

THE EMBRYOPATHOLOGICAL CONDITIONS OF PREGNANCY TERMINATION IN POLAND

EMBRYOPATOLOGICKÉ PODMÍNKY PRO UKONČENÍ TĚHOTENSTVÍ V POLSKU

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Abstract

The conditions for the permissibility of legal termination of pregnancy always arouse great public interest, antagonize public opinion. The conditions permitting legal termination of pregnancy in Poland are defined in Article 4a of the Act on family planning, protection of the human fetus, and the conditions for permissibility of pregnancy termination. The embryopathological premise was one of the most common reasons for abortion. However, this legal provision was derogated by the ruling of the Constitutional Tribunal.

Keywords: abortion, termination of pregnancy, embryopathological condition in Poland

Abstract

Text se věnuje podmínkám, za kterých je právně možné ukončit těhotenství. Tato problematika vždy vyvolává velký veřejný zájem a rozděluje veřejné mínění. Podmínky pro legální ukončení těhotenství v Polsku jsou definovány v článku 4a zákona o plánování rodiny, ochraně lidského plodu a podmínkách pro přípustnost ukončení těhotenství. Embryopatologická podmínka byla jedním z nejčastějších důvodů pro potrat. Tato právní ustanovení však byla zrušena rozhodnutím Ústavního soudu.

Klíčová slova: potrat, ukončení těhotenství, embryopatologický stav v Polsku

Preliminary Issues

The conditions for the permissibility of legal termination of pregnancy always arouse great public interest, antagonize public opinion, and are the subject of many commentaries and analyses (Michalczuk-Wlizło 2022: 153–167). In the considerations of abortion, the most frequently posed questions are: When does human life begins? and From what point is it entitled to legal protection? (Skrzydło 2013:49; Zdybel 2008: 36)

The preamble to the Act of January 7, 1993 *on family planning, protection of the human fetus, and the conditions for permissibility of pregnancy termination* (Journal of Laws 2022) stipulates that life is a fundamental human right, and care for life

and health is among the fundamental duties of the state, society, and citizens. Undoubtedly, human life is a value of the highest rank in our civilization and legal culture, and its protection should not be subject to differentiation (Constitutional Tribunal 2008). It is incumbent on state authorities to pass legislation that protects human life, and every case of restriction of the legal protection of life must be treated as a measure of last resort (Constitutional Tribunal 2004). However, legal protection of life is subject to gradation and reduction when there are conflicts of values within the constitution.

The conditions permitting legal termination of pregnancy in Poland are enumeratively defined in Article 4a of the *Act on family planning, protection of the human fetus, and the conditions for permissibility of*

pregnancy termination. According to the legal status in effect on the date of the promulgation of that Act, an abortion could be performed by a physician in the following cases: when the pregnancy poses a threat to the life or health of the pregnant woman; when prenatal testing or other medical indications point to a high probability of severe and irreversible disability or incurable life-threatening disease of the fetus; there is a reasonable suspicion that the pregnancy is the result of a crime; and when the pregnant woman is in difficult living conditions or a difficult personal situation.

The social condition (Article 4a (1) (4)) was abrogated by the ruling of the Constitutional Tribunal of May 28, 1997, file ref. no. K26/96, which stipulated that the terms “difficult living conditions” and “difficult personal situation” are vague and result in a woman's subjective belief in a possible threat to her material position or personal relationships, or her ability to fulfill her own needs and exercise her rights and freedoms¹. In the Tribunal's opinion, that belief, compared to the conflicting constitutional value of human life, presents an indisputably lower value and may not be the basis for the legislature to limit the protection of human life. The effect of such a ruling was that the provision formulated in Article 4a (1) (4) was rendered null and void. For many years, the first 3 conditions were in force, until the date of publication of the ruling of the Constitutional Tribunal in case no. K1/20, in which the provision of Article 4a (1) (2), which formulates the embryopathological condition, was stripped of legal force.

In the practice of application of the current legislation, even when the conditions in question existed, access to abortion was difficult and women could not obtain the medical service to which they were entitled. The unfavorable situation for women was further compounded by the fact that the existing legal norms, which allow, on the basis of juridical exceptions to the general prohibition, to carry out legal terminations of pregnancy, have no procedural guarantees and state authorities have not ensured their enforcement. Poland's current legislation on abortion is among the most radical in Europe and attempts to tighten it even further are in conflict with international standards for the protection of women's rights (Róžańska 2019: 343).

