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CONSEQUENCES OF THE CONSTITUTIONAL TRIBUNAL'S RULING OF OCTOBER 22, 2020. ON THE CITIZENS' BILL ON SAFE TERMINATION OF PREGNANCY AND OTHER REPRODUCTIVE RIGHTS

Abstract. The ruling of the Polish Constitutional Tribunal of October 22, 2020 introduced a near-complete ban on abortion in Poland, as it removed from the law the embryopathological condition that allowed abortion when the fetus had an incurable, severe disease. The ruling raises a number of questions regarding the recognition of international protection of human rights, the equal protection status of human rights, and the principle of trust in the state. The Tribunal's ruling resulted in massive public protests in Poland, the adoption of condemnatory resolutions by the European Parliament, and the submission of a new bill by members of the parliament from the opposition groups. The purpose of the paper is to show the questionable ruling issued by the Constitutional Tribunal from the perspective of protection of human rights and the attempts of opposition MPs to change the legal order. The Tribunal's ruling violates women's human rights and is therefore a form of discrimination against women. Attempts by opposition MPs to "civilize" the right to abortion have proved unsuccessful. The jurisprudence of the European Court of Human Rights may establish a breakthrough, as the Tribunal has received a complaint concerning the prevention of abortion on embryopathological grounds in connection with the ruling of the Constitutional Court of October 22, 2020.

Keywords: abortion law, reproductive rights, European Court of Human Rights, Constitutional Tribunal, Poland.

Introduction

The debate over the content of the legislation regulating abortion in Poland has been going on for 30 years, namely since the initiation of work on the Act of January 7, 1993 on Family Planning, Protection of Human Fetus, and the Conditions of Admissibility of Pregnancy Termination (Act of 1993). Unsuccessful attempts to amend the law in force have been made several times by means of a citizen's legislative initiative or a parliamentary initiative (Kapelańska-Pręgowska 2021, 213–215; Michalczuk-Wlizło 2022, 155ff; Michalczuk-Wlizło 2019). Each legislative initiative, whether aimed at liberalizing or radicalizing the law in question, provoked public discourse (Gałęska-Śliwka 2021, 88–91; Kowalczyk 2019, 97–102; Pańkow 2019; Banasiuk & Stępkowski 2017; Rachwał 2019) and arose extreme emotions. Opinions on the bills submitted to the Sejm to amend the Act of 1993 were expressed not only by those directly involved in the legislative process, but very often also by the Catholic Church and institutionalized groups of supporters or opponents of the permissibility of abortion. However, the "abortion compromise" was the prevailing *status quo*, which politicians did not really attempt to change for years for fear of a negative reaction from the public, feminist movements, or the Church, which leans heavily toward traditional gender roles (Heinen & Portet, 2010; Star 2020, 2).

The Constitutional Tribunal's of 2020, which declared the Act of 1993 unconstitutional, resulted in massive public protests in Poland, the adoption of a resolution by the European Parliament, and the submission of a citizens' bill in on pregnancy termination to the Sejm.

The purpose of the paper is to show the questionable ruling issued by the Constitutional Tribunal from the perspective of protection of human rights and the attempts of opposition MPs to change the legal order. The paper verifies the research hypothesis assuming that the Tribunal's ruling violates women's human rights and that attempts by opposition MPs to "civilize" the right to abortion are doomed to fail. The hypothesis is be verified using the dogmatic method.

The paper consists of six parts. The first part is introductory and takes a closer look at the permissibility of abortion in the Polish legal system before the 2020 ruling of the Constitutional Tribunal. The second part presents a brief analysis of Polish abortion complaints brought before the European Court of Human Rights. Next, the paper characterizes the October 2020 decision of the Constitutional Tribunal, which was widely described in the literature (Gliszczyńska-Grabias & Sadurski 2021; Wiak 2021;

Piotrowski 2021; Koncewicz 2022; Ploszka 2022; Szczepańska et al. 2022; Wicha 2022). The fourth part focuses on a discussion of the European Parliament's reaction to the ruling of the Polish Constitutional Tribunal. The fifth part discusses the actions taken by Polish MPs in response to the ruling of the Polish Constitutional Court. The last part of the paper contains the conclusions.

