

Mandates of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on the issue of discrimination against women in law and in practice

REFERENCE:
OL POL 1/2018

30 January 2018

Excellency,

We have the honour to address you in our capacities as Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on violence against women, its causes and consequences and Working Group on the issue of discrimination against women in law and in practice, pursuant to Human Rights Council resolutions 33/9, 32/19 and 15/23.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning a **proposed amendment to the Act of 7 January 1993 on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, which would further restrict the already limited access to abortion in Poland**. We take this opportunity to recall a joint communication of 2 May 2016 (POL 1/2016) whereby several Special Procedures mandate holders raised concerns about a draft law proposed by a civic committee, which would have prohibited and criminalized termination of pregnancy under any circumstances. We take note of your Excellency's Government's reply of 30 June 2016 to the above-mentioned communication.

Indeed, we were informed that amendments to the Act of 7 January 1993 on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, were submitted to the lower chamber of Parliament (Sejm) at the end of November 2017. The proposed amendments were drafted by a civil society organization and supported by more than 800,000 signatures. On 10 January 2018, two hundred and seventy-seven (277) members of the lower chamber of Parliament voted in favour of this bill. One hundred and thirty four (134) members of Parliament voted against the proposal. This bill was referred to the Parliamentary Committee for Social Policy and Family Affairs. Should the draft law get the support of the Committee, it will be sent back to the plenary of the lower Chamber of the Parliament and then to the Senate for a final vote.

Currently, the Act of 7th January 1993 on Family-Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination provides that: Pregnancy termination can be performed only by a doctor, when: the pregnancy imperils the life or health of the pregnant woman [article 4(a) (1) (1)]; pre-natal examinations or other medical conditions indicate that there is a high likelihood of a severe and irreparable handicap of the foetus or an incurable illness threatening its life" [article 4(a) (1) (2)]; "there are reasons to suspect that the pregnancy is a

result of an unlawful act”[article 4(a) (1) (3)]. The existing law, under article 152 of the Penal Code of 1997, provides that a woman is not subject to punishment if she decides to terminate her pregnancy on any other grounds than the ones previously mentioned. She is also exempted from punishment if the foetus suffers any injury (article 157a §3 of the Penal Code). However, under the existing law, those who perform or assist in performing an abortion that does not meet the conditions set out in the law are subject to criminal prosecution.

If adopted, the proposed amendment would repeal point (2) of article 4(a)(1). As a consequence, termination of pregnancy will be prohibited when “pre-natal examinations or other medical conditions indicate that there is a high likelihood of a severe and irreparable handicap of the foetus or an incurable illness threatening its life”, despite the fact that, according to information received, the majority (96% in 2016) of terminations of pregnancy in Poland are carried out on the grounds of severe or fatal foetal impairments. Therefore, the proposed amendment would further restrict the already limited access to abortion in Poland due to the risk of prosecution relevant professionals would face.

Reportedly, certain media have widely been referring to abortion on grounds of foetal impairment as “eugenic abortion”, implying that termination of pregnancy in cases of severe or fatal foetal impairments is actually a form of “selection” based on foetal characteristics.

We wish to express our serious concern regarding the amendments proposed as well as the misinformation conveyed by certain media. Indeed, according to international standards this bill would violate women’s rights to equality, dignity, autonomy, information and bodily integrity and respect for private life and the highest attainable standard of health, including sexual and reproductive health, without discrimination; as well as the right to freedom from torture and cruel, inhuman and degrading treatment.

We would like to recall that the right of a woman to make autonomous decisions about her own body and reproductive functions is at the very core of her fundamental right to equality and privacy, concerning intimate matters of physical and psychological integrity. Equality in reproductive health includes access, without discrimination, to affordable, quality contraception, including emergency contraception. WHO data has clearly demonstrated that criminalizing termination of pregnancy does not reduce women’s resort to abortion procedures. Rather, it is likely to increase the number of women seeking clandestine and unsafe solutions. Countries where women gained the right to termination of pregnancy in the 1970s or 1980s and are provided with access to information and to all methods of contraception, have the lowest rates of termination of pregnancy. Ultimately, criminalization does grave harm to women’s health and human rights by stigmatizing a safe and needed medical procedure. Furthermore, the requirement of grounds must not result in creating a barrier to termination of the pregnancy in situations in which the woman will pursue the course of seeking an unsafe termination rather than continuing the pregnancy and that in any case, where objective grounds are required, they should be expansive. Grounds proposed by various international human

rights mechanisms have included impairment of the fetus. While the WGDAW supports the extremely important goal of respecting, protecting and fulfilling the human rights of persons with disabilities, the approach chosen to avoid any type of stigmatization should not be detrimental to women's autonomy and decisions over their own body and a woman's human right to choose whether or not to continue her pregnancy. Criminalizing termination of pregnancy is one of the most damaging ways of instrumentalizing and politicizing women's bodies and lives, subjecting them to risks to their lives or health and depriving them of autonomy in decision-making¹.

