

Monika Gizynska, *Dr. iur.*

University of Warmia and Mazury in Olsztyn, Poland

PERMISSIBILITY OF PREGNANCY TERMINATION – THE LEGAL REALITY IN POLAND AFTER THE RULING OF CONSTITUTIONAL TRIBUNAL K 1/20

Keywords: permissibility of pregnancy termination in Poland, constitutional guarantees of the legal protection of human life, abortion, ruling of Constitutional Tribunal K 1/20

Summary

The article presents selected issues related to constitutional guarantees for the legal protection of a child's life in the prenatal period in the event of a collision of rights. The author analyses the problem concerning the legal status of a child in the prenatal phase of life, as well as acceptability and bounds of terminating pregnancy. The author examines the ruling of the Constitutional Tribunal in Poland of 22 October 2020 held that prenatal examinations or other medical data indicate a high probability of serious and irreversible disability of the foetus or an incurable life-threatening disease, was contrary to the Constitution of the Republic of Poland.

Introduction

Roots of the right to life in its contemporary form can be sought in Magna Carta, issued in 1215, which forbade arbitrary deprivation of life. The right to life composed a triad of three principal natural rights formulated by the 17th and 18th century thinkers. However, the right to life as an instrument guaranteeing the basic socio-ethical value was considered to be so obvious that it was merely mentioned, if referred to at all. Among the 18th century declarations of human rights, the right to life was only confirmed in America, where it was explicitly worded in the American Declaration of Independence. French and other European declarations concerned other natural rights. The World War

Two crimes and experiences of that time led to the right of life being strongly reaffirmed in proclamations of people's rights¹.

As regards its fundamental meaning, the right to life first and foremost entails the protection of a person's biological life, and, secondly, it means that a person must not be deprived of life in consequence of any action by the state authorities. It is the fundamental right of every person to exercise the inviolable right to life, which is the pillar of all the other human rights. The course of a human life is biologically conditioned, meaning that it begins from the moment of conception. Some legal regulations are required to protect life since its conception, subject to certain specific cases when women have a right to make an ultimate decision if they wish to carry a pregnancy to term.

1. Constitutional guarantees of the legal protection of human life

Constitutional guarantees of the legal protection of human life are regulated in Art. 38 of the Constitution of the Republic of Poland, which states that the Republic of Poland ensures the legal protection of life of every person². In the light of Polish law, human life is a constitutional value. The Constitution names the principle of protecting the life of every person as the first one among the regulations pertaining to rights and liberty. Rather than focusing on a guarantee of the right to life, the Constitution views human existence as a value deserving special protection. It should be underlined that the provision contained in Art. 38 of the Constitution does not state unambiguously that human life must be obligatorily protected from conception to death.

The entry into force of the provision by Art. 38 of the Constitution should be equated with the decision of the Constitutional Tribunal declaring that the presence of certain rights of an individual, such as the right to life, is an essential component of a democratic state, governed by the rule of law³. Art. 38 of the Constitution of the Republic of Poland guarantees protection of life to every individual, that is a person who has already been born. A question arises whether it entails 'the protection of man' and 'the protection of life'? If so, what is the difference between the two in terms of protection? Art. 38 of the Constitution does not suffice in itself to make such a distinction. The norm arising from the Constitution is very general and needs to be expressed more specifically in ordinary legislation. The legislator permits abortion in certain specific cases, and thus allows the deprivation of life of a conceived child. The Supreme Court stated that "it needs to be emphasised that

¹ Kędzia Z. *Prawo do Życia. Prawa człowieka. Model Prawny* [Right to Life. Human Rights. Legal Model]. Wrocław-Warszawa-Kraków: National Institute Ossolińskich, 1991, p. 169.

² Constitution of the Republic of Poland, of 2 April 1997, Dz. U. of 1997, No. 78, item 483 with subsequent amendments, hereinafter referred to as the Constitution or the Constitution of the RP.

