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# The right to abortion in Poland in the light of the Constitutional Tribunal's judgment of 22 October 2020

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## 1. Legal Regulation of Access to Abortion in Poland – general remarks

The problem of access to abortion in Poland is regulated by the Act on Family Planning, Protection of Human Foetus, and Conditions for Permissibility of Abortion (referred as Anti-Abortion Act, f.p.a.). This act, adopted in 1993, is general and refers to numerous subordinate acts as well as relevant provisions of the Act of 6 June 1997 – Penal Code.<sup>1</sup> In its original version, it introduced the general principle of punishability of causing the death of the child, excluding the punishability of mothers, and provided for therapeutic, embryopathological, and legal indications as an exclusion of unlawfulness. The amending act of 30 April 1996<sup>2</sup> additionally introduced social indication as a basis for carrying out the abortion. However, the added provision was recognised as

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<sup>1</sup> Consolidated text: Journal of Laws “Dziennik Ustaw” of 2020, item 1444.

<sup>2</sup> Journal of Laws “Dziennik Ustaw” of 1996, No. 139, item 646.

unconstitutional by the Constitutional Tribunal in the judgment of 28 May 1997, ref. no. K 26/96 (Journal of Laws “Dziennik Ustaw” No. 157, item 1040). Therefore, according to Article 4a sec. 1 f.p.a., after the ruling of 1997 and until 27 January 2021,<sup>3</sup> the termination of pregnancy could only be carried out by a doctor under three indications only,<sup>4</sup> when:

- (1) the pregnancy poses a threat to the life or health of the pregnant woman;
- (2) prenatal tests or other medical indications point to a high probability of severe and irreversible impairment of the foetus or an incurable disease threatening its life;
- (3) there is a justified suspicion that the pregnancy resulted from a prohibited act.

## 2. Abortion as a special health service and the right to this service

Subjecting the issue of the termination of pregnancy to regulation by a special act results in the fact that it should be placed within the category of special health services. Health service, as a term of legal language, has been synthetically defined in Article 2 sec. 1 pt. 10 of the Act of 15 April 2011 on Health Care Activities,<sup>5</sup> which is also referred to by the legislator in the second key legal act for the health care system in Poland – Article 5 pt. 40 of the Act of 27

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<sup>3</sup> As of this day, the provision of Article 4a sec. 1 pt. 2 of the Anti-Abortion Act has lost its binding force as a consequence of being deemed inconsistent with Article 38 in conjunction with Article 30 and Article 31 sec. 3 of the Constitution of the Republic of Poland, according to the judgment of the Constitutional Tribunal of 22 October 2020, ref. no. K 1/20 (Journal of Laws “Dziennik Ustaw” of 2021, item 175).

<sup>4</sup> Over the years in the twentieth century, the Polish legislator most willingly used the indication model, among others in the Penal Code of 1932, the Act on the Medical Profession of 1950, and the Act on the Conditions for Interruption of Pregnancy of 1956. Exceptionally, between 1959 and 1981, it chose to regulate the abortion-on-demand model.

<sup>5</sup> Consolidated text: Journal of Laws “Dziennik Ustaw” of 2021, item 711.

August 2004 on Health Services Financed from Public Funds<sup>6</sup> – as activities aiming at preserving, saving, restoring, or improving health, as well as other medical activities resulting from the process of treatment or separate provisions regulating the principles of their provision. This notion – from the point of view of the purpose of providing health services – has been broadly defined. It includes, as noted by Leszek Bosek and Beata Janiszewska, “various forms of therapeutic actions, i.e. those fulfilling therapeutic aims in a broad sense (prevention, diagnostics, therapy or rehabilitation), as well as non-medical interventions, the performance of which is provided for in the Polish legal system”.<sup>7</sup> Due to the specific character of the termination of pregnancy as a health service, which consists in permanent prevention of further development of the foetus by its annihilation, generally not having the character of strictly therapeutic activity,<sup>8</sup> it should be assumed that this is another medical activity resulting from separate provisions regulating the principles of their provision.<sup>9</sup>

Since actions of this type do not serve a strictly therapeutic purpose, the statutory regulation, which confirms the possibility of their performance, is an expression of the legislator’s assessment of the axiological conditions for their provision, resolving the collision of protected goods, in which the medical interference is to take place.<sup>10</sup> In this way, the legislator specifies which activities have the character of healthcare services and norms the conditions, both medical and legal, of their legality, such as clarification and ob-

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<sup>6</sup> Consolidated text: Journal of Laws “Dziennik Ustaw” of 2020, item 1398.

<sup>7</sup> L. Bosek, B. Janiszewska, *Pojęcie i podstawy prawne szczególnych świadczeń zdrowotnych*, in: *System prawa medycznego*, Vol. 2: *Szczególne świadczenia zdrowotne*, eds. L. Bosek, A. Wnukiewicz-Kozłowska, First ed., Warszawa 2018, p. 9.

<sup>8</sup> Except for abortion justified by the state of health of the woman, this may be regarded as medical activities of a mixed nature, partly therapeutic and non-therapeutic.