The permissibility of abortion in Polish law before the 2020 ruling of the Constitutional Tribunal

For many years, the so-called "abortion compromise," which was based on the Act of 1993 and the ruling of the Constitutional Tribunal of May 28, 1997 (TCR 1997), prevailed in Poland. When the Act of 1993 came into force, it introduced Article 149a into the Penal Code of April 19, 1969 (PC 1969), which criminalized acts consisting in causing the death of a conceived child, while providing for a statutory justification in the case of a doctor performing an abortion in a public health facility, who did not commit a crime if: 1) the pregnancy posed a threat to the life, or a serious threat to the health, of the mother, as determined by the opinions of two physicians other than the physician performing the abortion; however, this opinion was not necessary in the case of an immediate need to eliminate the threat to the life of the mother; 2) the death of the conceived child occurred as a result of actions taken to save the life of the mother or to prevent serious damage to the mother's health, the danger of which was confirmed by the opinions of two other physicians; 3) prenatal tests, confirmed by the opinions of two physicians other than the physician performing the abortion procedure, indicated severe and irreversible damage to the fetus; 4) there was a reasonable suspicion, confirmed by a public prosecutor's certificate, that the pregnancy was the result of a crime.

The next step in the process of consolidation of the legislation on abortion was the Act of August 30, 1996 on the Amendment of the Act of January 7, 1993 on Family Planning, Protection of Human Fetus, and the Conditions of Admissibility of Pregnancy Termination, and on the Amendment of other Acts (Act of 1996), which added a new Article 4a to the Act of 1993, which comprehensively regulated the procedure for legal termination of pregnancy and stated the conditions for such abortion, while deleting them from the Penal Code. In addition to allowing termination of a pregnancy to be performed solely by a doctor, in the following cases (Article 4a (1)): 1) the pregnancy poses a threat to the life or health of

the pregnant woman; 2) prenatal testing or other medical grounds indicate a high likelihood of severe and irreversible impairment of the fetus or an incurable life-threatening disease; and 3) there is a reasonable suspicion that the pregnancy is the result of a crime; a fourth condition was added: when the pregnant woman is in difficult living conditions or a difficult personal situation (so-called abortion on request for social reasons). Also, the time limit for permitted termination of pregnancy was clarified by indicating that in the case of embryopathological reasons (the condition specified in par. 1(2)), pregnancy termination was allowed until the fetus reached the capacity to live independently outside the pregnant woman's body, and in the case indicated in par. 1(3 or 4) (pregnancy resulting from a crime or abortion for social reasons) – if no more than 12 weeks have elapsed since the beginning of the pregnancy (more information on the conditions for permissibility of pregnancy termination can be found in Boratyńska, Różyńska 2019).

The condition for pregnancy termination upon a request when the pregnant woman is in difficult living conditions or a difficult personal situation was in effect for just over a year. As of December 23, 1997, that provision expired as a result of the Constitutional Tribunal's ruling of May 28, 1997 (K 26/96; Announcement 1997). This ruling, like the Constitutional Tribunal's ruling of October 22, 2020, was considered the result of the Tribunal's transgression of the role assigned to it by the Constitution (Piotrowski 2021a; Drozdowska 2016, 302–304).

In the current Act of June 6, 1997 – Penal Code (Act of 1997), provisions that criminalize abortion can be found in Articles 152–154. The basic type of the crime, i.e. pregnancy termination with a woman's consent in violation of the law, as well as aiding or abetting a pregnant woman to illegally terminate her pregnancy, is punishable by imprisonment for up to three years (Article 152 (1 and 2) of the Penal Code). The act on the basis of violation of whose provisions criminal liability is determined is the Act of January 7, 1993 on Family Planning, Protection of Human Fetus, and the Conditions of Admissibility of Pregnancy Termination. The aggravated type of the crime is the commission of the aforementioned acts when the conceived child has reached the capacity for independent life outside the mother's body, which is punishable by imprisonment for 6 months to 8 years. It should be noted that this characteristic is not explicitly defined in the Penal Code and should be evaluated in each specific case (Budyn-Kulik 2022; Giezek 2021, 260).

