

ON THE ADMISSIBILITY OF THE LEGAL TERMINATION OF PREGNANCY: A STUDY OF RECENT APPROACHES IN POLAND

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ABSTRACT

This paper examines the phenomenon of abortion through a legal perspective, while simultaneously adhering to philosophical approaches. The analysis is framed within the context of the inception of human life and the correlation between the protection of concurring fundamental rights, namely the rights to life and personal autonomy (freedom). The evolutionary approach highlighted in this study confirms the hypothesis that the issue of abortion in the Polish legal system has taken a different path when compared to other European countries. This is a peculiar route, as the trends have remained closely linked to political change. The distinctiveness lies in the fact that while in other European countries, the 1990s were associated with pro-choice trends, the opposite, namely the pro-life trend, prevailed in Poland. Thus, starting with the interwar period, with the exception of a brief liberalizing episode in 1996, the Polish legal treatment of abortion can be considered conservative-liberal (abortion compromise). It followed an indication model, covering legal, medical and eugenic considerations. In this paper, the key point concerns a judgment of the Polish Constitutional Court, dated 22 October 2020, which shifted the system to a fully conservative track. In the authors' opinion, at this point, another evolutionary milestone is about to take place. Whereas the path of conservative change remains unfinished, social resistance to this trend is substantial. Another clash between pro-life and pro-abortion options in the field of further potential changes concerning abortion law is expected.

KEYWORDS

*abortion
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termination of pregnancy
foetus
fundamental rights*

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1. General remarks

The question of abortion falls within the domain of law, which defines when it is admissible and how it should be performed or bans it altogether, as well as within the domains of several other fields of learning that strive to explain and understand diverse issues related to it. Abortion is a highly topical social problem that is subject to social and political discourse. It has stirred numerous controversies and antagonized various communities. This article traces the development of the abortion law in Poland, by focusing on relevant controversies and emotional disputes. First, it presents the philosophical underpinnings of possible legal treatments of abortion. Second, these treatments are described and their development is traced. Third, it shows how Polish abortion law evolved from the 1920s with a special focus on its present-day criminal law aspects. Emphasis is laid on the latest modification of the law as a result of the decision of the Polish Constitutional Tribunal (hereinafter, CT) dated 22 October 2020 (K 1/20),³ which declared the provision admitting abortion in the case of a high probability of severe and irreversible damage to the foetus unconstitutional.

The chief hypothesis advanced in this article is that Poland's abortion law follows, in its development, a non-standard path when compared to that in other European systems. Unlike them, Polish law has proceeded in waves and has shown strong tendencies drawing far more on pro-life than pro-choice ideas. This is clearly underscored by peculiar cultural traditions and developments in the political system (transformation). Tendencies to liberalize the abortion law in Poland are associated with the period of the Polish People's Republic (hereinafter, PRL), whereas conservative trends are related to Catholic-Conservative movements. The latter left a strong mark on the transformation of the political system in Poland in the 1990s. After 1989, the Third Republic laid the foundations for the abortion law, while being predominantly guided by the desire to leave behind the PRL legacy, which was branded as inglorious.

2. Philosophical theories on the admissibility of abortion and abortion models

The philosophical underpinnings of the possible legal treatment of abortion concentrate heavily on answering the fundamental bioethical question of when the existence of a human being begins. Can we speak of a human being in the prenatal period already,⁴ or is it only from the moment of birth? Anti-abortion views concentrate on the former, arguing that a foetus has an unlimited right to life and inherent human dignity. Pro-abortion or pro-choice views follow a line of argument that denies the notion that the life of a foetus is really protected by prescriptions against killing and in favour of respect

3 | OTK ZU 2021, item 4. Two justices, Piotr Pszczółkowski and Leon Kieres, filed dissenting opinions.

4 | The question may be made even more specific. If it is held that we can speak of the existence of a human being in the prenatal period, then we can ponder over whether it is from the conception or from the zygotic, embryonic, or only from the foetal periods onward.

for human life⁵ mainly by claiming that a foetus living in his/her mother's womb is not the same as a human being living on his/her own. It is a human being in a biological or genetic sense, but not in a moral one – it is not a person yet.⁶ The pro-choice argument takes into account the woman's perspective and her unfettered right to make decisions on procreation. Attention is also drawn to the unique nature of the relationship between a pregnant woman and a foetus or an unborn child and vice versa, stressing that the foetus is not self-contained and that its existence is conditional, being linked to the life of its mother.⁷

The conflict of two fundamental human rights, namely the rights to the protection of life and freedom arouses controversy vis-à-vis abortion law. Any attempt to resolve the conflict calls for an answer to the question about the beginning of human life. An answer is sought, making use of three fundamental criteria: genetic criterion, and the criteria of potentiality and consciousness. The genetic criterion suggests that at the moment of fertilization, when the DNA of an egg cell and of a spermatozoon merge, a human being – a genetic person – arises. Thus, there is no reason whatsoever for differentiating between a genetic person and human being. The newly-arisen genome determines the development of an embryo and foetus; at a later stage, it decides the biological identity of the organism throughout its life.⁸ The adoption of the genetic criterion results in the legal view that it is necessary to protect the legal interest, that human life begins from the moment of conception.⁹ Counterarguments to the genetic criterion include the observation that a human being does not owe his/her existence to the genetic record alone; after all, it is present in every biological element of the human body. For the human to exist, something more is necessary – the existence of a complete organism containing a human genetic code.¹⁰ Another argument equalizing a foetus with a human being is the argument of potentiality, which relies on the assertion that from the moment of conception itself, we are dealing with a being that will potentially be a human being.¹¹ D Marquis referred to potentiality and the future of a foetus in his discussion of abortion. He noted that homicide is the worst of all possible crimes as it annihilates the victim and deprives him/her of any future. By analogy, the same is true of abortion and a foetus. Abortion deprives a foetus of any future and all that it may bring. From this perspective, the termination of pregnancy does not differ from a homicide. A foetus, as any human being, has some future of which it is deprived.¹² A pro-choice retort to the argument from potentiality is not denying the potentiality or the future of a foetus as a person, but rather denying its significance. As J. Baker observed: 'In pro-choice terms, fetuses are only potential persons, and hence

5 | Cf. Baker, 1985, p. 263.

6 | Cf. Warren, 1973, passim.

7 | Cf. Soniewicka, 2021, passim.

8 | Cf. Derek, 2016, pp. 133–134.

9 | Cf. Noonan, 1968, p. 134.

10 | Cf. Derek, 2016, p. 134. A suggestive illustration of the qualitative and not only quantitative difference between a human being and an embryo having a human genetic code was given by G. Annas, who noted that if there are 20 human embryos and 1 two-year-old child in a lab, and a fire breaks out there, we will intuitively rescue the child first and not the embryos – cf. Annas, 1989, pp. 21–22.

11 | Wade, 1975, p. 241.

