Polish Abortion Legal Framework after the Judgment of the Constitutional Court of 22 October 2020 in case no. K 1/20: Impact on Doctors

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ABSTRACT: In 2020, the rules governing the practice of abortion in Poland were narrowed and became some of the strictest in Europe. These new rules were the result of the Constitutional Court's oral announcement of its judgment in case K 1/20, making abortion for embryo-pathological reasons illegal. Thus, terminations of pregnancy in cases where prenatal tests and other medical findings indicated a high risk of a severe and irreversible damage to the foetus, or an incurable life-threatening ailment of the foetus, which in 2018 accounted for approximately 98% of all abortions in Poland, were declared illegal. In the Constitutional Court's written opinion, however, the court included a statement that may constitute a basis for broader interpretation, namely, that reasons of an embryo-pathological nature, insofar as they pose a *threat to the life or health of the pregnant woman*, may constitute a basis for legal termination of a pregnancy on the grounds of "the mother's well-being." But it is not clear in the Court's opinion how

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many doctors (and of what specialties) should make the relevant evaluation that would constitute sufficient legal justification for a decision to perform a legal abortion, thereby mitigating the risk of facing legal liability for terminating a pregnancy. For these reasons, doctors are likely to bear the burden that should have been placed on the legislators, who are, after all, obliged to consistently and exhaustively consider all the factual situations that are bound to happen in medical practice. Such factual situations should be addressed by thoughtful legislation instead of subjecting physicians to potentially unorthodox or free interpretation of laws falling short of meeting the actual needs of their patients.

Abbreviations: **The European Court of Human Rights - ECtHR**

Funding: **The translation of the article from Polish into English has been financed by the Jan Kochanowski University in Kielce, Poland, from the Project financed under the program the Minister of Education and Science called "Regional Initiative of Excellence" in the years 2019-2022, project no. 024/RID/2018/19, amount of financing 11 999 000,00 PLN.**

Authors' contributions: **Kamila Kocańda–90 %; Olga Adamczyk–Gruszka–10 %**

Keywords: **abortion, termination of pregnancy for eugenic reasons, judgment of the Polish Constitutional Court in case K 1/20 of 22 October 2020.**

Background

The Constitutional Court, in its judgment of 22 October 2020 (case no. K 1/20),[1] found the provision of the Act on family planning, protection of the human foetus and conditions permitting termination of pregnancy,[2] that permits termination of pregnancy in cases where prenatal tests or other medical findings indicate a high risk of a severe and irreversible damage to the foetus, or an incurable life-threatening ailment of the foetus, to be incompatible with Article 38 of the Constitution of the Republic of Poland, read in conjunction with Articles 30 and Article 31(3) of the Constitution. The cited articles of the Constitution of the Republic of Poland refer to the following rights and guarantees of fundamental nature, namely that the Republic of Poland provides every human being with the legal protection of life (art. 38); that the inherent and inalienable dignity of man is the source of human and civil freedom and rights, is inviolable, and its respect and protection is the responsibility of public authorities (art. 30), and the

[1] Article 4a(1)(2) of the Act of 7 January 1993 on family planning, protection of the human foetus and conditions permitting termination of pregnancy (Journal of Laws No. 17, item 78 as amended).

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

[3] Dissenting opinion of Constitutional Court's judge Leon Kieres.

principle which stipulates the restrictions on the exercise of constitutional rights and freedoms may be established only by statute and only if they are necessary in a democratic state for its safety or public order, or for the protection of the environment, public health and morality, or the freedoms and rights of other persons and cannot affect the substance of freedoms and rights (art. 31 sec. 3). Said provision ceased to be effective on 27 January 2021. A dissenting opinion[3] to the October judgment noted that the rules governing the legality of abortion in Poland are among the strictest in Europe. According to the dissenting judge, the majority decision will lead to the criminal prosecution of abortions performed due to embryo-pathological reasons, considered legal for over 23 years. Available data show that in 2018, the foetal abnormality ground for termination of pregnancy was invoked in 1050 out of 1076 cases (i.e., approx. 98%) of legal abortions performed in Poland.[4] The post-judgment law on abortion in Poland provoked widespread domestic protests, and lead to a broad discussion on abortion, both in Poland and abroad. However, in the full written opinion, the Constitutional Court included arguments and reasoning that not only soften the judgment's tone, as compared to the original (verbally) pronounced judgment, but may even lead to a broader interpretation. It opened the door to broader grounds for abortion, because it refers to specific defects or ailments of the foetus, which were previously declared unconstitutional grounds for abortion, but would be legally permissible grounds, if the abortion is medically warranted due to the existence of a threat to the life or health of the mother.

