



HIGH LEVEL EUROPEAN SEMINAR

# PREVENTING ABORTION IN EUROPE

Legal framework and social policies

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## *The situation of abortion in Poland*

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### **1. Legal transitions of Polish anti-abortion policy – historical view**

The origins of the Polish legislation on abortion are dated to the interwar period, when in 1932 the Penal Code was adopted. At that time abortion was strictly forbidden and severely punished, consequently including the penalizing of women (under the Article 233 of the Penal Code, a woman who caused miscarriage was punished up to 3 years of imprisonment)<sup>1</sup>. The main good protected under the Criminal Code of 1932 was the life of the child<sup>2</sup>. Based on the introduced law, the absolute protection of human life was abolished in only two cases: because of a serious health or life threat to the mother and when the pregnancy was a result of a forbidden act, such as harlotry with underage, mentally impaired, abuse of dependency or incest.

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<sup>1</sup> According to Art. 231. "A woman who spends her fetus or lets her fetus be spent by another person is subject to the penalty of imprisonment up to 3 years." The sanction was lower in this case than against someone who commit abortion - Art. 232. "Whoever, with the agreement of a pregnant woman, spends her fetus or help her to spend it, shall be punished by imprisonment up to 5 years." At the same time art. 233: "There is no crime in art. 231 and 232 if the procedure was performed by a physician and it: a) was necessary for the health of the pregnant woman, or b) the pregnancy was the result of an offense referred to in art. 203, 204, 205 or 206 "[pedophilia, rape, abuse of dependency, incest]. Rescue of mother's life was not specified due to the existence of general norms: the necessary defense (Article 21) and the state of superior necessity (Article 22).

<sup>2</sup> See. L. Abortion. Forensic and Criminal Problems, Wroclaw 1980, p. 20-21. Bogunia writes about "the child's interest".

On April 27 1956, there was adopted a completely different law *Conditions for Admissibility of Termination of Pregnancy Act*, abolishing the provisions of the Penal Code on the punishment of women, making abortion actually available without any restrictions. Jointly with the abolition of legal restrictions on abortion, there was also the exclusion of women's criminal liability for the murder on her conceived child. Automatic impunity for women was presented in the doctrine as the attainment of "socialist legal education" that was created in opposition to the legislation of "imperialist states" and the teaching of the Catholic Church.

In legal education, the most popular argument supporting this solution was presented by Helena Wolińska PhD, the military prosecutor, the initiator of court murders on Polish patriots in the Stalinist period and the employee of the School of Social Sciences at the Central Committee of the Polish United Workers' Party. Wolińska left no doubt that the automatic exclusion of a woman's criminal liability for the murder of her conceived child creates a legitimate protection exclusively for the mother's health, eliminating the legal protection of the life and welfare of the conceived child. "If the subject of protection was the life of the foetus," wrote Wolińska, "the legislator would have introduced the highest privileged liability to a pregnant woman who interrupts her own pregnancy or allows her to be terminated by another person".

Erasure of the criminal liability of a pregnant woman is at the same time an erasure of the legal protection of the foetal life<sup>3</sup>. "In her opinion, the logical consequence of the exclusion of women's punishment for killing her child should be the complete abolition of the criminalization of abortion: "The principle of legal protection of the fetus has been erased. The pregnant woman is not punished for termination of pregnancy - already this fact has erase the "penal" value of the act. If the pregnant woman is free to destroy the foetus with impunity, why does the person who helps her or who performs the procedure with her consent and at her request (and that always goes hand in hand) is a criminal?"<sup>4</sup> The penal provisions of the communist Act of 1956 deprived the unborn child legal protection<sup>5</sup> and the legal good protected under Art. 3-5 was no longer the life of the child, but the health of the mother alone<sup>6</sup> The consequence of this reasoning was the assumption that the abortion made by the woman herself is only a self-mutilation, so it should not be penalized (as in the case of suicide).

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<sup>3</sup> H. Wolińska, *Interruption of pregnancy in the light of criminal law*, Warsaw 1962, p. 41. The voice of H. Wolińska was of importance in the context of the work undertaken on the revision of legislation allowing abortion, which eventually ended with the presentation in 1963 of a bill restoring, inter alia, Criminal punishment for abortion. The project was not accepted at the time.