<sup>9</sup> A. Barczak-Oplustil, *Przerwanie ciąży*, in: *System prawa medycznego*, Vol. 2: *Szczególne świadczenia zdrowotne*, eds. L. Bosek, A. Wnukiewicz-Kozłowska, Warszawa 2018, pp. 297–298.

<sup>10</sup> L. Bosek, B. Janiszewska, *op.cit.*, pp. 17, 18.

taining the consent of the entitled entity.<sup>11</sup> Thus, it determines the application to these services of the provisions on the principles of exercising medical professions, as well as the patient's rights.<sup>12</sup>

At this point, it is worth noting that in the science of administrative law the notion of "health service" does not function autonomously. It is connected with the sphere of health protection<sup>13</sup> – provision of health services takes place within the broadly understood health protection, which is one of the public tasks.<sup>14</sup> According to Wiesław Śniecikowski health services are constructions, which allow the realisation of the public task, which is a health protection.<sup>15</sup> Although it includes health care, it cannot be identified with it. It is the sum of tasks resulting not only from the social policy pursued by the state, among others, in the scope of health, but also from the provisions of the Constitution concerning the protection of dignity (Article 30) and protection of life (Article 38).<sup>16</sup> The right to health services is, therefore, a certain element of the whole, which is health protection and cannot be interpreted in a detached manner from the constitutionally guaranteed individual's subjective right to health protection (Article 68 sec. 1 of the Constitution).<sup>17</sup> The right to health protection is realised through the access of individuals to health services guaranteed in accordance with the provisions of Article 68 sec. 2 of the Constitution in conjunction with Article 15 sec. 1 and 2 Act on Health Services Financed from Public Funds, which is only one form of its realisation, the other

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<sup>11</sup> Ibidem, p. 18.

<sup>12</sup> Ibidem, p. 19.

<sup>13</sup> M. Dercz, T. Rek, *Ustawa o zakładach opieki zdrowotnej. Komentarz*, Warszawa 2010, p. 37.

<sup>14</sup> E. Bojanowski, *O zadaniach jednostek samorządu terytorialnego w Rzeczypospolitej Polskiej*, „Gdańskie Studia Prawnicze” 2012, Vol 8: *Wybrane problemy funkcjonowania samorządu terytorialnego w Rzeczypospolitej Polskiej po reformie*, p. 31.

<sup>15</sup> Ibidem, p. 41.

<sup>16</sup> D.E. Lach, *Zasada równego dostępu do świadczeń opieki zdrowotnej*, in: *System prawa medycznego*, Vol. 3: *Organizacja systemu ochrony zdrowia*, eds. D. Bach-Golecka, R. Stankiewicz, Warszawa 2020, p. 300.

<sup>17</sup> Ibidem, p. 301.

being the protection of an abstractly conceived good constituting health.<sup>18</sup> It may therefore be assumed, that the right to health services is understood as one of the elements of the subjective right to health protection, i.e. the entitlement of the subject – “someone’s right to something”.<sup>19</sup>

In the light of the above, it seems justified to assume that a woman has the right to abortion understood as a health service within the meaning of Article 15 sec. 1 and 2 of the Act on Health Services Financed from Public Funds in connection with Article 4a and Article 4b f.p.a.

### 3. Conditions for realisation of the right to abortion as a specific health service after the judgment of the Constitutional Tribunal of 22 October 2020, ref. no. K 1/20

#### 3.1. Abortion for embryopathological reasons in the light of the judgment of the Constitutional Tribunal of 22 October 2020

For the last twenty years, the Anti-Abortion Act has been presented in public discussion as an “abortion compromise” between the political groups of the early 1990s and the Catholic Church in Poland. It appears rather restrictive when compared to European legal solutions. Nevertheless, in 2020, a group of Deputies to the Sejm of the ninth term submitted a motion to the Constitutional Tribunal to examine the compliance of the embryopathological premise of the termination of pregnancy, as expressed in Article 4a

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<sup>18</sup> A. Rabiega, *Ochrona życia i zdrowia ludzkiego w działaniach podmiotów administrujących*, Warszawa 2009, pp. 41–51; A. Surówka, *Prawo do ochrony zdrowia w świetle orzecznictwa Trybunału Konstytucyjnego*, in: *Konstytucja i sądowe gwarancje jej ochrony. Księga jubileuszowa Profesora Pawła Sarnackiego*, ed. K. Świerk-Bożek, Warszawa 2004, pp. 206–207.