A type of crime subject to an aggravated criminal penalty is termination of a pregnancy while using violence or otherwise against a pregnant woman without her consent, as well as leading a pregnant woman by violence, unlawful threat, or deception to terminate a pregnancy, which is

punishable by imprisonment for 6 months to 8 years (Article 153 (1) of the Penal Code). As in the case of the basic type of the crime provided for Article 152 (1 and 2) of the Penal Code, the legislator has provided for an aggravated type with the prerequisite that the conceived child achieve the ability to live independently outside the mother's body, with a the penalty of imprisonment for 1 to 10 years. Further aggravated types are the acts provided for in Article 154(1 and 2) of the Penal Code, where the aggravating characteristic is the death of the pregnant woman. If the cause of the death is termination of a pregnancy with the woman's consent in violation of the law, or aiding or abetting the pregnant woman to illegally terminate her pregnancy, the perpetrator shall be punished by imprisonment for 1 to 10 years. If the conceived child has reached the capacity for independent life outside the mother's body, or if the termination of the pregnancy occurred as a result of the use of violence against a pregnant woman or otherwise without her consent, as well as if a pregnant woman was led by violence, unlawful threat, or deception to terminate her pregnancy, and the consequence of these acts turned out to be the death of the woman, the perpetrator shall be punished by imprisonment for 2 to 12 years.

The jurisprudence of the European Court of Human Rights in abortion-related cases against Poland

Bringing complaints to international bodies, including the European Court of Human Rights, is of great importance in building standards for the observance of women's rights. A possible complaint may concern not only lack of access to legal abortion or denial of prenatal testing, but also violation of rights arising from Article 3 of the Convention by degrading and inhuman treatment that consists in not being able to terminate a pregnancy in situations of lethal fetal defects and being forced to give birth to a child burdened with serious defects and diseases, or forcing a woman to travel abroad to terminate a pregnancy, as well as the right arising from Article 8 of the Convention, which guarantees respect for private life, with unlawful and disproportionate interference in private life by denying the possibility of terminating a pregnancy in situations of severe fetal damage and forcing a woman to give birth to a child with serious defects and diseases (Gąsiorowska 2021). Poland has lost three such cases so far (R.R. v. Poland 2021, Tysiąc v. Poland 2021, and P. and S. v. Poland). In each of these cases, a pregnant woman was denied access to legal medical diagnostics and treatment, including pregnancy termination. The ECtHR

has found Poland to violate, in various respects, Article 3 in various respects (the right to freedom from inhumane and degrading treatment), Article 5 (the right to liberty and security), and Article 8 (the right to respect for private life) of the Convention. Since these ECtHR judgments, Poland's government has not made any of the requirement amendments to the Polish laws and the Committee of Ministers of the Council of Europe regularly reminds the Polish authorities of this fact (Helsinki Foundation for Human Rights 2021, 5).

The cases adjudicated by the ECtHR that involved Poland show that the obstructive behavior on the part of medical staff and barriers to pregnancy termination prevent women from accessing abortion even when legal abortion would be allowed due to the fact that their specific situations fall within the few exceptions provided for in the applicable legislation (Berro Pizzarossa & Sosa 2021, 594).

In January 2020, the ECtHR informed the Polish government of a new complaint regarding the inability to perform a legal abortion, based on Articles 3 and 8 (B.B. v. Poland, 2021 pending), in July 2021, the Court informed the Polish government of twelve new complaints concerning abortion rights in Poland, as well as notified the government of Poland that it had received "over 1,000 similar applications" (ECtHR 2021, 1). By October 2021, the Council of Europe Commissioner for Human Rights has intervened in these twelve cases, stating that in her view, the almost complete ban on abortions should also be seen against the background of the long-standing disregard for women's sexual and reproductive health and women's rights in general. As the Commissioner noted in her Rule 9 submission to the Committee of Ministers in January 2020, the situation in the area of sexual and reproductive health and rights in Poland in the past several years had not only failed to improve, but had actually worsened (Commissioner for Human Rights 2021, 4).

The European Convention on Human Rights does not make an explicit reference to the concepts of reproductive health or reproductive rights. In general, the ECtHR has been unwilling to explicitly define a separate right of access to abortion on the basis of the European Convention of Human Rights (Berro Pizzarossa & Sosa 2021, 591). Reproductive rights are an important category of rights, both intrinsically and due to their broad socio-political implications. In the view of feminist scholars, the public-versus-private divide in law and politics is invalid. They claim that reproductive rights, which legal interpreters often see as belonging to the sphere of private life, are inherently political and public (Krajewska, 2021: 1073). Feminist researchers have emphasized the links between reproductive rights, citizenship, and the

state (Pollack Petchesky 1990; Fuszara 2010; Mishtal 2015; Oja & Yaminc 2016; Singer 2022).

