

IN THE EUROPEAN COURT OF HUMAN RIGHTS

(APPLICATION NO. 5410/03)

BETWEEN

TYSIĄC

APPLICANT

AND

POLAND

RESPONDENT

WRITTEN COMMENTS

BY

CENTER FOR REPRODUCTIVE RIGHTS

PURSUANT TO RULE 44, § 2 AND § 4 OF THE RULES OF THE COURT

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I. Introduction

1. The Center for Reproductive Rights submits these written comments pursuant to leave granted by the President of the Chamber in accordance with Rule 44 § 2 and § 4 of the Rules of the Court. These comments address the issue of whether a member state of the Council of Europe (“member state”) that has by law afforded women a right to choose abortion in cases where pregnancy threatens their physical health, but failed to take effective legal and policy steps to ensure that eligible women who do so choose can exercise their right, violates its obligations under the European Convention on Human Rights and Fundamental Freedoms (“European Convention”). These comments argue that such failure renders the right to abortion ineffective in practice, not only depriving women of their entitlement to a reproductive health service afforded under their national law, but threatening their well-being and basic rights to, *inter alia*, privacy, dignity, life, health, and nondiscrimination under international law. These comments draw upon the legislation and jurisprudence of member states, the jurisprudence of this Court, and international health and human rights standards to demonstrate (1) widespread recognition of the importance of permitting and ensuring the availability and accessibility of abortion in certain circumstances, including health risks, because of the implications for women’s well-being and basic human rights, and (2) states’ obligations to ensure that women legally entitled to abortion can effectively exercise their right and access services.

II. Interest of the Center for Reproductive Rights

2. The Center for Reproductive Rights is a non-profit legal advocacy organization dedicated to defending and promoting women’s reproductive rights worldwide. The International Legal Program, in collaboration with human rights advocates around the world, documents violations of reproductive rights, monitors laws concerning reproductive health care, and advocates at the United Nations and in regional human rights fora. The Center has previously submitted third-party interventions to this Court in the cases of *Vo v. France* and *D v. Ireland*.

III. The Legal Issue

3. This case presents the question of whether a member state that permits abortion in certain circumstances in its laws, but fails to adopt effective regulations, procedures and policies to ensure the availability and accessibility of legal services, thereby rendering women’s right to abortion ineffective in practice, violates its obligations under Articles 3, 8, 13, and 14 of the European Convention.

IV. Discussion

4. The following discussion is divided into two parts. Part A demonstrates widespread regional and international recognition of the importance of permitting abortion – and, implicitly, of ensuring its availability and accessibility – in various circumstances to protect women’s well-being and basic human rights. These circumstances include abortion in cases where pregnancy threatens the woman’s physical health, as allowed by Poland. Part B, drawing largely from the legislation, regulations and jurisprudence of member states, as well as the jurisprudence of this Court and international health and human rights standards, argues that states undertaking to permit abortion in prescribed circumstances have pursuant obligations to ensure that the textual guarantee to abortion in their national laws is an effective right in practice. To this end, states should – as many member states have – take effective legal and policy steps to ensure women’s access to services. These steps include instituting procedures for appeal or review of medical decisions denying a woman’s request for abortion, and ensuring the adequate availability of trained providers willing and able to perform abortion procedures by, *inter alia*, regulating the practice of conscientious objection by health-care providers to abortion services. Part B highlights regulation of this specific practice because of its critical implications for the availability of abortion providers and services.

Part C briefly discusses state failure to ensure access to abortion services where legal as a violation of women's right to nondiscrimination.

A. There is international and widespread regional recognition of the importance of abortion – both its legal permissibility and, by implication, its availability and accessibility – in certain circumstances including health risks because of the implications for women's well-being and basic human rights.

5. Laws permitting abortion when performed to protect a woman's physical health constitute the norm for almost all member states, including Poland.¹ All but four member states allow exceptions where the physical health of the pregnant woman is jeopardized,² if not for broader socioeconomic reasons or without restriction as to reason.³ In evaluating the constitutionality of national abortion laws, constitutional courts in Europe have consistently upheld the rights of a woman to protect her physical and mental health and to enjoy a level of personal autonomy in decisions about abortion.⁴ This statutory recognition and judicial affirmation of the permissibility of abortion for health reasons reflects the emphasis in Europe on protecting women's health and basic human rights. Globally, too, legal approaches to abortion underscore women's health as the foremost concern in decisions about pregnancy termination. Today almost 75% of the world's population lives in a country where abortion is permitted for health reasons.⁵

1. Constitutional court jurisprudence of member states

6. The constitutional courts of member states have evaluated their national abortion legislation against the body of their constitutional principles and consistently underscored the importance of making abortion available in cases where pregnancy threatens the woman's health in order to protect her basic rights. In upholding the constitutionality of a provision permitting abortion for health reasons, the Spanish Constitutional Court has recognized that "the postulated grave danger to the pregnant woman's health seriously affects her right to life and physical integrity."⁶ In 1975 the Constitutional Court of Italy declared unconstitutional the criminalization of abortion when the physical or psychological well-being of the woman was at risk, finding that protection of women's rights to life and health required the availability of abortion in circumstances covering the range of potential health risks posed by pregnancy.⁷ The Federal Constitutional Court of Germany has also consistently maintained the constitutionality of abortion in cases where pregnancy threatens the woman's life and health among other circumstances, recognizing that "her own 'right to life and bodily inviolability' is at stake [in such cases], the sacrifice of which cannot be expected of her for unborn life."⁸

2. European Court of Human Rights jurisprudence

7. While this Court has not yet been presented with an opportunity to decide whether the unavailability of abortion where legal is in violation of the European Convention, it has strongly recognized women's rights in considering cases involving a woman's decision to have a legal abortion, specifically, cases brought by putative fathers who oppose that decision.⁹ In *Boso v. Italy* (2002), the applicant challenged Italy's abortion law for precluding consideration of the putative father's interests, claiming that the law violated his rights to, *inter alia*, private and family life, and to found a family under the European Convention. This Court dismissed both claims, holding that "... any interpretation of a potential father's rights under Article 8 of the Convention when the mother intends to have an abortion should above all take into account her rights, as she is the person primarily concerned by the pregnancy and its continuation or termination."¹⁰ It is worth noting that Italian courts similarly dismissed the applicant's case at each stage of the domestic proceedings preceding his appeal to this Court, upholding the abortion law at issue as based on a sound policy decision to grant the woman, as the person primarily impacted by the physical and mental effects of pregnancy, full responsibility for the decision to have an

abortion.¹¹ This Court's ruling in *Boso* and its predecessors shows strong protection for a woman's rights in decisions concerning abortion, specifically, her Article 8 right to privacy.

3. United Nations treaty monitoring bodies

8. United Nations treaty monitoring bodies have recognized that restricting the availability of abortion in certain circumstances implicates women's rights to life,¹² health,¹³ privacy,¹⁴ and freedom from torture or cruel, inhuman or degrading treatment or punishment.¹⁵ These bodies have specifically criticized the restrictive nature of the abortion law and its application in Poland, and its implications for women's rights to life and health.¹⁶ In 2004, the Human Rights Committee, which monitors states parties' compliance with the International Covenant on Civil and Political Rights, ratified by Poland in 1977,¹⁷ observed: "The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health. ... The State Party should liberalize its legislation and practice on abortion. It should provide further information, so far as possible, on the number of illegal abortions that take place in Poland."¹⁸

B. States permitting abortion have pursuant obligations to ensure that women legally entitled to the procedure are able to exercise their right to an abortion and have effective access to such services.

