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Termination of Pregnancy (Abortion) in the Light of the Jurisprudence of the Polish Constitutional Court

Przerywanie ciąży (aborcja) w świetle orzecznictwa polskiego Trybunału Konstytucyjnego

Introduction

At the first place, it is worth emphasizing that the issue of abortion is not only of great public interest, but also arouses a number of controversies[1] and even constitutes the basis for possible social conflicts (e.g. the so-called women's strike), which we faced in Poland, for example, after the judgment of the Constitutional Tribunal of 22 October 2020,[2] which ruled that abortion in the

[1] See: A. Kania-Chramęga, *Warunki legalności przerywania ciąży (problemy prawnokarne i społeczne)*, Zielona Góra 2020; M. Soniewicka, *Spór o dopuszczalność przerywania ciąży z perspektywy etycznej i filozoficznoprawnej*, „Państwo i Prawo" 2021, z. 8, pp. 6–23; A. Przyłuska-Fiszer, *Etyka i przerwanie ciąży*, [in:] *Bioetyka*, red. J. Różyńska, W. Chańska, Warszawa 2013, pp. 311–326.

[2] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, OTK ZU 2021/A, item 4.

event that prenatal tests or other medical conditions indicate a high probability of severe and irreversible fetal impairment or an incurable disease threatening its life, is inconsistent with the Constitution of the Republic of Poland.[3] So far, this has been one of the premises that allowed abortion.[4] This ruling will be the subject of a wider analysis later in this study. However, it is worth mentioning that according to the Constitutional Tribunal, "legalization of abortion if prenatal tests or other medical conditions indicate a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life, there is no constitutional justification";[5] "the mere indication of the potential burden of such defects on the child is eugenic".[6]

The purpose of this study is primarily to analyse the jurisprudence of the Polish Constitutional Tribunal on the compliance of the conditions for the admissibility of termination of pregnancy (abortion) with the Constitution of the Republic of Poland.

In order to implement the author's research objectives, research methods such as the historical method and the dogmatic method, which is considered the basic research method in legal sciences, will be used. The purpose of using this method is to determine (decode) the formalised rules of operation (legal norms) contained in the regulations. One of the basic tasks of the researcher (this also applies to the entity applying the law) is to determine the meaning of individual

[3] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws 1997, No. 78, item 483, as amended. See: R. Piotrowski, *Nowa regulacja przerywania ciąży w świetle Konstytucji*, „Państwo i Prawo" 2021, z. 8, pp. 62–80; J. Giezek, P. Kardas, *Kompetencje derogacyjne TK oraz ich prawnokarne konsekwencje (refleksje na marginesie wyroku w sprawie K 1/20)*, „Państwo i Prawo" 2021, z. 8, pp. 40–61; S. Tarapata, W. Zontek, *Prawnokarne skutki wyroku TK z 22.10.2020 r., K 1/20 (zagadnienia wybrane)*, „Państwo i Prawo" 2021, z. 8, pp. 211–225; A. Kania-Chramęga, *Niekonstytucyjność embriopatologicznej przesłanki przerywania ciąży oraz jej prawnokarne konsekwencje*, „Przegląd Sejmowy" 2023, nr 4(177), pp. 7–24; B. Grabowska-Moroz, K. Łakomiec, *Niedopuszczalność aborcji. Glosa do wyroku TK z 22.10.2020 r., K 1/20*, „Państwo i Prawo" 2021, z. 8, pp. 251–259; M. Gutowski, P. Kardas, *Trybunał Konstytucyjny nie mógł rozstrzygnąć gorzej, czyli o dewastacji systemu jednym rozstrzygnięciem*, „Palestra" 2020, vol. 10, pp. 5–13; R. Adamus, *Przesłanka eugeniczna (embriopatologiczna) jako przesłanka legalnego przerywania ciąży – glosa do w wyroku Trybunału Konstytucyjnego z 22.10.2020 r. (K 1/20)*, „Palestra" 2020, vol. 11, pp. 94–107.