In the opinion of the ECtHR, the legal and social orders of the member states of the Council of Europe do not contain a uniform European concept of morals, including those related to the question of when life begins. Nevertheless, the Court has confirmed that women must be able to access abortion services that are level in a particular state if that state has decided to adopt legislation that legalizes the termination of pregnancy. The ECtHR emphasized that a state "must not structure its legal framework in a way that would limit real possibilities to obtain an abortion" (ECtHR 2012). In addition, states have a "positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion" (ECtHR 2007; ECtHR 2012). The ECtHR has expressed the opinion that states should provide clear, accessible, and foreseeable legislation; reliable and readily available information about access to abortion; sufficient participation of women in the decisions being made, and effective judicial remedies (Gerards 2018).

In conclusion, the judgments issued by the ECtHR against Poland have not been properly enforced by Poland. First, no remedy has been introduced into the Polish legal system against unjustified medical decisions denying access to legal termination of pregnancy. Admittedly, a few years after the verdict in the *Tysiąc v. Poland* case, the so-called objection was introduced, but it cannot be considered an effective remedy. Second, the healthcare system and the operation of the conscience clause do not ensure the availability of legal abortions.

Constitutional Tribunal's 2020 ruling

On October 22, 2020, the Constitutional Tribunal ruled that Article 4a(1)(2) of the Act of January 7, 1993 on Family Planning, Protection of Human Fetus, and the Conditions of Admissibility of Pregnancy Termination is incompatible with Article 38 in conjunction with Article 30 in conjunction with Article 31(3) of the Polish Constitution (K1/20). In the Tribunal's opinion, one of the statutory conditions allowing pregnancy termination due to "severe and irreversible fetal impairment or an incurable disease threatening its life" was unconstitutional. Thus, the provision of law that was most commonly used as the legal basis for legal termination of pregnancy was eliminated[1]. The Tribunal issued the ruling *in corpore*, with five dissenting opinions[2].

The ruling sparked massive public protests that continued for weeks (Rak 2022, 41) in both large cities and small towns, and brought about significant shifts in public opinion polls and changes in the attitudes of Polish women and men (Bucholc & Komornik 2020). According to a recent opinion poll conducted in October 2022 by IBRIS for Onet.pl, only 10% of the respondents had a positive view of the Constitutional Tribunal's ruling, and a half of those surveyed considered Jarosław Kaczyński and high-ranking members of the Catholic Church clergy personally responsible (*Polacy* 2022). The Constitutional Tribunal's ruling resulted in an increase in the number of people advocating greater access to the abortion procedure. In May 2022, as many as 66% of respondents said they supported women's right to abortion until the 12th week of the pregnancy (Ipsos 2022).

From a legal standpoint, the October 2022 ruling of the Constitutional Tribunal (K1/20) raises a number of concerns. First, when drafting the ruling, which concerned one of the most fundamental human rights issues, the Tribunal almost completely ignored, or rather attempted to abuse, the standards of international human rights protection systems in relation to reproductive rights, which Polish law (and Polish courts) must respect (Gliszczyńska-Garbias & Sadurski 2021, 152). As rightfully pointed out by Bucholc, this demonstrates the narrowing of the jurisprudential horizon as a result of the political change taking place in Poland since 2015, which consists in the reduced importance of debates on international human rights as a reference in Polish constitutional jurisprudence (Bucholc 2022).

Secondly, a reasonable doubt arises as to whether the sudden change in the regulations concerning the fundamental rights of citizens, which results from the Constitutional Tribunal's ruling, does not violate the principle of citizens' trust in the state and the law. It should be emphasized that the ruling in question resulted in criminalization of termination of pregnancy on embryopathological grounds, which was permitted pursuant to the Act of August 30, 1996 on the Amendment of the Act of January 7, 1993 on Family Planning, Protection of Human Fetus, and the Conditions of Admissibility of Pregnancy Termination, and on the Amendment of other Acts (Dziergawka 2021). Third, the Tribunal's ruling is not a law and broadening the scope of the criminal response without giving the legislature time to intervene legislatively contradicts both the Tribunal's role and the *nullum crimen sine lege* principle contained in the first sentence of Article 42(1) of the Constitution (Dziergawka 2021; see also pp. 105 and 109 of the grounds for the Tribunal's judgment of October 22, 2020 – the dissenting opinion of judge Piotr Pszczółkowski).

