

Eugenic Abortion as Discrimination against Persons with Disabilities: Another Perspective on Current Constitutional Case in Poland



Filip Cieply

Doctor Habil. of Law, an Associated Professor at the Department of Criminal Law at the John Paul II Catholic University of Lublin

✉ filip.cieply@kul.pl

<https://orcid.org/0000-0002-1124-7389>

On 22 October 2020, the Polish Constitutional Tribunal has declared provisions admitting eugenic abortion unconstitutional (case sign. K 1/20). Tribunal stated that the said provisions that sanction eugenic practices in relation to the unborn child deny respect and protection of human dignity (Art. 30) and the principle of legal protection of the life of every human being (Art. 38). Tribunal has not referred to another objection indicated in the MPs' motion that making the protection of unborn child's right to life dependent on its health status was tantamount to illegal direct discrimination (Art 32). Nevertheless, it seems noteworthy to underline that a negative assessment of a disease, handicap, or disability is not legally tantamount to a negative assessment of the affected human beings, their dignity and the value of their life. Human life valued so highly on normative grounds, regardless of the person's health condition, means that the life of a conceived child with malformations should be protected under penal law to the same extent as the life of a conceived and properly developing child. The admissibility of selective abortion based on the health status of the foetus must be recognized as unacceptable, just as abortion based on gender, race or social origin of the child.

Key words: protection of human life, eugenic abortion, malformed foetus, rights of persons with disabilities, anti-discrimination law, legal exclusion

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nity (Art. 30) and the principle of legal protection of the life of every human being (Art. 38). Tribunal has not referred to another objection indicated in the MP's motion that making the protection of unborn child's right to life dependent on its health status was tantamount to illegal direct dis-

crimination. Nevertheless, it seems noteworthy to analyze the constitutional issue also from this perspective. The essential problems are: Can a human foetus be object to discriminatory action at all? Is a foetus with developmental defects really discriminated against pursuant to the relevant provisions on life protection under penal law compared to a properly developing foetus? Does the eugenic grounds foster discriminatory attitudes towards people with disabilities given the motivational function of the law?

Introduction

The Republic of Poland is among the few countries whose legal system penalizes abortion. Termination of pregnancy with the woman's consent in violation of the provisions of the law is a crime subject to punishment by imprisonment of up to three years, nevertheless a pregnant woman who has consented to abortion is not liable to a penalty.¹ Since 1993 specific legislation has provided for three types of circumstances in which termination of pregnancy in Poland has been legally admissible. Abortion could only have been performed by a physician if: 1) the pregnancy poses a threat to the life or health of the pregnant woman (so-called medical grounds), 2) prenatal examinations or other medical conditions indicate that there is a high probability of a severe and irreversible foetal defect or incurable illness that threatens the foetus's life (so-called eugenic grounds), 3) there are reasons to suspect that the pregnancy is a result of an unlawful act (so-called criminal grounds).² Every year, several hundred legal abortions have been performed in Poland, and almost all involved the probability of impairment or incurable disease of the foetus, with genetic defects, including Down's syndrome, prevailing.

On 22 June 2017, a group of parliamentarians of the 8th term of office from the lower chamber of the Polish parliament (the Sejm), associated with the ruling party (Law and Justice), filed a motion to the Polish Constitutional Tribunal to declare provisions admitting eugenic abortion unconstitutional (case sign. K 13/17). After the 2019 winning parliamentary elections, a group of deputies renewed the motion (case sign. K 1/20). They stated that the said provisions sanction eugenic practices in relation to the unborn child, thereby denying it respect and protection of human dignity and, moreover, make the protection of such a child's right to life dependent on its health status, which is tantamount to illegal direct discrimination. That abortion induced for eugenic reasons is a manifestation of discrimination against people with disabilities has been stressed by some individuals and organizations that advocate the broadening of the scope of protection of human rights. This objection has also been voiced, for example, in Great Britain, United States, Germany or Japan.³

The content of the MPs' complaint to the Constitutional Tribunal

The group of MPs submitted a motion to declare, inter alia, Article 4a(1)(2) of Family planning act 1993 i.e. a provision admitting abortion for eugenic reasons unconstitutional. In their motion, the MPs claim in the challenged provision is incompatible with the constitutional principle of human dignity⁴ by allow-

1 Article 152 of Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny (Dz.U. nr 88, poz. 553 ze zm.) [Act of 6 June 1997 the Penal Code (Journal of Laws No. 88, item 553 as amended)].