Statutory Regulation

Article 4a (1) (2) of the Act of January 7, 1993 on family planning, protection of the human fetus, and the conditions for permissibility of pregnancy termination, by defining the embryopathological condition, permitted abortion in cases where

prenatal testing or other medical indications pointed to a high probability of severe and irreversible disability or incurable life-threatening disease of the fetus. The phrases “high probability,” “severe and irreversible,” and “life-threatening disease” used in the Act are imprecise and by their very nature lead to problems with interpretation (Królikowski 2010: 1–15). This is because the law does not specify any criteria for unequivocally and conclusively qualifying certain cases as meeting or not meeting the statutory conditions set forth in Article 4a (1) (2). Moreover, the expressions in question are not medical terms, which would clearly make their interpretation easier.

Because the legal basis makes a reference to vague criteria, it must be up to the physician in each case to arbitrarily decide on whether the conditions set forth in the relevant norms are met. The problem of interpretation becomes even more complicated because the diagnosis made in the course of examinations, even very detailed ones, determines only the probability, and not the degree, of the occurrence of a specific disease, and the real state of health can only be assessed after the child is born.

A catalog of diseases resulting in severe and irreversible impairment does not exist in medical science, let alone legal science. It seems that one should resort to a literal interpretation and consider that these cases will show a significant reduction in physical or intellectual capacity that is not subject to treatment and the consequences of which cannot be eliminated. The phrase “incurable life-threatening disease of the fetus” is also vague, because the legislature did not specify whether the threat to life should be immediate or potential. Moreover, with the dynamic advances in medical science, the list of such diseases becomes narrower (Kubiak 2021).

A difficult to estimate number of hereditary diseases and congenital defects are lethal or take the form of profound physical and mental disabilities, others are associated with numerous limitations in the daily lives of those suffering from them, while still others can be extremely severe or mild. This raises the question of whether the mere diagnosis of a developmental defect or incurable disease in prenatal or other medical tests or examinations fulfills the statutory condition set forth in the cited regulation.

In the opinion of W. Wróbel, the mere fact that the fetus is impaired or that there is an incurable disease cannot constitute the sole rationale for the permissibility of abortion. This is because neither concern for the quality of the transmitted genetic code nor consideration for the discomfort of the child's life can justify causing the child's death (Wróbel 2007: 32). On the other hand, M.

1 For more information, see: Ruling of the Constitutional Tribunal of May 28, 1997, file ref. no. K 26/96.

Boratyńska, starting from a literal interpretation of Article 4a (1) (2), stresses that the legislature uses the following alternative: a high probability of severe and irreversible damage to the fetus or an incurable life-threatening disease. Since this is a disjunctive alternative, a severe and irreversible damage to the fetus does not necessarily mean a lethal defect, i.e. one resulting in premature death (Boratyńska 2008). Still another opinion is expressed by M. Królikowski, who believes that the constitutional status of the embryological condition is not clear, because it protects two situations: one where, due to a severe disease or impairment, the life of the child is considered to bring undue burdens on his or her family, and one where, due to too serious a “defect” of the child, he or she is denied the right to exist (cf. Królikowski 2010). In view of the above, it seems reasonable to assume that the condition is met when the health of the child cannot be really changed as a result of therapy, and the mother's associated emotional state is similar to that when she has to reckon with the death of her child.

The ruling of the Constitutional Tribunal

The object of consideration in case no. K1/20 was a motion by a group of members of parliament to recognize the incompatibility of Article 4a (1) (2) and Article 4a (2), first sentence, with Article 30 of the Constitution on the grounds that they legalize eugenic practices for an unborn child, which would allegedly violate the child's human dignity. At the same time, two alternative claims were raised in the justification. If the first demand was not granted, the Constitutional Tribunal was to rule that the challenged provisions were incompatible with Article 38 in conjunction with Articles 30 and 31 (3), and Article 38 in conjunction with Article 32 (1 and 2) of the Constitution, on the grounds that the provisions would make the protection of the right of an unborn child to life dependent on the child's health, which constitutes prohibited direct discrimination. If, on the other hand, this claim was also rejected, the Tribunal was to rule that the contested provisions are incompatible with Article 38 in conjunction with Article 31 (3) and in conjunction with Article 2 and Article 42 of the Constitution of the Republic of Poland, on the grounds that the provisions legalize the termination of pregnancy without sufficient justification by the need to protect another constitutional value, right, or freedom, and violate guarantees for human life by using unspecified criteria.

