

Admissibility of termination of pregnancy - legal reality in Poland after the judgment of the Constitutional Tribunal - K 1/20

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In my presentation I would like to present considerations regarding to constitutional guarantees for the legal protection of a child's life in the prenatal period in the event of a collision of rights. I would like to analyze the problem concerns the legal status of a child in the prenatal phase of life (his subjectivity), and acceptability and bounds of terminate pregnancy. I would like to analyze the judgment of the Constitutional Tribunal in Poland of 22 October 2020 held that prenatal examinations or other medical data indicate a high probability of serious and irreversible disability of the foetus or an incurable life-threatening disease, was contrary to the Constitution of the Republic of Poland.

Thereby, Constitutional Tribunal considered that there may be a situation in which one of the interests protected by the Constitution colliding is on the side of the child in the prenatal phase of his or her life. Abortion implies depriving the child of his or her life. If the child's right to life is denied, his or her legal protection is limited. In the Tribunal's view thus the possibility of sacrificing the interests of the child, it must be possible to determine a similar interest for other persons. Because of the nature of abortion, an interest can only be sought on the side of the mother of the child. The mere fact of a disability or incurable illness of the child in the prenatal phase, linked to considerations of a eugenic nature and to considerations relating to the possible discomfort of the sick child's life, cannot alone decide on the admissibility of the abortion. Consequently, the Tribunal found that the legalization of the procedure of abortion when prenatal examinations or other medical data indicate a high probability of serious and irreversible disability of the foetus or incurable life-threatening illness is not justified by the Constitution. Complete with the publication - on January 27, 2021 - of the judgment of the Constitutional Tribunal in the Journal of Laws, the abortion law in Poland has changed.

Since 1993, Poland has one of the most restrictive abortion laws in Europe: abortion is only available in cases of grave fetal defect, rape/incest, or threat to the life of the mother, and only within the first 12 weeks of pregnancy. This law replaced communist-era laws that made abortion widely available for four decades, and was termed a "compromise" between the proponents of a total ban and those who wanted a public referendum on the matter.

The judgment of the Constitutional Tribunal in Poland of 22 October 2020 made the fundamental abortion dispute has been reopened and the 1993 so-called abortion compromise has been ended. It provoked a public outcry. It was anticipated that the fear of the pandemic would keep people from taking to the streets. That is not what happened. In the discourse on abortion, we have returned to the level of the dispute: pro-choice versus pro-life, which is inconclusive on ideological and world-view grounds.

Article 38 of the Constitution: 'The Republic of Poland shall ensure legal protection of life for every human being'. This provision does not contain any indication that this is about life from conception (during the preparatory work on the Constitution such a proposal was even rejected). The 'right to life' is also not the same as the gradual 'right to the protection of life' (Article 38 of the Constitution). In the K 1/20 case, the court adopted a broad interpretation of this provision which is not covered by its content.

Only auxiliary reference was made to human dignity (Article 30 of the Constitution). In this way, a path was opened for the prohibition and penalisation of another of the remaining two exceptions to permissible abortion, i.e. a case where pregnancy is the result of a crime (incest or rape). Article 30 could open the way to weighing the balance of dignity of two entities on the scales. Not only the dignity of the unborn child (*nasciturus*), as is the case with the judgment, but also the dignity of the mother, who is forced to give birth, and to the dignity of *moriturus* (an unborn child about to die).

That would be the weighing of two dignities. Meanwhile, reference to Article 38 (and this is included as the right to life, not the right to protect it) justifies only one abortion exception motivated by the threat to the life of the mother. The health of the mother could not be a factor in this, because life would be put to weigh on the one hand, and health on the other. Life would always outweigh health.

In this way, the K 1/20 judgment is a significant sign of further developments in line with the pro-life offensive and the appeals to parliamentarians by the Church's leadership.

