

JUDGEMENT OF THE POLISH CONSTITUTIONAL TRIBUNAL OF 22 OCTOBER 2020 (K 1/20) ON EUGENIC ABORTION

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Abstract. The paper discusses the judgement of the Constitutional Tribunal of the Republic of Poland, given on 22 October 2020 (K 1/20) concerning *eugenic abortion*. The Constitutional Tribunal adjudicated that legal provisions permitting termination of pregnancy on the basis of “a high probability of the foetus’s severe and irreversible impairment” or of “the foetus’s life-threatening incurable illness” are inconsistent with the Constitution of the Republic of Poland. The result of the ruling is a ban on eugenic abortion and, consequently, a wider scope of protection of human life in the prenatal period.

Keywords: abortion, conceived child, right to life, Constitution of the Republic of Poland

INTRODUCTION

On 22 October 2020 the Polish Constitutional Tribunal gave the judgement in the case K 1/20 concerning *eugenic abortion*. The Constitutional Tribunal adjudicated that legal provisions permitting termination of pregnancy on the basis of “a high probability of the foetus’s severe and irreversible impairment or of the foetus’s life-threatening incurable illness” are inconsistent with the Constitution of the Republic of Poland. According to the Constitution of Poland, judgements of the Constitutional Tribunal are “of universally binding application and final” (Article 190(1)) and “take effect from the day of their publication” (Article 190(3)).¹ It means that – from 27 January 2021 (the day of the publication of the decision in the Journal of Laws of the Republic of

¹ The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483 as amended; see also: <https://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland> [accessed: 22.09.2021].

Poland)² – so-called *eugenic abortion* has been prohibited and punished under criminal law.

The ruling was adopted by a majority of votes. Two dissenting opinions (of Judge L. Kieres and Judge P. Pszczółkowski) to the judgment were submitted. Three subsequent dissenting opinions (by Judge Z. Jędrzejewski, Judge M. Muszyński and Judge J. Wyrembak) to the written justification for the judgment were published.

1. HISTORICAL BACKGROUND AND LEGAL BASES

Currently binding in Poland legal solutions regarding criminal protection of human life during prenatal development are based on a general ban of abortion, however, the prohibition is limited by a few exceptions (so-called *model of reasons*). A detailed scope of legal protection of the *conceived child*³ should be reconstructed from regulations of the Penal Code⁴ and of the Act on Family Planning, the Protection of Foetus and Grounds for Permitting the Termination of a Pregnancy.⁵

Article 152(1) of the Penal Code considers pregnancy termination with woman's consent, though with violation of the provisions of the Act of 7 January 1993, as criminal offence. Such an act is punishable with imprisonment ranging from 1 month to 3 years. A more severe penalty – that is imprisonment from 6 months to 8 years – applies in the case of pregnancy termination when the conceived child attained the ability to independent life outside the mother's womb (Article 152(3) of the Penal Code). Assistance to a pregnant woman in pregnancy termination with the violation of the provisions of the law or inducement to such an activity is penalized with imprisonment of up to 3 years (Article 152(2) of the Penal Code).

In Article 153(1) of the Penal Code, two cases of pregnancy termination against the will of the pregnant woman are punishable, i.e. the first, pregnancy termination with the use of violence against the pregnant woman or in other way without her consent, for example deceitfully, and the second, forcing a pregnant woman to terminate her pregnancy by violence, illegal threat or deceit. This criminal offence is punishable with imprisonment from 6 months to 8 years. The fact that the offense of the perpetrator was directed against

² Journal of Laws item 175. Justification to the judgement was published on 27 January 2021, see <https://monitorpolski.gov.pl/M2021000011401.pdf> [accessed: 22.09.2021].

³ The phrase *conceived child* (in Polish: *dziecko poczęte*) is a law term that means “human being from the moment of conception” [Grześkowiak 1996, 240].