9. As demonstrated above, there is international and widespread regional recognition, including by Poland, and in both courts and legislatures, of the need for the legal option of abortion to protect women's basic rights in at least certain circumstances, including where pregnancy threatens a woman's health. Governments that have undertaken to protect women's rights by legalizing abortion under prescribed conditions have an obligation to ensure that women are able to exercise their right to abortion and have effective access to services. United Nations treaty monitoring bodies have frequently criticized inadequate state policies and programs that fail to ensure women's access to reproductive health care,¹⁹ specifically addressing the problem of women's lack of access to safe abortion services where legal.²⁰ Again, these bodies have specifically expressed concern over this problem in Poland: "The [Human Rights] Committee ... is [] concerned at the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape."²¹

10. The world's leading health organization has similarly recognized the problem of lack of access to abortion even where women are legally entitled to have the procedure and the resulting increased risk of unsafe abortion.²² In its safe abortion guidelines for national health systems, the World Health Organization (WHO) recommends that governments establish policies that ensure access to quality abortion services where abortion is legal.²³ The guidelines urge ministries of health to clarify legal requirements for abortion and remove common barriers that constrain access to services allowed by law.²⁴

11. Consistent with these international norms, member states have instituted certain procedures and regulations to ensure that women legally entitled to abortion in their country have effective access to services. The practices of its regional neighbors serve as persuasive authority for this Court to urge Poland to take appropriate steps to ensure effective access to abortion as permitted by its own law, including in the manner discussed below.

1. States ensure access to legal abortion services by instituting procedures for appeal or review of medical decisions denying a woman's request for abortion.

12. Poland's lack of effective legal and administrative mechanisms providing for appeal or review of medical professionals' decisions in cases where they determine that the conditions for termination of

pregnancy have not been met is inconsistent with the practice of many other member states. The establishment of an appeals or review process in countries across Europe reflects a common understanding of the need to protect women's right to legal abortion in situations where a health-care provider denies such a request, including in cases where a woman's health is at risk. Lack of a timely appeals process undermines women's right to have access to reproductive health care, with potentially grave consequences for their life and health. It also denies women the right to an effective remedy as guaranteed by Article 13 of the European Convention.

13. Most laws and regulations on abortion appeals processes have strict time limits to which such appeals and reviews must be decided, recognizing the inherent time-sensitive nature of abortion procedures and the inability of regular administrative review or legal processes to respond in a timely manner. While such time limitations implicitly obligate the medical professional denying the request for abortion to immediately forward documentation to the review or appeals body, some laws have explicit language requiring doctors to do so. Furthermore, in some countries the appeals or review body must inform the woman where the abortion will be performed should her appeal be granted. Where an appeal or review body finds that the conditions for pregnancy have not been met, some laws require written notice to the woman of the decision. In all countries, appeals procedures need not be followed when pregnancy poses a threat to the health or life of the pregnant woman. These provisions ensure women access to an effective appeals process and timely reproductive health-care services to which they are legally entitled.

14. The abortion laws of Bulgaria,²⁵ Croatia,²⁶ Serbia,²⁷ Slovenia,²⁸ and the Former Yugoslav Republic of Macedonia²⁹ permit a woman requesting abortion after the prescribed gestational limit for abortion without restriction to appeal a rejection of her request if a dispute is likely to occur over whether the conditions for abortion exist. This would include cases where pregnancy poses a risk to a woman's health. All of these laws create an appeals commission to deal specifically with abortion-related appeals and require the commission's decisions to be made in a timely fashion, namely within seven to eight days from the filing of the appeal.³⁰ The Danish abortion law provides for a similar appeals board and process. The board is empowered to hear appeals, *inter alia*, in cases where the woman requesting abortion is beyond the gestational period for abortion without restriction and where pregnancy poses a risk to the woman's health.³¹ The board is established by the Ministry of Justice, and appointed members of the board must include a chairman who is a graduate in law.³²

15. The abortion law in the Czech Republic guarantees a woman's right to request a review of her gynecologist's decision to deny her an abortion during the "on demand" period for abortion and after, including in cases where health reasons for the abortion are at issue. According to the law, the woman's request must be reviewed by the district specialist in gynecology and obstetrics within two days of its submission.³³ If her request is approved, she must be informed of where the abortion will be performed. If her request is not approved, she has the right to a second level of appeal. In the latter case, the woman's documentation must be "immediately" forwarded to the regional specialist in gynecology and obstetrics and her request reviewed within three days of its submission. If her request is denied, the woman must receive written notification of the decision, but if it is granted, she must be informed of where the abortion will be performed, similar to the process at the first level of appeal.³⁴ Slovakia's abortion law provides for a similar review process.³⁵

16. In some member states, such as Norway and Sweden, a rejected request for an abortion is *automatically* examined by a review body. In Sweden, the National Board of Health and Welfare reviews such decisions; in Norway, a committee is formed by the county medical officer, which also includes the pregnant woman.³⁶ Finland's abortion law grants a woman the right to appeal directly to the National Board of Health where a physician rejects her request for an abortion, including in cases where pregnancy poses a risk to her health.³⁷

2. States ensure access to legal abortion services by ensuring the adequate availability of providers willing and able to perform abortion services.

17. The duty of states to ensure access to services provided for by law necessarily entails ensuring the availability of an adequate number of trained providers to provide services in a timely manner.³⁸ In Finland, for example, physicians may not refuse to consider a request for termination of pregnancy.³⁹ In circumstances where the government medical board observes that there are an insufficient number of physicians or facilities in some parts of the country “on account of long distances, a shortage of physicians or hospitals, or other reasons of this nature,” the law entitles women to submit their requests directly to the board itself.⁴⁰ In France, where women have had the right to abortion since 1975, subsequent abortion legislation has been adopted to improve women’s access to services. Decrees from 1980 and 1988 required regional and general hospital centers to have facilities to provide abortion, and then added public hospital establishments with surgical or obstetric units to the list.⁴¹ To ensure the quality of women’s reproductive health services, both France and Denmark require that women have local access to at least one hospital with the capacity to perform abortions.⁴²

18. Clinical guidelines issued in 2004 by the Royal College of Obstetricians and Gynecologists (RCOG) in the United Kingdom for the care of women seeking abortion on physical or mental health grounds⁴³ view induced abortion as a health-care need and call upon health authorities to accept responsibility for the abortions needed by women residing in their districts.⁴⁴

a. States regulate the practice of conscientious objection to ensure the adequate availability of legal abortion services and information.

19. The availability of providers for reproductive health services, especially abortion, is specifically impacted by the practice of conscientious objection. While many member states exempt health-care providers from performing procedures to which they conscientiously object, including abortion, some have regulated the practice to ensure that women nonetheless have access to services to which they are legally entitled. Regulations on conscientious objection shield providers from liability for refusing to provide services, but they also impose certain obligations on providers in order to ensure that patients receive the medical care they need and are legally entitled to receive.

20. Poland’s lack of a comprehensive and effective legal and policy framework governing the practice of conscientious objection⁴⁵ by health-care providers to ensure that women are able to access legal abortions is inconsistent with measures taken by other member states, as well as international standards. The absence of such regulation in Poland means that women today are generally unable to access abortion even when the conditions for termination of pregnancy have been satisfied,⁴⁶ undermining their rights to, *inter alia*, access to reproductive health-care services and privacy, and constituting a breach of the duty of care and abandonment of patients.⁴⁷

(i) Legislation and jurisprudence of member states

21. Conscientious objection clauses are found either in a country’s abortion law, the general public health law, regulations or deontology codes (ethics codes).⁴⁸ In most member states, health-care providers who refuse to perform services on grounds of conscience are legally obligated at a minimum to give notice to patients of their position and refer patients to health-care providers willing and able to perform the refused service(s). Through interpretation or explicit caveats in the law, such clauses apply only to *actual performance* of procedures; they do not justify the refusal of an appropriate referral. In all member states, health-care providers are prevented from refusing to provide services when patients require emergency care, such as when their lives or health are at risk. Some member states also have

oversight mechanisms that facilitate women's access to legal health-care services by requiring conscientious objectors to report their position to their employer health-care institution, and health-care institutions to ensure the availability of competent and willing providers to perform services.

22. In addition, decisions by various national-level European courts have articulated and further defined the practice of conscientious objection in the context of abortion. All of these decisions are guided by the principle that states and public institutions have a positive obligation to ensure that women are able to access health-care services provided for by law.