12 | Cf. Marquise, 2007, passim.

fall into quite a distinct moral category'.¹³ A foetus is a potential person, as is a sperm and an egg, because they have the potentiality to develop into an actual human being. As M Rasekh observed, the fact that A will become X in the future does not logically mean that A is X in the present or should now morally be treated as the same as X. Someday, we shall all die, which does not mean, however, that it is admissible to treat all of us as dead.¹⁴ There is a view placing the beginning of a human being at the beginning of his/her consciousness.¹⁵ As MA Warren observed, a foetus belongs to the species *homo sapiens* and satisfies the biological or genetic criterion; however, it is not a person as it is not rational and conscious and, consequently, does not have such a claim on life as a person does.

The views presented above and accompanying arguments in their favour, concerning the beginning of the existence of a human being, what or who a foetus is, and accordingly the admissibility or inadmissibility of abortion, can be categorized, in the opinion of M Rasekh, into four theories. The first two – the theories of sanctity of life and free will – are extreme and do not admit any considerations or discretion that may admit/preclude abortion under certain circumstances. The other two – the theories of value of investment and conscious person – can be considered more moderate.¹⁶ The theory of sanctity of life assumes that life is superior to any other value and that every life has the same value, including that of a mother and foetus. The life of a human being begins at the moment of conception and should be fully protected from then on. From this perspective, abortion is a form of homicide. At the other end of the continuum, the theory of free will assumes that abortion is the right of every pregnant woman, the exercise of which is solely at her discretion. This right supposedly follows from the autonomy and dignity of the woman. Arguments in support of the theory of sanctity of life are refuted by the statement that even if it is acknowledged that a foetus has a right to life, it should be distinguished from the mother's right to her bodily integrity and autonomy. The conflict between these rights is resolved by observing that the foetus cannot use the mother's body without her consent.¹⁷

The investment theory assumes that every life, including one that has just been conceived and not yet born, is of great value and cannot be wasted. The life of a foetus has such value, too, so it should not be wasted by abortion, if there is no indication for it.¹⁸ An anti-abortion argument does not rest in this case on the right of a foetus to life, but on the value its life has or may have in the future. This shift admits, unlike the theory of the sanctity of life, the performance of an abortion under certain circumstances, such as severe and irreversible damage to the foetus.

The fourth theory – the conscious entity theory – relies heavily on human consciousness arguments and maintains that killing a human being is homicide and a foetus becomes a human being only at a certain point in its development journey. From that moment on, abortion is not admissible. Earlier, until a foetus is considered a human being, the mother has the right to abortion. The question of the point in time when a foetus becomes a human being or rather what makes it a human being remains debatable. The

13 | Baker, 1985, p. 264.

14 | Rasekh, 2005, p. 254.

15 | Cf. Warren, 1973, p. 5.

16 | Rasekh, 2005, p. 253.

17 | *Ibid.*, p. 256.

18 | *Ibid.*, pp. 259–260.

answer is supposedly consciousness. Still, however, it is disputable as to when a foetus acquires consciousness.¹⁹ Nevertheless, the conscious entity theory admits abortion until a certain point in time during pregnancy and strictly rules it out afterwards.

The major arguments for and against abortion outlined above and the four theories based on them underpin specific model legal treatments of abortion. Three models can be distinguished: full protection, indications, and term, also referred to as abortion on request. The full protection model is based on the theory of sanctity of life. It suggests that no circumstances would make abortion legal. Thus, abortion remains a crime, the criminal responsibility for which may be precluded only along general principles as with any other offence. The full protection model is found in some Central American countries (e.g. Honduras and Salvador).²⁰ In Europe, the only countries that do not admit abortion are Malta and Andorra, although discussions questioning the justness and admissibility of such legislation have been recurrent in recent years.²¹ The indications model respects the principle of protection of life. The application of the principle is limited by specifying the circumstances that make abortion legal, namely medical, eugenic, legal, and social ones. Medical circumstances put the life and health of the pregnant woman at risk owing to pregnancy. Health, in this case, can be understood broadly and encompasses mental health as well (e.g. in Finnish law). The eugenic circumstances involve serious genetic defects of a foetus or permanent and irreversible damage to it. The legal circumstances cover a situation in which pregnancy results from a prohibited act (e.g. rape or incest). The social circumstances may be the broadest category, covering various socio-economic considerations. In practice, the legalization of abortion is considered where the pregnant woman's economic situation is bad or where her age is a concern. The indications model relies on the value of investment theory, whereas particular indications are possible reasons for renouncing the protection of the life of a foetus as a legal interest. The indications model (in various forms) is found in Finland, and Poland, whose legal treatment of abortion is analysed below. Unlike Polish law, Finnish law is more liberal, as it permits an abortion up to the 12th week of pregnancy for medical, legal, and/or eugenic reasons, and for a broad spectrum of social reasons, which include situations where the mother already has at least four children, she is under 17 or over 40 years of age, and where child-birth and care for the child would put too much of a strain on her, considering her current and future situation in life.

The third model is abortion on request (term model) where it is legal in principle and the right of a woman to have it is limited solely by the point in time during the pregnancy when it can be performed. This model dominated in Europe at the time of writing, where exceptions include Malta, Andorra, San Marino, Lichtenstein, Poland, and Finland. Over 95 percent of women of reproductive age live in Europe in countries that allow abortion on request or on broad social grounds (Finland).²² In the term model, it is crucial to indicate the period of pregnancy in which abortion is admissible. The periods vary under each legislative instrument. In Germany, abortion on request is possible until the 12th week of pregnancy, in Spain, until the 14th week. A relatively long period is provided for in the UK, namely the 24th week. Studies show that over 90 percent of abortions in England,

19 | Ibid.

20 | Berer, 2017, p. 20.

21 | Gravino and Caruana-Finkel, 2019, p. 299.

22 | Center for Reproductive Rights, 2021a, *passim*.

Scotland, and Wales are performed before the 13th week of pregnancy.²³ The term model permits abortions until a certain stage of pregnancy, and is based on the conscious entity theory, with the right of the pregnant woman to decide freely whether to terminate her pregnancy at an early stage being strongly underscored. Some countries have legislated guarantees to ensure that the decision is conscious and not taken hastily. The guarantees provide for mandatory waiting periods and counselling, and a third-party authorization procedure. Mandatory waiting periods require a mandatory time period to elapse between the date on which an abortion is first requested and the date on which it actually takes place. Such requirements are in place, for instance, in Germany, Spain, and Italy. Another procedure that has to precede the performance of an abortion on request is mandatory counselling. It is followed in several European countries (e.g. Germany and Italy) and requires women to undergo prior mandatory counselling or receive mandatory information from their doctors. The rarest limitation to abortion on request, the third party authorization procedure, requires prior permission from parents, spouse, guardians, doctors, or official committees before accessing abortion care, and applies chiefly to underage (e.g. in Slovakian law) or married (e.g. in Japan) women.²⁴

The legal admissibility or inadmissibility of abortion forms a continuum between the two extremes of the full-protection and term models. Changes in abortion law go in the direction of liberal solutions, at times very dynamically. A case in point is Ireland, where abortion, consistent with the full-protection model, was held to be an offence, and carried a maximum sentence of 14 years' imprisonment. In 1983, Ireland adopted the eighth amendment to its constitution, whereby human life was to be fully protected from the moment of conception. In 2018, by virtue of a referendum, the eighth amendment was repealed. The next step was the commencement of legislative work on a bill legalizing abortion. In the same year, the Health (Regulation of Termination of Pregnancy) Act, which permits termination under medical supervision, generally up to 12 weeks' gestation, and later if the pregnancy poses a serious health risk or there is a fatal foetal abnormality, was adopted.²⁵

Spain followed a similar path. After a period when abortion was totally banned under Gen. Franco, in 1985, the full-protection model was replaced by the indication model, under which abortion was permitted where: (1) the pregnancy was the result of rape, (2) foetal malformations appeared, (3) where the pregnancy was considered a risk for the physical or psychological wellbeing of the woman. It resembled the model in place in Poland. The Spanish model was changed 25 years later, in 2010, when Spanish lawmakers enacted a law providing for the abortion on the term model. Spanish law has permitted, for over a decade now, induced abortions without any prerequisites for up to 14 weeks of gestation. Afterwards, specific medical conditions must be put forth. The time limit after which abortion is absolutely inadmissible is 22 weeks of gestation.