<sup>4</sup> *Ib.*, s. 113-114. H. Wolińska also cites her own experience: "It is probably not accidental that neither the citizen militia nor the prosecutor's office have ever run and run any statistics on fetal abuse (today's abortion). When I was looking for any statistical material in the course of my work, I received a characteristic answer: "What a crime is it? - we have more concern".

<sup>5</sup> See H. Wolińska, *op. cit.*, s. 113-114.

<sup>6</sup> Leszek Bogunia distinguished five possible grounds for the penalization of abortion: 1. protection of the interest of the fetus, 2. interest of the state, 3. interest of the father, 4. interest of the person entitled to inheritance, and 5. health and life of the mother. L. Bogunia wrote that "this is a view that is based on the legends and traditions of the old days" (including the Criminal Code of 1932). Contrary to this tradition, for the purposes of socialist legislation, "it seems that the most appropriate view is that the punishment of termination of pregnancy is in the protection of the pregnant woman, especially in the protection of her life and health." The other grounds he rejects (*idem*, *Abortion, Criminal and Criminal Problems*, Wrocław 1980, pp. 20-21).

It is estimated from various sources that to the 90's 100,000 to 220,000 abortions were made per year.

After the fall of communism and the parliamentary elections in June 1989, the issue of admissibility for termination of pregnancy first appeared in the public forum in April 1990, in connection with the work of the Senate on the draft of the law on the protection of the legal status of conceived life. However, the new law was passed only on January 7, 1993, *the Act on family planning, the protection of the human foetus and the conditions for the abortion of pregnancy*, which adopted the principle of punishment for causing the death of a child, excluding the mother's punishment. The law also instituted indications justifying the admissibility of abortion – medical (threat to mother's life), eugenic (severe and irreversible damage to the foetus) and legal (origin of pregnancy from crime). At that time, the legislator "recognizing that human life is the fundamental good of man, and that care for life and health belongs to the basic duties of the state, society and citizen", just in Art. 1 sec. 1 introduced the principle that "every human being has a natural right to life from the moment of conception" and that "the life and health of the child from the moment of conception remains under legal protection". The newly introduced legislation has raised many doubts, and the controversy also aroused a total exclusion of the criminal responsibility of the mother, because if the legislator recognized the human embryo as a human being whose health and life was protected, it was illogical to resign from the sanctioning of the assassinations on the life of the child by the mother.

In subsequent years, several attempts were made to amend this law in order to liberalize it. The first time the law was amended in 1996 by Social-Democrats – ruling party, when significant changes were introduced just in the preamble, which was to guarantee, e.g. respect for the right to responsible decision-making about having children and to provide access to information, education, counselling, and to guarantee the means to use that right. Because of the new law, life was no longer protected by law from conception and was only subject to "protection, including in the prenatal phase within the limits set by the law". The terminology has also changed, henceforth the state no longer provided medical care for the "conceived child and his mother" but "prenatal care for the foetus and medical care for the pregnant woman". There also have been consistent changes in civil and penal codes. By virtue of the introduced abortion law, the abortion could be done by a doctor only in four cases:

- when pregnancy threatened the life or health of a pregnant woman,
- prenatal or other medical indications indicated high probability of severe and irreversible impairment of the foetus or an incurable disease threatening its life (in that case the pregnancy may have been terminated only until the foetus is able to live independently outside the pregnant woman's body),
- there was a reasonable suspicion that the pregnancy was a result of a crime (since the beginning of pregnancy it could not have been longer than 12 weeks, ex. incest, sex intercourse between juveniles; sex intercourse in public place),
- a pregnant woman was in difficult living conditions or in a difficult personal situation (in this case her pregnancy could not last more than 12 weeks).

The changes introduced by this law practically denied the foundations of human rights in relation to the unborn, not to mention entrusting the competency of the protection the right to life to the ordinary legislator. The legislator consciously deprived a child conceived of a human status and revoked the protection of the right to life in the prenatal phase, both in civil and criminal law.

Due to its controversy, the act of law became a subject of the judgement of the Constitutional Tribunal, at the request of senators, who asked to examine the compatibility of the so called economic and social provision of the amended anti-abortion law with the Constitution of the Republic of Poland.

## **2. Constitutional guarantees of protection of life**

According to the norm enshrined in Article 38 of the Polish Constitution, the Republic of Poland has the obligation to ensure the legal protection for every human being. This means that public authorities are not only obliged not to take any measures which affect life as a constitutionally protected value, but are also bound by the positive obligation<sup>7</sup> to undertake actions which fully implement the constitutional guarantee of the legal protection of life.