- *Ensuring adequate availability of abortion providers*

23. Norway's abortion law guarantees that a woman can obtain an abortion at anytime by requiring that medical services are organized to take into account health personnel who conscientiously object to abortion.⁴⁹ Regulations on conscientious objection require health-care providers to give written notice to their employer hospital if they refuse to assist with an abortion and those hospitals, in turn, to report to government authorities.⁵⁰ If requested, persons applying for hospital employment must give notice of their conscientious objection to performing or assisting in abortion procedures.⁵¹ Furthermore, in employment advertisements, hospitals may require as a condition for employment that hired health-care personnel be willing to perform or assist in abortion procedures.⁵² As the abortion law states, these provisions are in place to ensure the availability of an adequate number of providers so that women are able to exercise their right to abortion.⁵³

24. Italy's abortion law requires health-care institutions to ensure that women have access to abortion. Specifically, regional health-care bodies are required to supervise and ensure such access, which may include transfer of health-care personnel to guarantee access to abortion.⁵⁴ In accordance with this requirement, the law mandates health-care personnel to submit a written declaration of their conscientious objection to abortion to the medical director of their employer health-care institution and to the regional medical officer. Similarly, Portugal's Ministry of Health regulation on termination of pregnancy requires health-care institutions to adopt measures and cooperate with other health-care professionals and institutions to ensure women's access to abortion in cases where abortions are unobtainable because of conscientious objection.⁵⁵

25. A 1990 decision by the Bavarian High Administrative Court⁵⁶ in Germany, which was upheld by the Federal Administrative Court of Germany,⁵⁷ ruled that a municipality's job advertisement for a chief physician in a municipal women's hospital, which included a requirement that the physician be willing to perform abortions, was not in violation of a law providing that no one is obligated to perform abortions. The court referred to the need to provide abortions in public hospitals and took into consideration that private hospitals may not be willing to provide abortions due to religious or moral reasons. It emphasized that public hospitals must enable women to realize their entitlement to abortion under the law and, thus, the criteria for the job was deemed permissible.⁵⁸

26. Guidelines on the appointment of doctors to hospital posts issued by the United Kingdom National Health Services recommend that termination of pregnancy duties should be a feature of the job when adequate services for termination of pregnancy "would not otherwise be available," the job description should be explicit about termination of pregnancy duties, and applicants should be "prepared to carry out the full range of duties which they might be required to perform if appointed," including duties related to termination of pregnancy.⁵⁹ The British Medical Association (BMA) has recommended that conscientious objectors' position be disclosed to supervisors, managers or partners at as early a stage in employment as possible to ensure the availability of an adequate number of providers to perform abortions.⁶⁰

- *Conscientious objection applies only to actual performance of services and to objections by individuals, not institutions*

27. In most legal systems, only professionals who would otherwise have a legal duty to perform services directly on patients may invoke conscience clauses. Such individuals have the burden of proving the good faith of their objection. Hospital service staff, however, cannot refuse to provide routine general services on the basis of conscientious objection to the medical service the patient receives.⁶¹ Likewise, conscientious objection clauses in Council of Europe member states either explicitly state that they apply only to health-care personnel involved in the *actual performance* of procedures and do not justify the refusal of an appropriate referral (see discussion on referral below), or have been interpreted as such. For example, Norway's regulations implementing the abortion law expressly provide that the right to refuse to assist in an abortion belongs only to personnel who perform or assist the actual procedure, not to staff providing services, care or treatment to the woman before or after the procedure.⁶² Italy's abortion law does not exempt health-care personnel from providing pre and post-abortion care.⁶³

28. The scope of the conscientious objection clause in the United Kingdom's abortion law was clarified by House of Lords decision in 1988, which made clear that the clause applies only to participation in treatment.⁶⁴ The case involved a doctor's secretary who objected to signing an abortion referral letter on grounds of conscience. The House of Lords held that such an act did not constitute part of the treatment for abortion and, thus, was not covered by the conscientious objection clause of the abortion law. The decision supports the proposition that doctors cannot claim exemption from giving advice or performing the preparatory steps to arrange an abortion if the request for abortion meets legal requirements.⁶⁵

29. The refusal of public institutions to provide select services on grounds of conscientious objection constitutes a governmental failure in ensuring the availability and accessibility of reproductive health services. Such institutions, as state entities, have a duty to provide legal health services to the public. In a 2001 decision of the French Constitutional Council, the Council recognized that conscientious objection is a right afforded to individuals, not institutions, and upheld the repeal of paragraphs in the Code of Public Health, removing the possibility that department heads of public health establishments could refuse to allow the provision of abortion services in their departments.⁶⁶ The case was brought by senators who claimed in part that the repeal of these provisions violated the principle of freedom of conscience protected by the Constitution.⁶⁷ While the Constitutional Council recognized the fundamental nature of the freedom of conscience, it also clarified that such freedom was that of *individual*, not institutional or departmental, conscience "...which cannot be exerted at the expense of that of other doctors and medical staff working in his service."⁶⁸ The Council also provided that "... these provisions [of the Health Code] contribute in addition to respect for the constitutional principle of the equality of users before the law and before the public service."⁶⁹

- *Timely notice to patients and duty to refer*

30. Dutch and French laws place a legal obligation on health-care professionals and physicians, respectively, to immediately communicate to a pregnant woman their refusal to perform an abortion.⁷⁰ In France, doctors who conscientiously object also have a legal duty to the woman seeking abortion to "give her the name of experts to perform the procedure."⁷¹

31. Guidelines issued by the BMA⁷² and RCOG, which have informed the implementation and judicial interpretation⁷³ of the conscientious objection provisions of the 1967 Abortion Act, obligate physicians who conscientiously object to providing abortion services to take preparatory steps to arrange for an abortion and provide referrals to another doctor without delay.⁷⁴ The BMA guidelines explicitly provide that "[i]t is not sufficient simply to tell the patient to seek a view elsewhere since other doctors

may not agree to see her without appropriate referral.”⁷⁵ RCOG has issued recommended referral times to abortion services.⁷⁶ In addition, the UK National Health Service guidelines, which are issued to provide guidance to practitioners, note that all doctors who conscientiously object to “recommending termination should quickly refer a woman who seeks their advice about a termination to a different GP ... If doctors fail to do so, they could be alleged to be in breach of their terms of service.”⁷⁷

- *Duty to maintain standards of care*

32. Under the established medical doctrine of informed consent, patients must be informed of all risks, benefits and alternatives to treatment in order to make informed and voluntary decisions in their best interest.⁷⁸ In 2003, the High Court of Justice Queens Bench Division found a doctor negligent for failing to properly counsel – in part because of his religious beliefs – his patient on her increased risk of giving birth to a baby with Down’s Syndrome and the availability of prenatal screenings for such abnormalities.⁷⁹ The doctor, a devout Catholic, noted that he did not routinely and explicitly discuss screening for abnormalities with every pregnant woman. He testified that he thought pregnancy was a happy event and would want to “soothe, not alarm patients,” but that he expected he would have told someone of the plaintiff’s age that she was “at a slightly raised risk” for fetal abnormalities.⁸⁰ The court noted that “[o]n his own account Dr. Kwun’s approach to the subject [of informing patients about screening for abnormalities] was coloured by his belief in Roman Catholic doctrine.”⁸¹ The court ultimately found that if the doctor had used the phrase “slightly raised risk,” as the doctor testified, “it would have been seriously misleading,” considering that experts testified that the risk for fetal abnormalities increases significantly at the plaintiff’s age.⁸²

(ii) European Court of Human Rights jurisprudence

33. The Court’s jurisprudence recognizes the critical need to regulate the practice of conscientious objection to ensure women’s access to reproductive health care services they are legally entitled to receive. In *Pichon and Sajous v. France* (2001), the Court found that the Article 9 right to freedom of religion was not violated when two pharmacists were convicted under the French Consumer Code for refusing to sell contraceptive pills. The Court supported the French courts’ decision that ethical or religious principles are not legitimate grounds for refusing to sell contraceptives, so long as the sale of contraceptives is legal. The Court noted that as long as the sale of contraceptives is legal and medical prescriptions cannot be filled anywhere other than a pharmacy, the applicants cannot give precedence to their religious beliefs and impose them on others. The Court noted that applicants are free to manifest their beliefs in many ways outside the professional sphere, explaining that Article 9 protects acts closely linked to personal convictions and religious beliefs, such as acts of worship, teaching, practice, and observance. However, it noted that Article 9 does not always guarantee the right to behave in public in a manner governed by that belief. The Court said that the word “practice” used in Article 9(1) does not protect “each and every act or form of behaviour motivated or inspired by a religion or a belief.”⁸³ While this case involved an Article 9 claim, the decision reflects this Court’s understanding of the limitations of conscientious objection, especially in circumstances when persons are completely reliant on a certain profession to obtain legally authorized health-care services.