23 | Abortion Statistics, England and Wales, 2019, p. 4.

24 | Center for Reproductive Rights, 2021b, *passim*.

25 | Taylor, Spillane and Arulkumaran, 2020, p. 37.

3. Legal framework for abortion in Poland: The evolutionary approach

The evolution of abortion law in Poland has been very unique. In the interwar period – bearing in mind the cultural background – a relatively liberal indication model was adopted, making use of the medical, eugenic, and legal criteria. It evolved in the pro-choice direction in the PRL, when it expanded by adding a social (socio-economic) criterion. The political-system transformations of the 1990s brought about changes in abortion law while keeping the indication model. It was based on three criteria (medical, eugenic, and legal). A tendency towards reduction, besides a short episode of reinstating the socio-economic criterion in 1996, has been maintained to date. The current model in Poland is an indication model that is limited to two criteria: medical and legal. This journey is presented in detail below.

The rebirth of the Polish State in 1919 is taken as the starting point, marking the inception after 123 years of non-existence. Rebirth or the creation of an entirely new legal and political entity was a great challenge, but provided an opportunity to receive the latest philosophical, legal, and social trends. Abortion was a great social and legal problem at the time, provoking heated discussions on the scope of the legal protection of life. The positions taken by Catholic and conservative circles on the one hand and liberal ones on the other, clashed. The liberal trend was represented by authors such as Tadeusz Boy-Żeleński,²⁶ Irena Krzywicka,²⁷ and Stefan Glaser, who argued in favour of the liberalization of abortion law so that abortion would be available when medical, legal, and social indications for it were present.²⁸ It was vital to choose an adequate model. As opinions in the debate clashed, the indication model was chosen rather naturally as it offered some space for compromise. The task of setting the limits of the legality of abortion was given to the Criminal Law Codification Commission, which was set up to prepare a draft Criminal Code. The original draft made the termination of pregnancy legal for the sake of a woman's health and when pregnancy resulted from a prohibited act. The admissibility of abortion for social reasons was considered.

In the final version of the 1932 Criminal Code,²⁹ however, the conservative option won, represented, for instance, by Juliusz Makarewicz, its principal drafter. The 1932 Criminal Code, Articles 231–234, penalized illegal abortions except where the procedure was performed by a physician to save the life of a woman or where the pregnancy resulted from an offence. Punishments were incurred by both the pregnant woman and the person performing the abortion. At the time, a debate took place in the authoritative juristic literature as to whether criminal responsibility extended to an aider and abettor in aborting

26 | Tadeusz Boy-Żeleński published a series of features in the *Kurier Poranny* in October-December 1929 with the aim of convincing the jurists of the Codification Commission to decriminalize abortion. A selection of 11 of these features was published in book form, entitled *Piekło kobiet* in 1933.

27 | Zielińska, 1990, p. 123.

28 | Glaser, 1928, *passim*, its main theses were repeated in a speech at the 2nd Congress of Polish Lawyers in Sept. 1929.

29 | Order of the President of the Republic of Poland, *J. of Laws* of 1932 No. 60, item 571.

a foetus.³⁰ The Code in force then used terms such as aborting a foetus, pregnant woman, and foetus.³¹ Articles 231–234, formed part of Chapter XXXV, titled Offences against life and health, and remained in force until 1956.³² Among the conditions making the abortion of a foetus legal, the Code required that the medical necessity of the termination of pregnancy be confirmed by two physicians other than the one carrying out the procedure and that the reasonable suspicion that the conception occurred as a result of a crime be confirmed by a competent prosecutor.

After the Second World War, that is, in the Polish People's Republic (hereinafter, PRL), abortion law was liberalized to a degree, but the changes were gradual. The first piece of legislation making abortion legal was the Medical Profession Act of 28 October 1950.³³ Under Article 16, a physician could terminate a pregnancy only when (1) the procedure was necessary for the sake of the health of the pregnant woman, which was to be ascertained by an opinion of a medical panel; and/or (2) it was reasonably suspected that the pregnancy resulted from an offence specified under Articles 203, 204, 205, and 206 of the 1932 Criminal Code, which was to be confirmed by a public prosecutor.

Major changes in abortion law were brought in the PRL period by the Pregnancy Termination Conditions Act of 27 April 1956 (hereinafter, the 1956 Act)³⁴. It extended the catalogue of grounds for a legal abortion by adding difficult living conditions of the woman to it.³⁵ The indication model adopted earlier was consolidated at this point, having been founded on all three criteria. The 1956 Act repealed Articles 231–234 of the 1932 Criminal Code, replacing them with its Articles 3–6. Until 1969, when another Criminal Code was enacted, the 1956 Act regulated the question of the termination of pregnancy comprehensively and exhaustively. Its preamble stated that the Act aimed to protect women against 'detrimental effects of pregnancy termination in inappropriate conditions or by persons who are not physicians'. Under Article 1, pregnancy can be terminated only by a physician if (1) the termination of pregnancy was supported by medical indications or difficult living conditions of the pregnant woman; and/or (2) it could be reasonably suspected that the pregnancy resulted from an offence. However, abortion was not allowed for the sake of living conditions or despite the criminal origin of pregnancy if there were any medical reasons not to perform it.³⁶ Although the socioeconomic prerequisite was broadly formu-

30 | Makarewicz, 1933, pp. 327 et seq.

31 | The 1932 Criminal Code, Art. 231, said: 'Any woman who aborts her foetus or permits another person to abort it shall be punished by arrest of up to 3 years'. Art. 232 said: 'He who, with the consent of the pregnant woman, aborts her fetus or gives her aid with this shall be punished by imprisonment of up to 5 years'. The admissibility of abortion was legislated under Art. 233, which said that there was no offence provided for under Arts. 231 and 232 if the procedure was performed by a physician and (a) it was necessary to save the health of the pregnant woman; (b) pregnancy resulted from one of the offences specified under Arts. 203, 204, 205, and 206 of the Code (i.e. it resulted from rape, sexual abuse of a person aged under 15 years or a helpless person, or where a person was sexually abused taking advantage of her dependence on the abuser, or incest). Under Art. 234, 'He who without the consent of the pregnant woman aborts her fetus shall be punished by imprisonment of up to 10 years'.

