Health remarked that “access to certain reproductive health services, such as [...] legal abortion, is seriously impeded.”<sup>105</sup>

The Polish Penal Code Articles 18 and 152-154 threaten with up to three years imprisonment any person assisting a woman with an unlawful termination of her pregnancy by any means, including the provision of transport, advice or information. Since *Open Counselling & Dublin Well Woman v Ireland*, this might constitute another restraint that is impermissible under international human rights law.<sup>106</sup> There, the applicants, two counseling agencies, had provided women with uncensored information about their pregnancy-related options including the availability of abortion abroad. The European Court of Human Rights overruled an injunction of the Supreme Court of Ireland that had been based on domestic Irish law that restricted information in ways substantially similar to the Polish Penal Code. The Court held that, even if Ireland had a legitimate interest in protecting the life of the unborn, the Irish Supreme Court’s injunction had a disproportionate impact. Without the benefit of adequate counseling, it would likely lead to late-term or underground abortions. There exists an apparent contradiction between the European Court of Human Rights’ *Open Counselling* decision and the European Court of Justice’s *Grogan* decision of the previous year that had held, also in respect of distribution of information by third parties that are not providers of abortion services, that States prohibiting abortion are at liberty to prohibit distribution of information about the identity and location of clinics in another Member State.<sup>107</sup> By comparison, such a ruling justifying prior restraint would be near impossible to imagine in the United States in light of settled jurisprudence<sup>108</sup> on First Amendment rights to free speech and unfettered access to information not classified on national security grounds, even if it may reasonably be expected to aid and abet future unlawful acts of third parties. It should be noted, though, that the review by the European Court of Justice examined compliance with European Union law whereas the European Court of Human Rights examined compliance with a Convention of the Council of Europe that, despite near-identical Contracting States, is not an instrument of the European Union. Despite routine judicial notice<sup>109</sup> and recognition of fundamental rights,<sup>110</sup> there is no order of hierarchy or precedence established between the

<sup>104</sup> Committee on Economic, Social and Cultural Rights, *Concluding Observations: Poland*, para. 28, UN Doc E/C.12/POL/CO/5 (2009).

<sup>105</sup> UN Special Rapporteur on the Right to Health, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Report on Mission to Poland*, para. 24, UN Doc A/HRC/14/20/Add.3 (2010).

<sup>106</sup> *Open Counselling & Dublin Well Woman v Ireland* 15 ECHR 244 [1995] at <http://www.unhcr.org/refworld/country,,ECHR,,IRL,,3ac6b7020,0.html> (accessed on 12 March 2013).

<sup>107</sup> Case 159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v Stephen Grogan and others*, Case [1991] ECR I-4685 held that “1. Medical termination of pregnancy, performed in accordance with the law of the State in which it is carried out, constitutes a service within the meaning of Article 60 of the Treaty; 2. It is not contrary to Community law for a Member State in which medical termination of pregnancy is forbidden to prohibit students associations from distributing information about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information.”

<sup>108</sup> Since *Near v Minnesota*, 283 U.S. 697 (1931), the U.S. Supreme Court has struck down virtually all attempts at prior restraint including some purporting justification on national security grounds. See *New York Times Co v U.S.*, 403 U.S. 713 (1971).

<sup>109</sup> For purposes of interpretation for the content and portent of “fundamental rights,” the European Court of Justice looks to all treaties contracted by the Member States of the European Union. Among those, the European Convention on Human Rights has been recognized as a document of “special significance.” *Nold v Commission*, Case 4/73 [1974] ECR 491.

<sup>110</sup> The Treaty on European Union (Maastricht text) art. 6(2), July 29, 1992, 1992 O.J. (C 191) 1, 31 ILM 253 provides: “The Union shall respect fundamental rights, as guaranteed by the European Convention for

two courts. The European Union takes the position that, while the entirety of its Member States (and thus the Union) is bound by the Convention, the European Union itself is not bound by the decisions of the European Court of Human Rights.<sup>111</sup>