2 Article 4a(1) of Ustawa z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży (Dz.U. nr 17, poz. 78 ze zm.) [Act of 7 January 1993 on the Family Planning, Human Embryo Protection and Conditions of Admissibility of Termination of Pregnancy (Journal of Laws No. 17, item 78 as amended)].

3 Robin Downie, "Disability and Healthcare: Some Philosophical Questions," in *Inspiring a medico-legal revolution: Essays in honour of Sheila McLean*, ed. Pamela M. Ferguson and Graeme T. Laurie (London, New York: Routledge 2016), 109–124; Masao Kato, *Women's Rights?: The Politics of Eugenic Abortion in Modern Japan*, Amsterdam: University Press, 2009; "Parliamentary Inquiry into abortion on the Grounds of Disability, 2013, accessed January 20, 2021 <https://dontscreenusout.org/wp-content/uploads/2016/02/Abortion-and-Disability-Report-17-7-13.pdf>; Marsha Saxton, "Disability Rights and Selective Abortion," in *The Disabilities Studies Reader*, ed. Lennard J. Davised (New York: Routledge 2013), 105–116; Rickie Solinger, ed., *Abortion Wars: A Half Century of Struggle 1950–2000*, University of California Press, 1998.

4 Article 30 of Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. (Dz.U. Nr 78, poz. 483 ze zm.) [The Con-

ing eugenic practices in relation to the unborn child, thereby denying it respect and protection of human dignity. The authors of the motion indicate that if the constitutional standard set out in Article 30 is not met, they demand a judgement that the provision admitting eugenic abortion is against the principle of legal protection of the life of every human being (Article 38) by legalizing eugenic practices in the area of the right to life of a child not yet born and makes the protection of the right to such a child's life dependent on its health status, which is tantamount to illegal direct discrimination. The MPs emphasize that they raise their objection based on the violation of the prohibition of discrimination in respect of the right to life as an alternative if the objection related to the violation of the principle of human dignity does not hold because the principle of human dignity establishes the primary prohibition of differentiation of the very value of people's lives and their legal segregation.⁵

In connection with the challenged provisions, the Speaker of the Sejm of the Republic of Poland also presented his position in the proceedings before the Constitutional Tribunal. In his letter dated 1 March 2018, the Speaker approves the MPs' motion and requests that the challenged provisions be declared unconstitutional. It reads, among other things, that it is unacceptable to justify eugenic abortion either by caring for the psychological comfort of the woman or by concerns about the quality of the genetic information carried by the foetus. Accepting this kind of argument would amount to the statutory approval of negative eugenics leading to genetic control. This would create discrimination on the basis of genetic qualities, which is disallowed based on the general prohibition of discrimination contained in Article 32 of the Polish Constitution.⁶ The Prosecutor General

stitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 as amended)].

5 K 13/17 – wniosek grupy posłów na Sejm RP [K 13/17 – motion of the group of MPs], <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?pokaz=dokumenty&sygnatura=K%2013/17>, accessed August 21, 2020.

6 K 13/17 – Stanowisko Sejmu [K 13/17 – Position of the Sejm], <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?pokaz=dokumenty&sygnatura=K%2013/17>, accessed August 21, 2020.

also expressed his position on the matter in a letter of 28 May 2018. He confirmed that the challenged provision was incompatible with the Polish Constitution and put forward his own arguments in favour of this thesis, without, however, directly referring to the objection related to discrimination.⁷

Human foetus as an object of discriminatory action

When reflecting on whether the human foetus can be an object to discriminatory action and, at the same time, aspiring to counteract discrimination in a real and comprehensive manner, a number of general reservations should be made. First, generally speaking, one of the disguised forms of discrimination of human beings may be delegitimation, including social exclusion by employed legal regulations.⁸ At the extreme, it may manifest itself in depriving the members of a group of their subjectivity at the normative level (normative dehumanization).