³ Constitutional Tribunal judgement of 25 November 1997, Ref. No. K. 26/97.

irrespective of the opinion approved of by the legislator regarding the temporal borderlines of human life, the criminal law norms can determine differentiated protection of human life, depending on the phase of its development. This holds true both when the termination of pregnancy is considered as more leniently punishable homicide and when – as it is in Polish law – it is a separate type of crime⁴.

A much broader scope of protection is guaranteed to someone already born as an individual person, whereas a narrower one is ensured to a conceived child. This gives rise to another important question: when does a human cease to be a conceived child and becomes a person? The Supreme Court in the judgement cited above concluded that this moment occurs when the delivery of a baby begins, more specifically when “the uterine contractions start, implicating that delivery is in progress;” or when a Caesarean section is performed, this is the moment “procedures for a C-section are started”⁵. Although these borderlines apply to a regulation contained in Crime law, they rest on the foundations laid out by the Constitution and, through the systematic interpretation, are applicable in other branches of law.

In Polish law, the norm of legal protection of life was largely defined in the judgement of the Constitutional Tribunal of 28 May 1997⁶. The Constitutional Tribunal ruled out on the compliance of the provisions of the Act of 30 August 1996 amending the so-called anti-abortion law and some minor acts with the Constitution⁷. The aforementioned act liberalized the permissibility of abortion and weakened the position of an unborn child. The Constitutional Tribunal derived the assumption that protection of the right to life is the state’s responsibility arising from the principles of a democratic state under the rule of law, acknowledging that it was one of the standards of democracy. The Tribunal also pointed out that a democratic state under the rule of law is constituted solely as a certain community of people, where every person and all goods significant for the person are placed in the central position. Protection of life in such a state should therefore be granted to every person from the moment of conception. The constitutional value that life unquestionably is cannot be differentiated according to the phase in one’s life because there are no criteria that would allow one to make such a distinction.

2. Dignity of the person

Notably, human dignity and spirituality are fundamental to human life. How is then dignity perceived in the Polish legal system? Art. 30 of the Constitution of the Polish Republic affirms that the dignity of the person is inherent, inalienable

⁴ Resolution of the Supreme Court of 26 October 2006, Ref. No. I KZP 18/06, OSNKW 2006, No. 11, item 97.

⁵ Ibid.

⁶ Constitutional Tribunal judgement of 28 May 1997, Ref. No. K. 26/96, OTK 1997/2/19.

⁷ Dz. U. of 1996, No. 139, item 646.

and inviolable, and it is the source of freedoms and rights of the person and citizen. Therefore, the public authorities are obliged to respect and protect human dignity. The position of the Supreme Court appears helpful in this regard. The court has stated that dignity is the sphere of personality which attains its specific form in the person's self-esteem and expectation of respect from others. This feeling, which is an essential element of the human psyche, is determined by many external circumstances. Being a product of the development of human nature, human dignity depends on history and culture. Its form or dimension also significantly depends upon other characteristics of an individual's psyche and on his or her overall personality. Thus, there can be different measures of a person's self-esteem and what constitutes an act violation of dignity⁸.