The Polish Penal Code's threat of prison terms for aiding and abetting abortion through organized international travel<sup>112</sup> is likely to also violate the European Union's *acquis communautaire*<sup>113</sup> by unduly inhibiting the freedom of movement of persons<sup>114</sup> as well as services, which is a fundamental right under the purview of the Treaty on European Union and the jurisdiction of the European Court of Justice. Against such a complaint, Poland would presumably invoke the effects doctrine<sup>115</sup> to justify its assertion of jurisdiction over an extraterritorial act, based on the notion upheld by the Constitutional Tribunal of Poland's decision of 28 May 1997 that a fetus is a Polish citizen temporarily disabled from exercising his or her rights subject to live birth.<sup>116</sup> Therefore, a travel agent conniving in facilitating abortion travel abroad, even if the destination is inside the European Economic Area with its guaranteed freedom of movement of persons, is deemed to "conspire in the murder of a Polish citizen abroad" – a line of reasoning that would traditionally suffice to justify Poland's extraterritorial reach under the effects principle. The Polish legal response would probably also include reference to the example of the U.S. Travel Act<sup>117</sup> that serves similar objectives, albeit not in an abortion context.<sup>118</sup> It would also argue that the prohibited conduct was only in insignificant part extraterritorial since Poland had *in personam* jurisdiction in the first place over both travel agent and passenger as contract, payment and commencement of the journey took place in Poland. But European sensitivity to extraterritorial jurisdiction is traditionally high,<sup>119</sup> as is the consensus on preserving availability of core abortion rights. It is therefore

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the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

<sup>111</sup> M.D. Goldhaber, *A people's history of the European Court of Human Rights*, New Brunswick, NJ: Rutgers University Press 2007, p. 176.

<sup>112</sup> Penal Code arts. 18 and 152-154 (Pol), available at <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19970880553+2011%2407%2413&min=1> (accessed on 12 March 2013).

<sup>113</sup> The *acquis communautaire* is the entirety of existing European law any new member State must adopt upon accession to the European Union to ensure uniformity of certain legal standards.

<sup>114</sup> A multitude of treaties and directives have been promulgated to secure permanent as well as temporary movement of persons. See 'The free movement of persons,' at [http://eur-lex.europa.eu/en/dossier/dossier\\_62.htm](http://eur-lex.europa.eu/en/dossier/dossier_62.htm) (accessed on 12 March 2013).

<sup>115</sup> The effects doctrine is derived from the territorial principle, first established in the U.S. by *United States v Aluminum Company of America*, 148 F.2d 416 (2d Cir 1945). It is now widely invoked by many States world-wide.

<sup>116</sup> Polish Constitutional Tribunal, 28 May 1997 (Sign Act K 26/96), available at <http://isap.sejm.gov.pl/RelatedServlet?id=WDU19930170078&type=10&isNew=true> (Polish version) and at [http://www.trybunal.gov.pl/eng/Judicial\\_Decisions/1986\\_1999/K\\_%2026\\_96a.pdf](http://www.trybunal.gov.pl/eng/Judicial_Decisions/1986_1999/K_%2026_96a.pdf) (English version) (accessed on 12 March 2013).

<sup>117</sup> 18 USC § 1952, interstate and foreign travel or transportation in aid of racketeering enterprises.

<sup>118</sup> In the event of an overturn of *Roe v Wade*, 410 US 113 (1973), it is not inconceivable that the interstate transport of females for "immoral purposes" (such as adoption outlawed in one State but not another) could result in application of the Mann Act, 18 USC § 2421-2424, very similar to current prohibitions under the Polish Penal Code.

<sup>119</sup> See Fédération internationale des ligues des droits de l'homme, *Extraterritorial Jurisdiction in the European Union. A Study of the Laws and Practice in the 27 Member States of the European Union* (December 2010), at - [http://fidh.org/IMG/pdf/Extraterritorial\\_Jurisdiction\\_In\\_the\\_27\\_Member\\_States\\_of\\_the\\_European\\_Union\\_FINAL.pdf](http://fidh.org/IMG/pdf/Extraterritorial_Jurisdiction_In_the_27_Member_States_of_the_European_Union_FINAL.pdf) (accessed on 12 March 2013). For a synopsis of ECHR Jurisprudence, see 'Extraterritorial jurisdiction of ECHR States, December 2011,' at [http://www.echr.coe.int/NR/rdonlyres/DD99396C-3853-448C-AFB4-67240B1B48AE/0/FICHES\\_Jurisdiction\\_extraterritoriale\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/DD99396C-3853-448C-AFB4-67240B1B48AE/0/FICHES_Jurisdiction_extraterritoriale_EN.pdf) (accessed on 12 March 2013).