<sup>19</sup> W. Lang, *Zarys analitycznej teorii uprawnienia*, „Studia Prawnicze” 1985, No. 3–4, p. 157.

sec. 1 pt. 2 f.p.a., with the Constitution of the Republic of Poland. According to the provisions of Article 4a sec. 1, pt. 2 f.p.a. – in the version in force on the day the petition to the Constitutional Tribunal was submitted – the termination of pregnancy could be carried out by a doctor 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 its life. Therefore, based on this indication, the termination of pregnancy was carried out due to the state of health of the developing foetus, until the moment when the foetus attains the capacity to lead an independent life outside the organism of the pregnant woman (art. 4a sec. 2).<sup>20</sup> The termination of pregnancy was possible after the determination of the existence of indications for the termination of pregnancy. This was performed by a doctor with specific qualifications – a specialist ruling based on genetic tests or a specialist in obstetrics and gynaecology ruling on foetal malformation based on ultrasound tests carried out on the pregnant woman. On the other hand, the pregnancy was terminated by another doctor, who had a first-degree specialisation in obstetrics and gynaecology or the title of a specialist in this field, exceptionally by a doctor in the course of specialisation, but under the direction of a person authorised to carry out the termination of pregnancy. In the case

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<sup>20</sup> In the legal literature, it was a matter of debate whether the possibility of survival should be understood as survival in special conditions, i.e. with the use of technical means (M. Nesterowicz, *Prawo medyczne*, Toruń 2016, p. 276), or in natural conditions without support (V. Konarska-Wrzošek, *Ochrona dziecka w polskim prawie karnym*, Toruń 1999, pp. 20–21). Unfortunately, this limit is defined differently, e.g. as 22–28 weeks from the moment of conception, although it is influenced by the continuous technical progress in medicine (E. Zielińska, „*In dubio pro vita humana*”, czyli o ochronie początków życia ludzkiego w projekcie kodeksu karnego, in: *Problemy kodyfikacji prawa karnego. Księga ku czci Profesora Mariana Cieślaka*, eds. S. Waltoś, Z. Doda, A. Światłowski, J. Rybak, Z. Wrona, Kraków 1993, p. 222; J. Kulesza, *Prawnokarna ochrona życia człowieka w fazie prenatalnej (w projekcie Komisji Kodyfikacyjnej Prawa Karnego)*, „Państwo i Prawo” 2015, No. 7, pp. 61–62; E. Plebanek, *Życie i zdrowie dziecka poczętego jako przedmiot prawnokarnej ochrony (wybrane problemy wykładnicze w perspektywie najnowszych propozycji legislacji)*, „Czasopismo Prawa Karnego i Nauk Penalnych” 2016, No. 4, p. 11).

of the embryopathological premise, the termination of pregnancy was carried out in a hospital (both public and non-public), meeting the professional requirements specified by the law.

In the motion, the Members demanded an examination as to whether this premise “legalises eugenic practices concerning a child that has not yet been born, thus denying it respect and protection of human dignity”.<sup>21</sup> Should this objection be rejected, the Constitutional Tribunal was to examine whether the embryopathological premise does not lead to unconstitutional discrimination against “unborn children” suffering from incurable diseases and whether it does not “legalise the termination of pregnancy without sufficient justification by the need to protect another constitutional value, right or freedom, and uses undefined criteria for this legalisation, thus violating constitutional guarantees for life”.<sup>22</sup>

In the aforementioned judgment, the full Tribunal held that legalisation of the termination of pregnancy,<sup>23</sup> when prenatal tests or other medical prerequisites indicate a high probability of severe and irreversible impairment of the foetus or an incurable disease threatening its life, is not constitutionally justified in the light of the principle of the protection of life, considered in connection with the principle of the protection of human dignity and the principle of proportionality (Article 38 in conjunction with Article 30 and in conjunction with Article 31 sec. 1 of the Constitution of the Republic of Poland).<sup>24</sup> Invoking the constitutional values, the

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<sup>21</sup> Group of Deputies to the Sejm of the Republic of Poland of the 9<sup>th</sup> term represented by Deputy Dr. Bartłomiej Wróblewski, Deputy Piotr Uściński, Motion to declare a normative act incompatible with the Constitution of the Republic of Poland, Warsaw 19 November 2019, p. 1.

<sup>22</sup> Group of Deputies to the Sejm, p. 2.

<sup>23</sup> It is worth noting, however, that at the stage of adjudicating on the compliance of the provision expressing this premise with the Constitution of the Republic of Poland, several judges of the Constitutional Tribunal disagreed in their assessment with the majority of voters. Consequently, two dissenting opinions to the judgment of the Constitutional Tribunal were presented by judge Leon Kieres and judge Piotr Pszczółkowski. Furthermore, three judges of the Constitutional Tribunal, while agreeing with the judgment itself, presented three dissenting opinions to the justification of the judgment.

<sup>24</sup> Following the established case-law of the Tribunal, since the questioned

Tribunal referred them to the rights of the foetus – recognising it as a subject of the right to life and dignity – and indicated that situations of collision of its rights during the period of life before birth are possible. The Tribunal pointed out that “by the very nature of the termination of pregnancy when considering a collision situation, the analogous good can only be sought on the part of the child’s mother. Although a high probability of severe and irreversible disability of the foetus or an incurable disease threatening its life may also involve a threat to the life or health of the mother, art. 4a sec. 1 pt. 2 of f.p.a. does not refer to such a situation, the more so as the circumstance of such a collision was indicated as a separate premise of admissibility of the termination of pregnancy in art. 4a sec. 1 pt. 1 of the f.p.a. This means that if the circumstances specified in Article 4a sec. 1 pt. 1 and 2 of the f.p.a. occurred simultaneously, then Article 4a sec. 1 pt. 1 of the f.p.a. should apply. [...]”<sup>25</sup> However, the condition of a high probability of severe and irreversible disability of the foetus or an incurable life-threatening disease formulated in the Anti-abortion Act cannot constitute grounds for an automatic presumption of infringement of the welfare of a pregnant woman. In the opinion of the Constitutional Tribunal, the limitation of the legislator to indicating the potential burden of such defects on the child is of eugenic nature.<sup>26</sup>

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regulation was inconsistent with one of the models of control indicated by the appellants, the adjudicating panel decided to abandon further substantive assessment with the remaining constitutional standards (Art. 32 sec. 1 and 2, Art. 2 and Art. 42 of the Constitution of the Republic of Poland) and to discontinue the proceedings due to redundancy of the judgment.