The Constitutional Court issued a judgment in the case in question on October 22, 2020, declaring as unconstitutional Article 4a (1) (2) of the Act on family planning, protection of the human fetus, and conditions for the permissibility of termination of pregnancy, and consequently eliminating the possibility of invoking the embryopathological condition, which has so far permitted termination

of pregnancy when prenatal tests or other medical indications pointed to a high probability of severe and irreversible disability of the fetus or an incurable disease threatening the life of the fetus (Kuzelewska, Michalczuk-Wlizio, Kuzelewski 2022: 105–125). The principles cited as the benchmarks for constitutional evaluation of the condition under Article 4a (1) (2) are: the dignity of the individual (Article 30 - *The inherent and inalienable dignity of the individual is the source of human and civil liberties and rights. It is inviolable, and its respect and protection is the duty of public authorities*); legal protection of human life (Article 38 - *The Republic of Poland shall ensure to every person the legal protection of life*); and proportionality of the limitation of rights (Article 31 (3) - *Limitations on the exercise of constitutional freedoms and rights may be established only by a statute and only if they are necessary in a democratic state for its security or public order, or for the protection of the environment, public health and morals, or the freedoms and rights of others. Such limitations may not violate the essence of freedoms and rights*) (Młynarska-Sobaczewska 2021: 168–179).

Weighing the constitutionality of the embryopathological condition, the Constitutional Tribunal used the ethical and philosophical context, concluding that the obligation of legal protection of life in each of its phases is supra-positive and should be fulfilled to the highest possible degree. The legislature, on the other hand, has the freedom to regulate the issue of permissibility of abortion, as long as it does not violate norms, principles, and constitutional values, and does not go below the level of protection provided for in the wording of the Constitution. Recognizing that it is constitutionally permissible to vary the scope of intensity of the legal protection of unborn children, the Constitutional Tribunal stressed that the Constitution of the Republic of Poland adopts the maximum protection, in the form of the highest standard of protection of human life, while finding no space for the protection of other values in the context of abortion, including a woman's dignity and her right to self-determination.

As the Constitutional Tribunal stated in the grounds for its ruling, “Article 4a (1) (2) does not allow us to assume that a high probability of a severe and irreversible disability of the fetus or an incurable disease threatening the life of the fetus is to provide a basis for an automatic presumption of violation of the welfare of the pregnant woman, and the mere indication of a potential burden of such defects on the child is eugenic in its nature. The provision lacked reference to measurable criteria of violation of the mother's well-being that would justify termination of pregnancy, namely a situation in which she could not legally be required to sacrifice a given legal interest.” When considering the existence of a constitutional value that justifies the termination of a pregnancy due to

the fulfillment of the so-called eugenic condition, the Constitutional Tribunal concluded that it could not be public safety or order, or the protection of the environment, health, or public morals. Nor can the saved interest be the health of the fetus, since a person's health cannot be put in opposition to his or her life. It was recognized that interests cannot be balanced in a situation where the interest being sacrificed and the interest being saved concern the same person. The Constitutional Tribunal also pointed out that in the case considered there was no certainty of a defect or disease of the fetus, which was described in the grounds of the ruling as a "state of diagnostic certainty," but only a probability of their occurrence.

It seems that, in the Tribunal's opinion, the ruling should be enforced in such a way that it becomes possible to terminate a pregnancy - with the introduction of "measurable criteria" - in situations where a woman cannot be required to make sacrifices beyond the usual extent. One can assume that these criteria are met, in particular, by a lethal defect in the fetus that leads directly to its imminent death in the near future. In such a case, abortion is not "eugenic" in nature and, therefore, absolutely ruled out by the Constitutional Tribunal, but allows the elimination of a situation that can be described as inhumane treatment of a woman. Pregnant women whose fetus is burdened with a lethal defect must face the mental and physical suffering associated with the need to continue the pregnancy and the knowledge that the fetus will die either before or shortly after delivery. In the grounds for the ruling in case no. K1/20, the Constitutional Tribunal found it reasonable for the legislature to analyze whether the legal solutions in force in Poland that concern the provision by public authorities of special assistance to mothers before and after childbirth are sufficient in the event that Article 4a (1) (2) is eliminated from the legal system.

One should bear in mind that the removal from the Act of any of the conditions permitting a lawful termination of pregnancy also means that abortion under the conditions set forth in the derogated norm becomes an unlawful act that has the characteristics of the crime under Article 152 of the Criminal Code² (Journal of Laws 2022a). This is because in the Polish normative system the scope

of abortion allowed by the current law is closely correlated with the acts described in the Act of June 6, 1997 – Criminal Code.