Historically speaking, the most prominent examples of legal exclusion were predated by ideological dehumanization of members of a discriminated group based on the assumption that full humanity can be achieved in stages through a biological or social process. In consequence, denying a person's "human" or "fully human" status at an ideological level would lead to the

7 K 13/17 – Stanowisko Prokuratora Generalnego [K 13/17 – Position of the Prosecutor General], <https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?pokaz=dokumenty&sygnatura=K%2013/17>, accessed August 21, 2020.

8 Daniel Bar-Tal, "Delegitimization: The Extreme Case of Stereotyping and Prejudice," in *Stereotyping and prejudice: Changing conceptions*, eds. Daniel Bar-Tal, Carl Friedrich Graumann, Arie W. Kruglanski, Wolfgang Stroebe (New York: Springer Science & Business Media 2013), 168–182; Daniel Bar-Tal, and Philip L. Hammack, "Conflict, Delegitimization, and Violence," in *The Oxford Handbook of Intergroup Conflict*, ed. Linda R. Tropp (Oxford University Press 2012), 29–52; Adriano Zamperini, Maria Luisa Menegatto, "Giving Voice to Silence: A Study of State Violence in Bolzaneto Prison during the Genoa G8 Summit," in *Conflict and Multimodal Communication: Social Research and Machine Intelligence*, eds. Francesca D'Errico, Isabella Poggi, Alessandro Vinciarelli, and Laura Vincze (Roma: Springer 2015), 185–206.

exclusion of subjectivity and reduced legal protection. In the past, this type of mechanism was employed, for example, to children, slaves, racial minorities, criminals, class enemies, and individuals with physical or mental disabilities.⁹

Formally, no discriminatory practices are in place since such legally excluded persons are not considered subjects of freedoms and rights. They are denied legal subjectivity, rights, or claims, meaning that they have no such rights granted by the system that can be limited. A possible legal protection may then have only its substantive scope and not the personal scope as its content and boundaries are arbitrarily set by the authorities or dependent on the will of other righthold-

excluded persons¹⁰. Hence, good intentions do not guarantee that no legal exclusion occurs. It is noted that in the event of full subjective exclusion it may even go unnoticed by those who remain subjects of law.¹¹

Under Polish law, the principle of equality laid down in Article 32 of the Polish Constitution protects against discrimination and legal exclusion. This principle contains an imperative of equal application of the law to all who are subjects to legal norms and lays down the rule of equality before the law, i.e. making such laws that would neither discriminate nor privilege anybody under the law. Thus, public authorities are bound by this principle in their law-making activity. This is a fundamental principle, so it is general enough

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ers. It is also important to bear in mind that legal exclusion may, or may not, involve the intention of doing harm to or disadvantaging the members of a specific group. It also occurs when it deprives, or fails to grant, subjectivity or rights for the sake of “interest” of the

to cover all freedoms, rights, and duties. The principle of equality is underpinned by primary equality based on the fact that all people belong to the same species (genus) and possess the attributes of humanity¹². The personal scope of the principle of equality is framed by the concepts of “all” and “nobody.” The use of the term “all” should therefore be understood as “everybody,” meaning “everybody has the right.” In this way, the constitutional legislator permits the broadest possible determination of subjects covered by the principle of equality. Therefore, the personal scope of