unlikely that, despite its ruling in the *Grogan* case,<sup>120</sup> the European Court of Justice would uphold provisions of the Polish Penal Code against a third party “aider and abettor” that does not itself provide abortion services or information about where and how such services might be obtained, including advice on communication. Such would be the case of a travel agent that provides an otherwise lawful service, however necessary that service may be in the chain of causality leading to an abortion, and also regardless of the predominance of female customers of reproductive age or similar indications. After all, just shortly after *Grogan*, the European Court of Human Rights had declined to uphold prior restraints on information under the Convention in *Open Counselling*, although the EU clearly does not have authority to deal in the area of abortion, and although not a single piece of European legislation has attempted to overturn the position of its five member States with restrictive measures on abortion.<sup>121</sup>

Citing *Tysi c* extensively, the European Court of Human Rights in *A, B and C v Ireland*<sup>122</sup> declined to find that art. 8 of the Convention conferred to women a fundamental right to an abortion irrespective of national legislation.<sup>123</sup> It nonetheless found that Ireland had violated the right of applicant C to privacy under art. 8 because she could not receive information as to whether she could receive an abortion in a situation believed to be life-threatening (as in *Tysi c*) due to the chilling effect of Irish abortion legislation.<sup>124</sup> All other claims – those of applicants A and B under art. 8 – were dismissed,<sup>125</sup> as were those of all applicants under articles 2 and 3, whereas claims under art. 14 were not considered. Not least because of the “exceptionalism” of Irish abortion law and its specific and recent elevation to a constitutional amendment by popular vote in 1983,<sup>126</sup> the Court, including its partially dissenting minority, in deference to Irish moral choices and despite strong European consensus in favor of abortion rights,<sup>127</sup> declined the opportunity to interpret the right to privacy as guaranteeing a right to abortion, despite strong resonances of Justice Blackmun’s reasoning in *Roe v Wade*<sup>128</sup>

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<sup>120</sup> Case 159/90, *The Society for the Protection of Unborn Children Ireland Ltd. v Stephen Grogan and others*, Case [1991] ECR I-4685. Summary prosecution of travel agents (as has occurred in Poland) whose knowledge of their customer’s intentions may or may not have existed but would presumably have been conjectural or provided inadvertently by the customer unrelated to an act of solicitation on the travel agent’s part constitutes such an overreach. This certainly has an egregiously chilling effect on lawful services as it would appear to impose, without a statutory basis, a duty upon business operators to inquire into the motives and background of their traveling customers, not unlike duties of diligence imposed on bankers nowadays. But these are based on an extensive body of regulatory provisions and treaties. Such a statutory framework is notably absent in the context of prosecutions of Polish abortion tourism that is done neither systematically nor in a sustained fashion, but only as a matter of deterrent by select high-profile cases.

<sup>121</sup> For a comparative overview cf. International Planned Parenthood Federation, ‘Abortion Legislation in Europe’ (IPPF European Network 2007), at [http://www.ippfen.org/NR/rdonlyres/2EB28750-BA71-43F8-AE2A-8B55A275F86C/0/Abortion\\_legislation\\_Europe\\_Jan2007.pdf](http://www.ippfen.org/NR/rdonlyres/2EB28750-BA71-43F8-AE2A-8B55A275F86C/0/Abortion_legislation_Europe_Jan2007.pdf) (accessed on 12 March 2013).

<sup>122</sup> [2010] ECHR 2032, Application no 25579/05, at <http://www.bailii.org/eu/cases/ECHR/2010/2032.html> (accessed on 4 May 2013).

<sup>123</sup> [2010] ECHR 2032 at para. 214.

<sup>124</sup> Including section 40.3.3 of the Irish Constitution providing that “the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”

<sup>125</sup> [2010] ECHR 2032, at paras. 159 and 165, at <http://www.bailii.org/eu/cases/ECHR/2010/2032.html> (accessed on 4 May 2013).