Fourth, the ruling raises concerns about its constitutionality and the constitutional status of the Tribunal itself (Piotrowski 2021a; Piotrowski 2021b, 319; Rakowska-Trela 2021; Tarapata, Zontek 2021; Ploska 2022). Fifth, the ruling is based on the premise that, regardless of religious considerations, the questioned provision of law that governs pregnancy termination must be deleted, thus enforcing submission to injunctions that require suffering commanded not by the conscience of the person concerned, but by the government's political will. In a democratic law-abiding state, imposing one's faith on others who do not share one's beliefs and enforcing submission to religious commandments on pain of punishment – as in the case of physicians who violate the prohibitions resulting from the Tribunal's ruling – is not permissible. The replacement of an individual's conscience with the conscience of a public authority, which results from the ruling, can hardly be seen as an implementation of the principle of dignity of a person that is laid down in Article 30 of the Constitution. The judgement blurs the line between law and morality, and demonstrates lack of empathy, typical of a legislative approach that can be referred to as constitutional authoritarianism (Piotrowski 2021b, 320).

Sixth, the ruling concerns an individual's decision related to her reproductive rights and her decision-making autonomy, and in the cases indicated in Article 4a(1) of the Act of 1993 termination of pregnancy is a woman's right, not her obligation. The Tribunal made only a marginal reference to the rights of pregnant women, as the October 22, 2020 ruling rarely uses the terms "women's rights" and "rights of a pregnant woman," instead most often referring to "mother's rights," which, as Grabowska-Moroz & Łakomiec rightly point out, is not only incorrect, but would also mean that, in the Tribunal's view, women's rights are defined through the lens of their potential social roles as mothers (Grabowska-Moroz & Łakomiec 2021, 254).

Seventh, as Koncewicz rightly points out, the ruling in K 1/20 makes a rather dramatic change. Its clear recognition of life in the prenatal phase as a human being granted legal protection greater than that enjoyed by the mother cannot be supported either by the wording or by the axiology of the Constitution. This violates the equal status of the right to legal protection enjoyed by all human beings without properly assessing the weight of the value to be protected against the weight of the value to be sacrificed. Acceptance of this reductive reasoning causes women to be invisible as bearers of constitutionally protected rights (Koncewicz 2022, 315). Protection of the fetus is only one side of the coin and the rights of the mother must constitute the other side. In its ruling, the Tribunal clearly did not follow the principle of proportionality.

Currently, Poland's abortion law is one of the most restrictive in Europe. The Constitutional Tribunal's ruling has resulted in the almost complete cessation of legal abortions in Poland. Their number has decreased tenfold. The data presented by the Minister of Health indicate that 107 legal abortions were performed in Poland in 2021, of which 75 procedures were performed pursuant to the embryopathological condition, which was in effect until January 27, 2021, the date the Constitutional Tribunal's ruling took effect, and 32 other terminations of pregnancy were performed due to a threat to the life or health of the mother (*Dziesięciokrotny spadek* 2022).

Response of the European Parliament to the ruling of the Polish Constitutional Court

Opposition to the legal situation of pregnant women in Poland has also been expressed internationally. On November 26, 2020, the European Parliament adopted a resolution on the *de facto* ban on the right to abortion in Poland. The resolution argued that women's rights are fundamental human rights, and "the unjustified excess of restrictions on access to safe abortion resulting from the aforementioned ruling of the illegitimate Constitutional Tribunal fails to protect the inherent and inalienable rights and dignity of women, as it breaches the Charter, the ECHR, the case law of the ECtHR, numerous international conventions to which Poland is a signatory, as well as the Constitution of the Republic of Poland" (European Parliament 2020). It also reminded that restricting or banning the right to abortion in no way eliminates abortion, but only pushes it underground, leading to an increase in illegal, unsafe, clandestine, and life-threatening abortions (European Parliament 2020a).

On the anniversary of the Polish Constitutional Tribunal's ruling, in November 2021, the European Parliament passed another resolution on abortion in Poland (European Parliament 2021). The Parliament called on the Polish government to lift the ban on abortion, which threatens women's lives, and to guarantee access to safe, legal, and free abortion services for all women (Krupa-Dąbrowska 2021). In the resolution, adopted by an overwhelming majority, MEPs condemned the hostile and brutal treatment of human rights defenders in Poland and called on the Polish authorities to guarantee their right to public expression without fear of repercussions or threats. The Parliament called on European Union member states to cooperate to facilitate access to abortion, for example by ensuring that

Polish women have access to free and safe abortion in the national healthcare systems of other states.