9 Lasana T. Harris, Susan T. Fiske, “Social Neuroscience evidence for Dehumanized Perception,” *European Review of Social Psychology*, vol. 20(2009), 192–231; Nick Haslam, “Dehumanization: An Integrative Review,” *Personality and Social Psychology Review*, vol. 10(2006), 252–264; Paulus Kaufmann, Hannes Kuch, Christian Neuhäuser, Elaine Webster, *Humiliation, Degradation, Dehumanization: Human Dignity Violated*, Springer 2010; Mari Mikkola, *The Wrong of Injustice: Dehumanization and Its Role in Feminist Philosophy*, Oxford University Press, 2016; Alessandra Roncarti, Juan A. Pérez, Marcella Ravenna, Esperanza Navarro-Perthus, “Mixing Against Nature: Ontologization of Prohibited Interethnic Relationships,” *International Journal of Psychology*, vol. 44/(2009), 12–19; Cristian Tileaga, “Discourse, Dominance, and Power Relations: Inequality as a Social and International Object,” *Ethnicities*, vol. 4/6(2006), 476–497.

10 Piotr Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [Commentary to the Constitution of the Republic of Poland of 2 April 1997], Warszawa: Liber, 2000, p. 51.

11 Margaret Davies, “Exclusion and the Identity of Law,” *Macquarie Law Journal*, vol. 5(2005), 5–30.

12 Maria Bosak, “Zasada równości w Konstytucji RP i w prawie międzynarodowym” [“The Principle of Equality in the Constitution of the Republic of Poland and in International Law”] *Ius et Administratio*, no. 3(2005), 43–54.

the principle should pertain to every human being.¹³ Nowadays, not only Polish citizens or natural persons but also legal persons and even entities without legal personality can rely on the principle of equality. This is the outcome of the implementation of the imperative of broad application of the principle of equality.¹⁴

The principle of equality is rested on primary equality, i.e. the fact that all people belong to the same species (genus), i.e. they possess the attributes of humanity

time, the cornerstone of the entire legal order (K 11/00). Dignity is regarded as an inherent and inalienable interest that is universal and is enjoyed by every person regardless of their attributes. Dignity is not a quality bestowed by the state and is ranked higher than the state. The constitution excludes the legal segregation of people into those who enjoy inherent rights and other “defective” or “flawed” persons who fall out of the legal protection. The constitutional protection of



The principle of equality is rested on primary equality, i.e. the fact that all people belong to the same species (genus), i.e. they possess the attributes of humanity (human DNA) and the same dignity.

(human DNA) and the same dignity. The starting point in determining the personal scope of the principle of equality is therefore the principle of protection of human dignity.¹⁵ This principle laid down in Article 30 of the Polish Constitution is fundamental for the defence of the person against exclusion. A state governed by the rule of law respects the human being, in particular his or her dignity. The constitutional legislator attached constitutional significance to human dignity, thus making it a baseline for the system of values that resonate in the constitution and, at the same

dignity determines the universality of constitutional rights. A person would be stripped of their dignity, for example, in a situation in which they would be objectified by action taken by the authorities, and their role would be reduced that of an exploited entity without legal subjectivity. The legislator is not empowered to decide on human subjectivity, hence the absolute prohibition of objectification (normative dehumanization).

Resting the constitutional guarantees of protection of human and civil rights, freedoms and duties upon the principle of the protection of the inherent human dignity determines the meaning of the concept of “person” in the constitution, and the interpretation of this concept implies the personal scope of human rights included in that basic law. The protection of human dignity requires that the referent of the constitutional concept of “person” be defined as broadly as possible, i.e. without exclusions, in full and completely. Interpretation of the concept of “person” by public authorities may not lead to the exclusion of any person from the category of subjects vested with human rights, regardless of any differentiating and secondary quality that may define them, including the phase of development, health status, race, origin, etc. Essentially, human dignity does not allow any exemptions,

13 Anna Łabno, “Zasada równości i zakaz dyskryminacji” [“The principle of equality and non-discrimination”] in *Wolności i prawa jednostki oraz ich gwarancje w praktyce* [Freedom and rights of an individual and their guarantees in practice], ed. Leszek Wiśniewski (Warszawa: Wydawnictwo Sejmowe 2006), 35–51.

14 Jacek Falski, “Ewolucja wykładni zasady równości w orzecznictwie Trybunału Konstytucyjnego” [“Evolution of the Interpretation of the Principle of Equality in the Case Law of the Constitutional Tribunal”] *Państwo i Prawo*, no. 1(2000), 49–54.

