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Threat to a Woman's Life or Health as a Premise for Termination of Pregnancy in the Light of Constitutional and Statutory Provisions in Force in Poland

Keywords: abortion, the law on family planning, threat to life or health, women's rights
Słowa kluczowe: aborcja, ustawa o planowaniu rodziny, zagrożenie życia lub zdrowia, prawa kobiet

Abstract

The right to the protection of life and health is one of the fundamental human rights. Therefore, it cannot be restricted on the basis of gender, especially when we are dealing with a pregnant woman. Meanwhile, in Poland, since the 1990s, there has been a process of limiting access to legal abortion. Democratically elected authorities have the right to shape the legal system in this area as well, however, by virtue of a ruling of the Polish Constitutional Tribunal in 2020, abortion has been outlawed in cases where pregnancy threatens a woman's life or health. The number of cases where doctors refuse to help pregnant women is increasing, and there is even a loss of a woman's life as a result of doctors' passivity. In these circumstances, it is necessary to analyse the regulations in force in Poland and determine what is currently the scope of a woman's rights, what is the scope of a doctor's duties, and whether the regulations do not excessively hinder access to legal abortion.

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Streszczenie

Zagrożenie życia lub zdrowia kobiety jako przesłanka przerwania ciąży w świetle przepisów konstytucyjnych i ustawowych obowiązujących w Polsce

Prawo do ochrony życia i zdrowia jest jednym z fundamentalnych praw człowieka. W związku z tym nie może być ograniczane z uwagi na płeć, a zwłaszcza gdy mamy do czynienia z kobietą ciężarną. Tymczasem w Polsce od lat 90. XX wieku trwa proces ograniczenia dostępu do legalnej aborcji. Demokratycznie wybrane władze mają prawo do kształtowania systemu prawnego także w tym zakresie, jednak na mocy orzeczenia polskiego Trybunału Konstytucyjnego w 2020 r. doszło do delegalizacji aborcji, w przypadku, gdy ciąża zagraża życiu lub zdrowiu kobiety. Liczba przypadków, gdy lekarze odmawiają pomocy kobietom ciężarnym rośnie, a nawet dochodzi do utraty życia kobiety na skutek bierności lekarzy. W tych okolicznościach należy dokonać analizy przepisów obowiązujących w Polsce i ustalić, jaki jest obecnie zakres uprawnień kobiety, jaki zakres obowiązków lekarza, a także czy przepisy nie utrudniają nadmiernie dostępu do legalnej aborcji.

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I.

In early November 2021, the media around the world reported on mass street demonstrations in Poland[2]. The protest was attended mainly by women, outraged by the death of a pregnant mother, whose doctors refused to terminate a life-threatening pregnancy, even though it is legal in Poland. The process of

[2] See: cnn.com, *Death of pregnant woman ignites debate about abortion ban in Poland*, https://edition.cnn.com/2021/11/07/europe/poland-abortion-ban-march-intl/index.html; bbc.com (6.12.2021), *Poland clarifies abortion law after protests over mother's death*, https://www.bbc.com/news/world-europe-59206683 (6.12.2021); independent.co.uk, *Pregnant woman's death puts spotlight on Polish abortion law*, https://www.independent.co.uk/news/world/europe/warsaw-polish-people-krakow-law-and-justice-b1949843.html (6.12.2021); theguardian.com, *Polish activists protest after woman's death in wake of strict abortion law*, https://www.theguardian.com/world/2021/nov/02/polish-activists-protest-after-first-death-in-wake-of-stricter-abortion-law (6.12.2021).

limiting the availability of abortion has been underway in Poland since 1997, but it intensified in 2020, when the Constitutional Tribunal – strongly associated with the ruling party called Law and Justice – significantly limited women's rights in this area[3]. The control activities of the public prosecutor's office against hospitals, aimed at impeding access to legal abortion, have also been intensified. It certainly influenced the actual possibility of terminating the pregnancy, even if it threatens the woman's life or health[4].

This article is to provide an answer to the question of how the legal provisions currently in force in Poland regulate this issue, and whether they secure the exercise of a woman's right to terminate a pregnancy that threatens her life or health. For this purpose, the following provisions were analyzed: the Constitution of the Republic of Poland of April 2, 1997[5] (hereinafter: the Constitution of Poland), the Act of January 7, 1993 on family planning, protection of the human fetus and conditions for the admissibility of abortion[6] (hereinafter: the Act on Family Planning), the Act of December 5, 1996 on the professions of doctor and dentist[7] (hereinafter: the Act on the profession of a doctor), the Act of November 6, 2008 on the rights of patients and the Patient's Rights Ombudsman[8] (hereinafter: the Patient Rights Act), the Act of June 6, 1997 – the Penal Code[9] as well as the regulation of the Minister of Health and Social Welfare of January 22, 1997[10] on the professional qualifications of doctors entitling to terminate a pregnancy and stating that the pregnancy threatens the life or health of a woman or indicates a high probability of severe and irreversible impairment of the fetus or an incurable disease that threatens its life (hereinafter: the Regulation of the Minister of Health).