⁴ Act of 6 June 1997, the Penal Code, Journal of Laws No. 88, item 553 [hereinafter: the Penal Code].

⁵ Act of 7 January 1993 on Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy, Journal of Laws No. 17, item 78 as amended.

the conceived child that attained the ability to independent life outside the mother's womb is a circumstance resulting in a more severe penalty, that is imprisonment from 1 to 10 years. (Article 153(2) of the Penal Code). The Penal Code also defines the types of the so-called offenses qualified by consequences, in which a more severe penalty was introduced, dependent on the effects, such as the death of the pregnant woman (Article 154 of the Penal Code).

While the case was examined by the Tribunal in 2020, Article 4a(1) of the Act of 7 January 1993 provided three conditions for pregnancy termination, namely when: 1) pregnancy constitutes a threat to the life or health of the pregnant woman (*medical reasons*), 2) on the basis of prenatal tests or on other medical grounds, there is a high probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness (*eugenic reasons*), 3) there are justifiable suspicions that the pregnancy results from a prohibited act (*criminal reasons*).

The law also provided for a number of specific requirements regarding a woman's consent to perform abortion, time limits for performing abortion, place of the procedure (a hospital or a private clinic), doctor's qualifications.⁶

It is worth noting that in 1996 an attempt was made in the Polish Parliament to liberalize the protection of life of a conceived child, which was eventually blocked by the Constitutional Tribunal. In the Act of 30 August 1996 on the Amendment of the Act on Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy,⁷ two new, very unclearly specified *social reasons* for pregnancy termination appeared, namely "difficult living conditions" or "difficult personal situation" of the woman. In the decision of 28 May 1997 (K 26/96)⁸ the Constitutional Tribunal disqualified – in view of constitutional standards – these two *social reasons* for pregnancy termination. The 1997 ruling is considered one of the most important in the history of the Constitutional Tribunal [Żelichowski 1997, 104]. In subsequent years, the argumentation adopted in it was a point of reference for decisions concerning human life. The Tribunal outlined in detail the constitutional standards for the protection of human life, referring them to the prenatal period of human development.

The Constitutional Tribunal held that the very essence of a democratic state ruled by law implies the obligation to ensure the protection of human life from the moment of conception. "Such a state" – the Tribunal said – "can only exist as a community of people and only people can be recognized as the

⁶ More see Wiak 2021, 1030.

⁷ Act of 30 August 1996 on the amendment of the Act on Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy, Journal of Laws No. 139, item 646.

⁸ Published in: "Orzecznictwo Trybunału Konstytucyjnego" of 1997, No. 2, item 19.

actual carriers of rights and obligations laid down by the State concerned. Life is the fundamental attribute of a human being. When life is taken away, a human being is at the same time annihilated as the holder of rights and obligations. If the essence of a democratic state ruled by law is a set of fundamental directives inferred from the sense of law proclaimed through democratic procedures, providing for the minimum level of fairness thereof, therefore, under a democratic state ruled by law, the first such directive must be respect for the value, as its absence excludes the recognition of a person before the law, i.e. human life from its outset. The supreme value for a democratic state ruled by law shall be a human being and his/her goods of the utmost value. Life is such a value and, in a state under a democratic state ruled by law, it must be covered by constitutional protection at every stage of development.”⁹

The following three statements of the Tribunal should be considered particularly important, the first: “human life, also at the prenatal stage, is a constitutional value,”¹⁰ the second: the recognition of the fact that “every human being is eligible for the protection of his/her life from the moment of conception,”¹¹ and the third, that “the value of legal interest covered by constitutional protection, such as human life, including life at the prenatal stage of development, cannot be subject to any differentiation.”¹²

According to the Tribunal, regardless of the recognition of the fact that human life, also at the prenatal stage, is a constitutional value, in certain extraordinary situations the protection of that value may be limited or even waived in order to protect or enforce other constitutional values, rights or freedoms. The decision of the legislator who waives the protection of a constitutional value or even legalizes cases of violations of that value, must be justified on the basis of the aforesaid conflict of constitutional interests, rights or freedoms. Nevertheless, the legislator is not entitled to resolve such conflicts in a discretionary, arbitrary manner.¹³