15 Leszek Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* [Polish Constitutional Law: The Outline of the Lecture], Wolters Kluwer Polska, 2006.

which means that it is linked to the affiliation with the human species (the full scope of the category of “person” without any specifying attributes). By admitting the option of exclusions affecting the personal scope

The Polish Constitution says that human dignity is “inherent.” The term is synonymous with such words and concepts as natural, innate, self, inbred, immanent, inseparable, inborn, internal, native, given by



The inherent human dignity does not emerge upon birth but is vested in the person before, during and after birth, but also in situations where there is no physiological delivery at all, for example, in the case of caesarean section, post-mortem delivery and, prospectively, also in cases of foetal development in an artificial uterus (incubator).

would strip the principle of protection of dignity of its meta-legal character; any interpretation to the same effect would be contradictory, and the principle would lose its axiological justification and normative value. That would lead to circumstances in which the legal subjectivity and the protection of human rights and freedoms would, contrary to the purpose of the principle, not result from humanity in its biological (genetic) sense but from “normative humanity, that is, an arbitrary decision of the authority as to who should be considered a person.

By allowing the slightest breach in the personal scope of Article 30 of the Polish Constitution, for example, by agreeing to exclude the human being in their prenatal stage of development, this kind of legal exclusion mechanism (dehumanization and delegitimation) could be readily applied to other categories by designing various criteria reflecting the most prominent current ideological trends. An excluding attribute could be infancy as a developmental phase, old age, disability (e.g. profound disability or retardation), dangerous mental illness, type of committed crime (e.g. of a terrorist nature), and even, although it is hard to imagine today, gender, religion, race, nationality, political views, etc.

nature. Consequently, “inherent” refers human dignity to human identity defined by the species (genus) and does not indicate any temporal or spatial constraints narrowing dignity to a specific human developmental stage (postnatal period) or a place of development (outside the womb). The term “inherent dignity” used by the constitutional legislator has an inclusive function, i.e. that of protecting against delegitimation, and not an exclusive one and highlights the immanent relationship between dignity and the human being; it does not establish a physiological or obstetric exclusion criterion, either. The inherent human dignity does not emerge upon birth but is vested in the person before, during and after birth, but also in situations where there is no physiological delivery at all, for example, in the case of caesarean section, post-mortem delivery and, prospectively, also in cases of foetal development in an artificial uterus (incubator). The terms “person” and “inherent dignity” should therefore also refer to a human being in the prenatal stage of development as he or she has their own individual identity, as indicated by the DNA structure which is autonomous of that of the pregnant woman. Acknowledgement of the legal protection of the dignity of the human foetus provides grounds for including it in the personal scope of the principle of equality.

Discrimination of foetus with malformations

In some cases, discrimination is justified and legally admissible. The differentiation of the legal position of individuals having a specific significant (relevant) quality does not violate the principle of equality if it is justified, proportionate and relies on the constitutional values. However, having a closer look at the protection of human life in the prenatal stage of development (a relevant quality) under penal law, then, given the eugenic grounds, what can alter its scope (and alter dramatically because upon the consent of the woman depriving the foetus of its protection until its full ability to live on its own) is highly probable foetal malformations leading to a severe and irreversible impairment or an incurable disease that poses a threat to the life of the foetus. Pursuant to the provision of Article 4a(1)(2) of Family Planning Act 1993, which fails to mention any threats to the physical or mental health of the pregnant woman, the basis for a major limitation of the penal-law protection of a conceived child's life (exclusion of protection guaranteed under Art. 152 of Penal Code 1997 is the probability of a bad health status of the foetus.

