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**POLAND**

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## Introduction

1. ADF International is a global alliance-building legal organization that advocates for religious freedom, life, and marriage and family before national and international institutions. As well as having ECOSOC consultative status with the United Nations (registered name 'Alliance Defending Freedom'), ADF International has accreditation with the European Commission and Parliament, the Organization for Security and Co-operation in Europe, and the Organization of American States, and is a participant in the FRA Fundamental Rights Platform.
2. This report focuses on the right to life of the unborn, the right to freedom of thought, conscience, and religion, and Poland's efforts in promoting and defending these rights.

### (a) Right to Life

#### *Background*

3. The right to life is protected in the Constitution of the Republic of Poland of 1997 (the Constitution). Article 38 of the Constitution guarantees, 'The Republic of Poland shall ensure the legal protection of the life of every human being.' This may be read as guaranteeing the right to life of the unborn.
4. Furthermore, Article 47 of the Constitution reads, 'Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life.'
5. The practice of abortion is criminalized in Article 152 § 1 of the Criminal Code.
6. Despite the clear recognition of the right to life of the unborn in the Constitution and the prohibition on abortion, abortion is permissible in certain cases. Under Section 4a of the 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act (the 1993 Act),
  - (1) An abortion can be carried out only by a physician where
    1. pregnancy endangers the mother's life or health;
    2. prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;
    3. there are strong grounds for believing that the pregnancy is a result of a criminal act.
  - (2) In the cases listed above under sub-paragraph 2, an abortion can be performed until such time as the foetus is capable of surviving outside the mother's body; in cases listed under sub-paragraph 3 above, until the end of the twelfth week of pregnancy.
7. Poland is considering a bill which protects unborn life by prohibiting abortion. The draft bill was introduced by way of a civic initiative that was supported by over 450,000 signatories. The draft bill recognizes the constitutional protection of human life at every stage and of the inherent right to life from the moment of conception. Consequently, the draft bill aims to remove the existing exceptions to the prohibition on abortion. The draft bill is currently in the lower house of the Polish parliament.<sup>1</sup>

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<sup>1</sup> Gazeta Wyborcza, Czy będzie całkowity zakaz aborcji? Społeczny projekt ustawy już w Sejmie (5 July 2016) <http://wyborcza.pl/10,82983,20356190,czy-bedzie-calkowity-zakaz-aborcji-spoleczny-projekt-ustawy.html>

8. Poland has come under a great deal of pressure to reject the draft bill and to instead liberalize its abortion law.<sup>2</sup> Such recommendations to relax the law on abortion are not supported in international law. On the contrary, international law recognizes the right to life of the unborn.
9. Furthermore, a number of hospitals have come under scrutiny after the case of a so-called 'failed abortion' that resulted in the birth of a premature child at the Holy Family Hospital in Warsaw. Between 6 and 7 March 2016, an abortion was performed on a woman in the 24<sup>th</sup> week of her pregnancy. The child survived the abortion and was delivered alive. It took over an hour before the child, who was in pain and suffering, died. During that time no attempts were made by the medical staff to save the child.<sup>3</sup> Subsequently, further reports of similar cases started coming out.<sup>4</sup>
10. In another case, in August 2014, doctors at a hospital in Opole performed an abortion of a child with Down syndrome. During the procedure complications arose and the baby was delivered by Caesarean section.<sup>5</sup> The baby was placed in an incubator for approximately 4 hours. However, on the express request of the medical professionals that attempted the abortion, medical care was then withdrawn from the baby, leading to the baby's death. The case was investigated by the Patient's Rights Ombudsman and by the prosecutor.

#### *Right to Life in International Law*

11. Poland ratified the International Covenant on Civil and Political Rights (ICCPR) on 18 March 1997, and the Convention on the Rights of the Child (CRC) on 7 June 1991.
12. Article 6(1) of the ICCPR states, 'Every human being has the inherent right to life.' Furthermore, Article 6(5) of the ICCPR states, 'Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and *shall not be carried out on pregnant women.*' The ICCPR's prohibition on the death penalty for pregnant women implicitly recognises the right to life of the unborn. As the *travaux préparatoires*<sup>6</sup> of the ICCPR explicitly state, 'The principal reason for providing in paragraph 4 [now Article 6(5)] of the original text that the death sentence should not be carried out on pregnant women was to *save the life of an innocent unborn child.*'<sup>7</sup> Similarly, the Secretary General report of 1955 notes that the intention of the paragraph 'was inspired by humanitarian considerations and by *consideration for the interests of the unborn child.*'<sup>8</sup>

<sup>2</sup> Committee on the Elimination of Discrimination against Women, Concluding observations on the combined seventh and eighth periodic reports of Poland, 14 November 2014, CEDAW/C/POL/CO/7-8, 37.