The Historical Perspective of Legal Abortion

In the interwar period, termination of pregnancy, at the time defined as "aborting a foetus," was legal if the procedure was necessary due to the state of health of the pregnant woman, or the pregnancy was the result of "an indecent act."[5] The above rule was repealed by the Family Planning Act, which permitted termination of pregnancy,[6] by allowing abortions justified by medical indications or difficult living conditions of a pregnant woman, as well as a reasonable suspicion that the pregnancy resulted from an offence.[7]

The amendment to the Family Planning Act made under the Act of 30 August 1996,[8] which became effective on 4 January 1997, added to the Family Planning Act

[4] Report of the Council of Ministers on the implementation and consequences of the application of the Act of 7 January 1993 on family planning, protection of the human foetus and conditions permitting termination of pregnancy in 2018, Sejm Paper No. 339/IX (9th parliamentary term), p. 116.

[5] That is, an act perpetrated against a person under the age of 15 or a person totally or partially incapable of recognising the meaning of the act or of conducting their own affairs, or and act involving rape, abuse of a relationship of dependency or the exploitation of a critical position or incest (Journal of Laws No. 17, item 78, as amended); Regulation of the President of the Republic of 11 July 1932 – Criminal Code (Journal of Laws No. 60, item 571), Articles 231-233 of the Criminal Code.

[6] Act of 27 April 1956 (Journal of Laws No. 12, item 61, as amended), Article 1.

[7] Article 2 of the Act of 27 April 1956 on conditions permitting termination of pregnancy (Journal of Laws No. 12, item 61, as amended.

[8] Act amending the Act on family planning, protection of the human foetus and conditions permitting termination of pregnancy and amending certain other acts ("Family Planning Act", Journal of Laws of 1996 No. 139, item 646).

article 4a that describes cases of legally permissible abortion. In the original version of the law in question, the lawmakers provided that pregnancy may only be terminated by a doctor if the pregnancy poses a threat to the life or health of the pregnant woman, prenatal tests or other medical findings indicate a high risk of a severe and irreversible damage to the foetus or an incurable life-threatening ailment of the foetus, there is a justified suspicion that the pregnancy resulted from a prohibited act, or the woman experiences difficult living conditions or personal situation. The living conditions/personal situation ground for abortion, which is social in nature, was soon abolished because it permitted termination of pregnancy without being sufficiently justified by the necessity to protect another constitutional value, right or freedom and was based on ambiguous permissibility criteria and as such violated constitutional guarantees for human life.[9]

The Object of Constitutionality Assessment in the Written Statement of Reasons for the Judgment of the Constitutional Court

In its judgment of 22 October 2020, the Constitutional Court held that the condition allowing termination of pregnancy in cases where prenatal tests and other medical findings indicate a high risk of a severe and irreversible damage to the foetus or an incurable life-threatening ailment of the foetus is "eugenic" in the sense of liberal eugenics.[10] The Constitutional Court derived the inherent right to life of every human being, which, in the Court's view, justifies the finding of unconstitutionality of Article 4a(1)(2) of the Family Planning Act, from both international instruments[11] and national legislation.[12] The Constitutional Court decided that circumstances relating to the state of health of the child could not be a stand-alone ground for termination of pregnancy. The Court's adjudicating panel challenged the provision based on the "inadequate," as the judges put it, description of "high risk of a severe and irreversible damage to the foetus or an incurable life-threatening ailment of the foetus." The repealing of the provision in question restricted circumstances in which an abortion would be considered legal.

[9] Article 4a(1)(4) has been repealed pursuant to Article 1(2) of the Act of 30 August 1996 (Journal of Laws of 1996 No. 139, item 646) amending the Family Planning Act as from 23 December 1997—see the Notice of the President of the Constitutional Court of 18 December 1997 (Journal of Laws of 1997 No. 157, item 1040), ruling of the Constitutional Court of 28 May 1997, case no. K 26/96, OTK 1997, No. 2, item 19.

[10] In the written statement of reasons for its judgment, the Constitutional Court referred to views on liberal eugenics, defining it as an ideology advocating genetic manipulations at the behest of private individuals, an effect of which is to be the best possible human being (Miętek A., "Przeciw eugenice liberalnej", Dialogi Polityczne 2008 (10), p. 87, cited by the Court).