Meanwhile, care for human health, including in the prenatal stage of development, is a legal duty. The duty to take action for the protection of the health of the human foetus is voiced, *inter alia*, in Article 68(1) of the Polish Constitution and statutory law.¹⁶ After a careful analysis, it appears that in the entire Polish legal system, apart from eugenic grounds for abortion, there is no legal basis for the reduction of the value of human life and its legal protection on account of poor health, disability, or terminal disease. Quite the contrary, there are standards that guarantee terminally ill, disabled or impaired persons respect for their dig-

nity, equal treatment, and even special protection.¹⁷ Standards of legal protection reside on the foundation of special care for the lives of seriously ill, impaired and disabled people and bolster the argument that even this kind of affliction like a severe disability or incurable disease cannot (*per se*) offer an excuse for the restriction of rights, in particular to the legal protection of life. The principle of protecting persons unable to determine their legal position independently is ranked among the basic principles of law. Any doubts as to the scope or level of protection of "structurally weak" individuals must be resolved in favour of that protection¹⁸. In this context, the provision of Article 4a(1)(2)

16 Art. 2 of Family Planning Act 1993; Art. 26 of Ustawa z 5 grudnia 1996 o zawodach lekarza i lekarza dentystry (Tekst jednolity Dz.U. 2011, nr 277, poz. 1634) [Act of 5 December 1996 on the Professions of Doctor and Dentist (Consolidated text: Journal of Laws of 2011, No. 277, item 1634)]; Art. 3(2)(1) in conjunction with Art. 2(1) of Ustawa z dnia 6 stycznia 2000 r. o Rzeczniku Praw Dziecka (Dz.U. nr 6, poz. 69) [Act of 6 January 2000 on the Ombudsman for Children (Journal of Laws of 2000, No. 6, item 69)].

17 They are established, *inter alia*, in Art. 68 in conjunction with Art. 30 of the Polish Constitution and also Art. 10 of Konwencja o prawach osób niepełnosprawnych sporządzona w Nowym Jorku dnia 13 grudnia 2006 r. (Dz.U. z 2013 r., poz. 1169) [Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 (Journal of Laws of 2013, item 1169)]; Art. 2 and 23 of Konwencja o prawach dziecka przyjęta przez Zgromadzenie Ogólne Narodów Zjednoczonych dnia 20 listopada 1989 r. (Dz.U. z 1991 r., nr 120, poz. 526) [The Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989 (Journal of Laws of 1991, No. 120, item 526)]; Art. 2 of Ustawa z dnia 19 sierpnia 1994 r. o ochronie zdrowia psychicznego (Tekst jedn. Dz.U. z 2011 r., nr 231, poz. 1375) [Act of 19 August 1994 on the Protection of Mental Health (Consolidated text: Journal of Laws of 2011, No. 231, item 1375)]; Art. 20(2) of Ustawa z dnia 6 listopada 2008 r. o prawach pacjenta i Rzeczniku Praw Pacjenta (Tekst jedn. Dz.U. z 2013 r., poz. 159 ze zm.) [Act of 6 November 2008 on Patient Rights and the Patient Rights Ombudsman (Consolidated text: Journal of Laws of 2013, item 159 as amended)]; Art. 9(1)(4) of Ustawa z dnia 15 kwietnia 2011 r. o działalności leczniczej (Tekst jedn. Dz.U. z 2013 r., poz. 217) [Act of 15 April 2011 on Medicinal Activity (Consolidated text: Journal of Laws of 2013, item 217)]; Art. 15, 27, 33 of Ustawa z dnia 27 sierpnia 2004 r. o świadczeniach opieki zdrowotnej finansowanych ze środków publicznych (Tekst jedn. Dz.U. z 2008 r., nr 164, poz. 1027 ze zm.) [Act of 27 August 2004 on Healthcare Services Financed from Public Funds (Consolidated text: Journal of Laws of 2008, No. 164, item 1027 as amended)].