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[3] Information on the ruling of the Constitutional Tribunal K 1/20 and other rulings of the Tribunal concerning abortion in English is available on the Tribunal's official website: https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11299-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy (4.12.2021).

[4] See: A. Krajewska, *Revisiting Polish Abortion Law: Doctors and Institutions in a Restrictive Regime*, "Social & Legal Studies" 2021, doi.org/10.1177/09646639211040171, pp. 1–30.

[5] Dz.U.No. 78, item 483.

[6] Dz.U. 1993, Nr 17, poz. 78.

[7] Dz.U. 1997, No. 28 item 152.

[8] Dz.U. 2020, item 849.

[9] Dz.U.No. 88 poz. 553.

[10] Dz.U. No 9 poz. 49.

II.

The Polish legal system provides guarantees for the protection of human life and health. Article 38 of the Constitution of Poland (the Republic of Poland provides every human being with the legal protection of life) and Art. 68, sec. 1 (Everyone has the right to health protection). Pursuant to Art. 68, sec. 3, special health care is available to, inter alia, pregnant women[11]. The Criminal Code in Chapter XIX, entitled "Crimes against life and health", penalizes: murder, infanticide, euthanasia, persuasion to commit suicide, termination of pregnancy with the consent of the woman, forced termination of pregnancy, death of a woman due to termination of pregnancy, manslaughter. Other provisions of the acts are also aimed at minimizing the probability of loss of life or health. The Act on Family Planning is part of the systemic protection of life and health. However, it is an act of a special kind, since it is intended both to protect the life of the mother and the fetus, and must therefore exclude the protection of life in certain circumstances.

The Act on family planning protects the right to life, also in the prenatal phase (Art. 1). This protection, however, is not absolute, as it is subject to protection only within the limits specified in the Act. Initially – i.e. in 1993 – the Act allowed for legal termination of pregnancy in four cases: 1) a threat to a woman's life or health, 2) severe and irreversible damage to the fetus, 3) when the pregnancy resulted from a prohibited act, 4) in a difficult life situation of a pregnant woman (so-called social considerations). As a result of the judgment of the Constitutional Tribunal of May 28, 1997[12], the admissibility of termination of pregnancy for social reasons was excluded, while by the judgment of October 22, 2020, the Constitutional Tribunal excluded the admissibility of termination of pregnancy in the event of severe and irreversible damage to the fetus[13].

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[11] D. Bieńkowska, *Konstytucyjne gwarancje szczególnych świadczeń zdrowotnych w kontekście ochrony kobiet w ciąży*, "Przegląd Prawa Konstytucyjnego" 2020, No. 4 (56), doi.org/10.15804/ppk.2020.04.22, pp. 413–423.

[12] See: https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/11299-planowanie-rodziny-ochrona-plodu-ludzkiego-i-warunki-dopuszczalnosci-przerywania-ciazy (4.12.2021).

[13] K. Kowalczyk, *Parliamentary Parties and the Anti-Abortion Laws in Poland (1991–2019)*, "Polish Political Science Yearbook" 2021, vol. 50 (2), doi.org/10.15804/ppsy202118, pp. 27–35.

Currently, termination of pregnancy is legal when: the pregnancy poses a threat to the life or health of the pregnant woman (sec. 1 point 1), there is a justified suspicion that the pregnancy resulted from a prohibited act (sec. 1 point 3). The use of this possibility in practice is possible only when all additional conditions specified in the Act on family planning have been met. First of all, termination of pregnancy may only be performed by a doctor (Art. 4a sec. 1). Secondly, the termination of pregnancy is performed by a hospital doctor (Art. 4a sec. 3). Third, the occurrence of the circumstances referred to in Art. 4a sec. 1 point 1 of the Act is confirmed by a doctor other than the one who terminated the pregnancy, unless the pregnancy directly threatens the woman's life (Art. 4a sec. 5). Fourth, the consent of the woman or her statutory representative or guardianship court is required for termination of pregnancy (Article 4a sec. 5). Fifthly, the professional qualifications of doctors entitling to terminate a pregnancy, as well as the qualifications of doctors authorized to conclude that the pregnancy poses a threat to the health of a pregnant woman, are determined by way of an ordinance by the Minister of Health and Social Welfare after consulting the Supreme Medical Council. (Art. 4a sec. 9).