<sup>25</sup> Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, “Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy. Seria A” 2021, pos. 4, pp. 33–34.

<sup>26</sup> In the justification of the judgment of the Constitutional Tribunal, as well as in the application to the Tribunal, the stigmatising term eugenic abortion is used to refer to eugenics, which in the public perception is associated with Nazi practices aimed at improving subsequent generations and the exclusion of “weak” genes through the selection of the species. See: Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, “Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy. Seria A” 2021, pos. 4, pp. 20–21, 32, 34; Group of Deputies to the Sejm, p. 1–2.

In the opinion of the Tribunal, Article 4a sec. 1 pt. 2 f.p.a. lacked reference to measurable criteria of violation of the mother's good that would justify the termination of pregnancy, i.e. a situation in which she could not be legally required to sacrifice a given legal good, right or constitutional freedom. The decision legalising behaviour violating the constitutional value of unborn life cannot be entirely discretionary and arbitrary but justified by the collision of constitutional goods, rights, or freedoms, which may be accorded comparable importance in a given collision situation. In the opinion of the Tribunal, "when regulating this issue in the future, the legislator should take into account the views of the Tribunal expressed in the present case (in particular see Part III, point 4.2 of the justification), as well as in case ref. K 26/96".<sup>27</sup>

According to Article 190 sec. 1 of the Constitution, judgments of the Constitutional Tribunal have universally binding force and are final. When the Tribunal rulings on the constitutionality of acts the judgments, as a rule, come into force on the day of their announcement in the Journal of Laws, although the Tribunal may set a different date for the normative act to lose binding force, but no longer than eighteen months (Article 190 sec. 3 in conjunction with Article 180 pt. 1 of the Constitution). The fundamental legal effect of the publication of a judgment of the Constitutional Tribunal is the loss of binding force of individual provisions or the entire normative act.

Assuming that the verdict of the Constitutional Tribunal has legal effect set out in the Constitution,<sup>28</sup> in the analysed case of

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<sup>27</sup> Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, "Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy. Seria A" 2021, pos. 4, pp. 33–34.

<sup>28</sup> Because of the ongoing dispute over the appointment of the Constitutional Tribunal, two positions are presented as to the effects of the decisions of the Constitutional Tribunal in general, including the decision on the admissibility of abortion on embryopathological grounds. The first position, according to which the Tribunal is unconstitutionally staffed – its composition includes persons improperly appointed to seats that have already been filled, the so-called "doubles", and thus a decision made with the participation of persons who are not judges is not a judgment. Therefore, it does not have any legal effects, neither for state authorities nor for citizens. Even if one were not

the verdict of the Constitutional Tribunal of 22 October 2020, the principal legal effect is the loss of binding force of Article 4a sec. 1 pt. 2 f.p.a. That is, the publication of the judgment resulted in amending the Anti-Abortion Act. In the case under consideration, due to the fundamental importance of the legal protection of life on the grounds of the axiology of the Constitution, the Tribunal found it justified to determine the loss of binding force of Article 4a sec. 1 pt. 2 f.p.a. as of the date of entry into force of the judgment. By doing so, it did not exercise its right to set a different – longer – date, although the postponement of the date of expiration of the binding force of this provision was supported by ensuring an appropriate period for the legislator to enact changes in the anti-abortion law and, possibly, those related to criminal liability.

As a consequence of this change, the scope of the statutory elements of a prohibited act, stipulated in Article 152 of the Penal Code, was broadened. In other words, it has become a criminal offence for a doctor to terminate a pregnancy if the foetus has serious defects. Performing an abortion in violation of the provisions of the Anti-Abortion Act will result in criminal responsibility – imprisonment for up to three years, except for acts of mothers, which are not subject to criminal responsibility. Thus, the verdict has automatically generated law-making effects in the area of criminal law and not consisting in depenalisation of the prohibited act, which could still be accepted, but in penalisation, which is contrary to the role of a Constitutional Tribunal and the correct understanding of Article 42 sec. 1 of the Constitution.

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to agree with this allegation, the independence of the Constitutional Court should be questioned, as noted, *inter alia*, in the resolution of the joint: Civil, Criminal and Labour and Social Insurance Chambers of the Supreme Court of 23 January 2020, BSA I-4110-1/20. Since the Court does not guarantee a fair and impartial examination of the case, its decisions cannot have legal effects. The second position, according to which, although the ruling was made in a defective composition and with gross violations of law, there are no grounds for reviewing judgments of the Constitutional Tribunal. Secondly, despite its defects, this verdict, officially announced, was recognised by the constitutional organs of the Polish state and led to a change in the law.