18 Leszek Bosek, "Konstytucyjne podstawy prawa biomedycznego w orzecznictwie TK" ["Constitutional Basis of

of Family Planning Act 1993, which offers autonomous eugenic grounds for the admissibility of termination of pregnancy with the consent of the woman, thus excluding the protection of the life of the conceived child provided for under Article 152 of Penal Code 1997 has no axiological justification.

woman cannot be sustained logically.²⁰ An attempt to explain that the eugenic grounds are related to health but are just described differently in order not to have to assess the mother's psychological resistance in the event of foetal malformations, is not sufficient. It would be unacceptable to seriously undermine the



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When looking at the values in question from a different angle, i.e. the protection of the rights of the pregnant woman, who is the biological and legal guarantor of the life and development of her conceived child, when comparing the legal position of the pregnant woman and her conceived child, the principle of proportionality should be invoked and, at the outset, we should compare the woman's right to have her life and health protected and the same right vested in the impaired foetus. Based on such a comparison, it naturally follows that abortion would be justified if the continuation of pregnancy in the event of foetal malformations posed the risk of death or serious damage to the health of the pregnant woman. Attempts sometimes made in the doctrine to justify eugenic grounds by a threat to the health of the pregnant woman are misguided since if foetal defects in a specific case created this kind of hazard to the woman, termination of pregnancy would be admissible on medical grounds.¹⁹ In such cases, eugenic grounds overlap with medical grounds, thus isolating the eugenic reasons for abortion to protect the life and health of the pregnant

protection of the value of human life in the prenatal stage of development by the sole need to avoid the demonstration of existence of the medical grounds. The specific eugenic grounds do not refer to the health of the pregnant woman and cannot be interpreted as a presumed threat to her mental health.

Another argument to justify the admissibility of termination of pregnancy due to potential foetal defects is the view that the possible moral requirement for a woman to give birth to a disabled child exceeds what is expected in the law, whose standards do not require people to be morally perfect but encourage less demanding ethical conduct. The birth of a seriously impaired or terminally ill child is considered a heroic attitude, and no law can demand that. The general norm, however, imposes the duty of protection of human life and health at the prenatal stage of development. Hence, we cannot ignore the fact that

Biomedical Law in the Jurisprudence of the Constitutional Tribunal"] *Zeszyty Prawnicze BAS*, vol. 22(2009), 29–30.

¹⁹ Art. 4a (1)(1) of Family Planning Act 1993.

²⁰ Michał Królikowski, "Problem interpretacji tzw. przesłanki eugenicznej stanowiącej o dopuszczalności zabiegu przerwania ciąży" ["The Problem of Interpreting the So-called the Eugenic Premise which is the Admissibility of the Termination of Pregnancy"] in *Współczesne wyzwania bioetyczne [Contemporary Bioethical Challenges]*, eds. Leszek Bosek, and Michał Królikowski (Warszawa: C.H. Beck 2010), 175–183.

the birth of a disabled child does not impose an absolute obligation to look after it on the mother. There is an option of putting a disabled child up for adoption (including the possibility of leaving it in hospital), placement in a foster family or in a competent care institution. Mother's lowered standard of living can-

gerous view that killing disabled children before birth rather than allowing them to be born and offering them prenatal and postnatal care is a social standard. There are concerns that opinions that people with congenital disabilities should basically not live because the law offers the option of eugenic abortion may not



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not provide exclusive grounds for admissibility of abortion because it falls under the so-called social grounds already rejected in constitutional case-law (K 26/96, 1997). A collision of parallel values should be taken into account.²¹

Reinforcing discriminatory attitudes

The admissibility of abortion on eugenic grounds produces negative effects given the educational and motivational function of law and can lead to discriminatory attitudes towards people with disabilities also after their birth. To regard the birth of an impaired child as an act of heroism rather than a natural consequence of pregnancy may lead to a give rise to a dan-

be uncommon, and that parents, if they decided to accept and raise a seriously impaired or terminally ill child, should handle their situation alone because it was their heroic, yet free decision. If they decided so, it means that they were able to afford it emotionally and financially, and they did it only on their own account; by extension, they should not, for example, seek extra social benefits or expect the state or the local government to offer assistance to the child later on. Such opinions have been voiced in the Polish mass-media. One journalist argued that the budget cannot be stretched any further, and that experiencing unforeseen difficulties is not the same as living with the effects of a heroic decision. This type of stigmatization that violates the dignity of disabled children and their parents must not be amplified any further.