The ascertainment whether one's dignity has been violated is based on objective criteria rather than on subjective feelings of the person seeking legal protection. A measure that will allow passing a judgment should be sought in the so-called public opinion, which is the emanation of views broadly held and accepted by the society at a given time and place. The models which should be the targeted point of reference for the assessment being made "are provided by opinions of reasonably and honestly minded persons, and further on by moral teachings given by persons competent in this scope and enjoying unquestionable authority". It follows that non-legal norms will be decisive in the process of passing a judgement on the violation of a person's dignity. They will be the norms related to customs in the society, – moral, social, occupational and, to a certain degree, religious norms. They are not fully encompassed in the content of legal acts by the legislator, although to some extent they are referred to in written law, as can be seen in the constitutional, civil and criminal laws. In all these branches of law, there are notions that refer to social norms or customs. Thus, identification of the values (premises) required to ascertain whether some action or behaviour is dignified relies on the views held by the public opinion and on the attitude of the public opinion to the behaviour of a given person. The court of law must explore the type and character of the rights that a person has been deprived of, and the attitude of other people to this person deprived certain rights. Thus, an act of the violation of dignity will be identified not when a person feels they have been deprived of a certain value but when a value identified by most of the society in which that person lives has been violated. The Supreme Court asserts that, "although human dignity is expressed in the capacity of defending some acknowledged values, the defence of which is connected with the person's sense of self-esteem and expectation of respect from others, this does not entail that deprivation of some rights in the circumstances of the contemporary social life means the violation of personal dignity⁹". In the court's opinion, if only a few individuals (or one, two or a few persons out of hundreds or several thousands) believe that their dignity has been violated while the overwhelming majority that has been exposed to the same

⁸ Judgement of the Supreme Court of 25 April 1989, Ref. No. I CR 143/89, OSP 1990/9, item 330.

⁹ Ibid.

action or behaviour claim the reverse, then it cannot be concluded that was a case of the violation of the person's dignity. A decisive role here is played by the view of the majority. Hence, objectivization is always required. Any sign of subjectivism must be excluded. Otherwise, it would be necessary to take into consideration frequently exaggerated and inappropriate behaviours, which might be turned into typical ones by the adjudicating court.

3. Abortion in Poland

Since the dawn of human history, abortion has been one of the most fervently contentious ethical and philosophical issues. The fundamental problems stem from definitions of the beginnings of human existence and different stages in the development of a human being. This is where the dilemma of the moral and legal status of man has its rooted¹⁰. The Latin term *abortio* stands for miscarriage, which leads to the termination of pregnancy, removal of an embryo from the mother's organism, causing its death. Abortion can be divided into spontaneous one, where a pregnancy is terminated due to natural causes, and artificial (induced) abortion, which is brought about by intentional manipulation. In common language, the term "abortion" is associated with the latter, an abortion induced with the woman's consent. It is the only type of abortion that can be submitted to moral and legal evaluation. Other categories of abortion are also distinguished, such as therapeutic abortion, where the foetus is removed because of the risk to the mother's life, eugenic abortion, where there is high risk or certainty that the child will have a permanent health damage, humanitarian abortion, when the conception has been caused by a criminal act, or social abortion, when the baby is not desired due to poor economic and social conditions.

The origin of the debate on abortion and its legal regulations in Poland dates back to the interwar years, when the penal code was being developed. The Penal Code of 1932¹¹ legalized abortion by a doctor if there was a serious risk to the mother's health or life, if the pregnancy resulted from such crimes as a sexual intercourse with a minor or mentally retarded, or by abuse of the relationship of dependence, through rape or incest.

In the 1950s, work commenced on new regulations pertaining to the issues of abortion. It was a consequence of the fact that abortion was legalized in the Soviet Union in 1955. In Poland, it resulted in the Act on Conditions for Permissibility of Abortion¹². The purpose of this act was to protect women's health from adverse consequence of abortions performed in unsanitary conditions or by persons who

¹⁰ Breczko A. Podmiotowość prawna człowieka w warunkach postępu biotechnomedycznego [Legal subjectivity of the human being under biotechnomedical progress]. Białystok: Publishing House Temida 2, 2011, p. 191.

¹¹ Art.231, Art. 232 and Art. 233, Penal Code of 11 July 1932, Dz. U. of 1932, No. 60, item 571.

¹² Art. 1 and Art. 2, Act on Conditions for Permissibility of Abortion, of 27 April 1956, Dz. U. of 1956, No. 12, item 61.

were not doctors. The new law stated that a woman undergoing abortion could not be penalized. Abortion was permitted due to legal, medical but also social indications, the latter meaning inadequate living standards. The two principal conditions were: to have an abortion performed by a doctor, and to ensure that the procedure would not pose a risk to the pregnant woman's health or life.