[4] See: U. Drozdowska, *Wykładnia art. 4a ust. 1 pkt 2 ustawy o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży w świetle orzecznictwa Sądu Najwyższego i poglądów doktryny prawa*, „Miscellanea Historico-Iuridica" 2016, vol. 1, pp. 301–316; A. Zoll, *Ochrona dziecka poczętego w fazie prenatalnej w pracach komisji kodyfikacyjnej prawa karnego*, „Studia Prawnicze KUL" 2013, vol. 2(54), pp. 123–134; M. Królikowski, *Problem interpretacji tzw. przesłanki eugenicznej stanowiącej o dopuszczalności zabiegu przerywania ciąży*, [in:] *Współczesne wyzwania bioetyczne*, red. L. Bosek, M. Królikowski, Warszawa 2010, p. 175 et seq.

[5] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20.

[6] *Ibidem*.

legal regulations (*ratio legis*) desired by the legislator using linguistic and non-linguistic rules of interpretation of the legal text.

Legal bases, systemic position, functions, organization of the Constitutional Tribunal in Poland

The legal basis for the functioning of the Constitutional Tribunal in Poland are both the provisions of the Constitution of the Republic of Poland (in this study the author will use the terms "Constitution of the Republic of Poland" and "Basic Law" interchangeably), the Act of 30 November 2016 on the Organisation and Procedure of Proceedings before the Constitutional Tribunal,[7] as well as the provisions of the Rules of Procedure of the Constitutional Tribunal,[8] while its constitutional position is determined primarily by the provisions of the Constitution of the Republic of Poland, which devotes to the Constitutional Tribunal a number of provisions contained mainly in Chapter VIII "Courts and Tribunals". In Article 10 of the Basic Law, courts and tribunals, including the Constitutional Tribunal, are included in the judiciary. At this point, it is worth noting that the Constitutional Tribunal is not a court and does not administer justice, because according to the content of Article 175 of the Constitution of the Republic of Poland, the judiciary in the Republic of Poland is administered by the Supreme Court, common courts, administrative courts and military courts, while the functions of the Constitutional Tribunal and its material jurisdiction are defined by Articles 188, 189 and 131(1) of the Basic Law, according to which the jurisdiction of this judicial authority is:

- adjudicating on the constitutionality and legality of normative acts;
- adjudicating on the constitutionality of the purposes or activities of political parties;
- adjudicating constitutional complaints;
- resolving conflicts of competence between central constitutional bodies of the state;
- resolving on finding an obstacle preventing the President of the Republic of Poland from exercising his/her functions.

Therefore, it can be concluded that the Constitutional Tribunal is a judicial authority, it is not a court, and it does not administer justice, but it has many

[7] Consolidated text, Journal of Laws 2019, item 2393.

[8] Resolution of the General Assembly of the Judges of the Constitutional Tribunal of 27 July 2017 on the Rules of Procedure of the Constitutional Tribunal (PM 2017, item 767).

features in common with the courts and should be treated as a "type of state authority separate from the courts".[9]

Pursuant to Article 194(1) of the Constitution of the Republic of Poland, the Constitutional Tribunal consists of fifteen judges elected by the Sejm for a term of 9 years, from among persons distinguished by their legal knowledge. The organs of the Constitutional Tribunal are the General Assembly of the Constitutional Tribunal Judges and the President of the Constitutional Tribunal. The President and Vice-President of the Constitutional Tribunal are appointed by the President of the Republic of Poland from among the candidates presented by the General Assembly.