The currently binding provisions on permissibility of abortion raises some serious doubts as to its conformity to the norms laid down in the Constitution, and namely in its Article 38 and Article 30. As a matter of fact, the Constitution requires that the legislator ensures the protection of human life – as such closely related to the inherent (and hence supra-positive) nature of human dignity – at its every stage, before and after birth.

This principle is reflected in the judgment of the Constitutional Tribunal (case no. K 26/96): “The worth of the constitutionally protected legal good which is human life, including life in the prenatal stage of its development, shall not be subject to differentiation. There are no sufficiently precise and substantiated criteria to allow for its differentiation according to the developmental stage. Therefore, since its onset, human life shall become the value protected under the Constitution. This shall apply also to its prenatal stage”. Thus, based on the constitutional case-law, it becomes unquestionable that “from its onset, human life shall become the value protected under the Constitution. This shall apply also to its prenatal stage”.

Constitutional Tribunal held also that: “the right to have a child can be interpreted solely in positive terms, and not as a right to destroy the developing human foetus”. The decision to have a child cannot be taken when the child is already developing, in his/her prenatal stage. In other words, there exists no right not to give birth. Therefore, the prerequisite which allows for the termination of pregnancy is not justified with any value, right or constitutional freedom.

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<sup>7</sup> P. Sarnecki [in:] L. Garlicki (ed.), *Constitution...*, commentary to Article. 38, p. 3.

This view was confirmed by the Constitutional Tribunal in a judgment of 23 March 1999 in case no. K 2/98<sup>8</sup> in which the Tribunal developed the principle saying that “when in any doubt regarding the protection of human life, rule in favour of this protection (*in dubio pro vita humana*)”<sup>9</sup>.

Finally, this orientation was further developed in the judgment of the Constitutional Tribunal of 30 September 2008 issued in case no. K 44/07<sup>10</sup>, where the Tribunal found that: “there is therefore no doubt that the value of human life shall not be subject to differentiation according to age, health condition, expectancy or to any other criteria”.

Obviously, while it is undisputed that the constitutional guarantee of human life protection is one of the ultimate values, it is not absolute though<sup>11</sup>. In other words, in exceptional cases law can allow for situations where the protection of individual life is sacrificed in order to protect another or even equivalent value guaranteed by the provisions of the Constitution. The conflict of rights to life of two persons, both in critical situation, can be quoted here as an example<sup>12</sup>. In such a case, there is no doubt as to the constitutionality of norms which exclude the illegality of acts (Article 25 of the Criminal Code – necessary self-defence justification) or of the individual’s guilt, as a result of which his/her act of taking somebody else’s life will not be considered as an offence (Article 26, paragraph 2 of the Criminal Code - state of necessity)<sup>13</sup>. This assumption results from the general provisions of the Criminal Code and as such does not require that exceptions from the universal protection of the life of the child in the prenatal stage of development be upheld in the legal system.

Once introduced into the legal system the value differentiation of human life according to such utilitarian criteria as its quality, normativity or ability, opens the door to further exceptions. Then, usurping itself the power over life, the State could feel authorized to divest some further “useless” (from this point of view) groups of population of the protection of their lives. Upholding in the legal system of the prerequisite for waiving the absolute guarantee of the right to life in case of congenital defects causes the stigmatization of all people with disabilities.

### **3. Severe consequences of the abortion compromise**

Although over the last couple of decades Polish legal provisions concerning the protection of human life have not changed significantly, in practice, more and more conceived, unborn children are being killed in Poland.

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<sup>8</sup> Judgment of the Constitutional Tribunal of 23 March 1999, case no. K 2/98, in: OTK 1999, no. 3, item 38.

<sup>9</sup> Judgment of the Constitutional Tribunal of 7 January 2004, case no. K 14/03, J.L. of 15 January 2004.

<sup>10</sup> Judgment of the Constitutional Tribunal of 30 September 2008, case no. K 44/07, in: OTK A 2008, no. 7, item 126, [http://trybunal.gov.pl/fileadmin/content/omowienia/K\\_44\\_07\\_GB.pdf](http://trybunal.gov.pl/fileadmin/content/omowienia/K_44_07_GB.pdf)

<sup>11</sup> Judgment of the Constitutional Tribunal of 23 March 1999, case no. K 2/98.