The call was answered very quickly by the Netherlands, whose parliament passed a resolution in late November 2021 allowing state funding for abortions for European women (*Netherlands* 2021). Funding for abortions will come from the Human Rights Fund for 2022–2027. The impetus for action was the death of the 30-year-old Izabela from Pszczyna (Borowska 2021). In the grounds for its resolution, the Dutch parliament stated that freedom in some regions of Europe was under intense pressure from repressive legislation and a shrinking civil society, which has a disproportionate impact on the LGBTI community and women seeking to terminate pregnancies (Orłowski 2021). It should be noted that the content of the resolution was, as an exception, drafted also in Polish, in order to reach the widest possible group of addressees. In addition to the Netherlands, Belgium also responded to the European Parliament's call, as the Belgian government donated EUR 10,000 to the Abortion Without Borders NGO, which assists Polish women in arranging abortions abroad (Euronews 2021). The strong reaction of the European Parliament and the position of the Belgian and Dutch governments did not in the least result a modification of the legal system in Poland with regard to a liberalization of the law so as to facilitate abortions.

Response of Polish MPs to the Constitutional Tribunal's verdict

On October 26, 2020 – as a response to the Constitutional Tribunal's verdict – a *bill amending the Penal Code* was submitted to the Sejm by MPs of the Left political alliance, which expanded Article 152 of the Penal Code by adding section 4, which reads "He who, with the woman's consent, terminates her pregnancy, shall not commit a crime if no more than 12 weeks have elapsed since the beginning of the pregnancy," and section 5, which reads "Whoever, with the woman's consent, terminates her pregnancy, shall not be subject to a penalty, if prenatal testing or other medical grounds indicate a high likelihood of severe and irreversible impairment of the fetus or an incurable life-threatening disease." The Left's bill would exclude criminal liability for terminating a pregnancy based on the embryopathological condition (Projekt, 2020).

A bill amening the Act on Family Planning, Protection of Human Fetus, and the Conditions of Admissibility of Pregnancy Termination was also submitted by the President of the Republic of Poland. According to the text of

the October 30, 2020 initiative, the condition repealed by the Constitutional Tribunal, which allowed termination of a pregnancy, would be reinstated in certain cases where "prenatal examinations or other medical indications point at a high likelihood that the child will be born dead or burdened with an incurable disease or defect, leading inevitably and directly to the death of the child, regardless of the therapeutic measures used" (Druk 727, 2020).

Another attempt to restore the *status quo* prevailing prior to the Tribunal's ruling was made on January 29, 2021, when a parliamentary bill amending the Act on Family Planning, Protection of Human Fetus, and the Conditions of Admissibility of Pregnancy Termination was submitted to the Sejm, which proposed a reinstatement of the repealed embryopathological condition in the Polish legal system.

Opposition to the Constitutional Tribunal's ruling has also taken the form of a citizens' legislative initiative. On March 31, 2022, the Committee of the Legal Abortion Without Compromise Legislative Initiative submitted to the Sejm a bill on safe termination of pregnancy and other reproductive rights (Druk 2298, 2021). The bill envisaged the derogation of the existing legislation on abortion and the introduction of completely new laws to ensure the full exercise of reproductive rights, including the right to health protection and respect for freedom and privacy in the area of reproduction. More than 200,000 citizens had signed the citizens' initiative. According to the wording of the submitted bill, any pregnant person would have the right to health care services in the form of termination of pregnancy until the end of the 12th week of the pregnancy, and after that period – at the earliest possible stage of pregnancy development, in the cases enumerated in the bill: when the pregnancy posed a threat to the life or physical or mental health of the woman, when the results of prenatal diagnostics or other medical indications point at developmental or genetic abnormalities of the fetus, and when the pregnancy is the result of a crime identified on the basis of a statement made by the pregnant person (Article 2). The pregnancy termination procedure itself would be reimbursed by the National Health Fund. The decision to terminate a pregnancy could be made independently by a person who is at least 13 years old. In the case of a minor under 13 year of age who expressed the will to terminate a pregnancy, the consent would also have to be granted by the legal guardian or, if the legal guardian did not express the consent, by the family court (Article 3 of the bill).