Prerequisites for the admissibility of abortion in the light of the jurisprudence of the Constitutional Tribunal

At this point, one should proceed to the analysis of the prerequisites for the admissibility of abortion in the light of the jurisprudence of the Constitutional Tribunal, which spoke on the issue of their constitutionality (compliance with the Constitution of the Republic of Poland). However, before moving to this issue, we should focus on the issue of the constitutional model regarding the legal protection of human life. Such a pattern may be derived from various provisions of the Basic Law, but Article 38 is crucial for this issue, according to which the Republic of Poland ensures legal protection of life for every human being. This provision guarantees the legal protection of life. In this context, it is also worth paying attention to the content of Article 30, which recognizes the inherent and inalienable dignity of the human being as a source of constitutional freedoms and rights of the individual, including the right to life. Although Article 38 does not specify that it is about the legal protection of life from conception to natural death, but this type of interpretation seems to be adopted by the Polish Constitutional Tribunal, which has resulted in subsequent rulings assessing the compliance of the grounds for the admissibility of abortion with this model. This approach, *nota bene*, is consistent with contemporary findings of biological and medical sciences, which, to make a certain generalization, indicate the moment of human conception as the beginning of life, and not the moment of its birth. Recognizing conception as the beginning of life is no longer a matter of religious beliefs or philosophical views, but of the development of biological or medical sciences, mainly due to progress in medical technologies, new imaging and diagnostic methods, etc.

[9] B. Naleziński, *Organy władzy sądowniczej*, [in:] *Prawo Konstytucyjne RP*, red. P. Sarnecki, Warszawa 2008, p. 414.

However, the literature pointed out that the draft amendments to the regulations proposing to add the following phrase to Article 38: "from the moment of conception", was rejected,[10] which may lead an interpreter using a historical interpretation to claim that, in general, legal protection of life covers a child already born. In addition, the literature stresses that "in the face of new medical technologies, the issue of legal protection of the conceived child refers to increasingly earlier stages of its development, especially the so-called the stage of »preembryo«, i.e. the period between fertilization and the end of the implantation process (…) in the light of constitutional, civil and criminal law, a *nasciturus* can count on a certain scope of legal »care«, but there is a lack of conceptual coherence defining its humanity and selective and indirect treatment of the protection of its rights still does not allow for a final determination of the scope of the legal personality of a conceived child".[11]

Considering the above, it should be stated that the Polish legislator did not literally support the legal protection of human life from conception (in the prenatal phase), and one may get the impression that he transferred the burden of this protection *de facto* to the ordinary legislator, the judiciary, and the doctrine.

As to whether and to what extent the life and health of the fetus is protected, reference should first be made to the provisions of the Act of 7 January 1993 on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy.[12] At this point, it is worth noting this act was adopted before the entry into force of the currently applicable Constitution of the Republic of Poland, i.e. before 17 October 1997. The preamble to this act states that "life is a fundamental good of man, and the care for life and health is one of the basic responsibilities of the state, society and citizen; (…) everyone [has the right] to make responsible decisions about having children and the right of access to information, education, advising and resources enabling the exercise of this right". In turn, Article 1 of the Act on family planning, protection of the human fetus states that the right to life is protected, including in the prenatal phase, within the limits specified in the Act.

The provisions of this Act and the acts amending it regarding the conditions for the admissibility of termination of pregnancy were the subject of the decisions

[10] M. Chudzińska, A. Grzanka-Tykwińska, *Status i ochrona prawna dziecka poczętego w świetle polskich regulacji prawnych*, [in:] *Początek ludzkiego życia – bioetyczne wyzwania i zagrożenia*, red. W. Sinkiewicz, R. Grabowski, Bydgoszcz 2016, p. 150; M. Banyk, *Status prawny dziecka poczętego na tle jego prawa do ochrony życia i zdrowia, wynagradzania szkód doznanych przed urodzeniem oraz ochrony dóbr osobistych matki*, „Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM" 2014, nr 4, pp. 17–18.

[11] M. Chudzińska, A. Grzanka-Tykwińska, *op. cit.*, p. 150.

[12] Consolidated text, Journal of Laws 2022, item 1575.

of the Constitutional Tribunal, and mainly as a result of them, the current wording of Article 4a allows termination of pregnancy in cases where: 1) pregnancy poses a threat to the life or health of the pregnant woman; 2) there is a justified suspicion that the pregnancy was the result of a prohibited act.