<sup>126</sup> P. Ronchi, ‘A, B and C v Ireland: Europe’s *Roe v Wade* Still Has to Wait’, *Law Quarterly Review* 2011-127-3, pp. 365-369, at p. 365.

<sup>127</sup> Applicants A and B would, respectively, have been permitted an abortion in forty and thirty-five Contracting States. Partial dissents were filed by judges Rozakis, Tulkens, Fura, Hirvel , Malinvern  and Poalelungi. *Idem* at 369. Traditionally, the most restrictive States taking an absolute pro-life position are Poland, Ireland and Malta.

<sup>128</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

throughout the *A, B and C* Court's opinion.<sup>129</sup> In so doing, the Court acknowledged the Contracting States' broad latitude under art. 8 in maintaining existing abortion laws where they provided adequate certainty and clarity.<sup>130</sup>

#### IV. Effects of Current Legislation on Public Health in Poland

Outlawing abortion on social and economic grounds and limiting access to it on medical and crime-related grounds can be, and in fact is, interpreted in Poland as part of a larger pro-natalist policy. The hierarchic perspective promoted by the Catholic Church along with conservative politicians and their followers views motherhood and family as every woman's primary if not exclusive role in life. Women are expected to act in the interest of their pregnancy under all circumstances, even if it is injurious to their health. That rings especially true given the steep obstacles to birth control and reliable sex education in Poland. As evidenced by a recent tendency to rename gynecological care to "preconception care."<sup>131</sup>

Oral contraceptives are still fairly difficult to obtain in Poland: although they are available, only one type of birth control pill is partially covered by health insurance. Average monthly costs often exceed what poorer families can afford. This is exacerbated by the fact that oral contraceptives are available by prescription only, and that the wait for an appointment with a gynecologist runs into weeks if not months. Even then, doctors often invoke the Medical Code of Ethics' conscience clause to decline prescribing any form of birth control. The only practical solution to secure a prescription for birth control pills is to see a doctor privately. Many doctors even require monthly appointments to prescribe a refill.<sup>132</sup> These costs create additional barriers to birth control for poorer women. And even upon showing a prescription, a pharmacist is allowed to refuse selling contraceptives by invoking his own conscience clause that was also incorporated in his Code of Ethics.<sup>133</sup> As a result of this extortionate climate, the WHO showed that Poland, with 19% of women users, ranks last in Europe in the use of modern contraceptives. Well behind Great Britain (81%), Italy (38.9%) and even behind Romania (29%).<sup>134</sup> Sterilization, such as vasectomy or tubal ligation, is generally deemed illegal under current legislation.<sup>135</sup> Emergency contraception, such as the "morning-after pill", is largely treated as abortion medication.<sup>136</sup> Reliable information on birth control is generally not available, in most cases not even from doctors.<sup>137</sup>

Conscience clauses, such as the ones invoked by doctors, pharmacists and other health care professionals in Poland, are increasingly discussed in light of the right to benefit from scientific progress recognized in art. 27(1) of the Universal Declaration of Human Rights.<sup>138</sup>

<sup>129</sup> Ronchi 2011, supra note 126, p. 369.

<sup>130</sup> [2010] ECHR 2032, at para. 241, at <http://www.bailii.org/eu/cases/ECHR/2010/2032.html> (accessed 4 May 2013).

<sup>131</sup> Domaradzka 2008, supra note 63, p. 67.

<sup>132</sup> Nowicka 2008, supra note 4, p. 34.

<sup>133</sup> Zielińska 2008, supra note 56, p. 15.

<sup>134</sup> Nowicka 2008, supra note 4, p. 34.

<sup>135</sup> Poland has no explicit regulation on contraceptive sterilization, but a negative interpretation is deduced from Penal Code art. 156 with regard to denial of reproductive capabilities. Zielińska 2008, supra note 56, pp. 13-14 and Nowicka 2008, supra note 4, p. 40.

<sup>136</sup> Domaradzka 2008, supra note 63, p. 70.