(iii) International and regional human rights and medical standards

34. United Nations treaty monitoring bodies have called upon states parties to ensure that women receive appropriate referrals in cases where providers are unwilling to perform requested reproductive health procedures.⁸⁴ With respect to legal abortion services, the Committee on the Elimination of Discrimination Against Women, which monitors states parties’ compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), ratified by Poland in 1980, has

made clear that it considers it an infringement of women's reproductive rights when a government fails to ensure access to another provider willing to perform the procedure,⁸⁵ underscoring the importance of the duty to refer. The Committee has noted that the high incidence of conscientious objection among doctors and hospital personnel is a major reason why women lack access to abortion services, especially where such services are legal.⁸⁶

35. Importantly, the Human Rights Committee, in its latest concluding observations on Poland, specifically expressed concern over the unavailability of legal abortion due to the lack of information on conscientious objection: "The Committee ... is [] concerned at the unavailability of abortion in practice even when the law permits it ... and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions. The Committee further regrets the lack of information on the extent of illegal abortions and their consequences for the women concerned. The State Party should ... provide further information on the use of the conscientious objection clause by doctors"⁸⁷

36. Standards issued by international medical bodies stress the importance of timely referrals, especially with respect to reproductive health services. WHO recognizes the right to conscientious objection to abortion for health workers, but adds that they have "an ethical obligation to follow professional ethical codes, which usually require health professionals to refer women to skilled colleagues who are not, in principle, opposed to termination of pregnancy allowed by law."⁸⁸ According to WHO guidelines, a well-functioning referral system is critical to the provision of safe abortion services; all health personnel should be able to direct women to appropriate services if they are unavailable on site.⁸⁹ The guidelines declare further, "[t]raining and equipping health professionals at the primary level to provide early abortion services and to make appropriate referrals may thus be one of the most important investments to consider."⁹⁰ If no alternative provider is available, the guidelines instruct that a health worker should perform an abortion in cases where a woman faces risks to her life or health.⁹¹ Recommendations by the International Federation of Gynecologists and Obstetricians and the World Medical Association provide similar guidelines.⁹²

3. States ensure access to legal abortion services by training providers, adopting measures to ensure the timeliness of services, and respecting women's decision-making role in the abortion process.

37. Member states have instituted a number of other safeguards in their abortion laws and regulations to ensure women's access to abortion services. These include, *inter alia*, provider trainings to ensure proper implementation of the law and regulations, and uniformity of services; procedures to ensure timely provision of services; and provisions expressly respecting women's participation in the abortion decision-making process.

a. States train providers on their legal and ethical obligations regarding the provision of abortion services.

38. Member States laws and regulations, as well as national and international medical guidelines, recognize the importance of training health-care professionals on their legal and ethical obligations to women seeking abortions. Under Finnish abortion regulations, the state's medical regulatory body must issue instructions for abortion providers "concerning the implementation of those provisions of [the abortion law and regulations] which may give rise to difficulties of interpretation."⁹³ To address this difficulty, the RCOG clinical abortion guidelines state that most doctors in Great Britain apply the WHO definition of health in interpreting the 1967 Abortion Act.⁹⁴ The Italian abortion law calls for the state to promote "refresher trainings" of health and allied health personnel on various reproductive health matters, including the use of safer and more modern techniques of pregnancy termination.⁹⁵ The law in Croatia

similarly requires health facilities that provide abortions to ensure that modern medical methods are used.⁹⁶

39. Under Finnish regulations on abortion, the state's medical regulatory body must issue guidelines for abortion providers "with a view to the adoption of uniform practices in the interpretation of the indications for abortion."⁹⁷ In Iceland, the law expressly requires that all information and counseling provided to a woman prior to abortion, *inter alia*, on the risks associated with abortion and the availability of social assistance, be conveyed in an impartial manner.⁹⁸

40. International policy standards similarly underscore the importance of training health-care providers as a means of ensuring access to legal abortion services. At the five-year review of the International Conference on Population and Development Programme of Action, governments of the world agreed that "... in circumstances where abortion is not against the law, health systems should train and equip health-service providers and should take other measures to ensure that such abortion is safe and accessible. Additional measures should be taken to safeguard women's health."⁹⁹ In accordance with these commitments and international human rights, WHO recommends that national health systems train health personnel so that they are conversant with national laws and regulations, noting in particular the lack of clarity for abortion on health grounds.¹⁰⁰

b. States adopt standards to ensure that legal abortion services are provided in a timely manner.

41. Member states' laws and health standards on abortion recognize the importance of ensuring timely access to abortion services, understanding that abortion is safer the earlier it is performed.¹⁰¹ The abortion law in Bulgaria requires health facilities to which women are referred to undergo abortion to admit them within three days of the presentation of authorization for abortion.¹⁰² The law in Croatia includes language recognizing the time-sensitive nature of abortion services. The law expressly recognizes that "[t]he application procedure for pregnancy termination is urgent" and establishes a narrow timeframe within which decisions regarding requests for abortion must be made and the procedure itself must be performed.¹⁰³ The Dutch law requires the physician from whom abortion services are sought to inform the woman "as soon as possible" whether he or she will provide the requested service, and at most between three to five days after the request.¹⁰⁴ French national health standards call for all patients requesting an induced abortion to be given an assessment appointment with a doctor within five days, recognizing that "[t]he earlier an abortion is performed, the lower the risk of complications. A wider choice of techniques can be used when an abortion is performed at an early stage. Access to abortion should be simple and quick."¹⁰⁵ Similarly, the RCOG clinical guidelines recommend that all women requesting abortion ideally should be offered an assessment appointment within five days of referral and able to undergo the abortion within seven days of their decision to proceed. As a minimum standard, no woman should have to wait longer than three weeks from her initial referral to the time of her abortion. Further, women requiring abortion for urgent medical reasons should be seen as soon as possible.¹⁰⁶ The RCOG guidelines expressly call for access to services to be ensured for women with special needs.¹⁰⁷

c. In their laws and practice on abortion, states respect women's decision-making role in the provision of services.

42. Member States' abortion legislation contains express language underscoring a woman's rights to dignity and free and autonomous decision-making, among others, in requests for and the provision of abortion services.¹⁰⁸ Norway's law and regulations on abortion strongly emphasize the woman's autonomy and active participation throughout the process for obtaining an abortion. The law, which permits abortion upon a woman's request during the first trimester of pregnancy, expressly provides that the woman "shall personally reach a final decision to terminate the pregnancy."¹⁰⁹ In assessing a

woman's eligibility for abortion after the first trimester, including when her health is at risk, the law instructs physicians to make the eligibility decision "following consultation with the woman" and give "major consideration[] ... to the woman's own assessment of her situation."¹¹⁰ In France, abortion within the first 12 weeks is available if the woman herself judges that the continuation of pregnancy would cause her "distress."¹¹¹ After that period, a commission comprised of a physician chosen by the woman herself, an obstetrician and a social worker reviews a woman's request for abortion.¹¹²

C. States' failure to ensure access to abortion services where legal is discriminatory against women.

43. In denying access to a reproductive health service that only women need and leaving women uniquely vulnerable to the risks associated with illegal and unsafe abortion, Poland's failure to take effective legal, policy and administrative measures to ensure that women can exercise their legal right to abortion in practice disproportionately disadvantages women over men and violates women's right to non-discrimination in the enjoyment of their other human rights.¹¹³ Article 12 of CEDAW guarantees the right to equality in access to health care, specifically requiring states to ensure access to services exclusively or disproportionately needed by women.¹¹⁴ These necessarily include services in connection with women's reproductive health, including abortion. States' failure to ensure access to such services, which address women's distinct biological needs and interests, is discriminatory against women.

V. Conclusion

44. This survey of legislation, regulations and jurisprudence of member states, and international and regional human rights standards demonstrates that states undertaking to permit abortion in prescribed circumstances ensure that women have effective access to such services. Laws and regulations making this right effective in practice include instituting procedures for appeal or review of medical decisions denying a woman's request for abortion, and ensuring the adequate availability of trained providers willing and able to perform abortion procedures by, *inter alia*, regulating the practice of conscientious objection by health-care providers to abortion services. For the reasons set forth in these comments, this Court should find that the failure to ensure effective access to abortion services where legal is a violation of women's basic human rights, specifically those guaranteed under Articles 3, 8, 13, and 14 of the European Convention.