Referring here to the jurisdiction of the Constitutional Tribunal, it is worth mentioning the judgment of 28 May 1997,[13] which first emphasized the constitutional guarantees of the protection of human life at every stage of its development and questioned, *inter alia*, admissibility of termination of pregnancy due to difficult living conditions or difficult personal situation of the pregnant woman (and the pregnancy did not last longer than 12 weeks) as a ground inconsistent with the constitutional model in force at that time (at that time, the provisions of the Constitution of the Polish People's Republic of 1952 and the Constitutional Act of 17 October 1992 on mutual relations between the legislative and executive authorities of the Republic of Poland and on local government were still in force[14]). In this jurisdiction, the Constitutional Tribunal noted that "the constitutional regulations in force in Poland do not contain a provision directly relating to the protection of life. However, this does not mean that human life does not have a constitutional value. The basic provision from which the constitutional protection of human life should be derived is Article 1 of the constitutional provisions maintained in force, in particular the principle of a democratic state of law. Such a state is realized only as a community of people, and only people can be the proper subjects of the rights and obligations established in such a state. The basic attribute of a human being is his/her life. Therefore, deprivation of life annihilates a human being as a subject of rights and obligations".[15] The judgment further states: "A democratic state of law places people and their most precious goods as their primary value. Such a good is life, which, in a democratic state of law, must remain under constitutional protection at every stage of its development. The value of the constitutionally protected legal good of human life, including life developing in the prenatal phase, cannot be differentiated. There are no sufficiently precise and justified criteria allowing for such differentiation depending on the developmental phase of human life. From the moment of its creation, human life becomes a constitutionally protected value. This also applies to the prenatal phase. Covering this phase of human life with constitutional protection is confirmed by the Convention on the Rights of the Child, ratified by the Republic of Poland on 30 September 1991. In the preamble, it is declared in the tenth paragraph, referring to the Declaration of the Rights of the Child, that

[13] Judgment of the Constitutional Tribunal of 28 May 1997, K. 26/96, OTK ZU 1997, No. 2, item 19.

[14] Journal of Laws 1992, No. 84, item 426.

[15] Judgment of the Constitutional Tribunal of 28 May 1997, K. 26/96.

the child, due to his/her physical and mental immaturity, requires exceptional care and concern, especially appropriate legal protection, both before and after birth. Including this rule in the preamble to the Convention must cause the conclusion that the guarantees contained in the Convention also apply to the prenatal phase of human life".[16] It is worth emphasizing that the Constitutional Tribunal also based its recognition of the life of a conceived child as a constitutional value on the constitutional provisions in force at that time, pointing to the obligation to protect motherhood and family (Article 79(1)). According to the Constitutional Tribunal, "the view that protection of maternity cannot only mean protection of the interests of a pregnant woman and mother is justified. The use of a noun term by constitutional provisions indicates a specific relationship between a woman and a child, including a just-conceived child. The entire relationship under Article 79(1) of the constitutional provisions has the nature of a constitutional value, thus covering the life of the fetus, without which the motherhood relationship would be interrupted. Therefore, maternity protection cannot be understood as protection implemented solely from the point of view of the interests of the mother/pregnant woman".[17] "Similar conclusions should also be reached when analysing the concept of »family« as a constitutional value".[18] "The basic, procreative function of the family must assume that the life of the conceived child must benefit from the protection provided for by the constitution for the family, thus becoming a constitutional value. Fatherhood or motherhood is protected in relation to already born children to the same extent as the relationship, which must also be protected in relation to children in the prenatal phase of their life".[19] The Constitutional Tribunal further assumes that "the statement that human life in every phase of its development is a constitutional value subject to protection does not mean that the intensity of this protection in every phase of life and in all circumstances should be the same. The intensity of legal protection and its type is not a simple consequence of the value of the protected good. In addition to the value of the protected good, the intensity and type of legal protection are influenced by a number of factors of various nature that must be considered by the ordinary legislator when deciding on the type of legal protection and its intensity. However, this protection should always be sufficient from the point of view of the protected good".[20]