The ruling in question lacked, most importantly, consideration of whether the interest saved in the identified conflict of values is not human dignity itself, to which both the pregnant woman and the human being in the prenatal period are entitled. As the Tribunal rightly noted, abortion involves a conflict between the rights of the embryo or fetus and the rights of the pregnant woman. Such a conflict may concern, for example, the right to protect the life or health of a pregnant woman, as in the case of the health condition for permissibility of abortion. The embryopathological condition, on the other hand, involves a conflict between the pregnant woman's dignity, freedom, and right to self-determination, and the fetus' right to the protection of life in the prenatal period. That conflict, however, has not been resolved by the Constitutional Tribunal, or even analyzed in depth.

The Constitutional Tribunal's ruling did not rule out the possibility of adopting new legislation on legal abortion. It follows from it that the legislature, when drafting the relevant statutory provisions, should be guided by the standards developed in the case law of the Constitutional Tribunal. It is the role of the legislature to construct appropriate legal norms.

The President's Bill

The Constitutional Tribunal's ruling in case no. K1/20, as previously mentioned, resulted in the elimination from the Polish legal system of the provision³ that has been the most commonly used legal basis legitimizing the legal termination of pregnancy⁴. Since the date of its delivery, legal abortions have almost stopped to be performed in Poland. Their number has decreased tenfold (Ekai. pl 2021). Thousands of citizens took to the streets of Polish cities and towns to protest against the content of the ruling and the state's policies on women's reproductive rights (Rak 2022: 41).

In view of the social crisis triggered by the Constitutional Tribunal's ruling, on October 30, 2020, the President of the Republic of Poland, Andrzej Duda, using his legislative initiative prerogatives, submitted to the Sejm a bill amending the Act on family planning, protection of the

2 Article 152 of the Criminal Code, Journal of Laws of 2022, item 1138.

§ 1. Anyone who, with a woman's consent, terminates her pregnancy in violation of the law shall be liable to imprisonment for up to three years.

§ 2. The same punishment shall be imposed on anyone who helps a pregnant woman to terminate her pregnancy in violation of the law, or who persuades her to do so.

§ 3. Anyone who commits the act specified in sec. 1 or 2 after the conceived child is capable of living outside the pregnant woman's body is liable to the penalty of imprisonment for a period between six months and eight years.

3 The ruling of the Constitutional Tribunal was published on January 27, 2021 and became effective on the same day, thus having legal effect.

4 Since 2017, more than 90% of legal abortions were performed annually for embryopathological reasons; detailed data can be obtained from the Center for Healthcare Information Systems.

human fetus, and the conditions for permissibility of termination of pregnancy (Parliamentary print no. 727 of the Sejm of the 9th term).

The President's bill provided for the introduction of a new condition allowing legal termination of pregnancy when prenatal tests or other medical indications point to a high probability that the child will be born dead or burdened with an incurable disease or defect, leading inevitably and immediately to the death of the child, regardless of the therapeutic measures used (Sejm 2020). In the explanatory memorandum for the bill, it was argued that legislation regulating such socially important issues as the possibility of pregnancy termination must take into account, while respecting the constitutional provisions concerning both the unborn child and the mother, the right to make independently, under statutorily defined conditions, the extremely difficult decision to continue or terminate a pregnancy (see: Explanatory memorandum to the bill amending the Act on family planning, protection of the human fetus). In addition, the proponent of the bill noted that the recommended amendment, which would expand the scope of the conditions for legal abortion, includes only lethal defects of the fetus, thus excluding other developmental defects. The condition of inevitability of the child's death due to a disease or defect with which it would be burdened from birth, and the direct connection of the child's anticipated death with that disease or defect, precludes the possibility of applying the introduced condition with the intent to perform the so-called eugenic abortion. It also clearly distinguishes the recommended norm from the condition challenged by the Constitutional Tribunal, as formulated in Article 4a (1) (2) of the amended act.

The adoption of the above solution was based on the belief that, given the need for the absolute protection of human life, in the case of lethal defects the death of the child is inevitable, even if it is born alive. Protecting the life of a child with lethal defects is therefore beyond human capabilities. Therefore, taking into account the protection of other constitutional values, primarily the principle of inviolability and respect for human dignity, it is the mother who should make the decision to terminate the pregnancy in such cases. After all, guided by her own conscience and professed values, a woman should be able to decide whether to continue a pregnancy or terminate it.

Contrary to its declarations (TVN 24 2020) the Sejm did not urgently process the presidential bill allowing abortion in the case of a lethal defect of the fetus. The first reading of the *Bill amending the Act on family planning, protection of the human fetus, and the conditions for permissibility of termination of*

pregnancy was scheduled to take place at meetings of the Justice and Human Rights Committee and the Health Committee, where it was submitted on November 3, 2021. However, it has not taken place, despite the passage of more than 2.5 years⁵ since the bill was submitted to the Sejm.