In connection with the information and concerns mentioned above, please refer to the attached **Annex which cites international human rights instruments and standards** relevant to these issues.

As it is our responsibility, under the mandates entrusted to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information or comment you may have on the above-mentioned information, including on the process of revision of this bill.
2. Please provide detailed information on how the Government intends to proceed with regard to the aforementioned bill which seems in contradiction with Poland's international human rights obligations.
3. Please provide detailed information about the measures taken, or intended to be taken, to ensure that the rights of women and girls to sexual and reproductive health, including access to adequate health services, to physical and mental integrity, and to life, in line with international human rights standards.

Given the urgency of the issues addressed in this letter, we would appreciate that your Excellency's Government could forward a copy of the present letter to the Marshal of the Sejm, His Excellency Mr. Marek Kuchciński.

We would appreciate receiving a response within 60 days. Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

We would like to inform you that this communication will be made available to the public on the website page of the mandate of the Working Group and will be included in the periodic communications reports of the Special Procedures to the Human Rights Council. Any response of Your Excellency's Government will also be made public in the same manner. We also reserve the right to publicly express our concerns on these matters

¹ Please see WGDAW paper on Women's Autonomy, Equality and Reproductive Health available at: <http://www.ohchr.org/EN/Issues/Women/WGWomen/Pages/WGWomenIndex.aspx>

in the future, which would indicate that we have been in contact with the Government of Your Excellency.

Please accept, Excellency, the assurances of our highest consideration.

Dainius Pūras

Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

Dubravka Šimonović

Special Rapporteur on violence against women, its causes and consequences

Alda Facio

Chair-Rapporteur of the Working Group on the issue of discrimination against women in law and in practice

Annex

Reference to international human rights law

In connection with the above concerns, we would like to refer your Excellency's Government to the International Covenant on Civil and Political Rights (ICCPR), which Poland ratified on 18 March 1977. The ICCPR underlines that the State shall respect and ensure the rights of all individuals, without any distinction of any kind, including of sex (art.2), to be free from inhuman and degrading treatment or punishment (art.7), and the right to one's privacy and family (art.17). The right to the highest attainable standard of health of young women and girls (art.12) as set forth in the International Covenant on Economic, Social and Cultural Rights (ICESCR), acceded by Poland also on 18 March 1977 is also relevant to the matters discussed in this letter. .

General Comment 14 of the Committee on Economic, Social and Cultural Rights highlights that the right to health contains both freedoms and entitlements and that these freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation (para.8). It also indicates that States shall respect the right to health by, inter alia, abstaining from imposing discriminatory practices relating to women's health status and needs as well as by refraining from limiting access to contraceptives and other means of maintaining sexual and reproductive health (para.34). In addition, with the aim to eliminate discrimination against women, General Comment 14 refers to the need to develop and implement policies to provide women with access to high quality and affordable sexual and reproductive services (para.21), further indicating that "the provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" may be understood as requiring measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care, emergency obstetric services and access to information, as well as to resources necessary to act on that information (para.14).

We would like also to refer your Excellency's Government to General Comment 22 of the Committee on Economic, Social and Cultural Rights, which stipulates that the right to sexual and reproductive health is an integral part of the right to health enshrined in article 12 of the Covenant, which includes a set of freedoms and entitlements, including the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, over matters concerning one's body and sexual and reproductive health (para. 5). The Committee recalled that States parties should aim to ensure universal access without discrimination for all individuals to a full range of quality sexual and reproductive health care, including maternal health care, contraceptive information and services and safe abortion care (para.45) and that States parties have a core obligation repeal or eliminate laws, policies and practices that criminalize, obstruct or undermine individual's or particular group's access to sexual and reproductive health facilities, services, goods and information and to take measures to prevent unsafe abortions and to provide post-abortion care and counselling for those in need (para. 49 a) & e)).

We would also like to recall a number of rights and principles guaranteed under the Convention on the Elimination of all forms of discrimination against women (CEDAW), ratified by Poland on 30 July 1980. The Convention condemns all forms of discrimination against women and girls (art.2), requires the modification of social and cultural patterns of conduct in order to eliminate discrimination against women and girls (art.5), guarantees their right to access health care services and goods without discrimination, including appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation (art.12), as well as their rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights (art.16).

In its General Recommendation n°24 on “women and health”, the Committee on the Elimination of all forms of discrimination against women specified that it is discriminatory for a State party to refuse to provide legally for the performance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers (para. 11). The Committee also recalled the obligation to respect rights requiring States parties to refrain from obstructing action taken by women in pursuit of their health goals (para.14).