In 1956, the Ministry of Health issued a regulation on the termination of pregnancy¹³, to make it as easy as possible for women to obtain a decision permitting abortion, making it sufficient for a woman to testify verbally about her difficult situation and then the procedure was allowed.

In 1980, pressure from Catholic movements contributed to passing a legal limitation on the permissibility of abortion. The ministry now ordered to limit the number of abortions carried out on the basis of medical and social indications. Consultations with doctors, who would try to dissuade women from terminating pregnancy, became mandatory. It became illegal to perform an abortion after 12 weeks from conception. Another restriction imposed on the legal permissibility of pregnancy termination was the Regulation of the Minister of Health of 30 April 1990¹⁴, which granted the right to doctors to decline performing an abortion except in cases where there was an immediate risk to the woman's life. The Polish Commissioner for Protection of Civil Rights questioned this regulation, which was nevertheless upheld by a ruling of the Constitutional Tribunal.

In March 1992, two drafts of acts were tabled, both derived from completely different doctrinal grounds. The first one, a draft of Act on Legal Protection of a Conceived Child, was signed by members of parliament who advocated a restrictive approach to the question of the termination of pregnancy. The proponents of the extremely opposite position submitted a draft on the Act on Parenthood, Protection of Conceived Human Life and Conditions of the Permissibility of Abortion. Meanwhile, it was proposed to have a nationwide referendum concerning abortion¹⁵. This proposal was criticised by the authorities of the Catholic Church in Poland. On 7 January 1993, the Act on the Family Planning, Human Embryo Protection and Conditions for Legal Pregnancy Termination,¹⁶ which was rather restrictive, was passed. The principle of penalisation of causing death of a child, excluding penalisation of the child's mother, was adopted. This effectively discouraged doctors from performing abortion procedures. In the light of this act, indications in favour of abortion are a risk to the mother's life, a pregnancy resulting from a criminal act, and an irreversible damage to the foetus.

¹³ Regulation of the Minister of Health of 19 December 1959 on termination of pregnancy, Dz. U. of 1960, No. 2, item 15.

¹⁴ Regulation of the Minister of Health and Social Care, of 30 April 1990, on the professional qualifications to be possessed by doctors performing abortion, and on the procedure for issuing medical opinions on the permissibility of abortion, Dz. U. z 1990, No. 29, item 178.

¹⁵ More on this in: A. Breczko, 2011, p. 206.

¹⁶ Act on Family Planning, Human Embryo Protection and Legal Pregnancy Termination, of 7 January 1993, Dz. U. of 1993, No. 17, item 78, with amendments.

In 1995, the act was amended, which obligated the Council of Ministers to submit an annual report to the Lower Chamber of the Parliament on the execution of this act and consequences of its implementation. In August 1996, other amendments were made, accepted by the Parliament and signed by the then President of the Republic of Poland, Mr Aleksander Kwaśniewski.

This law has been in force in Poland to date. The circumstances, when pregnancy is allowed to be terminated are expressed in Art. 4a, which states that abortion can be performed only by a doctor in cases, when the pregnancy is a threat to the woman's health or life. The presence of such circumstances must be determined by a doctor other than the one who will carry out abortion. In such a situation, it is allowed to terminate a pregnancy at any stage. Another indication for abortion is the results of prenatal tests or other medical findings, which indicate a very high probability of "a severe and irreversible foetal defect or incurable illness that threatens the foetus's life." Likewise, in such cases these conditions are diagnosed by a doctor other than the one who will carry out the procedure. The termination of a pregnancy in these cases is allowed up to the moment when the foetus is able to live outside the mother's womb. The last legal provision enabling abortion is a situation when there are reasonable grounds to suspect that a pregnancy is a consequence of a prohibited act, e.g., rape. This must be verified and confirmed by a prosecutor. Under this provision, abortion is allowed until the 12th week of pregnancy.