The case R.R. v. Poland

In Poland, women who wish to use the medical procedure of induced miscarriage, to which they are entitled under current law, face numerous factual obstacles that result either from a misinterpretation of the current law or from institutional abuses on the part of healthcare providers. This causes those women to search for institutions outside of Poland to protect their reproductive rights. The Council of Europe's system is considered one of the most effective.

As for termination of pregnancy, the European Court of Human Rights has ruled against states where access to the procedure was limited or the existing law was improperly implemented. Poland has so far been a party to three proceedings in which a verdict was reached that recognized the plaintiffs' claims. These were *Tysi c v. Poland*, *R. R. v. Poland*, and *P. and S. v. Poland*. From the point of view of this paper, the case *R. R. v. Poland* (complaint no. 27617/04) is of particular importance.

During her pregnancy, a woman was repeatedly denied referrals for legally mandated prenatal tests, despite alarming symptoms detected in the fetus during ultrasound examinations in the 18th week of her pregnancy. The plaintiff was eventually given the opportunity to undergo genetic testing of the fetus when she was already 23 weeks pregnant. These tests confirmed a genetic defect in the fetus; however, she was forced to wait for two more weeks for a written opinion. The temporal aspect of the way the problem was handled was crucial, since the law in effect on the date of consideration of the case allowed legal termination of the pregnancy on embryopathological grounds only up to the 24th week of pregnancy. After obtaining the opinion, the plaintiff sent a request to the hospital, to perform an abortion. However, the healthcare facility refused to provide the service claiming that, in the opinion of the physicians, the time limit for termination of the pregnancy (24 weeks) allowed by the current law had expired. The woman gave birth to a child with a very serious genetic defect - the Turner syndrome.

In 2011, the European Court of Human Rights issued a landmark ruling in the case *R. R. v. Poland*, affirming women's right to reliable information about the health of the fetus, enabling them to make informed decisions about their reproductive health, including the possibility of terminating

5 As of the date of submission of the paper (June 1, 2023), the legislative procedure has not been initiated.

a pregnancy. In the Court's view, the guarantee of women's access to prenatal tests to assess the health of the fetus and the reliable information provided by the physician are an immanent part of women's exercise of personal autonomy. The state's failure to provide sufficiently fast⁷ access to the services to which one is entitled, which consequently prevents an informed decision to continue a pregnancy,

violates Article 3 of the European Convention on Human Rights. It is therefore considered as inhuman and degrading treatment. In addition, the failure to establish effective procedures to allow women access to legal abortion violates Article 8 of the Convention and constitutes a violation by the state of the right to respect for private life.

Conclusion

The abortion procedure highlights the conflict of values between the right to the protection of life enjoyed by human embryos and fetuses, on the one hand, and the rights of the pregnant woman, primarily her dignity, the right to the protection of life and health, including mental health, on the other. Formulating a universally acceptable answer to the questions of when a human being is created and from what point in time he or she is entitled to the legal protection of life seems impossible.

The ruling of the Constitutional Tribunal in case no. K1/20 failed to take into account the need to protect a woman's inherent and inalienable dignity, and appears, by making it impossible to legally terminate a pregnancy when medical indications point to a high probability of severe and irreversible disability of the fetus or an incurable disease threatening its life, to have violated the prohibition of cruel treatment and torture, the right to the protection of private life, and the right to the protection of health, which are guaranteed by both the Polish Constitution and acts of international law, for example the European Convention for the Protection of Human Rights and Fundamental Freedoms. It seems that in the course of performance of a medical procedure classifying a specific situation as fulfilling the condition for pregnancy termination under Article 4a (1) of the Act on family planning, or in possible court proceedings initiated in connection with such cases, one could consider shifting the assessment to the condition allowing the termination of an embryopathological pregnancy when such a pregnancy poses a threat to the life or health of the pregnant woman. This is because the fulfillment of the embryopathological condition, especially a lethal defect, can result in serious or even irreversible consequences for the life and health of the pregnant woman. Also, one of the consequences of the lack of legislative intervention after the ruling of the Constitutional Tribunal is to oblige women to adopt a heroic attitude, which the law should never require. It is up to the legislature to balance all the constitutional values that come into play in this regard. And the rationale for such intervention was pointed out by the Constitutional Tribunal itself.

Given that the object of the Constitutional Tribunal's consideration was only the condition for termination of pregnancy specified in Article 4a (1) (2), it cannot be ruled out that in the coming years politicians will decide to derogate from the legal system the remaining two conditions for legal abortion in Poland, up to the introduction of a total ban on this procedure.

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