However, those norms which were not subject to the interference of the Constitutional Tribunal remain in the Act and are subject to interpretation and enforcement. Therefore, in Article 4a sec. 1 f.p.a. there remain two points (point 1 and point 3) which contain two premises for legal abortion – the therapeutic premise and the legal premise. Although the above-mentioned abrogated premise – the embryopathological one – was most frequently applied, it constituted the basis for approximately 97–98 percent of all legal abortions in Poland.<sup>29</sup>

### 3.2. Conditions for realising the right to abortion on therapeutic and legal grounds

Under the Anti-Abortion Act, the subject entitled to the service of the termination of pregnancy is the woman. In the case of the first indication, which is therapeutic, the aim of the treatment carried out is to eliminate the risk of death or serious and prolonged physical harm or disturbance to the health of the woman. This may concern both the physical and psychological health of the pregnant woman. It is assumed that this premise occurs when the condition of the mother's illness worsens as a result of the pregnancy.<sup>30</sup> As for the second indication – the legal one – it has been formulated broadly by the use of the phrase “pregnancy resulting from a criminal act”. This may refer to the crime of rape, a lustful act

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<sup>29</sup> According to the report of the Council of Ministers on the implementation and effects of the application in 2018 of the Act of 7 January 1993 on Family Planning, Protection of the Human Foetus, and Conditions for Permissibility of Abortion – adopted by the Council of Ministers and submitted to the Sejm on 9 April 2020 – out of 1098 abortions performed in 2016, 1052 were justified by the embryopathological premise. In 2017, out of 1057 abortions, 1035 were performed on embryopathological grounds, and in 2018, out of 1076 abortions, 1050 due to defects in fetal development. Moreover, it was noted that in recent years the number of pregnancies terminated for embryopathological reasons has been gradually increasing. e.g. in 2002 such procedures were carried out 159, in 2003 – 174, in 2009 – 538, in 2014 – 971 (Sejm RP 2020).

<sup>30</sup> R. Kubiak, *Prawo medyczne*, Warszawa 2017, p. 506.

with a minor, an incapacitated person, incest, forced prostitution, as well as a situation where the perpetrator of the pregnancy is an incapacitated person or a minor, or even performing a procedure without the patient's consent, i.e. forced *in vitro* fertilisation.<sup>31</sup> Which acts are those which result in pregnancy, is determined by the Penal Code or other penal laws.

The Act introduces several limitations on the admissibility of abortion – temporal, formal, and organisational, as well as financial. Moreover, although it is not explicitly stated by the legislator, further restrictions on the permissibility of abortion also result from the necessity to proceed *lege artis*.

As for the first restriction, which is temporal, in the case of a therapeutic premise, the time frame in which the procedure can be carried out, is not specified, i.e. it is permissible to terminate the pregnancy even at a late stage of the foetus's development. It is stressed in literature, however, that if the foetus acquires the capacity for an independent life outside the mother's organism, then the rescue measures should be taken both about the woman and the born child.<sup>32</sup> Given the above, it is proposed that, in this case, the moment of the termination of pregnancy should be determined by the stage of development of the foetus, i.e. its ability to live independently outside the mother's organism.<sup>33</sup> When it comes to the legal indication, it is possible to carry out the procedure if no more than 12 weeks have elapsed since the beginning of the pregnancy.

As far as formal restrictions are concerned, the Anti-Abortion Act provides the necessity of obtaining a determination of the existence of indications for the termination of pregnancy. In the case of a therapeutic indication, the determination is made by a single doctor with specific qualifications – a specialist in medicine relevant

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<sup>31</sup> E. Zielińska, *Ograniczenia czasowe dopuszczalności przerywania ciąży oraz wskazania do przerywania ciąży uzasadniające prawną dopuszczalność przerywania ciąży*, in: *Prawne problemy ludzkiej prokreacji*, ed. W. Lang, Toruń 2000, pp. 207–209; R. Kubiak, *op.cit.*, p. 513.

<sup>32</sup> A. Zoll, in: *Kodeks karny. Część szczególna. Komentarz*, Vol. 2, ed. A. Zoll, Kraków 1999, p. 257.

<sup>33</sup> A. Barczak-Oplustil, *op.cit.*, p. 319.

to the type of illness of the pregnant woman. Thus, if the reason for the termination of pregnancy is serious ophthalmological diseases of a woman, the entitled doctor is a specialist in ophthalmology. On the other hand, if the indication for the termination of pregnancy results from the generally very poor health of the woman, e.g. multiple diseases, it is considered acceptable in the literature to issue a certificate by a family doctor.<sup>34</sup>

The determination of a prerequisite by a doctor is made in the form of a medical certificate,<sup>35</sup> the issuance of which, apart from the provision of health services, is part of the exercise of the medical profession within the meaning of Article 2 sec. 1 of the Act of 5 December 1996 on the Medical and Dental Profession.<sup>36</sup> As Eleonora Zielińska points out, the determination of a prerequisite is a certificate of knowledge – its purpose is to confirm the existence of objective circumstances or to certify their lack.<sup>37</sup> It has a declaratory character – it does not bind the doctor who performs the abortion, who, by invoking the conscience clause or other justified circumstances, may refuse to terminate the pregnancy.