[11] Article 6(1) of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 (Journal of Laws of 1977 No. 38, item 167; Article 2(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993 No. 61, item 284, as amended); Article 2(1) of the Charter of Fundamental Rights of the European Union of 7 December 2000 (OJ EU C 202 of 7 June 2016, p. 389).

[12] Articles 152-154 of the Criminal Code; Article 446^1, Article 927 § 2 of the Civil Code; Articles 75 and 182 of the Family and Guardianship Code.

In its written opinion, the Constitutional Court explains that the challenged provision provides no basis for the conclusion that a high risk of a severe and irreversible harm to the foetus, or an incurable life-threatening defect of the foetus, automatically infers a threat to the well-being of the pregnant woman, and that the consideration of possible defects in the child is itself of a eugenic consideration. The Court made it clear that the provision in question makes no reference to any measurable criteria in determining the threat to the mother's well-being that would justify abortion, i.e., a situation in which she could not be legally required to sacrifice her well-being as a legally protected interest. As noted by one of the dissenting judges, the Constitutional Court, contrary to the arguments presented in public during the verbal announcement of the judgment, explicitly allowed for the possibility of establishing such "measurable criteria" in legislation.[13]

It accordingly appears that, as a result of the widespread criticism of the October judgment, the Constitutional Court's written statement of reasons expresses a change in the Court's rhetoric as compared to the summary justification of the judgment presented at the time of its verbal announcement. The argument concerning the maternal well-being element may become a directive leading to the implementation of legislative changes which may result in the lawmakers upholding the circumstances affecting the foetus as a legislative ground for legal abortion provided that this ground is linked to the mother's well-being, together constituting a counterweight to the protection of another important good, the well-being of the new born child. However, any legislative initiative that may result from a certain interpretation of the above conclusions of the written statement of reasons given by the Court requires a certain amount of time. In any case, one should attempt to assess whether current law may be interpreted in a way permitting consideration of whether foetal defects that pose a threat to the health of the mother may constitute grounds for legal abortion.

Possible Consequences of the October Judgment

It should be noted at the outset that under the current law, a pregnancy that endangers the life or health of the pregnant woman may legally be terminated during the entire pregnancy period, whereas termination of the pregnancy for the reasons which the Court considered unconstitutional was allowed only until the foetus gains the ability to live independently outside the mother's body. The first consequence of adopting an interpretation that would allow termination of pregnancy in the situation where certain defects or ailments of the foetus pose a threat to the life or health of the mother could therefore produce an effect opposite to what the Court intended. If a foetal defect or ailment is considered to pose a threat to the mother, the pregnancy could be terminated at any point of its entire duration rather than until the moment when the foetus reaches the ability to live independently outside the mother's body, as previously provided for in the abortion ground that the Court considered unconstitutional.

[13] Dissenting opinion of Constitutional Court's judge Jarosław Wyrembak.

The doctrine indicates that if embryopathological defects of the fetus simultaneously pose serious threats to the mother's psyche, the premise to terminate pregnancy due to mother's health is applicable and the removal from the legal system the abortion premise due to embryopathological defects has not changed anything,[14] and each premise concerning the admissibility of termination of pregnancy is closely related to the protection of the life and health of a pregnant woman.[15] The commentators also emphasize that it is not possible to assume the absolute protection of the conceived life by contrasting it with the mother's life, nor to treat a pregnant woman purely instrumentally as the environment in which the fetus develops.[16]

However, answering the following question is now in order: who (and under what procedure) should decide whether certain foetal defects endanger the life or health of the mother? Under the currently applicable regulation of the Minister of Health, the occurrence of circumstances indicating that a pregnancy poses a threat to the life or health of the pregnant woman is determined by a doctor specialising in a branch of medicine appropriate to the type of disease of the pregnant woman.[17] The law thus requires that the existence of the ground relevant to the assessment of the permissibility of abortion in a given case should be confirmed by a doctor specialising in the relevant medical field. In the context of assessing whether it is possible to consider that it is a particular ailment of the foetus that poses a threat to the life or health of the pregnant woman, the opinion of a doctor specialising in a medical field other than obstetrics and gynaecology would, arguably, be insufficient.