Referring to the very premise of the admissibility of abortion, i.e. due to difficult living conditions or the difficult personal situation of a pregnant woman and the pregnancy lasted no longer than 12 weeks, the Constitutional Tribunal

[16] *Ibidem*.
[17] *Ibidem*.
[18] *Ibidem*.
[19] *Ibidem*.
[20] *Ibidem*.

pointed out that "human life, as the preamble to the Act itself emphasizes, is a *fundamental human good*. The right of a pregnant woman not to deteriorate her material situation results from the constitutional protection of the freedom to freely shape her living conditions and the related right of a woman to satisfy her and her family's material needs. However, this protection cannot lead so far, so as to associate with a violation of the fundamental good of human life, in relation to which the conditions of existence are secondary and may be subject to change".[21] However, "in the case of a premise indicating *a difficult personal situation*, in conflict with the protection of human life in the prenatal phase, a complex of various legal goods related to good name, proper relations with other people, the possibility of exercising certain rights and freedoms may remain. Furthermore, the legislator did not specify what constitutional value it meant. The concept of a *difficult personal situation* used by the legislator does not allow for the approximate assignment of specific designates".[22] "The indeterminacy of the return of a *difficult personal situation* disqualifies from the point of view of constitutional requirements Article 4a(1)(4) of the Act of 7 January 1996 in the wording after the amendment. It allows to derive from it a norm allowing for the deprivation of life without considering other constitutional values. The indeterminacy of this premise leads to undermining the very principle of protection of life in the prenatal phase".[23] In conclusion, it should be stated that neither the difficult living conditions nor the difficult personal situation of a pregnant woman, in the opinion of the Constitutional Tribunal, may constitute grounds for undermining the very principle of protecting life in the prenatal phase and may not constitute an excuse for depriving a conceived child of life.[24]

In the analysed judgment, the considerations related to the right to make responsible decisions about having children, as mentioned in the preamble to the Public Procurement Law, are also interesting. In this context, the Constitutional Tribunal emphasizes that "this right applies in a special way to the decision to conceive a child. In fact, any interference by the state or other persons in this sphere should be considered an unacceptable violation of the fundamental right of every human being. The question arises whether the right to a decision on having a child can be understood in a broader sense, also as the right to a decision on the birth of a child. In this case, it would be unacceptable to introduce a legal ban on the birth of a conceived child, a ban that would be enforced by the state. Similarly, it would be unacceptable to establish any negative legal consequences

[21] *Ibidem*.
[22] *Ibidem*.
[23] *Ibidem*.
[24] *Ibidem*.

related to the fact of childbirth. Any public or private interests that could justify the introduction of this type of regulation should be opposed to the primary value of the life of the conceived child and the right of parents to have children. Another issue involves considering the right to give birth in a negative aspect, and thus also as the right to terminate a pregnancy. In this situation, in connection with the origin of life, the right to decide to have a child would have to be reduced in essence to the right not to give birth to a child. It cannot be decided to have a child if a child is already developing in the prenatal phase and in this sense is already *had* by the parents. The right to have a child can therefore only be interpreted in a positive aspect, and not as the right to annihilate the developing human fetus. Therefore, the right to make responsible decisions about having children covers, in a negative aspect, only the right to refuse to conceive a child. However, when the child has already been conceived, this right can only be exercised in a positive aspect, such as the right of birth and upbringing of the child".[25]

Another decision that is worth paying attention to in this study is the aforementioned judgment of the Constitutional Tribunal of 22 October 2020,[26] which questioned the compliance with the Constitution of the Republic of Poland of one of the conditions for the admissibility of abortion and stated that "legalization of abortion if prenatal or other medical conditions indicate a high probability of severe and irreversible fetal impairment or an incurable disease threatening his life, is not justified by the Constitution". As indicated above, this judgment caused mass dissatisfaction and social protests in Poland, referred to as the so-called women's strike. However, it should be emphasized that for people who know this issue, it should not be a surprise, because it is in fact a continuation of the existing jurisprudence of the Polish Constitutional Tribunal.[27]