From that point of view, the regulation contained in the Act of 30 August 1996, in the part covering the legalization of abortion when the living conditions of a pregnant woman were difficult or her personal situation was difficult, did not meet the above requirements. The comparison of the value of such interest that was in conflict in view of constitutional standards, disqualified the regulation of abortion for *social reasons*. Human life is the fundamental interest of a human being, as the Tribunal emphasised. The essence of constitutional values, by reference to which attempts can be made to justify the regulation laid down in the Act of 30 August 1996 regarding *social reasons*

⁹ Ibid., p. 6–7.

¹⁰ Ibid., p. 15.

¹¹ Ibid., p. 4.

¹² Ibid.

¹³ Ibid., p. 15.

for abortion, does not entail their priority or at least equality in relation to the value of human life, also at the prenatal stage.¹⁴

In the following years, the constitutional standards for the protection of human life, outlined in the decision of 28 May 1997 by the Constitutional Tribunal, became a point of reference for resolving various issues related to the protection of life, including, among others, the problem of admissibility of the decision of shooting down a civilian aircraft posing a potential threat of a terrorist attack. Resting its decision of 30 September 2008¹⁵ on the principle of the legal protection of life and human dignity, the Constitutional Tribunal appealed to axiology underlying a democratic state ruled by law. This axiology entails some important limitations to the state's activity that should be respected in all circumstances, including the threat of terrorism. However, it is unacceptable in the first place to judge the value of human life, neither in quantitative nor qualitative terms.¹⁶

The constitutional standards of life protection outlined in the decision of 28 May 1997 also became the starting point for the Tribunal's ruling on *eu-genic abortion* in 2020.

2. JUDGEMENT AND ITS JUSTIFICATION

In 2020 the Constitutional Tribunal considered the application lodged by a group of 119 Deputies of Parliament (*Sejm*) demanding that Article 4a(1) (2) and Article 4a(2), first sentence, of the Act of 7 January 1993 on Family Planning, the Protection of Foetus and Grounds for Permitting the Termination of a Pregnancy be examined for compliance with the Constitution of the Republic of Poland.

Pursuant to Article 4a(1)(2) of the Act of 7 January 1993, pregnancy may be terminated exclusively by a competent medical practitioner when, "on the basis of prenatal tests or on other medical grounds, there is a high probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness." Article 4a(2) of the Act of 7 January 1993 specifies that "the termination of a pregnancy is permissible until the foetus is able to live outside the body of the pregnant woman."

The Constitutional Tribunal examined the conformity of the above provisions to Article 38 in conjunction with Article 30 and Article 31(3) of the Constitution of the Republic of Poland. Pursuant to Article 38 of the Constitution, "the Republic of Poland shall ensure the legal protection of the

¹⁴ *Ibid.*, p. 15–16.

¹⁵ Decision of the Constitutional Tribunal of 30 September 2008, ref. no. K 44/07, "Orzecznictwo Trybunału Konstytucyjnego" of 2008 (7A), item 126.

¹⁶ More see Wiak 2012, 180–82.

life of every human being.” Article 30 of the Constitution, lays down the strong normative declaration and obligation directed to all authorities of Poland, that “the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.” Article 31(3) of the Constitution, contains a plain directive that “Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state ruled by the law for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.”