Implementation of the provisions of art. 4a sec. 1 point 1 of the Act on Family Planning requires a decision of the woman or the entity authorized to make decisions on her behalf, as well as confirmation of the occurrence of certain circumstances by a doctor. However, the decision of the woman is of key importance here, because only she can initiate the termination of pregnancy. This decision is made in special circumstances, beyond the woman's control or fault, but for natural reasons. An important circumstance is the inability to evade the decision – it must be taken, usually without undue delay. Contrary to popular belief, such a decision is one of the most difficult life choices – it is irreversible, and in any case it means at least the risk of losing a valuable good for a pregnant woman. The assessment of the value of goods between which a woman chooses in such a situation is subjective in nature, and the decision itself lies in the area of fundamental human freedoms. Therefore, no person (group of people) or entity can decide for a woman whose life or health is at risk. In this context, the professionalism of the doctor and the scope of the rights and obligations he has under the Act are of significant importance.

Pursuant to § 1 of the Regulation of the Minister of Health, the powers that a doctor who terminates a pregnancy must have in the circumstances specified in the Act on Family Planning. It can be done by a doctor with a first degree specialization in obstetrics and gynecology or a doctor undergoing specialization training in order to obtain a first degree specialization in obstetrics and gynecology in the presence and under the supervision of an authorized doctor, as well as a doctor with the title of specialist in obstetrics and gynecology. The existence of circumstances indicating that the pregnancy poses a threat to the life or health of a pregnant woman is confirmed by a doctor who has the title of specialist in the field of proper medicine due to the type of disease of the pregnant woman (§ 2 sec. 2).

Neither the provisions of the Act on family planning, nor the ordinance of the Minister of Health specify what activities are to be performed by the doctor in order to determine the existence of conditions for the admissibility of termination of pregnancy. It can only be presumed that the decision should be made on the basis of medical knowledge and research. However, bearing in mind that the doctor's decision is subjective and may be biased, it should not be final.

He points out that such important issues as the rights of a licensed doctor to decide on exercising the rights of a woman under the provisions of the Act on Family Planning are regulated in a low-ranking legal act. ie a regulation, which is not conducive to obtaining full knowledge on the implementation of the provisions of the Act, but may have an impact on the stability of the regulation.

III.

The above problem is not addressed either by the Act on Family Planning, or by any regulations issued on its basis. However, the provisions of Art. 6 sec. 3 of the Act on Patients' Rights allow the patient to demand that the doctor who is providing him health services consults another doctor or convenes a medical council. At the same time, the provisions of Art. 6 sec. 4 of the above-mentioned Acts leave it to the physician to convene a medical council or to consult another physician. It may refuse if it deems that the request is unfounded. On

the other hand, the act on the medical profession in Art. 37 provides for the possibility that, in the event of diagnostic or therapeutic doubts, a physician, on his own initiative or at the request of the patient or his legal representative, if he considers it justified in the light of the requirements of medical knowledge, consults a competent specialist physician or organizes a medical consultation.

The European Court of Human Rights in Strasbourg, while examining the case of Alicja Tysiąc v. Poland[14], questioned the lack of an appeal procedure against a doctor's opinion on the admissibility of termination of pregnancy. The possibility for the patient to submit an application for an additional opinion of a specialist doctor or to convene a council under Art. 37 of the Act on the Medical Profession, the Tribunal considered an insufficient measure. As a result, a special procedure was established. Based on Art. 31 of the Act on Patients' Rights, a patient or their statutory representative may raise an objection if the opinion or decision of a doctor affects the patient's rights or obligations under the law.

The objection shall be submitted to the Medical Commission operating at the Patient's Rights Ombudsman, via the Ombudsman, within 30 days from the date of the opinion or decision by the doctor adjudicating on the patient's health condition. The objection must contain a justification, including an indication of the legal provision from which the patient's rights or obligations arise. The Medical Committee issues a decision immediately, no later than within 30 days from the date of the objection being raised, on the basis of medical documentation and – if necessary – after examining the patient. There is no right to appeal against the decision of the Medical Commission. Once a year, national consultants, in consultation with the relevant provincial consultants, prepare a list of doctors in a given field of medicine who may be members of the Medical Commission. It is composed of three doctors appointed by the Patient Ombudsman from the above-mentioned lists, including two of the same specialties as the doctor who issued the opinion or the decision to which the objection relates (Art. 31 of the Act on Patients' Rights).