A legal premise is established by the public prosecutor indicating that there is justification for committing a prohibited act. This statement falls within the scope of other actions set out in-laws, which prosecutors are obliged to undertake according to Article 3 § 1 pt. 14 of the Act of 28 January 2016 Prosecution Law.<sup>38</sup> Thus, it can be assumed that the prosecutor, based on the competence provided for in Article 4a sec. 5 of the f.p.a., will act as a public administration body in the functional meaning. The basis for ascertaining the fact of the existence of a legal premise by the public prosecutor is the opinion of an expert doctor, who was commissioned to examine the woman as part of the activities carried out under Article 308 of the Act of 6 June 1997 – Code of Criminal

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<sup>34</sup> E. Zielińska, *Wzajemne relacje w zespołowym działaniu medycznym w aspekcie odpowiedzialności karnej*, „Prawo i Medycyna” 2001, No. 9, p. 5.

<sup>35</sup> See: M. Nesterowicz, op.cit., p. 278.

<sup>36</sup> Consolidated text: Journal of Laws “Dziennik Ustaw” of 2021, item 790.

<sup>37</sup> E. Zielińska, *Regulacja prawna fazy wykonania przerywania ciąży*, in: *Prawne problemy ludzkiej prokreacji*, ed. W. Lang, Toruń 2000, p. 229.

<sup>38</sup> Consolidated text: Journal of Laws “Dziennik Ustaw” of 2021, item 66.

Procedure.<sup>39</sup> As for the form of the statement of the legal premise, both the Anti-Abortion Act and the Prosecution Law do not refer to this problem. In the literature, Marian Filar and Mirosław Nesterowicz use the concept of a certificate issued by the prosecutor conducting criminal proceedings in the case.<sup>40</sup> In such a certificate the prosecutor states that there are circumstances provided for in Article 4a par. 1 pt. 3 of the f.p.a. As in the case of the medical certificate, the prosecutor's certificate will be declaratory. Both the prosecutor's certificate and the doctor's certificate are necessary elements for a woman to acquire the right to the procedure.

The other formal requirement is to obtain the patient's written consent to the termination of pregnancy and in the case of a minor or a person who is completely incapacitated, the written consent of the legal representative. If the minor is over 13 years of age, her written consent is also required (so-called cumulative consent). If she is under 13 years of age, the consent of the guardianship court is necessary, and the minor has the right to express her opinion. In the case of a woman who is completely incapacitated, her written consent is also required, unless her mental health does not allow her to give consent. In the absence of the consent of the legal representative, the consent of the guardianship court is required to terminate the pregnancy. This consent should be explained according to the principles set out in Article 6 and Article 10 of the Act of 6 November 2008 on Patients' Rights and the Patient's Rights Ombudsman.<sup>41</sup> It should be assumed that the written form of consent has been reserved for evidentiary purposes (*ad probationem*).<sup>42</sup> The woman's consent to the termination of pregnancy is a condition of its legality.

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<sup>39</sup> Consolidated text: Journal of Laws "Dziennik Ustaw" of 2021, item 534. Compare M. Kurowski's comments on proceeding to the necessary scope. M. Kurowski, in: *Kodeks postępowania karnego*, Vol. 1: *Komentarz aktualizowany*, ed. D. Świecki, Lex 2021, art. 308.

<sup>40</sup> M. Filar, *Lekarskie prawo karne*, Kraków 2000, p. 194; M. Nesterowicz, *op.cit.*, pp. 278–279.

<sup>41</sup> Consolidated text: Journal of Laws "Dziennik Ustaw" of 2020, item 849.

<sup>42</sup> R. Kubiak, *op.cit.*, p. 515.

As far as restrictions of an organisational nature are concerned, the termination of pregnancy may be carried out by doctors with specific qualifications, in health care facilities that meet professional requirements. As for the qualifications of the doctor terminating the pregnancy – it is a doctor who has the first degree of specialisation in the field of obstetrics and gynaecology or the title of a specialist in this field, exceptionally, a doctor in the course of specialisation, but under the direction of a person authorised to carry out the termination of pregnancy. It is worth emphasising that the Act indicates that the doctor performs two different roles – he/she acts as the determining subject, which is stipulated in Article 4a sec. 5 f.p.a., or as the subject performing the procedure under Article 4a sec. 1 f.p.a., which is characteristic for the so-called indicative model of legal regulation of permissibility of the termination of pregnancy, where the combination of these roles is excluded. Exceptionally, in a situation when pregnancy directly threatens the life of a woman, the same physician may make a statement of indication and perform the procedure.

In the case of a therapeutic indication, the termination of pregnancy is carried out in a hospital (both public and non-public), whereas in the case of a legal indication, the termination of pregnancy may be carried out in a private surgery which meets the technical requirements specified in separate regulations.