In 2014, the CEDAW Committee also recommended to your Excellency’s Government (CEDAW/C/POL/CO/7-8) to (a) enhance women’s access to health care, in particular to sexual and reproductive health services, including by amending the 1993 Act on family planning, human foetus protection and preconditions for the admissibility of abortion, to make the conditions for abortion less restrictive, (b) establish clear standards for a uniform and non-restrictive interpretation of the conditions for legal abortion so that women may access it without limitations owing to the excessive use of the so-called conscientious objection clause by doctors and health institutions and ensure effective remedies for contesting refusals of abortion, within the revision of the Act on Patient Rights, (c) mandate, support and finance research, study and data collection, as previously recommended (CEDAW/C/POL/CO/6, para. 25), on the scope, causes and consequences of unsafe illegal abortion and its impact on women’s health and life, in order to obtain evidence-based elements for a revision of the law, and (d) ensure the accessibility and affordability of modern contraception for women and girls, including women in rural areas, through the reimbursement of modern and efficient methods of contraception by the public health system (para. 37).

We would like to remind your Excellency’s Government of the absolute and non-derogable prohibition of torture and other ill-treatment as codified in articles 2 and 16 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which Poland ratified on 26 July 1989.

We would like to bring to Your Excellency’s attention Article 1 of the United Nations Declaration on the Elimination of Violence against Women which provides that

the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

In its General Recommendation 35 on gender-based violence against women, the CEDAW Committee provides that violations of women's sexual and reproductive health and rights, such as forced sterilization, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.

In its report A/HRC/32/44, the Working Group on discrimination against women in law and in practice calls on states to decriminalize the termination of pregnancy and repeal restrictive abortion laws and to ensure that access to health care, including reproductive healthcare, is autonomous, affordable and effective. This necessitates a series of measures with regard to termination of pregnancy: to invalidate conditioning of women's and girls' access to health care on third-party authorization; provide training to health providers, including on gender equality and non-discrimination, respect for women's rights and dignity; provide non-discriminatory health insurance coverage for women, without surcharges for coverage of their reproductive health; include contraception of choice, termination of pregnancy in universal health care or subsidize provision of these treatments and medicines to ensure that they are affordable; restrict conscientious objection to the direct provider of the medical intervention and allow conscientious objection only where an alternative can be found for the patient to access treatment within the time needed for performance of the procedure; exercise due diligence to ensure that the diverse actors and corporate and individual health providers who provide health services or produce medications do so in a non-discriminatory way and establish guidelines for the equal treatment of women patients under their codes of conduct; provide age-appropriate, comprehensive and inclusive sexuality education based on scientific evidence and human rights, for girls and boys, as part of the mandatory school programmes. Sexuality education should give particular attention to gender equality, sexuality, relationships, and responsible parenthood and sexual behaviour to prevent early pregnancies

The Special Rapporteur on violence against women, its causes and consequences highlighted in her report (E/CN.4/1999/68/Add.4) that acts deliberately limiting the freedom of women to for contraception or to have an abortion constitute violence against women by subjecting women to excessive pregnancies and childbearing against their will, increasing the risk of maternal mortality when it could be avoided (para. 57). She added, moreover, that in countries where abortion is illegal or where safe abortions are unavailable, women suffer serious health consequences, even death. Women with unwanted pregnancies are forced to resort to life-threatening procedures when an abortion performed under appropriate conditions would otherwise be safe (para.59). The fact that

the government does not take positive steps to ensuring access to appropriate health-care services that enable women to safely give births and safely have an abortion when pregnant against her will, may constitute a violation of the right to life of women, as well as a violation of their reproductive rights. Similarly, the fact that the government did not provide conditions that enable women to control their fertility and reproduction, as well as to bring voluntary pregnancies constitutes a violation of the right to personal security of women (para.66).

In this context, we would also like to refer to the report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/ 66/254), which reiterates that the criminalization of sexual and reproductive health services for women generates and perpetuates stigma; restricts their ability to make full use of the products available for their sexual and reproductive health services and information; denies their full participation in society; hinders their access to health services; and it affects women's empowerment. Furthermore, the criminalization of abortion has a negative impact on physical and mental health of women and can increase the likelihood that women resort to unsafe and clandestine abortions.

Finally, we would like to refer to the 2013 thematic report of the Special Rapporteur on torture (A/HRC/22/53) wherein he noted that international and regional human rights bodies have begun to recognize that ill-treatment of women seeking reproductive health services can cause enormous and lasting physical and emotional suffering based on gender, and he highlighted as a prime example facto denial of legally available health services such as abortion and post-abortion care (para.46). In this regard, the Special Rapporteur called upon all States to ensure that women have access to emergency medical care, including post-abortion care without fear of criminal sanctions or reprisals. He also recommended that States whose national law permits abortions in various circumstances must ensure the effective availability of services without adverse consequences for the woman or the health professional (para.90).