<sup>3</sup> Prof. Chazan odniósł się do sprawy aborcji w Szpitalu Świętej Rodziny, available at: <http://www.niedziela.pl/arttykul/21182/Prof-Chazan-odniosl-sie-do-sprawy-aborcji>

<sup>4</sup> Wrocław: ważące 700 gramów dziecko przeżyło aborcję, available at: <http://wiadomosci.onet.pl/wroclaw/wroclaw-wazace-700-gramow-dziecko-przezylo-aborcje/5kv7p>

<sup>5</sup> Po interwencji Ordo Iuris Rzecznik Praw Pacjenta wszczął postępowanie wyjaśniające w sprawie podejrzenia uśmiercenia dziecka narodzonego w trakcie późnej aborcji, available at: <http://www.ordoiuris.pl/po-interwencji-ordo-iuris-rzecznik-praw-pacjenta-wszczal-postepowanie-wyjasniajace-w-sprawie-podejrzenia-usmiercenia-dziecka-narodzonego-w-trakcie-poznej-aborcji,3715,i.html>.

<sup>6</sup> In accordance with the Article 32 of the Vienna Convention, the *travaux préparatoires* are considered to be a "supplementary means of interpretation."

<sup>7</sup> Report of the Third Committee to the 12th Session of the General Assembly, 5 December 1957. A/3764 § 18.

<sup>8</sup> Report of the Secretary-General to the 10th Session of the General Assembly, 1 July 1955. A/2929, Chapter VI, §10.

13. The protection of unborn life is also found through an ordinary reading of the language in the preamble of the Convention on the Rights of the Child (CRC). The preamble states, '[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before as well as after birth.*' Article 1 of the CRC defines a child as 'every human being below the age of eighteen years.' This provides an upper limit as to who is a child, but does not provide a lower limit on when the status of 'child' attaches.
14. Providing access to abortion means that more women suffer from abortion-related complications. There are numerous maternal risks associated with abortion. A major study published in the *British Medical Journal* in 2015 concluded that States with 'less permissive' abortion laws 'exhibited consistently lower maternal mortality rates.'<sup>9</sup> Although the study explains these differences in terms of other independent factors rather than in terms of abortion legislation itself, it nevertheless concludes, 'No statistically independent effect was observed for abortion legislation, constitutional amendment or other covariates.'<sup>10</sup> Because abortion legislation has no effect on maternal mortality, abortion need not be legalized to protect women's health. Abortion is further associated with a high risk of haemorrhaging, developing sepsis, and developing injuries to internal organs, including intrauterine perforations.<sup>11</sup> Moreover, abortion can never be safe because it takes the life of the unborn child and harms the mother through the loss of her child.
15. Therefore, Poland must continue protecting the right to life of the unborn and must focus on helping women get through pregnancy and childbirth safely, rather than on ending pregnancies. Poland must protect women, girls, and children. Furthermore, Poland needs to investigate all cases of abortion where the child survives and dies thereafter due to lack of the provision of medical care. Poland must prosecute such cases as manslaughter and ensure that the perpetrators are brought to justice in line with Poland's criminal law.

## **(b) The Right to Freedom of Thought, Conscience, and Religion**

### *Background*

1. The right to freedom of thought, conscience, and religion is protected in Article 53 of the Constitution, which states: Freedom of conscience and religion shall be ensured to everyone.
2. Freedom of religion shall include the freedom to profess or to accept a religion by personal choice as well as to manifest such religion, either individually or collectively, publicly or privately, by worshipping, praying, participating in ceremonies, performing of rites or teaching...

16. Furthermore, Article 25(2) of the Constitution indicates:

Public authorities in the Republic of Poland shall be impartial in matters of personal conviction, whether religious or philosophical, or in relation to outlooks on life, and shall ensure their freedom of expression within public life.

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<sup>9</sup> Elard Koch, Monique Chireau, and Fernando Pliego et. al., *Abortion Legislation, Maternal Healthcare, Fertility, Female Literacy, Sanitation, Violence Against Women and Maternal Deaths: A Natural Experiment in 32 Mexican States*, *BMJ OPEN* 2015:5 e006013, doi:10.1136/bmjopen-2014-006013, 1.