The aforementioned regulation also defines the procedure applicable to the finding of circumstances indicating a high risk of a severe and irreversible damage to the foetus or an incurable life-threatening ailment of the foetus, requiring that such circumstances must be confirmed by a *quasi*-medical certificate issued by a specialist doctor who confirms a genetic defect of the foetus based on genetic tests or by a doctor specialising in obstetrics and gynaecology who confirms a foetal developmental defect based on ultrasound imaging tests of the pregnant woman. Consequently, during the period relevant to the ground of legal abortion concerning the foetus, the applicable medical circumstances were to be assessed by an obstetrician-gynaecologist.

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[14] Tarapata S., Zontek W., Prawnokarne skutki wyroku TK z 22.10.2020 r., K 1/20 (zagadnienia wybrane), Państwo i Prawo 2021 (8) p. 211-225.

[15] Dziergawka A., Prawna ochrona życia dziecka poczętego w aspekcie prawa kobiety do aborcji. Glosa do wyroku TK z dnia 22 października 2020 r., K 1/10, Palestra 2021 (5), p. 96-113.

[16] Soniewicka M., Spór o permissibility of termination of pregnancy from an ethical and philosophicznoprawa (commentary to the judgment of the Constitutional Tribunal in case K 1/20), Państwo i Prawo 2021 (8), p. 6-23.

[17] Section 2 (1)-(2) of the Regulation of the Minister of Health and Social Welfare of 22 January 1997 on the professional qualifications of doctors required for the performance of abortion procedures and determination of the fact that pregnancy poses a threat the life or health of the woman or indicates the high risk of a severe and irreversible damage to the foetus or an incurable life-threatening ailment of the foetus (Journal of Laws No. 9, item 49).

Since Poland lost the case of *Tysiąc v. Poland*[18] before the European Court of Human Rights, Polish legal scholars and commentators have been discussing the ground for legal abortion that invokes a threat to the life or health of the pregnant woman. In 2007, the European Court of Human Rights stated in the case of *Alicja Tysiąc v. Poland* that Poland had failed to fulfill its obligation to ensure effective protection of the provisions of art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, guaranteeing the right to respect for private life. In the opinion of the Tribunal, the pregnant woman was not granted the right to appeal against the doctors' decision imposing the right to perform a legal abortion for health reasons. At the same time, the ECtHR unanimously ruled that there had been no violation of the provisions of art. 3 of the Convention guaranteeing the right to protection against inhuman treatment. The ECtHR held that Polish lawmakers were responsible for a legislative omission, namely the failure to establish an appeal remedy against a medical certificate concerning circumstances indicating that the pregnancy endangers the life or health of the pregnant woman.[19] However, one cannot ignore the fact that the Medical and Dental Professions Act currently in force provides for a procedure of medical council held at the patient's request, which may be considered a sufficient measure of the *ex ante* review of the diagnosis.[20] This legislative solution is arguably useful in the process of assessing whether certain foetal defects or ailments have an impact on the threat to the life or health of the pregnant woman which is sufficient to justify that termination of a pregnancy is legal based on the lawful ground of the mother's well-being.

One may reasonably argue that the consequences of such circumstances on the life or health of the mother should be evaluated not only by a doctor with the specialist knowledge of the condition suffered by the pregnant woman but also by an obstetrics and gynaecology specialist. After all, since the source of the risk is the condition of the foetus, an omission of medical circumstances relating to the latter and the resulting threat to the life or health of the mother would result in the absence of a sufficient confirmation of the fact that the pregnancy may lawfully be terminated because it constitutes a risk to the life or health of the pregnant woman. The legislation expressly separates the two circumstances, whereas it cannot be ruled out that they may co-exist in a situation where it is precisely certain defects or ailments of the foetus that pose a threat to the well-being of the mother. The abortion ground challenged by the Court clearly involves a situation in which certain defects or ailments of the foetus do *not* pose a threat to the life or health of the pregnant woman.

Furthermore, one cannot overlook that under the current law, it is a doctor other than the one who terminates the pregnancy (unless the pregnancy poses a direct threat

[18] Tysiąc v. Poland, no. 5410/03, 20 March 2007, LEX no. 248817.

[19] Tysiąc v. Poland, no. 5410/03, § 128, 20 March 2007, LEX no. 248817 cited in M. Żelichowski, Opinia prawna w przedmiocie "Konsekwencje dla polskiego systemu prawnego wyroku Europejskiego Trybunału Praw Człowieka w sprawie Tysiąc przeciwko Polsce," Prawo i Medycyna 2009 (3), p. 139-140.