<sup>137</sup> Nowicka 2008, supra note 4, pp. 34-35. Besides ideological opposition, lack of information is also due to absence of modern contraceptives from the curriculum taught by Polish medical schools. Nowicka 1994, supra note 71, p. 6.

<sup>138</sup> "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits." GA Res 217A (III), art. 27(1), UN Doc A/810 (12 December 1948), at <http://www.un.org/en/documents/udhr/> (accessed on 12 March 2013).

This is one of the least-known human rights, that nonetheless became increasingly important in resolving conflicts between religious freedom and other fundamental rights. Art. 15(1)(b) of the International Covenant on Economic, Social and Cultural Rights<sup>139</sup> and art. 15 of the Universal Declaration of Bioethics and Human Rights<sup>140</sup> set forth analogous provisions.

Opposition to birth control and abortion still emanates from religious doctrines and pro-natalist policies combating the “graying of Poland.” But despite the fact that all these policies advocate a *de facto* bar of access to factually accurate and comprehensive sex education, births have dropped by half since 1980.<sup>141</sup> This demonstrates that pro-natalist policies indeed have an effect opposite to the one they purport to intend: instead of lowering the incidence of abortion, they have actually preserved abortion as the principal method of birth control. Presumably, part of the observed drop in the number of live births could also be explained by a significant increase in infertility as a result of botched underground abortions.<sup>142</sup> On the other hand, *in vitro* fertilization was also made illegal under the 1993 Act, effectively preventing infertile couples from having wanted children.

Furthermore, by effectively blocking access to lawful medical services, doctors endanger the life of the fetus indirectly by endangering the life of its mother.<sup>143</sup> This is an obvious violation of both the Hippocratic Oath and hence of medical ethics, but also, strictly speaking, of the Polish Penal Code, as endangerment of the life of the fetus (however indirectly) would constitute a felony offense under the Code that aims to provide for absolute protection of unborn life. This line of reasoning is, after all, invoked by doctors all across Poland when pregnant women are denied medical care that might harm their fetus. This irreconcilable logical contradiction is inevitable under any legislation that declines to prioritize one life over the other, or at least defer to individual choice. Since passage of the 1993 Act, doctors are no longer trained to perform abortions and have no access to modern abortion technology.<sup>144</sup> Still, most doctors necessarily practice abortion unofficially and clandestinely. As a consequence, new doctors are unable to provide safe abortion services even in cases where abortion is warranted under law. The statute’s penalties for bodily harm done to a fetus results frequently in a denial of necessary medical treatment to pregnant woman for entirely unrelated conditions,<sup>145</sup> such as kidney inflammation or ulcerating colitis.<sup>146</sup> By valuing life and health of a fetus not only higher than but also as somehow independent of the life and health of the woman, lawmakers and the medical profession have created an absurd legal framework that has no basis in biology or science. Instead, this results in practical outcomes that are contrary to the stated objectives of the said legislation. Concern for social and professional repercussions results in an unwillingness of doctors to perform lawful abortions, unless it is absolutely certain that the woman would not survive the delivery. This situation has become increasingly rare in an era of advanced caesarean procedures. Even under this extreme criterion, some doctors believe, based on their own independent “conscience,” that they should prioritize the fetal life over the wishes of the mother.

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<sup>139</sup> ICESCR, GA Res 2200A (XXI), art. 15(1)(b), UN Doc A/6316 (16 December 1966), at - <http://www2.ohchr.org/english/law/cescr.htm> (accessed on 12 March 2013).

<sup>140</sup> UNESCO Res SHS/EST/BIO/06/1, art. 15 (19 October 2005), at [http://portal.unesco.org/en/ev.php-URL\\_ID=31058&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html) (accessed on 12 March 2013).

<sup>141</sup> Główny Urząd Statystyczny (Main Statistical Office). *Urodzenia 1970-2008* (Births in 1970-2008), at [http://www.stat.gov.pl/gus/5840\\_646\\_ENG\\_HTML.htm](http://www.stat.gov.pl/gus/5840_646_ENG_HTML.htm) (accessed on 12 March 2013).

<sup>142</sup> Sterility is a common consequence of improperly executed or multiple abortions. See Nowicka 2008, p. 40.