This problem is of interest to courts that attach great importance to the proper fulfillment of the doctor's obligation to consult their decisions with an-

[14] Judgment in case 5410/03 of 20 March 2007. See: https://hudoc.echr.coe.int/eng?i=001-79812 (29.11. 2021).

other doctor. The Supreme Court in its judgment of March 26, 2007[15] quashed the judgment of the district court, which acquitted doctors accused of manslaughter of a patient. He also alleged that the district court had failed to take into account the doctors' failure to take sufficient steps to obtain consultations with other specialist doctors[16]. The obligation to consult is also introduced by the Code of Medical Ethics[17] in Art. 10 sec. 1. According to them, a physician should not exceed his professional skills in performing diagnostic, preventive, therapeutic and certification activities. In the event that the scope of such activities exceeds the skills of the doctor, he should refer to a more competent colleague. This regulation does not apply in emergencies and serious diseases, when the delay may endanger the patient's health or life.

Proper access to information is an important aspect of the functioning of health care for the patient. The Act on Patients' Rights in Art. 9 sec. 1 guarantees the patient the right to information about his or her health condition. The patient (including a minor who is over 16 years of age) or his legal representative have the right to obtain from a person performing a medical profession accessible information about the patient's health condition, diagnosis, proposed and possible diagnostic and treatment methods, foreseeable consequences of their application or omission, the results of treatment and prognosis in the scope of health services provided by that person and in accordance with their rights. The application of these provisions is of particular importance in the case of Art. 4a sec. 1 point 1 of the analyzed law on family planning, as this provision refers to a situation where pregnancy violates the basic values, i.e. threatens the life or health of a woman.

IV.

The law guaranteeing the right to terminate a pregnancy in special circumstances may only act on the condition that patients and doctors are made aware that they are acting in accordance with the law. A pregnant woman is not criminal-

[15] WA 17/07, OSNwSK 2007, No. 1, item 701.

[16] M. Malczewska, *Art. 37,* [in:] *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz,* ed. E. Zielińska, Warsaw 2014.

[17] Resolution of the Supreme Medical Council of December 14, 1991.

ly liable in Poland, regardless of what actions she took to terminate the pregnancy and whether they were consistent with the Act on Family Planning[18]. On the other hand, the Penal Code provides, in Art. 152 penalizing an act consisting in termination of pregnancy with the consent of the woman, but only if it violates the provisions of the Act on Family Planning. Also, providing a pregnant woman with help in terminating a pregnancy or forcing her to do so is not a crime under the Criminal Code, unless it violates the provisions of the Act. The liability of the doctor is excluded here, provided that the actions were taken in a public health care institution in the cases specified in the Act. Therefore, the legislator established counter-types, i.e. circumstances that would revoke the unlawfulness of an act due to a collision of legally protected goods.

In addition to the provisions protecting a physician saving the life or health of a pregnant woman, there are general provisions requiring doctors to undertake life-saving measures. Art. 30 of the Act on the Medical Profession states that "A physician is obliged to provide medical assistance whenever a delay in providing it could result in a risk of loss of life, serious injury or serious health impairment". The provisions of Art. 38 sec. 1 above Acts exclude the possibility of not starting or withdrawing from treatment of a patient in the event of a risk of loss of life, serious bodily injury or serious health disorder. The order under Art. 30 does not even exclude the use of the so-called conscience clause, regulated in Art. 39 above the law. As a rule, the doctor may refrain from performing health services inconsistent with his conscience, but subject to Art. 30. Thus, the conscience clause does not work as long as human life is at risk and it does not matter what kind of action the doctor will have to undertake. The rules of conduct for doctors are defined in the Code of Medical Ethics, which is the basis for professional liability before medical courts. Pursuant to the provisions of Art. 39. "By taking medical treatment of a pregnant woman, the doctor is also responsible for the health and life of her child. Therefore, it is the doctor's duty to try to preserve the health and life of the child also before it is born". This does not abolish the general obligation to act for health and life, expressed, inter alia, in including the medical oath, which is part of the code[19].

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[18] V. Konarska-Wrzosek, *Art. 152,* [w:] A. Lach, J. Lachowski, T. Oczkowski, I. Zgoliński, A. Ziółkowska, V. Konarska-Wrzosek, *Kodeks karny. Komentarz, wyd. III,* Warsaw 2020.