<sup>10</sup> *Ibid.*

<sup>11</sup> Gunnell Lindell and Folke Flam, *Management of Uterine Perforations in Connection with Legal Abortions*, *ACTA OBSTET GYNECOL SCAND.* (1995) May 74(5):373-5, available at <http://onlinelibrary.wiley.com/doi/10.3109/00016349509024431>.

17. However, it has been reported that the right to freedom of thought, conscience, and religion of medical staff, especially in cases of abortion, is not fully respected. One of the most prominent cases is that of Dr. Bogdan Chazan.
18. Dr. Chazan is a renowned specialist in obstetrics and gynaecology who has been practising in this area of medicine since 1974. Since 2004, Dr. Chazan was Department Director of Obstetrics and Gynaecology at Holy Family Hospital in Warsaw. In 2014, Dr. Chazan refused on the basis of conscience to perform an abortion on a child diagnosed with severe brain damage. As a result, the hospital was fined and Dr. Chazan was fired from the Holy Family Hospital in Warsaw, with his contract cancelled by the Mayor of Warsaw, Ms. Hanna Gronkiewicz-Waltz. At all times, Dr. Chazan was open about his faith and had previously signed a 'Declaration of Faith' together with over 3,000 other medical experts.<sup>12</sup>
19. Since then, many other medical professionals, including nurses, have come forward reportedly complaining of not being able to rely on conscientious objection to abortion.<sup>13</sup>

#### *Freedom of Thought, Conscience and Religion under International Law*

20. Article 18 of the Universal Declaration of Human Rights (UDHR) and Article 18(1) of the ICCPR guarantee the right to freedom of thought, conscience to everyone.
21. The Human Rights Committee confirmed in its General Comment No.22:
 

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others.<sup>14</sup>
22. Paragraph 1 of the UN General Assembly Resolution on the Elimination of All Forms of Religious Intolerance reaffirmed that 'freedom of thought, conscience, religion and belief is a human right derived from the inherent dignity of the human person and guaranteed to all without discrimination.'<sup>15</sup>
23. In General Comment No. 22, the Committee stated:
 

The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief.<sup>16</sup>

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<sup>12</sup> Ordo Iuris, Bogdan Chazan, available at: <http://bogdanchazan.pl/>.

<sup>13</sup> *Polozna poskarzyla sie ze jest zmuszana do pomocy w aborcji*, available at: <http://natemat.pl/93817,polozna-poskarzyla-sie-ze-jest-zmuszana-do-pomocy-w-aborcji-teraz-szpital-zada-od-niej-50-tys-zl-nie-pozwolimy-sobie-na-zniewagi>.

<sup>14</sup> UN Human Rights Committee (HRC), CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, available at: <http://www.refworld.org/docid/453883fb22.html>.

<sup>15</sup> Elimination of all forms of religious intolerance, A/RES/48/128, 20 December 1993, 1, available at: <http://www.un.org/documents/ga/res/48/a48r128.htm>.

<sup>16</sup> (n 15)

24. The Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt (the Special Rapporteur), confirmed that conscientious objection is incorporated in the right to freedom of thought, conscience, and religion. Despite the fact that he was referring to the example of military service, this rule would be similarly applicable in case of medical staff as it involves the same objection to the taking of human life.
25. Despite the recognition of the right to conscientious objection of medical staff to abortion under international law, it has been rejected by treaty monitoring bodies, for example, the CEDAW Committee general recommendation on the right to health<sup>17</sup> and the CRC Committee general comment on the right to health,<sup>18</sup> with the argument that the exercise of conscientious objection by medical staff impedes access to reproductive health services. This wrongly places a right to 'reproductive health services,' a right that is not mentioned in any international treaty, above a right to freedom of conscience, which is explicitly recognised.
26. Poland must ensure that the right to conscientious objection of medical staff is respected in practice.

### **(c) Recommendations**

27. In view of the above, ADF International recommends the following:
  - Continue its efforts to protect the right to life of the unborn;
  - Work to end abortion in accordance with international obligations to protect the life of the unborn;
  - Ensure that any cases of death of children who survive abortions are duly investigated and prosecuted as manslaughter;
  - Ensure that the right to freedom of thought, conscience, and religion is duly recognised and respected, in line with international law standards;
  - Ensure that the right to conscientious objection of medical staff is respected in practice.

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<sup>17</sup> General recommendations, Committee on the Elimination of Discrimination against Women, Recommendation 24, 11, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recom.htm#recom24>.

<sup>18</sup> Committee on the Rights of the Child, General Comment No. 15.



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