<sup>143</sup> As in *Z v Poland*, [2011] ECHR App no 46123/08.

<sup>144</sup> Nowicka 2008, supra note 4, p. 40.

<sup>145</sup> Zielińska 2008, supra note 56, p. 14.

<sup>146</sup> Nowicka 1994, supra note 71, p. 2.

Today, civil and human rights of women and the purported rights of fetuses are also violated in other ways in Poland. Prenatal screenings have virtually been discontinued.<sup>147</sup> This under the pretext of not wanting to provide an excuse for lawful abortions and also because they slightly increase the risk of miscarriage, an act coming under the Penal Code's prohibition of causing "bodily harm to the fetus."<sup>148</sup> Since early detection and treatment of curable conditions of the fetus is *de facto* precluded, the result is an increased birth rate of disabled children.<sup>149</sup> Furthermore, budget cuts of public gynecological services have the obvious effect of denying care to women who need it most.<sup>150</sup> As a consequence, the reproductive health of the Polish population deteriorates and may result in deaths without anyone being able to show a causal relationship. Levels of miscarriages in Poland are already staggering: since 1993 they have remained at 40,000-53,000 reported cases per year, while simultaneously increasing in terms of miscarriage rates per registered pregnancy – as registered pregnancies decline.<sup>151</sup> Even medical services related to childbirth have become a scarce resource as hundreds, if not thousands, of women in labor are turned away each year by underfunded hospitals.<sup>152</sup> Screenings for cervical cancer have been discontinued and Polish hospitals closed their gynecological oncology, pathologic pregnancy ward and even neonatal units. As a result, there are no facilities for adequate care for prematurely born, theoretically "viable" infants.<sup>153</sup> The tragic situation of Polish women has become a concern of national and international human rights groups; it has reached crisis level according to the UN, the EU, and even the European Court of Justice.<sup>154</sup>

## V. Stakeholders in the Abortion Debate

Women were not consulted in any manner prior to enacting the 1993 Abortion Act. The fact alone that a democratic process was sidestepped at legislative and regulatory levels testifies to the acute awareness among politicians of the lack of public support for its policies. However, after an initial flurry of protests by women's organizations, public discourse quickly became dominated by pro-life rhetoric.<sup>155</sup> This made it difficult for women to claim their reproductive rights without being labeled as "baby-killers" and "murderers," even when just demanding effective access to contraceptives. In an era of small and shifting margins of electoral majorities, feminists and women's organizations refuse to address abortion so as not to endanger other policy objectives.<sup>156</sup>

While more affluent women in Poland experience no particular difficulty with access to abortion, women from rural areas and small provincial towns pay a heavy price for these laws. A mother of several children with little or no income cannot afford an illegal abortion, nor can she afford to raise yet another child. Men's joint responsibility for pregnancies, as

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<sup>147</sup> In 2000, only some 1,600 invasive prenatal tests were done while 380,000 children were born. That amounts to all of 4.5% of women with indications for prenatal tests on account of age alone being actually tested. Nowicka 2008, *supra* note 4, p. 34.

<sup>148</sup> Penal Code art. 157 (Pol), available at <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19990640729> (accessed on 12 March 2013).

<sup>149</sup> Nowicka 2008, *supra* note 4, p. 33.

<sup>150</sup> Domaradzka 2008, *supra* note 63, p. 67.

<sup>151</sup> Nowicka 2008, *supra* note 4, p. 20.

<sup>152</sup> The medical director of just one single hospital in Warsaw reported that he had turned away several hundred women in labor annually. Domaradzka 2008, *supra* note 63, p. 71.

<sup>153</sup> *Ibid.*, pp. 68-76.

<sup>154</sup> See *supra* note 4-6.

<sup>155</sup> Ignaciuk 2007, *supra* note 3, pp. 70 et seq.