32 | Siewierski, 1958, p. 314.

33 | *J. of Laws* 1950, No. 50, item 458.

34 | *J. of Laws* 1956, No. 12, items 61, 62.

35 | See the stenographic record of parliamentary debate, 1956, p. 475.

36 | See comments by Szwarc and Śliwowski, 1957, p. 45. The authors drew attention to the fact that the Act did not eliminate interpretation doubts arising in connection with the 1932 Criminal Code.

lated, difficult living conditions of the woman, it was subordinated together with the legal prerequisite, to the medical one. The last-mentioned prerequisite was broadly interpreted to encompass medical indications concerning the health of the woman and foetus.

Criminal responsibility was not borne by the pregnant woman, which resulted from the recognition of two varieties of illegal abortion: performed either with or without the consent of the pregnant woman (or, in an aggravated form, with the use of violence). It was forbidden to force a woman to undergo abortion,³⁷ to carry out an abortion with the consent of the woman, but contrary to the provisions of Article 1 of the Act,³⁸ and to provide assistance to a pregnant woman in performing an abortion against Article 1 of the Act.³⁹

The 1956 Act was the most liberal statute to regulate abortion under Polish law. The provisions classifying the prohibited acts defying abortion bans were modified in the meantime owing to the enactment of a new Criminal Code in 1969.⁴⁰ Its entry into force derogated the criminal law provisions of the 1956 Act that were superseded by Articles 153, 154, and 157 of the new Code.⁴¹ In its original wording, the Code used terms such as 'induces miscarriage', 'terminates pregnancy', 'pregnant woman', and 'termination of pregnancy'. Criminal responsibility for an illegal termination of pregnancy depended on whether the perpetrator terminated pregnancy or had it terminated with or without the consent of the pregnant woman. The 1956 Act did continue until a new statute was enacted in 1993, to specify the legal conditions of the admissibility of termination of pregnancy.

The turn away from liberal tendencies was ushered in by political-system transformations and the rise of the III Republic in which the voice of Catholic and conservative circles came to dominate in such matters.⁴² On 1 March 1989, MPs representing the Polish Catholic-Social Union submitted a bill on the legal protection of the conceived child that had been drafted in collaboration with the Polish Episcopate. Thus began concerted efforts taken by radical conservative circles with the support or assistance of the Polish Catholic Church to change abortion law.

Before the enactment of the new statute, on 30 April 1990, the Minister of Health and Social Welfare issued an Executive Regulation to the 1956 Act.⁴³ It concerned '...

37 | Art. 3. Any person who forces a woman in any manner to terminate her pregnancy shall be punished by imprisonment of up to 5 years.

38 | Art. 4. Any person who terminates a pregnancy with the consent of the pregnant woman but contrary to statute shall be punished by imprisonment of up to 3 years.

39 | Art. 5. Any person who aids a pregnant woman to terminate her pregnancy contrary to statute shall be punished by imprisonment of up to 3 years.

40 | They were repealed as of 1 January 1970 by virtue of the Criminal Code Introductory Provisions Act of 19 April 1969. *J. of Laws of 1969*, No. 13, item. 95.

41 | The 1969 Criminal Code classified the prohibited acts defying abortion law. Art. 153 said: 'Any person who induces miscarriage in a pregnant woman by force or terminates her pregnancy in another manner without her consent or makes her terminate it by resorting to violence, unlawful threat or deceit shall be punished by imprisonment from 6 months to 8 years'. Art. 154 said: 'Any person who with the consent of the pregnant woman, but contrary to statute, terminates her pregnancy shall be punished by imprisonment of up to 3 years. The same punishment shall be inflicted on any person who aids a pregnant woman to terminate her pregnancy contrary to statute'. Art. 157, raised the sanctions for the perpetration of acts defined under Arts. 153 and 154 if they ended in the death of the pregnant woman.

42 | Pietrzykowski, 2007, p. 81.

43 | *J. of Laws of 1990*, No. 13, item 95. Thereby, the Regulation on termination of pregnancy (*J. of Laws of 1960*, No. 2, item 15) was repealed.

professional qualifications to be possessed by physicians terminating pregnancies and procedures to be used in issuing medical opinions about the admissibility of such terminations.' Although the Regulation did not modify the grounds for a legal abortion, it did introduce a number of measures that could actually reduce its numbers. Among them were a mandatory psychological consultation for women intending to terminate their pregnancy and a directive to inform women about the detrimental effects of abortion and the conscience clause, giving a physician the right to refuse the issuance of a certificate of legal admissibility of abortion or to perform it for ideological reasons.

The next important step in the evolution of relevant legislation was taken when a new compromise law, was enacted at the time, comprehensively regulating the admissibility of the termination of pregnancy. The Family Planning, Human Foetus Protection, and Pregnancy Termination Admissibility Act of 7 January 1993⁴⁴ (hereinafter, the 1993 Act) restricted access to abortion. It stated that an abortion could be legally performed, provided one of the following conditions was met:

- (1) pregnancy posed a risk to the life or health of the pregnant woman (without restrictions owing to the age of the foetus; this was to be determined by a doctor other than the one who terminated the pregnancy, unless it was a case of a life-threatening emergency);
- (2) prenatal tests or other medical features indicated a high likelihood of severe and irreversible impairment of the foetus or an incurable life-threatening disease (until the foetus became viable, or capable of living independently outside the body of the pregnant woman); this was to be ascertained by a doctor other than the one who terminated the pregnancy;
- (3) a reasonable suspicion arose that the pregnancy resulted from a criminal act and the occurrence of this circumstance was ascertained by a public prosecutor.

The 1993 Act introduced the provision on the protection of human life from the moment of conception and the concept of the conceived child. The preamble and Article 1 proclaimed:

Considering human life to be a fundamental interest of every human being and care for life and health to be an obligation of the State, society and citizens [...]. Every human being enjoys an inherent right to life from the moment of conception.

The 1993 Act modified criminal law regulations, that is, the provisions of the 1969 Criminal Code by adding Articles 23b, 149a, 149b, and 156a. Under Article 23b, a conceived child could not be subjected to procedures other than those that protect the life and health of the child and/or his/her mother with the exception of procedures specified by the statute.⁴⁵ Article 149a laid down conditions for the legality of abortion and specified

44 | *J. of Laws* of 1993, No. 17, item 78.