Abortion cannot be performed without the woman's written consent. If a pregnant woman is a minor or a completely incapacitated person, a written consent is given by the person with a power of attorney acting in the name of this woman. If this is a woman over 13 years of age, then her written consent is also required. If a pregnant underage girl is less than 13 years of age, than the consent must be given by the Court of Protection, although the minor also has a right to express her opinion. When a woman is entirely incapacitated, her written consent is also required except in a situation when her current mental health state does not enable her to express consent. When there is no consent expressed by the legal representative, then it needs to be issued by the Court of Protection.

In the original version, the act comprised another indication for abortion, which was similar to the one included in the Act of 1956. Namely, it referred to constrained living conditions or a difficult personal situation of a pregnant women at the given time. In the ruling of 28 May 1997,¹⁷ the Constitutional Tribunal stated that the regulations which permit abortion in such circumstances were not compliant with the then binding constitutional regulations. The lack of compliance consisted of the fact that the mentioned provisions of the Act legalised abortion without a sufficient justification of the need to protect any other constitutional right, value or liberty. They also referred to some unspecified legalisation criteria in these cases, thereby violating the constitutional guarantee of the right to life

¹⁷ Judgment of the Constitutional Tribunal of 28 May 1997, Ref. No. K 26/96, OTK 1997, No. 2, item 19.

of human beings. The Constitutional Tribunal also validated the statement that human life in any stage of its development and in any circumstances is a constitutional value. Legal protection and its type are not a simple consequence of the value of a protected good. The intensity and type of protection are influenced by several factors, beside the value of the protected good, and these factors need to be taken into consideration by the legislator when specifying the intensity and type of protection. Considering the perspective of the good to be protected, this protection should be adequate to every situation¹⁸.

4. Ruling of the Constitutional Tribunal of 22 October 2020¹⁹

In its judgement passed on 22 October 2020, the Constitutional Tribunal questioned the permissibility of the so-called eugenic abortion (due to embryonic pathology). In the Act on Family Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, of 7 January 1993, the legislator permitted abortion, as noted above, if prenatal tests or other medical indications suggested a high probability of “a severe and irreversible foetal defect or incurable illness that threatens the foetus’s life”²⁰. A eugenic (embryo pathological) abortion under the provision questioned by the Tribunal was allowed until the foetus was able to sustain life outside the women’s womb²¹. The legal problem in respect of eugenic abortion arises from the indissoluble duality of contradictory interests, namely the public interest such as the protection of conceived life, and the woman’s interest, who – by virtue of her inherent dignity – cannot be subjected to any degrading and inhumane treatment.

The constitutional problem pending before the Tribunal touches one of the most difficult questions. Firstly, the problem concerns the legal status of a child in the prenatal stage of life, and the child’s subjectivity. Secondly, it pertains to the permissibility and limits of pregnancy termination, that is an action in a situation of the conflict of values and balancing the values. Significantly, the way the first question is solved has a fundamental influence on the other issue.

The Tribunal emphasised that the role of a constitutional court is to issue binding statements in cases which concern the compliance of created law with the Constitution, and these statements must be based on the law in force, that is the system of norms created in compliance with the formal, established procedure by an authorised public authority. The Tribunal indicated that the mentioned

¹⁸ Announcement of the President of the Constitutional Tribunal of 18 December 1997, Dz. U. No. 157, item 1040.

¹⁹ Judgement of the Constitutional Tribunal of 22 October 2020, Ref. No. K 1/20, OTK ZU A/2021, item 4.

²⁰ Act on Family Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, of 7 January 1993, Dz. U. of 1995, No. 17, item 78 with amendments, hereinafter Act on Family Planning, Human Embryo Protection.

²¹ Art. 4a section 2 of the Act on Family Planning, Human Embryo Protection.

system should be understood as a system of axiologically and teleologically related norms, which – as pointed out by the Court in its judgement of 30 September 2008 – are the product of culture, rooted in the historical experiences of the community and built according to the system of values shared by the given community²².