¹ Center for Reproductive Rights, *The World's Abortion Laws 2005* (Wallchart, 2005).

² Only Andorra, Malta, Monaco, and San Marino maintain absolute prohibitions on abortion, without express exceptions for risk to the woman's health or life. *Id.*

³ Thirty-seven out of a total 46 member states allow abortions without restriction or for broad socioeconomic reasons. *Id.*

⁴ See *Entscheidungen des Bundesverfassungsgerichts [BverfGE] [Fed. Constitutional Court] 39, 1 (F.R.G.) translated in Robert E. Jonas & John D. Gorby, trans., West German Abortion Decision: A Contrast to Roe v. Wade*, 9 John Marshall J. Prac. & Proc. 605, 624 (1976); Corte Costituzionale, Repubblica Italiana, n.27, 1975 (Italy); Constitutional Court, Art. 47, 1985 (Port.).

⁵ Center for Reproductive Rights, *Reproductive Rights 2000: Moving Forward*, at 27 (2000).

⁶ S.T.C. 53/1985, Apr. 11, 1985 (B.O.E., 1985, 119) (Spain) (unofficial translation).

⁷ Corte Costituzionale, Repubblica Italiana, n.27, 1975 (Italy). National courts outside of Europe have similarly recognized the importance of the permissibility of abortion in cases where pregnancy threatens the woman's health. The United States Supreme Court recently prevented a restriction on a late-term abortion procedure that made no exception for the health of the woman. The Court reaffirmed its previous holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), that the constitutionally protected right to privacy required that post-viability abortions must remain legal to preserve a woman's life or health. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000).

⁸ Jonas & Gorby, *supra* note 4, at 648.

⁹ See *Paton v. United Kingdom*, App. No. 8416/78 Eur. Comm'n H.R. (1980); *R.H. v. Norway*, decision on admissibility, App. No. 17004/90 Eur. Comm'n H.R. (1992); *Boso v. Italy*, App. No. 50490/99 Eur. Comm'n H.R. (2002).

¹⁰ *Boso v. Italy*, App. No. 50490/99 Eur. Comm'n H.R. (2002).

¹¹ See *id.* (referring to the Constitutional Court of Italy's Order No. 389 of Mar. 31, 1988).

¹² The Human Rights Committee has consistently addressed restrictive abortion laws resulting in illegal and unsafe abortions as potential violations of Article 6 of the Covenant—the right to life—often making the link to high rates of maternal mortality. See Human Rights Committee, *General Comment No. 28: Equality of rights between men and women (Art. 3)*, 68th Sess., ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.5 at 168 (2001) [hereinafter Human Rights Committee General Comment 28]; see also *Concluding Observation of the Human Rights Committee: Chile*, 65th Sess., 1740th mtg., ¶ 15, U.N. Doc. CCPR/C/79/Add.104 (1999); *Costa Rica*, 65th Sess., 1751st mtg., ¶ 11, U.N. Doc. CCPR/C/79/Add.107 (1999); *Guatemala*, 72nd Sess., 1954th mtg., ¶ 19, U.N. Doc. CCPR/CO/72/GTM (2001); *Mongolia*, 68th Sess., 1835th mtg., ¶ 8(b), U.N. Doc. CCPR/C/79/Add.120 (2000); *Peru*, 70th Sess., 1892nd mtg., ¶ 20, U.N. Doc. CCPR/CO/70/PER (2000); *Poland*, 82nd Sess., 2251th mtg., ¶ 8, U.N. Doc. CCPR/CO/82/POL (2004).

¹³ The Committee on Economic, Social and Cultural Rights (CESCR), which interprets and monitors states parties' compliance with the International Covenant on Economic, Social and Cultural Rights, has interpreted Article 12 of the covenant, which guarantees the right to the highest attainable standard of health, as including the right to maternal, child, and reproductive and sexual health. The committee has defined "reproductive health" to include the "freedom to decide if and when to reproduce," and has called for the "removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health." The committee has underlined the need for state parties to provide a full range of safe, effective, affordable, appropriate and confidential sexual and reproductive health services. See Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, 22nd Sess., ¶¶ 12, 14, 21, 23, 44(a), n.12, U.N. Doc. E/C.12/2000/4 (2000), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 85 (2003) [hereinafter CESCR General Comment 14]. In recent Concluding Observations on state reports, the committee has expressed deep concern over the relationship between high rates of maternal mortality and illegal, unsafe, clandestine abortions, specifically recognizing that restrictive abortion laws contribute significantly thereto. See e.g., *Concluding Observation of the Committee on Economic, Social and Cultural Rights: Cameroon*, 21st Sess., 54th mtg., ¶ 25, U.N. Doc. E/C.12/1/Add.40 (1999); *Mexico*, 21st Sess., 54th mtg., ¶ 29, U.N. Doc. E/C.12/1/Add.41 (1999); *Nepal*, 26th Sess., 55th mtg., ¶¶ 32, 55, U.N. Doc. E/C.12/1/Add.66 (2001); *Panama*, 26th Sess., 51st mtg., ¶ 20, U.N. Doc. E/C.12/1/Add.64 (2001); *Poland*, 18th Sess., 10–12th mtg., ¶¶ 12, 20, U.N. Doc. E/C.12/1/Add.26 (1998); *Senegal*, 26th Sess., 53rd mtg., ¶¶ 26–27 U.N. Doc. E/C.12/1/Add.62 (2001); *Bolivia*, 25th Sess., 28th mtg., ¶ 43, U.N. Doc.

E/C.12/1/Add.60 (2001). In some cases, states parties have been called upon to liberalize their abortion laws. See e.g., *Concluding Observation of the Committee on Economic, Social and Cultural Rights: Nepal*, 26th Sess., 55th mtg., ¶¶ 33, 55, U.N. Doc. E/C.12/1/Add.66 (2001); *Concluding Observations of the Committee Against Torture: Chile*, 14/06/2004, U.N. Doc. CAT/C/CR/32/5 ¶7(m). The CEDAW Committee has interpreted the right to health similarly as the CESCR and has also recognized laws that criminalize medical procedures only needed by women and punish women who undergo those procedures as barriers to women's access to appropriate health care. It has expressly urged states parties to amend legislation criminalizing abortion. Committee on the Elimination of Discrimination Against Women, *General Recommendation 24: Women and health*, 20th Sess., ¶¶ 14, 22, 31(c), U.N. Doc. A/54/38 (1999), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 271 (2003) [hereinafter CEDAW Committee General Recommendation 24].

¹⁴ The Human Rights Committee has specifically addressed the right to privacy in the context of women's reproductive capacity and restrictive abortion laws, recognizing that "[s]tates may fail to respect women's privacy [with respect to] their reproductive functions, for example ... where States impose a legal duty upon doctors and other health personnel to report cases of women who have undergone [illegal] abortion." Human Rights Committee General Comment 28, *supra* note 12, ¶ 20.

¹⁵ See *Concluding Observation of the Human Rights Committee: Ireland*, 69th Sess., 1858th mtg., ¶¶ 23–24, U.N. Doc. A/55/40 (2000); see also *Morocco*, 82nd Sess., 2249th mtg., ¶ 29, U.N. Doc. CCPR/CO/82/MAR (2004); *Sri Lanka*, 79th Sess., 2164th mtg., ¶ 12, U.N. Doc. CCPR/CO/79/LKA (2003). The aim of Article 7 of the covenant is to "protect both the dignity and the physical and mental integrity of the individual." Human Rights Committee, *General Comment No. 20: Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7)*, 44th Sess., ¶ 2 (1992), in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 at 151 (2003).

¹⁶ See *Concluding observations of the Human Rights Committee: Poland*, 05/11/2004 CCPR/CO/82/POL/Rev. 1; *Concluding observations of the Committee on Economic, Social and Cultural Rights: Poland*, 29/11/2002 E/C.12/1/Add.82. The CESCR observed: "The Committee is concerned about the restrictive abortion laws, which have resulted in a large number of women risking their health by resorting to clandestine abortionists." The Committee requested that Poland "...provide in its next periodic report detailed information, including comparative data, about the problem of abortion in Poland and the measures, legislative or otherwise, including the review of its present legislation, it has undertaken to protect women from clandestine and unsafe abortions." *Id.* ¶¶ 29, 51.