The applicants questioned the compliance with the Constitution of the Republic of Poland resulting from Article 4a(1)(2) of the Act on Pregnancy Abortion in the event that prenatal examinations or other medical conditions indicate a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life, i.e. from:

1) Article 30 (protection of human dignity) by legalizing eugenic practices in relation to the unborn child, thus, denying him respect and protection of human dignity;
2) Article 30 and Article 31(3) (principle of proportionality of restrictions on individual freedoms and rights) and Article 38 (right to life) in conjunction with Article 32(1) and (2) (principle of equal justice under law) by legalizing

[25] *Ibidem*.
[26] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20.
[27] R. Piotrowski, *op. cit.*, pp. 66–67.

eugenic practices with regard to the right to life of the unborn child and making the protection of the right to life of the unborn child dependent on his or her state of health, which constitutes prohibited direct discrimination;

3) Article 38 (right to life), read in conjunction with Article 31(3) (principle of proportionality) and Articles 2 (principle of a democratic State governed by the rule of law) and 42 (principle of the inevitability of criminal liability; right of defence; presumption of innocence), by legalizing abortion without sufficient justification by the need to protect another value of a right or constitutional freedom and by using indeterminate criteria for that legalization, thereby infringing constitutional guarantees for human life.[28]

Ultimately, the Constitutional Tribunal, by a majority of votes (i.e. it was not a unanimous decision), found that the aforementioned condition violated Article 38 (right to life) in conjunction with Article 30 (respect for and protection of human dignity) in conjunction with Article 31(3) (principle of proportionality) of the Constitution of the Republic of Poland. Undoubtedly, the Constitutional Tribunal rightly noted that the analysed "constitutional problem touches on one of the most difficult issues that can face constitutional courts. First of all, this problem concerns the legal status of the child in the prenatal phase of life, its subjectivity. Secondly, the admissibility and limits of abortion, i.e. acting in the event of a conflict of values, weighing goods. Importantly, the resolution of the first issue fundamentally affects the latter. This problem, of course, beyond the juridical dimension, also has an ethical and philosophical dimension, because it concerns fundamental issues – human life and its values".[29] In the judgment in question, the Constitutional Tribunal emphasizes that "the duty of public authorities to protect human life is based on Article 2 of the Constitution, especially in the principle of a democratic state governed by the rule of law. The essence of such a state assumes that it is created by a community of people who are subjects of constitutional rights and freedoms".[30] "The essence of the inherent and inalienable dignity belonging to every human being and its equality results in the prohibition of differentiating the values of a given human being, and therefore his/her life. It is unacceptable to claim that, due to some characteristics, one individual is less valuable than another as a human being. This statement applies not only to the postnatal phase, but also to the prenatal phase of human life. Regardless of the fact of birth, the quality of a given being, which is being human, does not change. The basis for this statement is the observation that the development of a human being and his/her personality

[28] Z. Gromek, *Ocena zgodności z Konstytucją RP przepisów ustawy o planowaniu rodziny, ochronie płodu ludzkiego warunkach dopuszczalności przerywania ciąży*, „Zeszyty Prawnicze BAS" 2021, vol. 1(69), pp. 241–287.

[29] *Ibidem*.

[30] *Ibidem*.

is a gradual process that extends to the period before and after birth. This means that one cannot arbitrarily limit the dignity that is inherent and inalienable, and consequently – the legal protection of life, neither to a fully developed person, nor from a specific moment of the child's development in the prenatal phase. This protection applies to every living human being, and the period of their life and degree of development is irrelevant in this respect".[31]