In the beginning, the Tribunal emphasized that the problem under examination required considering two issues of a constitutional nature. First of all, it concerns the legal status of the child in the prenatal phase of life and its subjectivity within law. Secondly, it requires determining the admissibility and limits of abortion, and thus action in the event of a conflict of values.¹⁷

The Tribunal upheld its earlier position expressed in the decision of 28 May 1997 that human life is a value at every stage of development, and as a value whose source are constitutional provisions, it should be protected by the legislator, not only in the form of provisions guaranteeing human survival as a purely biological entity, but also as a whole being, for the existence of which there are also necessary social, living and cultural conditions that make up the entire existence of an individual. In the opinion of the Tribunal, a child not yet born, as a human being – a person who is entitled to inherent and inalienable dignity, is a subject having the right to life, and – pursuant to Article 38 of the Constitution – the legal system must guarantee due protection for this central good, without which this subjectivity would be deleted.¹⁸

Thus, human life is subject to legal protection, including in the prenatal phase, and the legal subjectivity of a child is intrinsically linked with its dignity. However, the protection of life as a constitutional value may be subject to limitations in the event of a conflict with other constitutional liberties and rights. These restrictions – in accordance with the principle of proportionality resulting from Article 30(3) of the Constitution – may be introduced only when they are “necessary in a democratic state ruled by law.”¹⁹

Referring to its previous jurisprudence, the Tribunal indicated that the condition of necessity in relation to solutions limiting the legal protection of life must be interpreted particularly restrictively, in the direction consistent with the criterion of “absolute necessity,” developed in the jurisprudence of the European Court of Human Rights under Article 2 of the European Convention

¹⁷ See <https://monitorpolski.gov.pl/M2021000011401.pdf> [accessed: 22.09.2021], p. 22.

¹⁸ *Ibid.*, p. 44.

¹⁹ *Ibid.*, p. 45.

on Human Rights. Any limitation on the legal protection of human life must be treated as an *ultima ratio* measure. Moreover, due to the fundamental nature of the right to life in the constitutional axiology, not each of the goods indicated in Article 31(3) of the Constitution, e.g. property, public morality, environmental protection or even the health of other people, may justify solutions that can harm human life. The condition for limiting the legal protection of life is the existence of a situation in which it is undoubtedly incompatible with the analogous rights of other people. This premise can be broadly defined as the requirement of symmetry of goods: sacrificed and saved.²⁰

Taking into account the provisions to Article 38 in conjunction with Article 30 and Article 31(3) of the Constitution, the Tribunal stated that the only grounds for terminating a pregnancy cannot be circumstances related to the child's health, the more so as the statutory premise for terminating a pregnancy is not the state of diagnostic certainty but only a "high probability" of severe and irreversible impairment or an incurable life-threatening disease. The Tribunal found that it is not permissible to juxtapose human health with his/her life, as the problem of weighing goods cannot be considered when both the sacrificed and the saved good belong to the same subject. It shared the view expressed in the legal literature that in the case of the premises specified in Article 4a(1)(2) of the Act of 7 January 1993 "the mere fact of fetal impairment (an incurable disease) cannot independently determine the admissibility of the termination of a pregnancy in the constitutional perspective"²¹ [Wróbel 2007, 32].

Due to the essence of the termination of a pregnancy, considering the conflict situation, the analogous good can only be sought on the side of the child's mother. Although the high probability of severe and irreversible impairment of the fetus or an incurable life-threatening disease may also be associated with a threat to the life or health of the mother, the *eugenic reasons* under examination do not refer to such a situation of a woman, but constitute a separate premise for the admissibility of termination of a pregnancy specified in Article 4a(1)(1) of the Act of 7 January 1993. In the opinion of the Tribunal, Article 4a(1)(2) of the Act of 7 January 1993 does not allow one to assume that the high probability of severe and irreversible impairment of the fetus or an incurable disease that threatens its life is to be the basis for the automatic presumption of a violation of the welfare of a pregnant woman, and the mere indication of a possible burden of such defects in the child is eugenic in nature. This provision does not refer to measurable criteria of violating the mother's welfare justifying the termination of a pregnancy, i.e. a situation in which she could not be legally required to sacrifice a given legal interest. Finally, taking into account the above arguments, the Tribunal stated that the

²⁰ Ibid., p. 47.