¹⁷ Office of the United Nations High Commissioner for Human Rights, International Covenant on Civil and Political Rights, available at <http://www.ohchr.org/english/countries/ratification/4.htm>, last updated 15 September 2005.

¹⁸ *Concluding observations of the Human Rights Committee: Poland*, 05/11/2004 CCPR/CO/82/POL/Rev. 1, ¶ 8.

¹⁹ See e.g., *Concluding Observation of the Committee on the Elimination of Discrimination Against Women: Croatia*, 14/05/98, U.N. Doc. A/53/38, ¶ 109; *Hungary* 09/05/96, U.N. Doc. A/51/38, ¶ 254; *Lithuania*, 16/06/2000, U.N. Doc. A/55/38, ¶¶ 158-59; *Romania*, 23/06/2000, U.N. Doc. A/55/38, ¶¶ 314-15. See e.g., *Concluding Observation of the Committee on Economic, Social and Cultural Rights: Poland*, 16/06/98, U.N. Doc. E/C.12/1/Add.26, ¶ 12; *Armenia*, 08/12/99, U.N. Doc. E/C.12/1/Add.39, ¶ 15; *Georgia*, 12/05/2000, U.N. Doc. E/C.12/1/Add.42, ¶ 18. Treaty monitoring bodies have recognized women's access to quality reproductive health care as a basic right under international human rights treaties. CEDAW Committee General Recommendation 24 *supra* note 13. CESCR has characterized states' duty to ensure reproductive and maternal health care as an obligation of comparable priority to "core obligations" under the International Covenant on Economic, Social and Cultural Rights, which are non-derogable. CESCR General Comment 14, *supra* note 13, ¶¶ 44, 47.

²⁰ In one case, the CEDAW Committee recognized that the criminalization of abortion in a country "deters medical professionals from providing this procedure without judicial order, even where they are permitted to do so by law, *inter alia*, where there are clear health risks for the mother ...," and urged the government to remove all obstacles to obtaining abortion in cases when the procedure may be lawfully performed. *Concluding Observation of the Human Rights Committee: Argentina*, 70th Sess., 1893rd mtg., ¶ 74(14), U.N. Doc. ICCPR, A/56/40 vol. I (2000). The Committee has also urged states to secure the enjoyment by women of their reproductive rights by, *inter alia*, guaranteeing them access to safe abortion services in public hospitals and other health facilities. *Concluding Observation of the Committee on the Elimination of Discrimination against Women: Croatia*, 14/05/98, U.N. Doc. A/53/38, ¶ 117; *Italy*, 17/07/97, U.N. Doc. A/52/38 Rev.1, Part II, ¶ 360. See *Concluding Observation of the Human Rights Committee: Ecuador*, 18/08/98, U.N. Doc. CCPR/C/79/Add.92, ¶ 11.

²¹ *Concluding observations of the Human Rights Committee: Poland*, 05/11/2004 CCPR/CO/82/POL/Rev. 1, § 8.

²² WHO, *Safe Abortion: Technical and Policy Guidance for Health Systems*, at 82 (2003) [hereinafter WHO, *Safe Abortion Guidance*]. The problem of access helps explain the fact that unsafe abortion is a leading cause of maternal mortality and morbidity worldwide, despite the fact that abortion is legal for at least some reasons in most countries. Lack of access to safe abortion services is due to a range of health systems problems and broader policy and social factors, including lack of trained providers or their concentration in urban areas; negative provider attitudes; use of inappropriate or outdated methods of inducing abortion; lack of knowledge of the law and women's rights under the law by providers and the public, or lack of application of the law by providers; stigmatization and fears about privacy and confidentiality; and the perceived quality of care provided. *Id.* at 14-15.

²³ *Id.* at 82. The guidelines recognize that health professionals themselves have ethical and legal obligations to respect women's rights, and appeal to such individuals to "understand and apply their national law related to abortion, and contribute to the development of regulations, policies and protocols to ensure access to quality services to the extent permitted by law and respecting women's rights to humane and confidential treatment." *Id.* at 15.

²⁴ *Id.* at 90.

²⁵ Abortion is regulated by decree in Bulgaria. Decree No. 2 of 1 February 1990 on the conditions and procedures for the artificial termination of pregnancy (Bulg.).

²⁶ Law No. 1252-1978 of 21 April 1978, Act concerning the medical measures for materialization of the right to freely decide on the birth of children, Art. 24 (Croat.).

²⁷ Law of 30 June 1977, the Act concerning the conditions of and procedures for the termination of pregnancy, Art. 25 (Serb.).

²⁸ Law of 20 April 1977 on medical measures to implement the right to a free decision regarding the birth of children, Art. 25 (Slovn.).

²⁹ See UN Abortion Policies: A Global Review, Yugoslavia at 185, available at <http://www.un.org/esa/population/publications/abortion/profiles.htm>.

³⁰ Law No. 1252-1978 of 21 April 1978, Act concerning the medical measures for materialization of the right to freely decide on the birth of children, Art. 24 (Croat.); Law of 30 June 1977, the Act concerning the conditions of and procedures for the termination of pregnancy, Art. 25 (Serb.); Law of 20 April 1977 on medical measures to implement the right to a free decision regarding the birth of children, Art. 25 (Slovn.). While an immediate transfer of documentation to the appeals body is implied, Serbia's law explicitly requires this. See also Law of 7 October 1977 (Bosnia and Herzegovina).

³¹ Law No. 350 of 13 June 1973 on the interruption of pregnancy, as amended through Law No. 389 of 14 June 1995, ch. 2, § 4 (Den.).

³² Law No. 350 of 13 June 1973 on the interruption of pregnancy, as amended through Law No. 389 of 14 June 1995, ch. 2, §§ 2, 4 (Den.).

³³ The woman must submit her request to the district specialist in gynecology and obstetrics, who reviews her request in consultation with other gynecologists and, if necessary, medical specialists in other fields.

³⁴ Law No. 66 of 20 October 1986 of the Czech People's Council concerning the artificial termination of pregnancy, Art. 8 (Czech Rep.).

³⁵ A woman has the right to request review of the physician's decision to reject termination of pregnancy by the director of the health care institution where she is seeking to undergo an abortion. The director is required to review the request in consultation with other physicians within two days of its submission and is required to inform the woman where the abortion is to be performed should it be approved and if denied, is required to inform the woman in writing. Law on abortion, 23 October 1986, as amended through Law No. 419/1991, ¶ 8 (Slovk.).

³⁶ Law No. 50 of 13 June 1975 concerning Termination of Pregnancy, as amended 16 June 1978 no.5, § 8 (Nor.); Act to amend the Abortion Act (1974:595), 18 May 1995, § 4 (Swed.). See also Swedish regulations regarding forms to complete for this procedure.

³⁷ Law No. 239 of 24 March 1970 on the interruption of pregnancy, as amended through Law No. 572 of 24 July 1998, § 6 (Fin.).

³⁸ See generally CEDAW Committee General Recommendation 24, *supra* note 13, ¶¶ 21, 23; CESCR General Comment 14, *supra* note 13, ¶¶ 35, 36.

³⁹ Law No. 239 of Mar. 24, 1970 on the interruption of pregnancy, as amended through Law No. 572 of 24 July 1998, § 6 (Fin.).

⁴⁰ Ordinance No. 359 of May 29, 1970 on the interruption of pregnancy, § 5 (Fin.).

⁴¹ Decree No. 80-285 of Apr. 17, 1980 and Decree No. 88-59 of Jan. 18, 1988 (Fr.), in UN Abortion Policies: A Global Review, France at 151, available at <http://www.un.org/esa/population/publications/abortion/profiles.htm>.

⁴² See Anika Rahman et al., *A Global Review of Laws on Induced Abortion, 1985-1997*, 24 Int'l Fam. Plan. Persp. 56, 62 (1998). See also 2409/ 1986, of 21 November, about authorized health centers and preceptive medical reports for the termination of pregnancy, (B.O.E., 1986, n. 281), Art. 5 (Spain) (providing that the health authority in each Autonomous Community is responsible for assuring the availability of necessary services, including access to emergency diagnostic techniques needed for abortion to be performed within the established time limits).