45 | It was admissible to perform prenatal tests that did not seriously increase the risk of miscarriage when (a) the conceived child belonged to a genetically predisposed family, (b) a genetic disease was suspected that could be cured, partially cured, or its effects could be limited in the foetal period, or (c) severe damage to the fetus was suspected.

responsibility for an illegal abortion.⁴⁶ It expressly said that no punishment was to be inflicted on the mother of a conceived child, meaning that although her behaviour constituted the *actus reus* of a prohibited act, a criminal law sanction did not actualize in respect of her, and that no offence was committed, meaning that there was no breach of a sanctioned norm, by a physician performing a legal abortion.⁴⁷

Once the 1993 Act entered into force, liberal-leftist circles raised objections and demanded that the limits of legal abortion be expanded. Their demands were met by the Amending Act dated 30 August 1996,⁴⁸ which added Articles 4a–4c to the 1993 Act and had a new liberalizing profile, as seen in its preamble, which proclaimed that: ‘life is a fundamental interest of every human being and care for life and health is a principal obligation of the State, society and citizens.’ However, it expressly recognized ‘the right of every person to decide responsibly on the possession of children and the right to access information, education, counselling and means to exercise this right.’ Article 4a introduced and defined the conditions for a legal abortion, and remains in force to date, albeit in truncated form. In its original version, it laid down four conditions for making an abortion legal, of which only two remain now, alongside a suitable procedure. It said that pregnancy may be terminated only by a physician if (1) pregnancy posed a risk to the life and/or health of the pregnant woman, or (2) the prenatal test or other medical indications reflected a high likelihood of severe and irreversible impairment of the foetus or an incurable disease, threatening its life, or (3) reasonable suspicion that the pregnancy had resulted from a prohibited act, or (4) the pregnant woman was in difficult living conditions or her personal situation was complicated.

46 | Art. 149a para. 1 said: ‘Any person who causes the death of a conceived child shall be punished by imprisonment of up to 2 years. Para. 2. No punishment shall be inflicted on the mother of the conceived child. Para. 3. No offence defined in para. 1 is committed by a physician who undertakes this action in a public health care establishment when: (1) the pregnancy poses a risk to the life or a serious risk to the health of the mother ascertained by the opinion of two physicians other than the physician undertaking the action mentioned in para. 1; the opinion shall not be necessary in a life-threatening emergency, (2) the death of the conceived child resulted from action undertaken to save the life of the mother or to prevent a serious damage to the health of the mother, the risk of which was confirmed by an opinion of two other physicians, (3) prenatal tests, confirmed by two other physicians other than the physician undertaking the action mentioned in para. 1, indicate severe and irreversible damage to the fetus, (4) it is reasonably suspected that the pregnancy resulted from a prohibited act. In this case a statement from a public prosecutor shall be necessary. Para. 4. In especially justified cases, the court may refrain from inflicting a punishment on the perpetrator of the offence defined in para. 1’. Under Art. 149b: ‘Any person who resorts to violence against a pregnant woman and thereby causes the death of a conceived child or otherwise causes the death of a conceived child without the consent of the pregnant woman or resorting to violence, unlawful threat or deceit makes the mother of a conceived child take the life of the child, shall be punished by imprisonment from 6 months to 8 years’. Under Art. 156a para. 1: ‘Any person who causes damage to the body of a conceived child or a health disorder in a conceived child, posing risk to his/her life shall be punished by restriction of liberty (community service) of up to 2 years. Para. 2. No offence is committed by the physician if the damage to the body of, and/or health disorder in, the conceived child are a consequence of medical procedures necessary to eliminate the risk to the life and health of the pregnant woman and/or the conceived child. Para. 3. No punishment shall be inflicted on the mother of the conceived child who commits an act defined in para. 1’.

47 | For the distinction between the ‘no punishment shall be inflicted upon’ and ‘no offence is committed’ clauses see Pohl, 2020.

48 | *J. of Laws of 1996*, No. 139, item 646.

The adopted indication model was rather broad as it included medical grounds, involving the life and health of the pregnant woman, eugenic reasons, and the broad category of difficult living conditions or complicated personal situation. They all had broad interpretations. Additional restrictions followed from time limits when the termination of pregnancy was admissible. They did not apply only to abortion for reasons that put the life and health of the pregnant woman at risk. In the case of prenatal defects, the termination of pregnancy was possible until the foetus became viable while in the case of the pregnancy being related to an offence and when abortion was justified by socioeconomic reasons, the admissibility of was restricted by a time limit whose end was defined by the phrase 'since the beginning of the pregnancy no more than 12 weeks have lapsed'. Among other procedural conditions that remain in place to date, a mention may be made of those concerning the legal situation of a pregnant minor, the manner of declaring her intent vis-à-vis abortion by her and on her behalf, and the manner of establishing the grounds for a legal abortion. These questions were dealt with by a suitable executive regulation later,⁴⁹ which said that the woman's written consent is essential to terminate pregnancy. Consent in writing from the legal representative of a minor or incapacitated woman is mandatory. Consent in writing is mandatory when the case concerns a minor aged over 13 years. Consent of the guardianship court is mandatory in the case of a minor aged under 13 years, where the minor also has the right to express her opinion. The written consent of an incapacitated woman is mandatory, unless the state of her mental health prevents her from giving consent. In the event of a disagreement among representatives, the consent of the court is essential to terminate pregnancy. The occurrence of the medical circumstances making abortion admissible is to be ascertained by physicians. If a pregnancy has resulted from a prohibited act, such an act (an offence) must be ascertained by a public prosecutor.

The 1996 Amendment Act also amended the 1969 Criminal Code that was still in force at the time. Articles 23b, 149a, 149b, and 156a, which had been in force since 1993, were repealed and new Articles 152a and 152b, were added, whereas Article 157 was rephrased. These articles penalized differently illegal abortions, based on whether they were performed with or without the consent of the pregnant woman. This classification extended criminal responsibility for an illegal abortion solely to an individual other than the pregnant woman. The criminal sanction depended on whether the foetus was viable.⁵⁰

The 1996 Amendment Act outraged the conservative circles from the start; in December 1996, a group of senators petitioned the Constitutional Tribunal to examine

49 | An executive regulation issued pursuant to the statutory empowerment included in Art. 4a(10) of the 1993 Act.

50 | Under Art. 152a: 'Any person who uses violence against a pregnant woman or terminates her pregnancy in another manner without her consent or makes her terminate it by violence, unlawful threat or deceit shall be punished by imprisonment from 6 months to 8 years'. The offence carried a higher sanction when in specific circumstances the fetus was viable; then this offence carried the punishment of imprisonment from 2 to 10 years. Under Art. 152b: 'Any person who with the consent of the pregnant woman but contrary to statute terminates her pregnancy shall be punished by imprisonment of up to 2 years. The same punishment shall be inflicted on any person who gives aid to a woman to terminate her pregnancy contrary to statute'. Art. 152a and Art. 152b provided for a higher sanction, imprisonment from 1 to 8 years, for the offender who had committed such acts when the fetus was viable. Under amended Art. 157, if a consequence was the death of person, offences specified in Art. 157a carried a minimum sentence of 2 years' imprisonment, whereas those specified in Art. 157b carried a sentence of imprisonment from 1 to 10 years.