In its conclusions, the Constitutional Tribunal pointed out that "human life is a value at every stage of development and as a value, the source of which are constitutional provisions, it should be protected by the legislator, not only in the form of provisions guaranteeing the survival of a human being as a purely biological unit, but also as a holistic being, for whose existence appropriate social, living and cultural conditions are also necessary, which make up the entire existence of an individual. In the opinion of the Court, the unborn child, as a human being – a person who has a natural and inalienable dignity, is an entity with the right to life, and the legal system – in accordance with Article 38 of the Constitution – must guarantee proper protection of this central good, without which this subjectivity would be erased".[32] The Constitutional Tribunal unequivocally stated that "termination of pregnancy is simultaneously associated with depriving the child of its life".[33] It further emphasizes that "the assessment of the admissibility of termination of pregnancy, in the event that prenatal examinations or other medical conditions indicate a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life, and thus the possibility of sacrificing the good of the child, requires an indication of an analogous good on the part of other people".[34] The Court noted "that it follows from the wording of Article 38, read in conjunction with Article 30, read in conjunction with Article 31(3) of the Constitution that circumstances relating to the child's state of health cannot constitute an independent basis for termination of pregnancy".[35] "Legalization of abortion if prenatal examinations or other medical conditions indicate a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life is no constitutionally justified".[36]

Analysing the content of this judgment and the dissenting opinions, it can be indicated that abortion is permissible when a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life

[31] *Ibidem*.
[32] *Ibidem*.
[33] *Ibidem*.
[34] *Ibidem*.
[35] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20; A. Kania-Chramęga, *Niekonstytucyjność…*, pp. 13–15.
[36] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20.

simultaneously poses a high risk to the life and health of the mother, which is in a sense an extension of the still existing premise that abortion can be performed when the pregnancy poses a threat to the life and health of the woman.[37]

Conclusions

The issue of termination of pregnancy (abortion) remains a contentious issue both on social and legal grounds. This applies in general to the legal status of *nasciturus* (to be born), and not only to the issue of abortion. The scope of legal protection of the unborn child in individual legal systems is diverse and particularly strongly determined by axiological influences; it depends on philosophical and religious views, professed moral principles, and historical experiences. In this area of legal regulations, the axiological dimension of law is particularly revealed. The law is based on values and is assessed through the prism of values.

The purpose of this study is primarily to analyse the jurisdiction of the Polish Constitutional Tribunal regarding the compliance of the conditions for the admissibility of termination of pregnancy (abortion) with the Constitution of the Republic of Poland.

In the Polish legal system, the Constitutional Tribunal is classified as a judicial authority, but it is not a court and does not administer justice. The competence of this body primarily includes adjudicating on the constitutionality and legality of normative acts.

The Constitution of the Republic of Poland provides every person with legal protection of life (Article 38). Legal protection of life can also be derived from the provisions of the Fundamental Law guaranteeing respect for and protection of human dignity, as well as from the guaranteed functions for the freedoms and rights of the individual of the directive of the democratic state of law. Legal protection of life is therefore one of the fundamental constitutional values that must be reflected in positive law.

Although Article 38 does not specify that it is about the legal protection of life from conception to natural death, but this type of interpretation seems to be adopted by the Polish Constitutional Tribunal, which has resulted in subsequent judgments assessing the compliance of the grounds for the admissibility of abortion with constitutional model in Poland.

The judgment of the Constitutional Tribunal of 28 May 1997 first emphasized the constitutional guarantees for the protection of human life at every stage of its development and questioned the admissibility of termination of pregnancy

[37] *Ibidem*.

due to difficult living conditions or the difficult personal situation of a pregnant woman (for social reasons).

However, in the judgment of 22 October 2020, it stated that there is no constitutional justification for the premise allowing termination of pregnancy (abortion) when prenatal tests or other medical grounds indicate a high probability of severe and irreversible impairment of the fetus or an incurable disease that threatens its life. In that judgment, the Constitutional Tribunal furthermore assumed that the mere indication of the potential burden of defects on the child is eugenic in nature. However, it was assumed that abortion is permissible when a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life simultaneously poses a high risk to the life and health of the mother, which is in a sense an extension of the still existing premise that abortion can be performed when the pregnancy poses a threat to the life and health of the woman.