The applicants formulated precise guidelines requiring healthcare service providers to perform the abortion procedure within 72 hours of the pregnant person's request. The bill also includes provisions clarifying the possibility for physicians to use the so-called conscience clause. If a physi-

cian refused to provide healthcare services citing Article 39 of the Act of December 5, 1996 on the Professions of Physician and Dentist, the head of the ward or the head of the medical entity in which the physician practiced his or her profession would be required to designate another physician to provide healthcare services at the same medical entity. If the conscience clause were invoked by all physicians providing healthcare services, then the person in charge of the medical entity would be obliged to enter into a contract with a subcontractor who would terminate pregnancies at that entity (Article 5). Such strict standards would prevent abuse of the conscience clause to the detriment of patients' rights related to the provision of free healthcare services included in the set of healthcare services paid for by the National Heath Fund. In addition, the submitted bill was to guarantee the right to information, education, and counseling enabling the full exercised of the right to informed parenthood. It abolished criminal penalties for physicians performing and persons assisting in abortions.

On May 20, 2021, the Committee launched a website, aborcjanatak.pl, through which MPs can be asked how they will vote when the bill is read in the Sejm. The website also includes call to members of the parliament: "Is this law worthy of your support? *YES!* – because it introduces a European standard for abortion in Poland. Apart from Malta, Poland has the strictest anti-abortion law in Europe."

In response to the submission of the citizens' bill, an opinion was drawn up by the Ordo Iuris organization, which pointed out numerous deficiencies in the bill. The opinion argues that the solutions contained in the bill are aimed at expanding the permissibility of killing conceived children. The phrase "pregnant person" consistently used in the text of the bill was also assessed negatively. According to the authors of the opinion, the *bill on safe termination of pregnancy and other reproductive rights* is inconsistent with the Constitution and violates the constitutional principle of protection of human life by making exceptions that allow termination of pregnancy an overriding rule. The proposed legislation dehumanizes conceived children and deprives the of their subjective right to life that is inherent in every human being. The extensive opinion also negatively assessed the provisions relating to the application of the conscience clause (Opinia 2022).

The first reading of the citizens' *bill on safe termination of pregnancy and other reproductive rights* was scheduled for June 23, 2022. The discussion that took place was based on several fundamental arguments. When presenting the bill, the representative of the applicant, leader of the Poland-wide Women's Strike Marta Lempart, stressed that the bill is a corrective program that introduces the standards of civilized countries and contains

provisions that are based on medical knowledge. The MPs speaking in support of the project pointed to Poland's appallingly low birth rate, which is the lowest since World War II. Blame for this state of affairs has been placed on Law and Justice politicians, whose activities, according to Barbara Nowicka of the Civic Coalition, cause Polish women to be afraid to have children: "It is because of you that young girls say: we are afraid to get pregnant in Poland, because we will not get help, support, or security here. You are responsible for dramas such as that of Ms. Izabela from Pszczyna, and the citizens' bill is the voice of women and men for normality in Poland."

Law and Justice MP Anna Milczanowska, who opposed the bill, argued in the debate that Law and Justice was concerned about safety and respect for the rights that are inherent in every person. Therefore, she stressed, the Law and Justice parliamentary club was strongly opposed to the bill in its entirety. She pointed out that the bill was in conflict with the right to life, freedom of conscience and expression, and parental rights. The provision that a decision to terminate a pregnancy could be made by a person who is at least 13 years old has been met with particular criticism. Milczanowska argued: "This is frightening – at a time when parental consent is required for simple medical or even hygienic examinations, on the issue of abortion the authors of the bill want to impose complete freedom on 13-year-olds."

Bożena Żelazowska, who represented the Polish Coalition – PSL parliamentary group, drew attention to another important issue in the debate, namely the state's long-term assistance to families raising sick or disabled children. In her opinion, it is impossible to fight for the protection of conceived life while forgetting about its subsequent stages.

The right to informed choice and free decision-making by pregnant women was emphasized in a statement made by an MP of the Left Katarzyna Kotuła. She urged: "Women's health and women's safety have no political colors, no religion, and no worldview, because women's health and safety is the foundation. Trust women and give them the right to decide about their motherhood." Joanna Senyszyn, a supporter of the bill, stressing the importance of women's rights in the broadest sense as a category of human rights, formulated the opinion that the current legislation will result in flourishing of the abortion underground.