its constitutionality.⁵¹ In a decision dated 28 May 1997 (Docket No. K 26/96), the Constitutional Tribunal found the provision permitting the termination of pregnancy for social reasons to be a contravention of the then constitutional provisions. Sitting *en banc*, with three dissenting opinions, the Tribunal ruled that Article 1(2) of the Act of 30 August 1996 amending the Family Planning, Human Foetus Protection and Pregnancy Termination Admissibility Act (1993),⁵² so far as it made the protection of life in the prenatal phase subject to the decision of the ordinary legislature, contravened Articles 1 and 79(1) of the Constitutional Act of 17 October 1992 on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government (hereinafter, Constitution of 1992). It was considered to violate the constitutional guarantees on the protection of human life at every stage of its development. The Constitutional Tribunal observed that Poland was a democratic state ruled by law and that from the constitutional provisions – imposing an obligation to protect and safeguard motherhood and family – it was possible to infer the constitutional protection of human life from conception. Following the Constitutional Tribunal’s decision, Article 4a(1)(4) of the 1993 Act (in the wording given to it by the 1996 Amendment Act) lost all force and effect as of 23 December 1997.⁵³ Three dissenting opinions on the decision were filed in which it was argued that ‘it is not the role or the responsibility of the Constitutional Tribunal to resolve general questions of a philosophical, religious or medical nature because they go outside the expertise of judges and competence of courts.’⁵⁴

The CT decision in K 26/96 set the limits to the right to a legal abortion, which now covered three cases: Risk to the life and health of the pregnant woman, severe and irreversible damage to the foetus, and pregnancy being the result of an offence. This continued until the CT declared the eugenic reason for abortion unconstitutional in the decision in K 01/20 dated 22 October 2020, which is analysed below. Thus, the changes in abortion law tended to limit the number of cases when abortion was legal while adhering to the indication model.

In sum, the 1993 Act recognized that life is a fundamental human interest and that care for life and health is a principal obligation of the State, society, and citizens. It recognized the right of every person to decide responsibly on the possession of children and the right to access information, education, guidance, and means to exercise this right. Under Article 1, the right to life is protected, including in the prenatal phase, within the limits set out in this Act. Under Article 4a(1), pregnancy may be terminated only by a physician, where (1) pregnancy poses a risk to the life or health of the pregnant woman, (2) prenatal tests or other medical indications suggest high likelihood of severe and irreversible foetal impairment or an incurable life-threatening disease (this reason was eliminated by the CT decision in K 01/20), and (3) there is a reasonable suspicion that pregnancy resulted from a prohibited act. This law was supplemented by the Criminal Code dated 6 June

51 | The 1997 Constitution had not been in force yet at the time. From 8 December 1992 to 16 October 1997, the Small Constitution (Constitutional Act of 17 October 1992) was in force in Poland.

52 | Act of 7 January 1993 on family planning, protection of the human foetus and the conditions for permissible termination of pregnancy (consolidated text *J. of Laws 2022*, item 1575). Art. 4a(1)(4) contravenes the Polish Constitution of 1992.

53 | Announcement by the President of the Constitutional Tribunal of 18 December 1997 (*J. of Laws 97*, No. 157, item 1040).

54 | A quotation from the dissenting opinion of a CT Justice, Lech Garlicki.

1997,⁵⁵ which penalized an abortion contrary to the statute. The legislator adopted the formula of a blank regulation in the Code; thus, the norms typifying illegal abortions still come from the 1993 Act. In its original wording, the 1997 Criminal Code used terms such as ‘foetus’, ‘pregnant woman’, and ‘termination of pregnancy’. A significant change in connotation in the provisions on abortion offences took place in 1999, when the term ‘foetus’ was replaced with ‘conceived child’.⁵⁶ The protection of a conceived child was enhanced by legislating a new provision, Article 157a in the Criminal Code, which penalized causing any damage to the body of a conceived child or a health disorder threatening his/her life.⁵⁷ The 1999 Amendment Act consolidated the trend of pro-life changes.

Abortion offences are regulated under Articles 152–154 under the Polish Criminal Code. Article 152(1) typifies a prohibited act involving the termination of the pregnancy of a woman in contrast to the Family Planning, Human Foetus Protection, and Pregnancy Termination Admissibility Act (1993), which has been explained above. The prohibited act involves performing an abortion in cases other than those set out therein, but with the consent of the pregnant woman. It carries a sentence of up to three years’ imprisonment. An analogous sanction is provided for under Article 152(2) for aiding a pregnant woman to terminate her pregnancy in contrast to the 1993 Act or urging her thereto. Thus, Article 152(2) typifies a prohibited act involving aiding or abetting but different from the aiding and abetting typified under Article 18(2)–(3) of the Criminal Code as it is directed at the person (pregnant woman) who herself does not commit a prohibited act. Urging a pregnant woman thereto must aim at arousing the intent to terminate the pregnancy. Aiding in the termination of pregnancy may take the form of supplying necessary instruments and pharmaceuticals (including morning-after pills), giving advice or information, such as to how and where pregnancy may be terminated. Article 152(3) regulates an aggravated type of both these offences. The aggravating circumstance is the viability of the child (foetus). The aggravated type carries a sentence of imprisonment ranging from 3 months to 8 years. It is debatable when a child (foetus) becomes viable. It is accepted that a child (foetus) becomes viable in about the 22nd week of pregnancy when it weighs 500g minimum.⁵⁸ Article 153(1) penalizes prohibited acts related to the performance of an abortion without the consent of the pregnant woman. Under it,

Any person who uses violence against a pregnant woman or terminates her pregnancy in another manner without her consent or makes her terminate it by violence, unlawful threat or deceit shall be punished by imprisonment from 6 months to 8 years.

An aggravated form of these offences is dealt with under Article 153(2), which covers the situation when the conceived child is already viable, and carries a sentence of imprisonment from 1 to 10 years. In the case of prohibited acts typified under Article 153, in

55 | The Code entered into force on 1 September 1998. For its original text see *J. of Laws* 1997, No. 88, item 553.

56 | See Amendment Act of 8 July 1999 (*J. of Laws* of 1999, No. 64, item 729).

57 | Such behaviour is punishable by a fine, restriction of liberty (community service), or imprisonment of up to 2 years. No offence is committed by a physician if the damage to the body of, and/or health disorder in, the conceived child are the consequence of medical procedures necessary to eliminate the risk to the life and health of the pregnant woman or the conceived child. No punishment shall be inflicted on the mother of the conceived child who commits such an act.

58 | Zoll, 2017, edge No. 25.

contrast to those specified under Article 152, the life of a child in the prenatal phase and the freedom of the pregnant woman as seen in her right to motherhood are protected.⁵⁹ A more severe sentence for performing an abortion, with or without the consent of the pregnant woman, is provided for where the pregnant woman dies as a result of the abortion.⁶⁰ Polish criminal law penalizes only the abortion-related offences described here, involving the performance of an abortion by third parties. A woman who terminates her pregnancy or has it terminated does not bear any criminal responsibility. In October 1997, Poland's current Constitution entered into force, after having been adopted on 2 April 1997. Article 38 of the Constitution says: 'The Republic of Poland shall ensure the legal protection of the life of every human being.' Thus, the legislator did not settle the question in the Constitution of when a human life and its legal protection begin.⁶¹

The implementation of the abortion standard in Polish law was reviewed by the European Court of Human Rights (hereinafter, ECHR), which found that the restrictive abortion standard in Polish law had become even more restricted when it came to its application, frequently leading to the infringement of the rights to privacy and related freedoms. In extreme cases, its application can be considered inhuman and degrading treatment. The ECHR reviewed the indication model adopted in Poland and all three categories of prerequisites for a legal abortion. In *Tysic v. Poland*,⁶² the Court found that the rights of the applicant had been infringed by denying her the right to abortion despite the fact that the pregnancy posed a risk to her health. In *Z. v. Poland*,⁶³ the Court found that the right of a pregnant woman to a legal abortion for medical reasons had been infringed upon owing to the failure to use diagnostic testing and to provide treatment. Both the pregnant woman and foetus died. In *R.R. v. Poland*,⁶⁴ the Court found that the applicant had been denied access to prenatal tests in time and was consequently denied full information on the health of the foetus and could not decide on a possible legal abortion. Poland had not provided access to legal and guaranteed medical procedures and information on the applicant's state of health. The Court ruled on the legality of denying the right to abortion when the pregnancy resulted from an offence. In *PiS v. Poland*,⁶⁵ the Court held that the abortion procedure had been vitiated in the case of a pregnant teenager whose pregnancy resulted from an offence.