[20] Gałązka M., Wiak K., "Glosa do wyroku ECtHR z dnia 20 marca 2007 r., 5410/03," Przegląd Sejmowy 2007 (3), p. 211-224.

to the life of the woman) who should confirm whether the pregnancy may be terminated due to circumstances involving a threat to the woman's health and foetal defects or ailments identified at the relevant time.[21] This further prevents the acceptance of the least contentious argument concerning the number, speciality and identities of doctors who would assess the impact of certain foetal defects or ailments on the threat to the life or health of the pregnant woman.[22] Consequently, at least three doctors, including a specialist in the medical field relevant to the type of disease of the pregnant woman and a specialist in obstetrics and gynaecology, should take part in the medical council.[23]

Conclusions

The Constitutional Court's judgment has removed from the legal order the possibility of legal termination of pregnancy in cases that previously accounted for the largest percentage of such abortion procedures, namely when prenatal tests or other medical findings indicated a high risk of a severe and irreversible damage to the foetus or an incurable life-threatening ailment of the foetus.

In the written statement of reasons for its judgment, the Constitutional Court included a statement which may constitute a basis for interpretation, concluding that reasons of an embryo-pathological nature, insofar as they pose a threat to the life or health of the pregnant woman, may constitute a basis for the legal termination of pregnancy on the ground of "the mother's well-being." It is not certain, however, how many doctors (and of what field) should make the relevant evaluation that would constitute sufficient legal justification for a decision to perform a legal abortion, thereby mitigating the risk of facing legal liability for terminating a pregnancy for reasons deemed unconstitutional by the Constitutional Court.

However, one should not discount the doctor's duty to save the patient's life or health in a medically justifiable situation and the associated risk of being legally responsible for failing to carry out a medical procedure. If a woman is unlawfully deprived of her right to terminate a pregnancy under the Family Planning Act, she may claim compensation for the damage resulting from that fact on account of the infringement of her personal interest, namely the right to family planning, which amounts to a violation of her freedom.[24]

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[21] Article 4a(5) of the Act of 7 January 1993 on family planning, protection of the human foetus and conditions permitting termination of pregnancy (Journal of Laws No. 17, item 78 as amended).

[22] Legal scholars and commentators note that while the abortion ground referring to the well-being of the woman is arguably the least controversial of the four grounds originally implemented to the Family Planning Act by Article 4a, it may raise certain doubts and difficulties regarding its interpretation, see Haberko, J., 4.2 Interes dziecka poczętego a dopuszczalność przerywania ciąży w sytuacji zagrożenia dla życia lub zdrowia kobiety ciężarnej, in: Cywilnoprawna ochrona dziecka poczętego a stosowanie procedur medycznych, Warszawa 2010.

[23] Żelichowski M., "Konsekwencje dla polskiego systemu prawnego wyroku Europejskiego Trybunału Praw Człowieka w sprawie Tysiąc przeciwko Polsce", Prawo i Medycyna, 2009 (3).

[24] Judgment of the Supreme Court of 21 November 2003, case no. V CK 16/2003, cited in Nesterowicz M., "Glosa do uchwały SN z dnia 22 lutego 2006 r., III CZP 8/2006", Prawo medyczne 2012 (384);

In such a situation, in the face of the lawmakers' inaction and in connection with the judgment of the Constitutional Court, it is the doctor carrying out the procedure of termination of a pregnancy due to defects or ailments of the foetus that pose a threat to the mother's life or health who will be forced to decide whether or not to carry out a medically necessary but legally questionable procedure. If they choose to save the life or health of the mother and decide to terminate the pregnancy because of the defects or ailments of the foetus that are dangerous for the mother, they will have to medically justify their decision in a way that falls outside the legislative framework and invoking the provisions designed to govern other types of legal abortion.

For these reasons, doctors are likely to bear the burden that should have been placed on the lawmakers, who are, after all, obliged to consistently and exhaustively legislate on factual situations that are bound to happen in the medical reality and should be addressed by legal measures other than those originating from an unorthodox or free interpretation of laws falling short of meeting the actual needs of the society. Doctors should not be required to make such interpretation and their role in the decision-making process concerning the termination of pregnancy should be limited to making assessments of medical nature.

cf.: judgment of the Supreme Court of 6 May 2010, II CSK 580/09, LEX no. 602234, judgment of the Supreme Court of 13 October 2005, IV CK 161/05, Orzecznictwo Sądów Polskich 2006 (6), p. 71; resolution of the Supreme Court of 22 February 2006, III CZP 8/06, Orzecznictwo Sądu Najwyższego Izba Cywilna 2006 (7-8), p. 123.