According to Article 4b f.p.a., the termination of pregnancy, regardless of the pharmacological or surgical method used, is financed from public funds for persons with social insurance and persons entitled to free health care based on separate provisions, but it must be carried out in a public health care facility. Taking into consideration the legal changes that have taken place concerning the organisation of the health care system *post factum* of the enactment of the Anti-Abortion Act, it should be assumed, that the termination of pregnancy financed from public funds may take place in those health care facilities that have concluded an appropriate agreement on this type of services with the National Health Fund (NHF). In this context, it should be emphasised, that in those cases, where there is a legal indication to terminate the pregnancy and the patient decides to terminate the pregnancy in

a clinic or hospital which has not concluded a relevant agreement with the NHF, the costs of this service will be paid by the patient privately.

On the other hand, as far as the restrictions resulting from the requirement to carry out an abortion *lege artis* are concerned, e.g. if a doctor undertakes the procedure when there are obstetric-gynaecological contraindications under the current state of health of the woman, this will be considered medical malpractice.

At this point, it is worth mentioning that the Anti-Abortion Act does not imply the obligation of the physician to determine the indications for the termination of pregnancy or the obligation of the physician or the healthcare provider to terminate the pregnancy, when the requirements set out in the Act are met. It must be emphasised that under Article 39 of the Act on the Medical and Dental Profession, a physician may use the so-called clause of conscience and refuse to determine the existence of indications, as well as refuse to carry out the abortion procedure. Unfortunately, the Anti-Abortion Act does not regulate the appeal procedure, which a woman could use if a physician refuses to issue a medical certificate to her, if the certificate is negative or if he refuses to perform the abortion. These problems, among others, were pointed out by the ECHR in its judgment of 20 March 2007 in the case of *Tysiąg v. The Republic of Poland*, application No. 54110/03.

Since the legislator to this day has not introduced relevant provisions to the Anti-Abortion Act in this respect, the legal literature proposes that for possible appeals against negative decisions of physicians, the provisions of Art. 31 of the Act on Patient's Rights and Patient's Rights Ombudsman, assuming that the statement of the premise is made in the form of a medical certificate and thus falls within the scope of its regulations, in particular, that it affects the possibility of a woman to realise her right to health service. An objection to the certificate must be filed within 30 days from the date of the issue of the certificate with the Medical Committee acting alongside the Patient Ombudsman, which has a maximum of 30 days to issue a new certificate.

It should be emphasised that if a doctor refuses to pronounce an indication or to carry out an abortion based on the clause of

conscience, he is obliged to note this refusal in the patient's medical records. However, he is not obliged to inform the patient of other doctors or health care facilities where she can receive treatment. If the refusing doctor is employed under a contract of employment or an organisational relation, is also obliged to inform the superior in writing in advance. It is worth mentioning, that a refusal invoking the clause of conscience by a physician may not take place in those cases in which a delay in providing help could cause a danger of loss of life, serious bodily injury, or serious disorder of health.<sup>43</sup>

What is extremely important, according to the judgment of the ECHR of 26 May 2011 in the case of *R.R. v Republic of Poland*, Application No. 17617/04, the effective enforcement of the right to freedom of conscience of health care professionals in the professional context must not prevent patients from gaining access to services to which they are entitled under the Act.<sup>44</sup>

## 4. Conclusions

As far as the consequences of the analysed judgment of the Constitutional Tribunal are concerned, as already noted by judge Piotr Pszczółkowski, "in fact, the findings made by the Tribunal in this judgment – based on the logic of 'life for life' – lead to the delegitimation of virtually all remaining statutory premises".<sup>45</sup> Therefore, it has fundamental consequences for the interpretation and application of the remaining premises. The judgment also questions Poland's obligations under the European Convention on Human Rights. By limiting the constitutionally guaranteed protection of health, but also by violating the rights to privacy, autonomy, protection against torture, inhuman or degrading treatment, Poland

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<sup>43</sup> See: M. Nesterowicz, *op.cit.*, p. 279.

<sup>44</sup> M. Górski, *Najnowsze wyroki ETPCz stwierdzające naruszenie Konwencji przez Polskę*, „Europejski Przegląd Sądowy” 2012, No. 5, pp. 38–39.

<sup>45</sup> Separate opinion of CT Judge Piotr Pszczółkowski to the judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, “Orzecznictwo Trybunału Konstytucyjnego. Zbiór Urzędowy. Seria A” 2021, p. 107.

fails to implement the recommendations of the Council of Europe Commissioner for Human Rights resulting from three lost cases in the ECHR concerning the termination of pregnancy and prenatal diagnosis.<sup>46</sup> Furthermore, the judgment also has economic implications. It leads to a significant financial obligation of women or families bringing up children with severe and irreversible disabilities or incurable life-threatening illnesses. These effects will not be alleviated by the Act on Support for Pregnant Women and Families “Za życiem” passed in 2016<sup>47</sup> and the Program of Comprehensive Support for Families “Za życiem” developed on its basis. It is difficult to assume that the state will provide comprehensive and adequate care to all families in need, if only due to limited financial resources.