Although beginning with 1993, the actual liberalization of Polish abortion law was merely symbolic and short-lived (1996), pro-choice movements continued their efforts.

59 | Giezek, 2014, edge No. 3.

60 | Art. 154(1)–(2) of the Polish Criminal Code.

61 | When this clause was being drafted, it was suggested that the phrase 'from conception' be added to it; however, the Constitutional Commission of the National Assembly rejected this motion. See Ślipko, 2004, p. 9.

62 | *Tysic v. Poland*, No. 5410/03, 20. 3. 2007, LEX No. 248817.

63 | *Z v. Poland*, No. 46132/08, 13. 11. 2012, LEX No. 1226411.

64 | *R.R. v. Poland*, No. 276117/04, 26. 5. 2011.

65 | *P. and S. v. Poland*, No. 57375/08, 30. 10. 2012. The cited judgment relates to the case of a raped teenage girl who, in 2008, had serious problems obtaining a termination of her pregnancy, despite meeting all the statutory conditions for doing so and obtaining the relevant certificate from the prosecutor investigating her rape – the pregnancy was the result of a crime. In its ruling, the European Court of Human Rights found that in the circumstances of the case, there had been inhuman and degrading treatment (Art. 3 of the Convention on Human Rights), a violation of the right to respect for family and private life (Art. 8 of the Convention) and the right to liberty and security (Art. 5(1) of the Convention).

Influenced by European and international standards,⁶⁶ they made an attempt in 2003–2005 to have a bill passed on planned parenthood⁶⁷ (successive bills, having the same purport, were submitted much less effectively much later). The bill departed from the indication model in favour of the model of abortion on request (with a minor concession to the indication model). Thus, it intended to give everyone the right to take his/her own decisions in relation to reproduction under conditions enabling conscious decisions on parenthood. It also intended to give every woman the right to terminate pregnancy in the first 12 weeks.⁶⁸ The intensive activity of pro-choice movements stirred pro-life circles to action and make demands that the right to abortion be curtailed further and that the full protection model be adopted. This last demand was satisfied by the CT judgment in K 1/20 of 22 October 2020,⁶⁹ which continues to arouse bitter public and legal controversies⁷⁰ as it limited the adopted indication model by eliminating the eugenic (embryo-pathological) condition for a legal abortion when prenatal tests or other medical indications suggest a high likelihood of severe and irreversible impairment of the foetus or incurable disease threatening its life.⁷¹ In the judgment, the CT held that Article 4a paragraph 1(2) of the Family Planning, Human Foetus Protection and Pregnancy Termination Admissibility Act (1993) was contravened Article 38 in connection with Articles 30 and 31(3) of the Constitution of the Republic of Poland. In the CT's opinion:

The legalization of the pregnancy termination procedure when prenatal tests or other medical indications suggest a high likelihood of severe and irreversible impairment of the foetus or an incurable disease threatening its life finds no grounds in the Constitution.

The result of the judgment was the derogation of a legal provision, thus, as of 27 January 2021, Article 4a paragraph 1(2) lost all force and effect. In this context, certain

66 | Kondratiewa-Bryzik, 2009, passim; Zampas and Gher, 2008, p. 249; Hewson, 2005, p. 365.

67 | Paper No. 3215 of the Sejm of the 4th Term. The text of the bill is available at: <https://web.archive.org/web/20061210190752/http://www.federa.org.pl:80/dokumenty/3215.pdf> (Accessed: 10 March 2023). See also Kondratiewa-Bryzik, 2009, passim.

68 | With statutory restrictions on the same level as before in the case of terminating pregnancy after the lapse of 12 weeks but when the fetus is non-viable; when the life and health of the woman is at risk, abortion is admissible regardless of the advancement of the pregnancy. For the bill on conscious procreation of 17 November 2017 see [http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-821-2018/\\$file/8-020-821-2018.pdf](http://orka.sejm.gov.pl/Druki8ka.nsf/Projekty/8-020-821-2018/$file/8-020-821-2018.pdf). (Accessed: 10 March 2023).

69 | Judgment of the CT of 22 October 2020, K 1/20, OTK-A 2021, No. 1.

70 | This paper concentrates exclusively on analysing the CT judgment on its merits, ignoring the political system and procedural controversies mentioned in legal publications. They centre on judicial appointments and the composition of benches in specific cases. One argument they persistently pursue is that some justices have been appointed to the CT in blatant violation of the rules. These justices, colloquially called doubles, are believed to be *de iure* disqualified from sitting on the CT (See Radziejewicz, 2017, p. 45; Cf. Pohl, 2017, p. 57). Other moderate opinions hold that the position of the CT in the Polish system of government is wrong, leaving it hamstrung by excessive partisanship. The fundamental shortcoming of the Polish system of government is certainly the procedure for electing justices by the Sejm by a simple majority of votes. This gives the political parties in power a decisive voice in judicial appointments to the CT. Although candidates must be apolitical and have extensive legal expertise, they are often closely connected to political parties. In extreme cases, they were active politicians before they were appointed to the CT. See Zyborowicz, 2016, pp. 117–118; Otręba, 2016, pp. 78–88.

71 | Gliszczyńska-Garabias and Sadurski, 2021; Rakowska-Trela, 2021; Adamus, 2020.

doubts arise as to the legal consequences of the CT judgment for the scope of penalization. As mentioned in relation to Article 152 ff of the 1997 Criminal Code currently in force, the legislator used the formula of the blank regulation there, specifying that the offender had to bear criminal responsibility for terminating the pregnancy of a woman in contrast to the Family Planning, Human Foetus Protection and Pregnancy Termination Admissibility Act (1993). The derogation of the eugenic condition for a legal abortion expands the scope of penalization. Some authors consider this controversial because, after certain assumptions are made, it may be seen as a violation of the principle of *nullum crimen sine lege*, because the expansion of responsibility follows from the (derogation) decision of a judicial body, namely the CT, and not from amending the statute by the legislative process as a manifestation of the legislator's activity.⁷²

Taking a stance by the CT called for a suitable analysis, covering first the question of whether legalization of the infringement of the interest – in this case, the life of a conceived child – is a constitutional value. As this question had been answered in the affirmative, it was necessary to establish whether legalizing the infringements of this interest was justified vis-à-vis constitutional values and, finally, whether the legislator had satisfied the constitutional criteria of resolving such collisions. The criteria relate to the proportionality test specified under Article 31(3) of the Polish Constitution.⁷³