²¹ Ibid., p. 48–49.

legalization of the abortion when, on the basis of prenatal tests or on other medical grounds, there is a high probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness, has no constitutional justification.²²

3. CONSEQUENCES

Judgement of the Polish Constitutional Tribunal given on 22 October 2020 had significant legal and social consequences.

The direct result of the judgment was the loss of binding force by the provision of Article 4a(1)(2) of the Act of 7 January 1993, and thus – limitation of the catalog of circumstances legalizing termination of pregnancy. From the date of the publication of the judgment, a “foetus” in “a high probability of severe and irreversible impairment or life-threatening incurable illness” should be treated as a “child” with a disability, requiring special protection and assistance from the state [Lis–Staranowicz 2021, 103]. Against the background of Polish criminal law, this statement may not be surprising. It does not introduce any “normative novelty,” if only because the Act of 6 January 2000 on the Ombudsman for Children in Article 2(1) states that “a child is every person from the moment of conception until the age of majority.”²³

The fact that eugenic abortion is no longer legal, has the effect of extending the scope of criminalization under Article 152(1) of the Penal Code. As of 27 January 2021, termination of pregnancy for *eugenic reasons* became a crime. Such a result of the ruling could suggest a violation of an old idea and important principle of criminal law that only a parliament may proscribe a particular act as punishable (*nullum crimen sine lege*). Such an objection was raised against both the judgment of 28 May 1997 and the judgment of 22 October 2020 [Giezek and Kardas 2021, 59–60]. The Constitutional Tribunal referred to such an objection in the justification, stating that the Tribunal “does not introduce a new type of prohibited act, does not criminalize.”²⁴ The subject of the scrutiny was not Article 152(1) of the Penal Code, which is a “blank rule” criminalizing pregnancy termination “with violation of provisions of the law.” Such “provisions” are not included in the Penal Code but in Article 4a(1)(2) of the Act of 7 January 1993.

It should be noted that after the Tribunal eliminated *social reasons* for the termination of a pregnancy in 1997, the most common condition for legal termination of a pregnancy in the following years were *eugenic reasons*. According to annual *Report of the Council of Ministers on the Implementation*

²² Ibid., p. 49.

²³ Act of 6 January 2000 on the Ombudsman for Children, Journal of Laws of 2017, item 922.

²⁴ See <https://monitorpolski.gov.pl/M2021000011401.pdf> [accessed: 22.09.2021], p. 53.

of the Act of 7 January 1993 on Family Planning, the Protection of Foetus and Grounds for Permitting the Termination of a Pregnancy in 2019,²⁵ the total number of registered abortions for *medical*, *eugenic* and *criminal reasons* amounted to 1110, of which: 1074 – for *eugenic reasons*, 33 – for *medical reasons*, 3 – for *criminal reasons*. These data do not differ from the number of abortions recorded in previous years.²⁶

In the current legal state, two conditions for pregnancy termination are still in force, the first, when pregnancy constitutes a threat to the life or health of a pregnant woman (*medical reasons*), or the second, when there are justifiable suspicions that the pregnancy results from a prohibited act (*criminal reasons*). So far, both in the doctrine of Polish criminal law and in the jurisprudence of Polish courts, these conditions are restrictively interpreted, e.g. the *medical reasons* does not include a threat to the mental condition of a woman.

Another consequence of the ruling was that it caused strong social emotions and sparked a wave of social protests. On the same day that the sentence was passed, demonstrations against it began. The protest was characterized by an unprecedented level of aggression and vulgarity. Demonstrators attacked Catholic churches, and holy masses were interrupted. Leaders of the protest published in social media the personal addresses of the judges of the Constitutional Tribunal and pro-life activists.

In such circumstances, on 29 October 2020 President Andrzej Duda submitted to the Parliament a bill amending the Act on Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy.²⁷ According to the President's proposition, abortion is to be allowed in a situation where "prenatal tests or other medical considerations indicate a high probability that a child will be born with a disease or defect that will lead to its death inevitably and directly, regardless of the therapeutic measures used." As a consequence, legal termination of pregnancy would be allowed only in the case of finding lethal defects (excluding Down Syndrome).