The analysis of the jurisprudence of the Polish Constitutional Tribunal therefore allows to formulate a conclusion on the conservative and restrictive approach of this body regarding the conditions for the admissibility of abortion in Poland and the recognition of the legal protection of life as a cardinal constitutional value of the Polish legal system.

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Abstract: The purpose of this study is primarily to analyse the jurisprudence of the Polish Constitutional Tribunal regarding the compliance with constitutional norms of the conditions for the admissibility of termination of pregnancy (abortion). The Constitution of the Republic of Poland provides every person with legal protection of life. Although its provisions do not *explicitly* specify that it is about the legal protection of life from conception to natural death, this type of interpretation seems to be adopted by the Constitutional Tribunal, which results in subsequent judgments on the assessment of compliance with this constitutional model of the conditions for the admissibility of abortion in Poland. In its jurisprudence, the Constitutional Tribunal first drew attention to the constitutional guarantees for the protection of human life at every stage of its development, and thus questioned the admissibility of termination of pregnancy due to difficult living conditions or the difficult personal situation of a pregnant woman, as well as in the case when prenatal examinations or other medical conditions indicate a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life. In this context, however, it is worth noting that abortion is permissible when a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life simultaneously poses a substantial risk to the life and health of the mother. The analysis of the jurisprudence of the Constitutional Tribunal therefore allows to formulate a conclusion on the conservative and restrictive approach of this body regarding the conditions for the admissibility of abortion in Poland and the recognition of the legal protection of life as a cardinal constitutional value of the Polish legal system.

Keywords: termination of pregnancy; abortion; legal protection of life; constitutionality of law; Constitutional Tribunal

Abstrakt: Celem opracowania jest przede wszystkim analiza orzecznictwa polskiego Trybunału Konstytucyjnego (TK) dotyczącego zgodności z normami konstytucyjnymi przesłanek dopuszczalności aborcji. Trybunał Konstytucyjny zaliczany jest do organów władzy sądowniczej, przy czym nie jest sądem i nie sprawuje wymiaru sprawiedliwości. Do właściwości tego organu należy przede wszystkim orzekanie w sprawach konstytucyjności i legalności aktów normatywnych. Konstytucja RP zapewnia każdemu człowiekowi prawną ochronę życia. Co prawda w jej postanowieniach nie sprecyzowano *explicite*, że chodzi o prawną ochronę życia od poczęcia aż do naturalnej śmierci, niemniej tego typu wykładnię zdaje się przyjmować TK, czego konsekwencją są kolejne orzeczenia dotyczące oceny zgodności tym wzorcem konstytucyjnym przesłanek dopuszczalności aborcji w Polsce. W swoim orzecznictwie TK w pierwszej kolejności zwrócił uwagę na konstytucyjne gwarancje ochrony życia ludzkiego w każdej fazie jego rozwoju, a co za tym idzie zakwestionował dopuszczalność przerwania ciąży z powodu ciężkich warunków życiowych lub trudnej sytuacji osobistej kobiety ciężarnej (ze względów społecznych), a także w przypadku, gdy badania prenatalne lub inne przesłanki medyczne wskazują na duże prawdopodobieństwo ciężkiego i nieodwracalnego upośledzenia płodu albo nieuleczalnej choroby zagrażającej jego życiu. W tym kontekście warto jednak zauważyć, że aborcja jest dopuszczalna w przypadku, gdy duże prawdopodobieństwo ciężkiego i nieodwracalnego upośledzenia płodu albo nieuleczalnej choroby zagrażającej jego życiu stwarza jednocześnie duże ryzyko dla życia i zdrowia matki. Analiza orzecznictwa TK pozwala na sformułowanie wniosku o konserwatywnym i restrykcyjnym podejściu tego organu do przesłanek dopuszczalności przerywania ciąży (aborcji) w Polsce i uznaniu prawnej ochrony życia za kardynalną wartość polskiego systemu prawnego.

Słowa kluczowe: przerywanie ciąży; aborcja; prawna ochrona życia; konstytucyjność prawa; Trybunał Konstytucyjny