4. Polish Constitutional Tribunal Decision K 1/20 – Discussion

The critics of the decision in K 1/20 have raised objections to all three stages of examining the constitutionality of the statute in question. First, with respect to the CT's finding that Article 38 of the Polish Constitution⁷⁴ covers the prenatal period from the moment of conception, it is believed that the CT acted *ultra vires*. The rationale was that the CT imparted a specific meaning to the concept of human life that the constitutional legislator did not. Second, the CT ignored the fact that the conceived child is not self-contained and is bound by a unique relationship with the pregnant woman. The relationship features the contingency of the creation of an independent being, pivoting on the fact of birth.⁷⁵ Third, criticism is levelled against the manner of defining relationships between constitutionally protected values and rights, and their mutual positioning: the life of a child and the dignity of the woman being its mother. In the case of '[...] eugenic (embryo-pathological) abortion what is at stake is not as much the protection of a woman's dignity at the level of her wellbeing but rather the protection of a woman's dignity touching the core of humanity'.⁷⁶ Finally, criticism is aroused by the manner in which the CT conducted the proportionality test.⁷⁷ Under this provision:

72 | Gutowski and Kardas, 2020, p. 8; Giezek and Kardas, 2021, p. 44.

73 | See the CT 1997 judgment in K 26/96 cited earlier.

74 | 'The Republic of Poland shall ensure the legal protection of the life of every human being.'

75 | Cf. Soniewicka, 2021, p. 17.

76 | Adamus, 2020, p. 96. Under the Polish Constitution, Art. 30: 'The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.' As the ECHR decisions held, the dignity of a pregnant woman is related to the prohibition of cruel, degrading, and inhuman treatment.

77 | Art. 31(3) of the Polish Constitution.

Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

It ought to have been verified whether the statutory right to abortion for eugenic reasons, which emanates from the right of a woman to have her dignity respected and recognizes the inadmissibility of demanding a heroic attitude from her, may be restricted in light of the constitutional standard.⁷⁸ Those limitation standards are covered by the subsequent conditions of necessity (usefulness), adequacy, and proportionality in a narrow sense. A correct analysis of such a limitation should begin with the identification of the right or freedom being limited. Next, it should indicate the value for the sake of which the limitation has been made. A closed catalogue of such values is given under Article 31(3) of the Constitution.

A key point in the CT's line of reasoning and the criticisms it evoked is the interpretation of Article 38 of the Polish Constitution, specifically, the recognition that human life is protected from the moment of conception. Disproving this thesis makes counterarguments pointless. Affirming justifies the criticism of the other two aspects. Thus, when viewed on its merits, any challenge to the assertion that an unborn child is covered by the legal protection afforded by the Polish Constitution questions the sense of any additional arguments by the CT. The interpretation cannot be considered arbitrary in the context of a prior CT decision. In a judgment dated 28 May 1996, the CT asserted that

[...] the value of the constitutionally protected legal interest that human life is, including life in its prenatal phase, must not be differentiated. [...] Thus, from the moment of its coming into existence, human life is a value that is constitutionally protected. This is also true of the prenatal phase.

Although the 1997 decision did not refer to the Constitution in Poland, which came into force only on 1 October 1997,⁷⁹ the axiology the decision adopted shared the pro-life outlook. The argument from the continuation of axiological assumptions made in earlier CT decisions cannot be decisive, even less so as the 1998 decision had attracted strong criticism. One reason was its failure to take into account European and international standards.⁸⁰

An answer to the question whether the Polish Constitutional Tribunal could impart to the concept of human life, used in the Polish Constitution, Article 38, a specific meaning (i.e. acknowledge that its protection starts already at the moment of conception, establishing thereby an initial model of constitutional review of statutory provisions)⁸¹ must take

78 | Cf. Judgment of the CT of 22 October 2020, K 1/20, dissenting opinion of CT judge Leon Kieres, OTK-A 2021, No. 1.

79 | When the 1997 Constitution was being drafted, strong efforts were taken to extend in express terms constitutional protection to the prenatal phase of human life. However, these efforts failed. Therefore, the planners did not intend to design a new model of the constitutionality review of existing statutory abortion law provisions (1993 Act) and thus create constitutional grounds for a change of the model followed until then.

80 | Woleński, 1998, pp. 88–98.

81 | In this case, Art. 4a para. 1(2) of the Act of 7 January 1993 on family planning, protection of the human foetus, and the conditions of permissibility of abortion (consolidated text *J. of Laws 2022*, item 1575).

into account all constitutional values and the special relationship holding between the pregnant woman and conceived child, i.e. biological, social and legal ties. In this sense, the decision under discussion is appropriately criticized for its arbitrariness vis-à-vis the concepts used (e.g. mother of a conceived child instead of a pregnant woman), narrative spun (incomplete narrative), and arguments employed (one-sided nature of arguments, absence of any confrontation with a different point of view). These charges gain strength because the interpretation given by the CT in judgment in K 1/20 offers full legitimacy to the rejection of the abortion law model followed thus far. The indication model in place thus far can be abandoned in favour of the protection model with the exception of situations when the life of a pregnant woman is at risk. Thus, the continuation of this trend may lead to the questioning of another condition for the legal termination of pregnancy, namely that of pregnancy being the result of an offence. Its existence is justified, even more so than in the case of a eugenic condition, by the protection of the dignity of a pregnant woman.

5. Conclusion

The evolution of the Polish legal treatment of abortion outlined in this article, going back almost a century, seems to justify the claim that it has taken a specific direction and course when compared to other European countries. Beginning with the interwar period, with the exception of a brief liberalizing episode in 1996, the Polish legal treatment of abortion could be labelled as conservative-liberal. It followed an indication model, covering legal, medical, and eugenic considerations. It used to be called, including in official contexts, an abortion compromise. The judgment of the Constitutional Tribunal of 22 October 2020, being the latest step, as of the time of writing, in this evolution, shifted it to a fully conservative track. The judgment and accompanying opinion may suggest that the evolution may not be over yet and may proceed, taking an extremely conservative course. The legal condition, taking into account the dignity of the pregnant woman, may be questioned, relying on the same line of reasoning used by the Polish Constitutional Tribunal with respect to the eugenic condition.

The judgment of the Constitutional Tribunal made the evolution of the Polish legal treatment of abortion depart even further from the course along which abortion law has developed in other European countries. There, it evolved along an entirely different path, although, as in Poland, countries like Spain and Ireland had a strongly conservative, Catholic segment of society. The CT judgment is exposed to the charge of arbitrariness (conceptual, narrative, and argumentative). It would seem that in the case of so sensitive and significant legal issue that the admissibility of abortion is, arbitrariness should be avoided. All the more so, as narrative presented in this judgment has been used to change the entire course of the legal perception of abortion admissibility. The judgment has marginalized the fact that no consensus on this issue is to be found in the Polish parliament or, more importantly, society.⁸²

82 | Cf. The dissenting opinion of a CT Justice, Leon Kieres, to the CT judgment of 22 October 2020, K 1/20, para. 3.3.

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