⁴³ Royal College of Obstetricians and Gynecologists, *The Care of Women Requesting Induced Abortion, Evidence-based Clinical Guideline Number 7*, § 1.1, at 1 (Sept. 2004) [hereinafter RCOG Guideline].

⁴⁴ *Id.* at 2.

⁴⁵ Conscientious objection: the refusal by individuals or entities to provide or cover certain health services based on religious or moral objections. Reproductive Freedom Project, Religious Refusals and Reproductive Rights 6 (2002).

⁴⁶ Federation for Women and Family Planning, *The Anti-Abortion Law in Poland: The Report - September 2000*, available at <http://www.federa.org.pl/english/reports/report00/index.htm>. See also Federation for Women and Family Planning, *Independent Report Submitted to the UN Human Rights Committee, September 2004*, available at http://www.federa.org.pl/english/report_indep.htm. Polish health care providers may or may not explicitly object based on conscientious objection but it is clear from their actions or their language that issues of religion or morality guide this decision. In addition in Poland, whole public health care institutions have refused to conduct such services, rendering women unable to effectively exercise this right. *Id.*

⁴⁷ See Rebecca J. Cook & Bernard M. Dickens, *Considerations for Formulating Reproductive Health Laws*, at 34, Doc. WHO/RHR/00.1 (2000), available at http://www.who.int/reproductive-health/publications/rhr_00_1/considerations_for_formulating_reproductive_health_laws.pdf.

⁴⁸ Deontology or medical ethics codes, while not legally binding, are highly persuasive authority since the development of deontology codes are mandated by public health laws. Often times they are used by national courts as persuasive authority.

⁴⁹ Law No. 50 of 13 June 1975 concerning Termination of Pregnancy, as amended 16 June 1978 no. 5, § 14 (Nor.).

⁵⁰ Regulations for the Implementation of the Act dated 13 June 1995 no. 50 concerning Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 66, cf. § 12 of the Act, laid down by Royal Decree, 1 December 1978, § 20 (Nor.). See also Slovenia Health Services Act, available at <http://www.consciencelaws.org/Conscience-Laws-Slovenia/Conscience-Laws-Slovenia-01.html>. The act allows for conscientious objection in accordance with international rules on the practice. It requires health-care workers to report their conscientious objection to their employer institution, and the institution to ensure that patients' rights to health care are accessible "without disruption." *Id.*, Art. 56.

⁵¹ Regulations for the Implementation of the Act dated 13 June 1995 no. 50 concerning Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 66, cf. § 12 of the Act, laid down by Royal Decree, 1 December 1978, § 20 (Nor.).

⁵² *Id.* § 20.

⁵³ Law No. 50 of 13 June 1975 concerning Termination of Pregnancy, as amended 16 June 1978 no. 5, § 14 (Nor.).

⁵⁴ Law No. 194 of 22 May 1978 on the social protection of motherhood and the voluntary termination of pregnancy, *Gazzetta Ufficiale della Repubblica Italiana*, Part I, 22 May 1978, No. 140, pp. 3642-46, § 9 (Italy).

⁵⁵ Ministry of Health Order No. 189/98 of 21 March 1998, *Diario da República*, Series I-B, No. 68, p. 1247 (Port.). "This Order establishes measures to be adopted in official health establishments with obstetric services for the termination of pregnancy under the circumstances provided for in Article 142 of the Penal Code," summarized in *Annual Review of Population Law*, available at <http://annualreview.law.harvard.edu/population/abortion/PORTUGAL.abo.htm>.

⁵⁶ Judgment of the Bavarian Higher Administrative Court of 03/07/1990, BayVGH DVB1. 1990, 880-82 (F.R.G.).

⁵⁷ Judgment of the Federal Administrative Court of 12/13/1991, BVerwGE 89, 260-70 (F.R.G.).

⁵⁸ Judgment of the Bavarian Higher Administrative Court of 03/07/1990, BayVGH DVB1. 1990, 880-82 (F.R.G.).

⁵⁹ NHS Guidelines Appointment of doctors to hospital posts: termination of pregnancy, NHS Executive HSG (94)39, 14 September 1994 (U.K.).

⁶⁰ British Medical Association, *Contraception, abortion, and birth, in Medical Ethics Today the BMA's Handbook of Ethics and Law* 248-50 (2d ed. 2004) [hereinafter *BMA's Handbook of Ethics and Law*].

⁶¹ See Cook & Dickens, *supra* note 47, at 33.

⁶² Regulations for the Implementation of the Act dated 13 June 1995 no. 50 concerning Termination of Pregnancy, with Amendments in the Act dated 16 June 1978 no. 66, cf. § 12 of the Act, laid down by Royal Decree, 1 December 1978, § 20 (Nor.).

- ⁶³ Law No. 194 of 22 May 1978 on the social protection of motherhood and the voluntary termination of pregnancy, *Gazzetta Ufficiale della Repubblica Italiana*, Part I, 2 May 1978, No. 140, pp. 3642-46, § 9 (Italy).
- ⁶⁴ *Janaway v. Salford Health Authority*, 3 All E.R. 1079 (H.L. 1988).
- ⁶⁵ BMA's *Handbook of Ethics and Law*, *supra* note 60, at 248-50.
- ⁶⁶ Decision 2001-446 DC of 27 June 2001, Voluntary Interruption of Pregnancy (Abortion) and Contraception Act, ¶¶ 11, 15, 17 (Fr.).
- ⁶⁷ *Id.* ¶¶ 12-13.
- ⁶⁸ *Id.* ¶ 15.
- ⁶⁹ *Id.*
- ⁷⁰ Code de la Sante Publique, arts. L2212-8 and R4127-18 (Fr.), <http://www.legifrance.gouv.fr/WAspad/RechercheSimpleCode?commun=CSANPU&code=>; Law of 1 May 1981 (Stb. 257) prescribing rules concerning the termination of pregnancy, § 20 (2) (Neth.). *See also* 2409/ 1986, of 21 November, about authorized health centers and preceptive medical reports for the termination of pregnancy, (B.O.E., 1986, n. 281) (Spain).
- ⁷¹ Code de la Sante Publique, arts. L2212-8 and R4127-18 (Fr.), <http://www.legifrance.gouv.fr/WAspad/RechercheSimpleCode?commun=CSANPU&code=>.
- ⁷² BMA's *Handbook of Ethics and Law*, *supra* note 60, at 248-50.
- ⁷³ *See e.g., Family Planning Ass'n of Northern Ireland v. Minister for Health, Soc. Serv. and Pub. Safety*, 2004 NICA 39 (Transcript) (Q.B.).
- ⁷⁴ BMA's *Handbook of Ethics and Law*, *supra* note 60, at 248-50; RCOG Guideline, *supra* note 43, at 16-17.
- ⁷⁵ BMA's *Handbook of Ethics and Law*, *supra* note 60, at 248-50.
- ⁷⁶ RCOG Guideline, *supra* note 43, at 23-24.
- ⁷⁷ NHS Guidelines HSG (95) 37, Guidance on Fundholder purchase of terminations of pregnancy, July 1995, ¶ 6 (U.K.).
- ⁷⁸ For example, many international documents and instruments set forth this standard. The European Convention on Human Rights and Biomedicine guarantees the right of individuals to “know any information collected about his or her health,” and to give “free and informed consent” to all health interventions, which includes the right to information about the nature, purpose, consequences and risks of the intervention. 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, April 4, 1997, at ch III, art. 10, § 2, ch. II, art 5.
- ⁷⁹ *Enright and another v. Kwun and another*, [2003] E.W.H.C. 1000 (Q.B.).
- ⁸⁰ *Id.* ¶¶ 29, 55.
- ⁸¹ *Id.* ¶ 30.
- ⁸² *Id.* ¶ 56. *See also Barr v. Matthews*, 52 BMLR 217 (Q.B. 1999). In 1999, the UK Queen's Bench Division held that plaintiff's medical negligence claim against defendant for failure to provide medical advice on termination of pregnancy because of defendant being “philosophically opposed to abortion, [and] unwilling to facilitate one,” thus *resulting in the birth of a child suffering from cerebral palsy*, was not successful. The court did emphasize that “once a termination of pregnancy is recognised as an option, the doctor invoking the conscientious objection clause should refer the patient to a colleague at once.”
- ⁸³ *Pichon and Sajous v. France*, App. No. 49853/99, Eur. Ct. H.R. (2001).
- ⁸⁴ CEDAW Committee General Recommendation 24, *supra* note 13, ¶ 11.
- ⁸⁵ Division for the Advancement of Women, Convention on the Elimination of All Forms of Discrimination Against Women, available at <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last updated 20 Sept. 2005). *See Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Croatia*, 53rd Sess., 383rd mtg., ¶ 109, U.N. Doc. A/53/38 (Part I) (1998).
- ⁸⁶ *See Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Italy*, 52nd Sess., 333rd mtg., ¶ 353, U.N. Doc. A/52/38/Rev.1 (1997).
- ⁸⁷ Concluding observations of the Human Rights Committee: Poland. 05/11/2004 CCPR/CO/82/POL/Rev. 1, § 8.
- ⁸⁸ WHO, *Safe Abortion Guidance*, *supra* note 22, § 2.4.1, at 66.
- ⁸⁹ *Id.* § 2.3, at 64.
- ⁹⁰ *Id.* § 2.1, at 59.
- ⁹¹ *Id.* § 2.4.1, at 66.
- ⁹² FIGO is the only worldwide organization that groups obstetricians and gynecologists. The mission of FIGO is to promote the well-being of women and to raise the standard of practice in obstetrics and gynecology. FIGO represents obstetricians and gynecologists in over one hundred territories, including Poland, available at