<sup>12</sup> <http://isap.sejm.gov.pl/DetailsServlet?id=WDU19911200526> , Dz.U. 1991 no. 120 point 526.

<sup>13</sup> Judgment of the Constitutional Tribunal of 30 September 2008, case no. K 44/07.

This is an effect of broader interpretation of the existing exceptions to the general principle of the protection of life, including in particular the eugenic exception (so-called abortion compromise). If current legislation is preserved in this form, it is likely that this process will soon allow mass abortions.

This situation happened in other countries, including Spain, where in 1985 a law with the similar meaning as the one currently in force in Poland was adopted. In the first year of its legislation, 411 children were aborted. Although the regulations did not change, in the following year more than 16,000 people were killed, and after 25 years (2010), more than 100 000 children have been killed every year.

And in Poland it is already visible, not in such drastic terms, but still the tendency remains alike. This process is a result of the adoption of a defective legal design of defining "conditions for the abortion of pregnancy" – which is often interpreted as establishing the right to abortion in specific situations.

Therefore, in addition to the abolition of the existing abortion conditions, it is also necessary to change the legal structure of rescuing a woman's life, which should not be based on the right to abortion, but rather on the medically well-known exclusion of the unlawfulness of the act in relation to the state of higher necessity, well known in criminal law in all EU countries.

For Poland, according to the statistics of the Ministry of Health, in 2014 - 971 legal abortion procedures were performed including 921 due suspected disability. In 2015 there were 1,040 induced deaths of conceived children and almost 96% of them due to a high probability of a severe and irreversible foetal defect or incurable illness that threatens the life of the unborn.

From other data collected by the National Health Fund, in 2015, there were 1998 abortions qualified as induction of miscarriage.

#### **4. Summary and conclusions**

The Polish Constitution 1997 guarantees for every person, regardless of the stage of development and health, the legal protection of life. There is therefore no formal obstacle to the introduction of full legal protection of human life at the prenatal stage in Poland.

This is also confirmed by other legal regulations: civil legal protection of the health and life of the child, conditional inheritance for *nasciturus*, the possibility of recognizing the fatherhood of the conceived child; criminal protection of life in the form of criminal protection of the child from harm of his or her life or health (art. 157a of Criminal Code) as well as penal provisions introduced into the law regulating the IVF procedure

penalizing the destruction of embryos capable of normal development or the law establishing the Ombudsman for Children officer, which state that the child is human being from the moment conception.

In this situation, the Polish legal system remains incoherent. Probably like the majority of European legal systems. On the one hand, it recognizes the subjectivity of the child at the prenatal stage of development by granting him certain privileges, and sometimes even protection, and, on the other hand, allows him to be killed. The inconsistency is also partly related to attempts at the redefinition of the human being, which goes back to the communist times.

Finally, it is worth pointing out that in Poland surveys conducted immediately after the embracing of conceived life with partial legal protection in 1993 indicated that while in the adoption year the support for abortion for social reasons was 65%, after three years it has decreased to 50% and in 2016 social reasons for abortion supported only 13% of respondents. At the same time opposition to social abortion increased from 20% in 1993 to 37% in 1996 and to 75% in 2016. On the other hand, the complete ban on abortion with the guarantee of saving mother's life, in the situation of immediate danger (state of necessity) supports nearly 60% of society. In the age group 18-24, this percentage is 79.2%.

## **5. Good practice**

As a good practice as to grow appropriate awareness, pro-life awareness - meaning for example organization an annual pro-life and pro-family marches. Pro-life demonstrations. In Poland for a couple of years we have pro-life marches, only in this year we have different kinds of them, in the different cities in the different time. March for life and family, March for Sanctity of life etc. Some see it as disadvantages because then some people go to one some to the other and we can't actually see the true scale of support for prolife cause, but on the other hand it definitely keeps the topic alive and as important issue it resonates in the society all the time.

It is also extremely important to organise as much pro-life talks and conferences at the universities – partially because it is already getting to be a challenge, the tendency of censoring pro-life lectures are quite well-known throughout Europe. Medical and legal conferences. Last year Ordo Iuris Institute organised a conference on the rights for a medical care for the unborn patient that was strictly about all disabled. It was met with a huge backlash of leftists and eventually was not held at the University of Warsaw but in the external conference hall near the Warsaw Cathedral, but it was worth it.