<sup>156</sup> *Ibid.*, p. 9.

recently illuminated by the novel concept of “preglimony,”<sup>157</sup> is almost completely ignored in Polish law. Women have to file a civil complaint for child support and expose themselves to humiliating interrogations. Yet even then, their actual collection of payments from the father is by no means guaranteed despite a judgment. The Supreme Court of Poland has held that spouses have a legal obligation to cohabit sexually. In accordance with this doctrine, marital rape is prosecuted extremely rarely, except under a lesser charge of domestic violence.<sup>158</sup>

Unwanted and disabled children become a burden not so much to society, but above all to their mothers. The Polish State takes little or no responsibility for minor children of living parents, unless they were given up for adoption or removed from family custody. Given a chronic shortage of orphanages and foster care, children resulting from unwanted pregnancies, especially those with incurable disabilities, become the true lifelong victims of Polish abortion legislation. While cases of infanticide are decreasing, cases of infant abandonment by depositing them at bay shelters and hospital counters are steadily on the rise.<sup>159</sup>

Considering that many, if not most, legislative initiatives discussed were created or supported by the Polish Episcopate, the Roman Catholic Church has an important stake in banning abortion and preventing birth control. Significantly, the *Declaration on Procured Abortion* (1974)<sup>160</sup> by the Congregation for the Doctrine of the Faith (approved by Pope Paul VI), had not been published in Poland until 1981.<sup>161</sup> That is, until after the Solidarity movement had come into being. This shows that the Polish Episcopate chose its battles with a hostile communist regime strategically. But since abortion has remained the principal method of family planning under communism as well as under all post-communist regimes despite unequivocal condemnation by the Church,<sup>162</sup> it also shows the Episcopate’s inability to compel at least the Catholic 95% of the Polish population to consider its social and moral teachings. The Polish people have long refused to observe Catholic dogma with regard to sexuality and procreative choices, although they continue to pay impressive lip service to the Church in public.<sup>163</sup>

Once abortion was turned into a political tool, politicians became important stakeholders in the debate.<sup>164</sup> During the early 1990s, the position of any candidate for public office on abortion became the single most important litmus test for differentiating new political

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<sup>157</sup> This novel legal concept is a prenatal extension of extramarital support obligations introduced by established precedent on palimony. See, e.g., S. Motro, ‘Responsibility begins at conception’, *New York Times*, 6 July 2012, at [http://www.nytimes.com/2012/07/07/opinion/time-for-pregnancy-support-alimony.html?\\_r=1&smid=pl-share](http://www.nytimes.com/2012/07/07/opinion/time-for-pregnancy-support-alimony.html?_r=1&smid=pl-share) (accessed on 12 March 2013).

<sup>158</sup> U. Nowakowska, ‘The position of women in the family’, in *Women in Poland in the 90’s*. Centrum Praw Kobiet, at <http://temida.free.ngo.pl/family.htm> (accessed on 12 March 2013); U. Nowakowska & M. Jabłońska, ‘Przemoc wobec kobiet’ in *Kobiety w Polsce w latach 90-tych*, Centrum Praw Kobiet, 2000, at <http://temida.free.ngo.pl/raprzemoc.htm> (accessed on 12 March 2013).

<sup>159</sup> Nowicka 2008, supra note 4, p. 32. The numbers are rather small, e.g., 10 cases of infanticide and 94 cases of criminal infant abandonment in 2006, but underreporting is suspected. In 1996 there were 54 cases of abandonment reported, but 803 cases of leaving a newborn in the hospital. In the same year there were 44 reported cases of infanticide, and two cases of child abandonment resulting in death. Nowicka 2008, p. 31.

<sup>160</sup> J. Hurst, *Historia Aborcji w Kościele Katolickim*, Warsaw: Polskie Stowarzyszenie Feministyczne Pro Femina 1991, p. 24.

<sup>161</sup> Fuszara 1991, supra note 7, note 13.

<sup>162</sup> Although, ironically, the above mentioned *Declaration* does list some grounds for abortion as “not always wicked.” Fuszara 1991, p. 121.

<sup>163</sup> Fuszara 1991, supra note 7, p.126.