[19] J. Czekajewska, *Ethical Aspects of the Conscience Clause in Polish Medical Law,* "Kultura i Edukacja" 2018, No. 4 (122), doi.org/10.15804/kie.2018.04.13, pp. 206–220.

V.

Based on the above findings, it can be stated that the exercise of rights vested in a pregnant woman under the provisions of Art. 4a sec. 1 point 1 of the Act on Family Planning requires the fulfillment of a number of conditions, and sometimes also the use of additional instruments offered to the patient. However, this should not be difficult, since the conclusion that the pregnancy is life-threatening to a limited extent is at the discretion of the doctor. On the other hand, in the case of a threat to a woman's health, there is no indication of the circumstances in which this type of threat can be considered. Precise information in this regard is also not provided by other legal acts in force in Poland, regulating the rights and obligations of a doctor or patient. Such information is provided by Art. 30 of the Act on the Medical Profession, which establishes the obligation to provide medical assistance "whenever a delay in providing it could result in a risk of loss of life, serious injury or serious health impairment". Although the purpose of their establishment was different, two important concepts appear here: "danger of serious injury to the body" and "danger of serious impairment to health". These are not cases of ordinary health threats (insignificant or temporary), but serious conditions that can be defined as qualified. Due to the lack of precision of the Act on Family Planning, it can be assumed that they also apply when pregnancy threatens the life or health of a woman.

The legislator is not consistent, therefore each act regulating this issue contains a different definition of health hazards. "The Act on Patients' Rights and the Act on Medical Activity refer to »threat to life or health«, in the Act on health services financed from public funds – on »emergencies«, in the Act on medical rescue – »on sudden health threats« (…) The commented provision of the Act on the Medical Profession mentions »the risk of loss of life, serious injury and serious health impairment« and »other urgent cases«"[20]. The Polish legal system is inconsistent in the analyzed area, which causes uncertainty as to the legal situation and makes it difficult to exercise the rights vested in individual entities under the applicable provisions.

[20] E. Zielińska, *Art. 30*, [in:] E. Barcikowska-Szydło, K. Majcher, M. Malczewska, W. Preiss, K. Sakowski, E. Zielińska, *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, Warsaw 2014.

In this context, it should be stated that the assessment of the Polish legal system made by the European Court of Human Rights in 2007 remains valid. "The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty. As a result, the applicant suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health"[21].

VI.

The interpretation of the act aimed at guaranteeing only the rights of a conceived child at the expense of reducing the scope of protection of the life and health of a pregnant woman is not justified. In the event of a collision of goods – in this case, the primary good (in this case the life of a pregnant woman) must be protected even at the expense of other goods (the life of a conceived child, referred to in medicine as "dependent life").

The right to have children does not come from the state, and the Family Planning Act only accepts (recognizes) the freedom to decide whether or not to have children. The right of access to information, education, counseling and access to means of exercising the right to have children is essential, as it can be used to prohibit acts or omissions that impede or prevent access to information, education, counseling and resources.

The provisions of the act on family planning should be interpreted in accordance with the provisions of the Polish Constitution. The provisions of Art. 31 sec. 2 require everyone to respect the freedoms and rights of others. Refusal to exercise a pregnant woman's right under legally established law or obstructing access to benefits under it should be treated as forcing to do what is not prescribed by law. Thus, there is a breach of the constitutional ban.

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[21] European Court of Human Rights, ECHR 2007/6, Case of Tysiąc v. Poland, 20 March 2007, No. 5410/03 (Fourth Section) para. 124. https://hudoc.echr.coe.int/eng?i=001-79812 (29.11.2021).

The decision to terminate a pregnancy in a situation where it poses a threat to the life or health of a woman is her own. Any woman who refuses to terminate a pregnancy must not be forced to do so. However, it is unacceptable that the religion, morality or worldview of those in power, or declaring whether the patient has the right to take advantage of the provisions of the Act, affect the possibility of using legal procedures.

Formally speaking, the finding of circumstances enabling the application of the provisions of Art. 4a of the Act on Family Planning is possible on the basis of general provisions, but scattered in numerous legal acts, which makes it difficult to obtain information on the admissibility of termination of pregnancy and the accompanying requirements. The Family Planning Act itself does not contain information about the possibility of challenging a doctor's decision or about the appeal procedure. Although this possibility is guaranteed by the Act on Patients' Rights, the procedural deadlines (30 days for submitting the application, 30 days for considering the objection) make it doubtful whether they apply in practice when the life or health of a pregnant woman is at risk.

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