<http://www.figo.org/default.asp?id=3>. The Recommendations on Ethical Issues in Obstetrics and Gynecology by the FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health states in part that providers who are "unable or unwilling to provide a desired medical service for non-medical reasons ... should make every effort to achieve appropriate referral." FIGO, *Ethical Framework for Gynecologic and Obstetric Care* (1994), in *Recommendations on Ethical Issues in Obstetrics and Gynecology by the FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health* 10 (2003) [hereinafter *FIGO Recommendations*]. FIGO's *Professional and Ethical Responsibilities Concerning Sexual and Reproductive Rights* includes an important recommendation about conscientious objection that should be followed in order to assure that human rights and ethical principles in the reproductive health care of women be respected: "Assure that a physician's right to preserve his/her own moral or religious values does not result in the imposition of those personal values on women. Under such circumstances, they should be referred to another suitable health care provider. Conscientious objection to procedures does not absolve physicians from taking immediate steps in an emergency to ensure that the necessary treatment is given without delay." FIGO Professional and Ethical Responsibilities Concerning Sexual and Reproductive Rights, available at <http://www.figo.org/default.asp?id=6137>. The International Code of Medical Ethics provides, "A doctor owes to his patient complete loyalty and all the resources of his science. Whenever an examination or treatment is beyond his capacity he should summon another doctor who has the necessary ability." World Medical Association, *International Code of Medical Ethics, in Duties of Doctors to the Sick* (1949). See FIGO, *Guidelines Regarding Informed Consent* (1995), in *FIGO Recommendations* 11–12.

⁹³ Ordinance No. 359 of 29 May 1970 on the interruption of pregnancy, § 8 (Fin.).

⁹⁴ RCOG Guideline, *supra* note 43, at 15.

⁹⁵ Law No. 194 of 22 May 1978 on the social protection of motherhood and the voluntary termination of pregnancy, § 15 (Italy).

⁹⁶ Law of 21 April 1978 on health measures to implement the right to a free decision regarding the birth of children, pt. III, § 28 (Croat.).

⁹⁷ Ordinance No. 359 of 29 May 1970 on the interruption of pregnancy, § 8 (Fin.).

⁹⁸ Law No. 25/1975, 27 May 1975, ch. II, art. 12 (Ice.).

⁹⁹ Programme of Action of the International Conference on Population and Development, 1999 (ICPD+5), ¶ 63.iii. Poland agreed to this statement in the Programme of Action originally adopted in 1994.

¹⁰⁰ WHO, *Safe Abortion Guidance*, *supra* note 22, at 69, 86.

¹⁰¹ National courts outside of the Council of Europe have similarly recognized the time-sensitive nature of abortion services and the importance of prompt access. In the seminal case on abortion rights in Canada, the Supreme Court of Canada found that unnecessarily delaying a woman's access to abortion "can have profound consequences on the woman's physical and emotional well-being," noting that the medical evidence indicated that any delay in performing an abortion can have potentially "devastating" implications and infringe on the "purely physical aspect" of the woman's right to security of the person. Furthermore, the court found that a woman's psychological integrity can be harmed when she is forced to wait for an abortion. *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at 57-60.

¹⁰² Decree No. 2 of 1 February 1990 on the conditions and procedures for the artificial termination of pregnancy, pt. I, art. 6 (Bulg.).

¹⁰³ Law of 21 April 1978 on health measures to implement the right to a free decision regarding the birth of children, pt. III, §§ 21, 23 (Croat.).

¹⁰⁴ Law of 1 May 1981 (Stb. 257) prescribing rules concerning the termination of pregnancy, § 3(3) (Nether.).

¹⁰⁵ National Agency for Accreditation and Evaluation in Health, *Induced Abortion up to 14 weeks* (Mar. 2001), at 7, available at [http://www.anaes.fr/anaes/Publications.nsf/nPDFFile/GU_LILF-5H7D3Y/\\$File/induced_abortion.pdf?OpenElement](http://www.anaes.fr/anaes/Publications.nsf/nPDFFile/GU_LILF-5H7D3Y/$File/induced_abortion.pdf?OpenElement). The standards urge all counties to ensure "sufficient abortion units to allow them to offer all women seeking an abortion access to the right care with the minimum delay." *Id.* at 6. See Law No. 50 of 13 June 1975 concerning Termination of Pregnancy, as amended 16 June 1978 no.5, § 7 (Nor.).

¹⁰⁶ RCOG Guideline, *supra* note 43, § 2.1.6-7, at 7.

¹⁰⁷ *Id.*, § 2.1.2, at 7.

¹⁰⁸ See Law No. 50 of 13 June 1975 concerning Termination of Pregnancy, as amended 16 June 1978 no.5 (Nor.); Law of 21 April 1978 on health measures to implement the right to a free decision regarding the birth of children (Croat.) (ensuring "the right of persons to a free decision regarding the birth of children" and the conditions necessary for effective enjoyment of this right); Law No. 194 of 22 May 1978 on the social protection of motherhood and the voluntary termination of pregnancy, § 5 (Italy) (respecting the woman's dignity and freedom in the performance of medical examinations relating to abortion and the abortion procedure itself); Law of June 30,

1977, the Act concerning the conditions of and procedures for the termination of pregnancy, Art. 18 (Serb.) (respecting the woman's dignity and personality).

¹⁰⁹ Law No. 50 of 13 June 1975 concerning Termination of Pregnancy, as amended 16 June 1978 no.5, §§ 2, 4 (Nor.).

¹¹⁰ Law No. 50 of 13 June 1975 concerning Termination of Pregnancy, as amended 16 June 1978 no.5, §§ 2, 7 (Nor.). The woman's wishes also dictate the counseling process, e.g. the provision of counseling and information on social assistance for pregnancy is contingent on whether the woman chooses to receive such information. *Id.* §§ 2, 5. The law expressly provides that such counseling, when offered, should aim "to enable [the woman] to make the final choice herself." *Id.* § 2.

¹¹¹ Law No. 2001-588 of 4 July 2001, art. 1; Law No. 75-17 of 18 January 1975 (Fr.), in UN Abortion Policies: A Global Review, France at 151, available at <http://www.un.org/esa/population/publications/abortion/profiles.htm>. In effect, a woman could have an abortion up to the 14th week of pregnancy because of the manner in which the law calculates gestational age. See Posting of Dr. Danielle Hassoun, d.hassoun@wanadoo.fr, to worldbytes@mailier.hotrock.com (May 31, 2001) (copy on file with author).

¹¹² Posting of Dr. Danielle Hassoun, d.hassoun@wanadoo.fr, to worldbytes@mailier.hotrock.com (May 31, 2001) (copy on file with author).

¹¹³ See Cook & Dickens, *supra* note 47, at 196–198.

¹¹⁴ Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, art. 12, U.N. Doc. A/34/46 (1979), 1249 U.N.T.S. 20378 (entered into force Sept. 3, 1981).