<sup>164</sup> A. Kramer, ‘The Abortion Debate in Poland: Opinion Polls, Ideological Politics, Citizenship, and the Erasure of Gender as a Category of Analysis’, in *Living gender after communism*, J.E. Johnson & J.C. Robinson, eds., Bloomington: Indiana University Press 2007, pp. 63-79, at p. 72.

parties.<sup>165</sup> Support for a ban on abortion became synonymous with support for nationalism, patriotism, and religious piety in the reconstituted Polish democracy. The political left inherited from the communist legacy its postulate for liberalization of abortion along with secularization and other reforms rooted in the socialist agenda. Hence, “[t]he abortion debate comes to stand as a symbol of ideological conflict between two competing nation-building projects.”<sup>166</sup>

The medical profession has a major stake of its own in the abortion wars. Stuck between social pressures to conform to pro-life rhetoric on the one hand and financial incentives to provide expensive illegal abortions on the other hand, doctors are clearly not in a position to advocate any change of the *status quo* concerning reproductive rights. Today’s complete absence of regulation of the underground abortion industry shields doctors from criminal and civil prosecution for malpractice, except in cases where the woman dies as a result of an illegal abortion.

After 1989, the Third Polish Republic signed multilateral conventions on human rights beyond the European Convention of Human Rights<sup>167</sup> including the Bioethics Convention of the Council of Europe<sup>168</sup> which it has not yet ratified. Tethered to religious strings and political debts dating back long before 1989, modern Poland has allowed itself to be found in breach of international obligations as defined by the European Court of Human Rights<sup>169</sup> and international organizations.<sup>170</sup> The international community has become another important stakeholder in the Polish abortion debate. Still, to this day, Polish legal vernacular does not know the concept of “reproductive rights,” referring to a woman’s right to reproductive health and reproductive self-determination.<sup>171</sup>

## VI. Conclusion

The disenfranchisement of Polish women by the 1993 Abortion Act reveals a stereotypical pattern of systemic violations of women’s reproductive and human rights at the intersection of special interests represented by influential factions of the country’s socio-cultural establishment. Gender-based discrimination in the area of reproductive health occurs on three distinct levels: (i) at the level of the nation state with its legislative authority, (ii) at the level of professional self-regulation of physicians, and (iii) at the professional and private level of the individual, who faces social pressures as well as financial incentives to conform. Wedged in between a multitude of shifting ulterior motives and interests of politicians, the Roman Catholic Church, and the medical professions, women and their reproductive health concerns are vulnerable, exposed to, and victimized by, a variety of better-organized special interests. The prevailing pro-life public discourse in Poland and its concomitant religious-political pressures in addition to statutory enactments that have been obtained through significant deviation from democratic and constitutional legislative procedure all have the same effect: they deprive women of their voice in the political process and of their right to self-

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<sup>165</sup> M. Fuszara, ‘Debata o aborcji a kształtowanie się sceny politycznej w Polsce po upadku komunizmu’ in *Polityka i Aborcja*, M. Chałubiński ed., Warsaw: Scholar 1994, pp. 53–67, at p. 54.

<sup>166</sup> Kramer 2007, *supra* note 164, p. 74.

<sup>167</sup> Zielińska 2008, *supra* note 56, p. 16.

<sup>168</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, *signed at Oviedo* 4 April 1997, CETS no 164, *entered into force* 1 December 1999, at <http://conventions.coe.int/Treaty/en/Treaties/html/164>. (accessed on 12 March 2013).

<sup>169</sup> See *supra* note 5.

<sup>170</sup> See *supra* note 7.

<sup>171</sup> Zielińska 2008, *supra* note 56, p. 9.

determination, including inalienable human and civil rights to life and health. As a consequence, Polish women have been, and continue to be, compelled to resort to informal methods of preserving their interests through private and unlawful services. Attempts at avoiding the social and individual costs of this current legal and medical state of affairs place a significant additional legal and financial burden on women. Such burdens add to egregious gender inequality and further disenfranchise rural women and those with minimal financial and logistical resources. As body politics is almost exclusively geared against preservation of women's civil liberties, the predominant influence of traditional patriarchal power in Polish society was restored and further reinforced to an unprecedented degree as a result of Poland's post-communist transition. Under the pretext of dismantling the legacy of communism, emancipatory efforts and progressive accomplishments of 45 years of legislation enacted by communist regimes were reversed in their entirety. In terms of gains for democracy and civil rights, post-socialist transformation in Poland has resulted in a giant leap backward by returning to legislative standards that flatly fail to secure the self-determination, liberties and health interests of the population's female half.