The debate on the submitted bill also included a proposal, put forward by Joanna Mucha of Poland 2050, to organize a citizens' panel to draft questions for a future referendum on abortion.

265 deputies voted against the citizens' bill in the first reading: 225 from the Law and Justice, 19 from the Polish Coalition, 10 from the Confederation, four from the Agreement, two from Poland 2050, two from Kukiz'15,

one from Civic Platform, one from the Polish Affairs group, and one non-attached MP. A total of 175 deputies voted in favor of the bill. Four MPs abstained from voting: one from the Polish Coalition, one female MP from the Agreement, and 2 non-attached MPs. At this point, it should be recalled that the Law and Justice party declared not to reject citizens' bills out of respect for citizens and to pass them on to the subsequent second reading. As long as the Sejm is represented by a majority of MPs who accept the current legal solutions applicable to abortion, no parliamentary or citizens' bill will have a chance of success.

Conclusion

The Constitutional Tribunal's ruling means an almost total ban on abortion in practice. The amendment to the abortion law was introduced during the pandemic and through the back door by the Tribunal. There was no referendum on abortion and no debate, which was the cause of the massive public protests in response to the announcement of the Tribunal's ruling.

One can only agree with the opinion of Kapelańska-Pręgowska (2021, 217) who argues that morals should approached with great caution (if not distrust) when invoked as a legitimate reason for interference with human rights and freedoms. Legal moralism based on particular beliefs and world-views is unacceptable as a tool for analyzing civil and human rights. The concept of public interest in the protection of morals could be upheld if objectified and focused on the protection of the fundamental principles of human dignity, non-discrimination, and equality. However, the Polish Constitutional Tribunal's October 2020 ruling does not reflect the morals of Poland's society or any other public interest, but rather implements the populist agenda of the group currently holding the political power.

An analysis of the votes in the legislative initiatives that deal with the termination of pregnancy and of the pre-election polls makes it possible to formulate the hypothesis that also during the next term of the Sejm, the votes of the Left and the Civic Coalition parliamentary clubs will not be enough to pass a law that will liberalize the abortion law. Such a law will not be supported by the Law and Justice party and, most likely, the PSL and some MPs of Poland 2050, despite the fact that abortion is one of the issues for which there is a huge public expectation of change.

As for Poland's implementation of ECtHR rulings, they are not being enforced properly. No remedy has been introduced into the Polish legal sys-

tem against unjustified medical decisions denying access to legal termination of pregnancy. The healthcare system and the operation of the conscience clause do not ensure the availability of legal abortions. The situation may normalize as a result of ECtHR rulings issued in response to the complaints filed after the 2020 Polish Constitutional Tribunal's ruling. The Strasbourg court will examine whether, in the specific circumstances of the case, there has been an interference with the rights arising from Article 3 and Article 8 of the Convention in connection with the restrictions imposed by the Constitutional Tribunal's ruling of October 22, 2020 (K1/20) with regard to legal abortion due to fetal defects. The court will also examine whether such interference with women's rights was permissible in a democratic law-abiding state and for what values. Arguments regarding the improper appointment of Constitutional Tribunal judges and their impartiality will also be examined. At this point, this is the only way to contribute to the liberalization of abortion law in Poland.

All in all, no abortion law will solve the problem of abortion, because the problem of abortion can only be mitigated by culture, education, and proper policies towards families. The ruling of the Constitutional Tribunal is in effect, but it does little to curb abortion in practice. It makes it more difficult to perform an abortion, but does not eliminate the problem. This is because Polish women have abortions in Belgium or the Netherlands, for example.

NOTES

[1] According to data from the Center for Health Information Systems, a total of 1,110 abortions were performed in 2019, including 33 due to threats to the life or health of the pregnant woman, 1,074 for embryopathological reasons, and 3 due to a crime. According to the Ministry of Health, 1,076 abortions were performed in 2020, of which 1,053 were due to a high likelihood of fetal impairment, 21 due to a threat to the life or health of the mother, and 2 due to a crime (https://www.rp.pl/kraj/art10701-raport-ministerstwa-zdrowia-1076-aborcji-w-polsce-w-2020-r-w-tym-legalne-bylyby-23).

[2] Two dissenting judges opposed the ruling and three concurred with it, but opposed the grounds for reaching such a ruling.

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