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In the current Anti-Abortion Act, the legislator has opted for the so-called indicative model of legal regulation of abortion, which is characterised by the fact, that throughout the entire period of pregnancy the foetus – considered a legal good (value) – is subject to legal protection and the woman does not have the right to exclusive disposal of it. Her request or consent is a necessary but not sufficient condition for the abortion to be permitted. The positive premise of the procedure is the determination by an authorised body of the existence of a valid reason, which is qualified as an indication provided by law. The fact that the termination of pregnancy is made unlawful does not mean at the same time that the foetus is deprived of legal protection.

In connection with the change made by the Constitutional Tribunal’s judgment to the law in force, the question arises as to the actual impact of the anti-abortion law in the social sphere, i.e. how it influences the attitude of the addressees of the legal norms, thus

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<sup>46</sup> See: *Tysiąg v. Republic of Poland* (Application No. 5410/03), *R.R. v. Republic of Poland* (Application No. 27617/04), *P. and S. v. Republic of Poland* (Application No. 57375/08). There is currently another case pending against Poland on access to legal abortion – *B.B. v. Republic of Poland*, Application No. 67171/17, in which the Ombudsman acts as a friend of the court.

<sup>47</sup> Journal of Laws “Dziennik Ustaw” of 2020, item 1329.

in practice influencing the effectiveness of the law. Currently, a frequently observed problem related to the social impact of the law is the complete or partial “detachment” of regulations from the social reality to which they should refer.<sup>48</sup> This is also the case with the Anti-Abortion Act, which attempts to reinforce moral norms with state law norms.<sup>49</sup> Nevertheless, it is worth noting that in the light of the jurisprudence of civil courts, as well as the doctrine, the nature of the right to abortion is debatable – whether it is a personal right (good) that is part of the right to family planning or not.<sup>50</sup> Even if the concept of a subjective right to abortion were to be rejected, this does not mean, as Agnieszka Barczak-Oplustil observes, “that the state does not have positive obligations to introduce procedures that enable the effective realisation of the possibility to terminate pregnancy resulting from the law [...]”.<sup>51</sup> Indeed, under current law, a woman is entitled to this health service in order to exercise her constitutionally guaranteed right to health protection.

## SUMMARY

### The right to abortion in Poland in the light of the Constitutional Tribunal's judgment of 22 October 2020

The article presents the conditions for exercising the right to abortion in Poland following the entry into force of the judgment of the Constitutional Tribunal of 22 October 2020, ref. no. K 1/20 (Journal of Laws “Dziennik

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<sup>48</sup> A. Podgórecki, *Hipoteza trójstopniowego działania prawa*, in: *Elementy socjologii prawa*, eds. A. Kojder, E. Łojko, W. Staśkiewicz, A. Turska, Warszawa 1990, p. 21.

<sup>49</sup> D. Szkółka, *Prof. Łętowska: Niedobry wyrok, w niedobrym czasie, z niedobrą intencją, w marny sposób zrobiony*, <https://oko.press/prof-letowska-niedobry-wyrok-w-niedobrym-czasie-z-niedobra-intencja-w-marny-sposob-zrobiony/>, 28 March 2021 (access: 28.04.2021). Compare M. Chrzczonowicz, *Prof. Zoll: „Nie należy wzmacniać wartości moralnych normami prawnymi”. A jak było z aborcją?*, <https://oko.press/prof-zoll-nie-nalezy-wzmacniac-wartosci-moralnych-normami-prawnymi-a-jak-bylo-z-aborcja/>, 29 May 2018 (access: 29.04.2021).

<sup>50</sup> A. Barczak-Oplustil, *op.cit.*, pp. 329–330.

<sup>51</sup> *Ibidem*, pp. 330–331.

Ustaw” of 2021, item 175), declaring unconstitutional those provisions of the Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and Conditions of Permissibility of Abortion, which provided for the possibility to terminate a pregnancy due to defects in the development of the foetus. Moreover, the publication presents the arguments which were invoked in the analysed judgment and indicates its legal and social effects.

**Keywords:** the model of legal regulation of abortion in Poland; the right to terminate pregnancy as a health service; indications for the termination of pregnancy; conditions for the legality of the termination of pregnancy

## STRESZCZENIE

### Prawo do aborcji w Polsce w świetle wyroku Trybunału Konstytucyjnego z dnia 22 października 2020 r.

W artykule przedstawiono warunki realizacji prawa do aborcji w Polsce po wejściu w życie wyroku Trybunału Konstytucyjnego z dnia 22 października 2020 r., K 1/20 (Dz.U. z 2021 r. poz. 175), uznającego za niekonstytucyjne te postanowienia Ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, z których wynikała możliwość przerywania ciąży z uwagi na wady rozwoju płodu. Ponadto w publikacji przedstawiono argumenty, które powołano w analizowanym wyroku, oraz wskazano jego skutki prawne i społeczne.

**Słowa kluczowe:** model regulacji prawnej aborcji w Polsce; prawo do przerywania ciąży jako świadczenia zdrowotnego; wskazania przerywania ciąży; warunki legalności zabiegu przerywania ciąży

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