According to Art. 4a, section 1 point 2 of the Act on Family Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination, termination of pregnancy can only be performed by a doctor in a case when “prenatal tests or other medical indications suggest a high probability of severe and irreversible foetal defect or incurable illness that threatens the foetus’s life”. This provision employs certain evaluative criteria referred to by every doctor *ad casum* when making a decision. However, the decision is not an unrestricted one, dictated by the formal conditions, but calls for weighing the good of the mother and the good of the child, which in such cases collide. According to the doctrine, the legislator concluded that due to severe illness or impairment, the life of a child can be too expensive for the child’s nearest family to be sustained, and may create excessive burden; on the other hand, due to the foetal defect the child is directly refused the right to life²³. However, the way the aforementioned indications were formulated, it appears that for a doctor to make a decision about abortion, it is not necessary to be certain that the foetus suffers from a severe and irreversible defect or from a life-threatening illness, as the provision allows a doctor to make such a decision when there is a high probability thereof. This approach can raise problems when interpreting this provision both by a doctor making a decision and the court which might have to judge whether a given decision was justified²⁴.

The Tribunal emphasised that the doctrine demonstrated – the notion of “high probability” included in Art. 4a section 1 point 2 of the Act on Family Planning was no longer valid in the light of the current medical knowledge. It is now possible to successfully perform medical treatments on a foetus in the mother’s womb, or implement intensive procedures sometimes without making a diagnosis, not just indicating probability but providing evidence beyond any doubt that the foetus suffers from a severe and irreversible defect or a life-threatening illness.

The Tribunal emphasised that the term “a severe and irreversible foetal defect” is not accurate enough and may be understood as a severe, considerable limitation of one’s physical or mental performance. In the court practice, however, it is assumed that the defect must be serious enough to threaten the child’s life – and

²² Judgement of the Constitutional Tribunal of 30 September 2008, Ref. No. 44/07, OTK ZU No. 7/A/2008, item 126.

²³ Cf. Królikowski M. Problem interpretacji tzw. przesłanki eugenicznej stanowiącej o dopuszczalności zabiegu przerwania ciąży. In: Współczesne wyzwania bioetyczne, [The problem of interpretation of the so-called eugenic premise constituting the admissibility of pregnancy termination. In: Contemporary bioethical challenges.] Bosek L., Królikowski M. (eds.). Warszawa: Publishing House C. H. Beck, 2010, p. 175 and on.

²⁴ Cf. e.g., judgement of the Supreme Court of 6 May 2010, Ref. No. II CSK 580/09.

this condition applies only to an incurable illness²⁵. Irreversibility in the context of this indication refers to a situation when the impairment of a foetus will be permanent and no improvement will be possible.

Conclusion

By passing the ruling K 1/20, the Constitutional Tribunal sustained the opinion that human life in any stage of its development is a value, and that by being a value arising from the constitutional regulations, it should be protected by the legislator, not only in the form of laws to guarantee the survival of a person as a purely biological creature, but also as a human being in its entirety, an individual who needs adequate social, living and cultural conditions to exist. The Tribunal's opinion is that an unborn child as a human being and a person who is entitled to inherent and inalienable dignity is a subject who has the right to life, and the legal system – in compliance with Art. 38 of the Constitution – must guarantee adequate protection of this principal good, without which the mentioned subjectivity of a person would be negated. The Tribunal underlined that human life is legally protected, also during the prenatal phase, and the child's legal subjectivity is inextricably connected with the dignity that the child is entitled to. Therefore, it is possible to envisage a situation when one of the constitutional goods being in a state of collision pertains to a child in the period of the child's life before birth. Thus, one of the indications for legally allowed abortion contained in the legal regulations binding until this judgement – a high probability of a severe and irreversible foetal defect or life-threatening illness – has now been dismissed.

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²⁵ Cf. judgement of the Supreme Court Ref. No. II CSK 580/09.

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