Another proposal, put forward in the Parliament by the deputies of the Left, is the project to restore the *eugenic reasons* for abortion, not in the Act of 7 January 1993, but in the Article 152 of the Penal Code.²⁸ The provision requires that cases of the termination of a pregnancy (in its first 12 weeks of duration) with the consent of the woman, should be treated as unpunishable "if on the basis of prenatal tests or on other medical grounds, there is a high

²⁵ See <https://orka.sejm.gov.pl/Druki9ka.nsf/0/E3A8B0D34BEFF42BC12586FD003A09AE/%24File/1332.pdf> [accessed: 22.09.2021].

²⁶ *Ibid.*, p. 115.

²⁷ The bill presented by the President of the Republic of Poland amending the Act on Family Planning, the Protection of Foetuses, and Grounds for Permitting the Termination of a Pregnancy, Paper no. 727, <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=727> [accessed: 22.09.2021].

²⁸ The bill amending the Penal Code, see: [http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-299-2020/\\$file/9-020-299-2020.pdf](http://orka.sejm.gov.pl/Druki9ka.nsf/Projekty/9-020-299-2020/$file/9-020-299-2020.pdf) [accessed: 22.09.2021].

probability of the foetus's severe and irreversible impairment or of the foetus's life-threatening incurable illness.”

The above two bills were submitted to the Parliament and, after a few months, are still at the initial stage of legislative work (*first reading*), which seems to indicate a lack of sufficient political will to proceed with them.

CONCLUSION

It should be pointed out that, on the one hand, the normative importance of the judgment is questioned on the procedural and substantive grounds.

Because the status of three judges who participated in the ruling is challenged (with reference to the judgement of the Constitutional Tribunal of 3 December 2015²⁹) some lawyers consider the decision as “procedurally flawed” and “non-existent” [Gliszczyńska–Grabias and Sadurski 2021, 130; Piotrowski 2021, 76–77].³⁰ However, according to the Constitution of Poland, judgements of the Constitutional Tribunal are binding and final (Article 190(1)) and “take effect from the day of their publication” (Article 190(3)). Consequently, in Polish law there is no procedure to question the rulings of the Constitutional Tribunal and there are no authorities competent to evaluate the possible defectiveness of such rulings.

It is also stated that the ruling fails to acknowledge the need to protect the inherent and inalienable dignity of women and it violates the prohibition of cruel treatment and torture, the right to protection of private life and the right to health, protected under the Constitution and public international law³¹ [Grabowska–Moroz and Łakomicz, 255–56; Piotrowski 2021, 73–76].

On the other hand, given the content of constitutional norms and the detailed standards of life protection set out in the previous jurisprudence of the Constitutional Tribunal, it could not be reasonably expected that the ruling on *eugenic abortion* would have been different. In the Polish criminal law literature, opinions have been expressed for years that the admissibility of termination of a pregnancy in such circumstances violates the constitutional principles of protecting human life and the very essence of a democratic state ruled by law, because sacrificing the life of a conceived child is not sufficiently justified by the need to protect women's essential rights [Wiak 2001, 267].

²⁹ Judgement of the Constitutional Tribunal of 3 December 2015, ref. no. K 34/15, Journal of Laws item 2129.

³⁰ *Statement by the Legal Experts Group of the Stefan Batory Foundation on the Constitutional Tribunal Ruling on Abortion*, <https://www.batory.org.pl/en/oswiadczenie/statement-by-the-legal-experts-group-of-the-stefan-batory-foundation-on-the-constitutional-tribunal-ruling-on-abortion/> [accessed: 14.09.2021], p. 1.

³¹ *Ibid.*, p. 1–2.

Against the normative background, the judgment has a strong constitutional justification.

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