Commissioners for Human Rights of Poland answers to the Guiding Questions for the X Session of the Open-ended Working Group on Ageing

Autonomy and independence

National legal framework

1. What are the legal provisions in your country that recognizes the right to autonomy and independence? Do they have a constitutional, legislative or executive foundation?

Under the **Constitution, bodily integrity and personal freedom are guaranteed to every person**. People may be deprived of their freedom or have it restricted only on conditions and according to procedures set out in a parliamentary act. One of the features of individual freedom is the “**right to make decisions regarding one’s personal life**”, **provided for under the Constitution**. The right to make decisions regarding one’s life and the protection of the right to privacy are not absolute, and may be limited for the sake of other constitutional norms, principles or values, with the degree of the limitation being proportionate to the weight of the cause which calls for it.

The Polish legal system contains regulations that permit full **legal** **incapacitation of an older person by limiting his/her autonomy and independence, even if the person in question is capable of making certain decisions concerning his/her life**.

**One of the basic patients’ rights** that doctors have the obligation to respect is that **medical treatment be undertaken only upon informed consent of the patient**. This right stems from the Act on Patients’ Rights and on the Patients Ombudsman, and from the Act on Physicians and Dentists. If an incapacitated person in capable for expressing an informed opinion about the medical procedure, his/her consent must be obtained. If such a person objects to the medical procedure, permission of the guardianship court is required.

On 1 January 2018, an amendment to the Act on Mental Health came into force, **extending the rights of persons placed in care institutions against their will, by protecting their procedural rights**.

According to the amendment, a person admitted to a care institution, even if incapacitated, may request the guardianship court to reverse the ruling concerning his/her placement there. Likewise, a person who refuses to prolong his/her stay in a care institution may apply to the guardianship court for discontinuation of the stay. The amendment also introduces a duty to hear an incapacitated person prior to admission to a care institution.

In the document ***Social Policy for Older Persons until 2030. Security – Participation – Solidarity*, adopted in 2018 by the Council of Ministers, there is no mention of the autonomy and independence of older persons** nor of their role as participants in the development of measures that concern them. These issues are also absent from the Act on Older Persons which outlines the scope of measures for monitoring older persons.

5. What are the best practices and main challenges in adopting and implementing a normative framework to implement these rights?

A point of particular importance is the l**ack of explicit regulations that would confirm the binding character of patient’s consent (or lack thereof) to future medical treatment** (the issue is dealt with by court verdicts).

In the case of care provided 24 hours a day, other problems and challenges have also been identified:

#### a) the fact that care centre’s staff members are also the legal guardians of the persons under their care may lead to the lack of objectivity in the way they represent the older persons’ interests, since the staff members report to the head of the care centre

b) video surveillance is a source of a conflict between security and the right to privacy

c) problematic leave rules; only mental and/or physical health concerns identified by a physician may provide grounds for denying the inhabitant of a care centre the right to go outside unattended

d) cooperation between care centres and psychologists; as of now, care centres are not obliged to employ psychologists

e) lack of regulations governing the use of physical coercion in round-the-clock centres; if physical coercion is indeed used, it is not just illegal, but may amount to a criminal act (violation of physical integrity or unlawful detention).

**Good practices:** a) testing mental capacity (Hodgkinson’s Mental Test) and physical capacity (Barthel Index) in order to tailor the care and treatment services to the needs of the care centre’s inhabitants; b) wide array of occupational therapies; c) employment of a psychologist; d) use of watches with GPS devices to track care centre inhabitants outside the premises.

**Equality and non-discrimination**

6. Which are the measures adopted to ensure equitable access by older persons to the enjoyment of the right to autonomy and independence, paying special attention to groups in vulnerable situation?

The Constitution contains a prohibition to discriminate against anyone on any grounds. However, the Act on Equal Treatment as such does not specifically identify the right to autonomy and independence as falling within the scope of the document. Moreover, the Act does not prohibit discrimination on the grounds of age in the context of access to social security and housing services which are among the pillars of autonomy.

**Participation**

7. The design and implementation of normative and political framework related to autonomy and independence included an effective and meaningful participation of older persons?

The document *Social Policy for Older Persons until 2030. Security – Participation – Solidarity*, adopted in 2018 by the Council of Ministers, contains recommendations concerning consultations with Senior Citizens’ Councils which may (but do not have to) be appointed as advisory bodies to local self-governments. Many of the measures described in the document aim to engage older persons in social life and to increase their autonomy by adjusting public spaces, helping maintain the self-sufficiency of older people and enhancing the availability of support services close to home. No additional funds on top of the existing government programmes have been appropriated for the implementation of these measures. This raises doubts as to whether the Policy will be widely implemented and whether it will significantly strengthen the autonomy of older persons.

**Another issue is the regulations concerning voting, and measures designed to engage older persons in public life.** Current regulations governing the right to vote and to stand for election should be expanded to cover measures facilitating seniors’ participation in elections and referenda, including local-level referenda, e.g. by postal voting or transport provision to polling stations etc., as well as standards facilitating the participation of older persons in meetings and proceedings of municipal councils. The existing and binding standards, such as those concerning the technical conditions to be met by polling stations, should be effectively implemented.

Accountability

8. What judicial and non-judicial mechanisms are in place for older persons to complain and seek redress for denial of their right to autonomy and independence

Non-judicial mechanisms: **with reference to institutional care for older persons, complaint mechanisms are in most cases ineffective and sometimes absent**.

In most care centres, no contact details or only fragmentary contact details of human rights institutions were on display anywhere, even though such information should be made available to the residents in the common spaces of the centre. Often, there were no signs informing the residents that it is possible to file a complaint. Theoretically, the residents could make verbal complaints to the head of the centre, but such complaints were not documented in any way.

Another shortcoming noted by inspectors in such care centres was the practice of passing information about the regulations in place in the centre to the families of the residents rather than to the residents themselves. No regulations specify who has the right to information about the health of the residents. In the light of regulations pertaining to the informed consent of the patient, passing health-related information about a patient to anyone, even to close family members, is unacceptable without the explicit consent of the patient. Personal data protection regulations are also violated, including regulations concerning sensitive data. This concerns both non-incapacitated and incapacitated residents.

**With reference to the health care system, complaint procedures do exist in the individual health care facilities as well as in the regional offices of the National Health Fund.** The Patients’ Ombudsman is the national-level government administration authority for the protection of patients’ rights. The Ombudsman is required to carry out an explanatory proceeding following the receipt of every report on likely violation of patients’ rights.

In addition to the above, **the civil law protects personal rights to freedom and privacy**. The civil law allows one to demand that actions violating these rights be stopped, unless they are permitted by the law. In case of violation, the victim may demand that the perpetrator to remedy the situation. When a personal right is violated, the court may rule that compensation be paid to the victim for the wrong inflicted or, at the victim’s request, that payment be made to a cause indicated by the victim. This mechanism has two flaws: the legal flaw is that the person filing the case must prove that violation has taken place, i.e. is burdened with the task of finding evidence; the factual flaw is that judicial proceedings are very lengthy and the judicial system is inefficient in this respect. In civil law cases, the assistance of a public lawyer is only provided on grounds of material status, with no regard to such circumstances as the helplessness or poor health of the person in question.