Also in states where abortion is widely available, there are opinions that eugenic practices, such as pre-birth selection, are regarded as discriminatory.²² Bioethicists warn against a diminishing tolerance for

21 Legal acts regarding public financial support for mothers and children with disabilities i.a. Ustawa z dnia 9 czerwca 2011 r. o wspieraniu rodziny i systemie pieczy zastępczej (tekst jedn. Dz.U. z 2013 r. poz. 135) [Act of 9 June 2011 on Family Support and Foster Care System (consolidated text: Journal of Laws of 2013, item 135)]; Ustawa z dnia 12 marca 2004 r. o pomocy społecznej (tekst jedn. Dz.U. z 2013 r. poz. 182) [Act of 12 March 2004 on Social Assistance (consolidated text: Journal of Laws of 2013, item 182)].

22 Oktawian Nawrot, *Ludzka biogeneza w standardach bioetycznych Rady Europy* [Human Biogenesis in Bioethical Standards of the Council of Europe], Warszawa: Oficyna, 2011.

the disabled and their social stigmatization²³. Prenatal eugenics denies the right to equal treatment, and eugenics programmes subordinate the interests of the individual to social interests.²⁴ Elimination of disability and disease by abortion can render any form of disability or handicap socially unacceptable. It is stressed that it is not far from differentiating the value of life at the prenatal stage based on the physical or psychological qualities of the organism to the differentiation of the value of human existence in the postnatal phase and the denial or restriction of legal protection of the mentally or physically defective persons.²⁵ Moreover, the availability of eugenic abortion reinforces the concept that women are extremely harmed by their disabled child. As a consequence, this may give rise to a desire to establish the right to a perfect child: the admissibility of sex-selective abortion is not far from it.

It is argued that the real burden to be shouldered by the mothers of disabled children is not the actual child's disability as such (*per se*), but it is the lack or impeded access to the financial and organizational assistance by the state.²⁶ The legal solutions permitting eugenic abortion are said to be flawed by being based on a false and stigmatizing assumption that the life of a person with a disability must be unhappy, and at the heart of social policies they put the ethics of productivity, which solidifies the phenomenon of social exclusion of people with disabilities.²⁷

23 Maja Grzymkowska, *Standardy bioetyczne w prawie europejskim* [Bioethical Standards in European Law], Lex, 2009.

24 Julita Jabłońska, „Prawo do integralności w Karcie Praw Podstawowych Unii Europejskiej” [„The Right to Integrity in the Charter of Fundamental Rights of the European Union”], in *Prawa człowieka wobec rozwoju biotechnologii* [Human Rights in Relation to the Development of Biotechnology], eds. Jelena Kondratiewa-Bryzik, and Katarzyna Sękowska-Kozłowska (Lex 2013), 4–5.

25 Grzegorz Kowalski, „Warunki dopuszczalności przerywania ciąży a prawna ochrona życia poczętego” [“Conditions for Permitting Termination of Pregnancy and Legal Protection of the Conceived Life”] in *Dziecko. Studium interdyscyplinarne* [Child. An Interdisciplinary Study], eds. Ewa Sowińska, Elżbieta Szczurko, Tadeusz Guz, and Paweł Marzec (Lublin: Wydawnictwo KUL 2008), 203–230.

26 Saxton, *Disability rights...*, p. 95.

27 Kato, *Women's rights...*, p. 68, 223.

Conclusion

On 22 October 2020, the Polish Constitutional Tribunal has declared provisions admitting eugenic abortion unconstitutional (case sign. K 1/20). Tribunal stated that the said provisions sanction eugenic practices in relation to the unborn child deny respect and protection of human dignity (Art. 30) and the principle of legal protection of the life of every human being (Art. 38). Tribunal has not referred to another objection indicated in the MP's motion that making the protection of unborn child's right to life dependent on its health status was tantamount to illegal direct discrimination (Art 32). Nevertheless, in the context of the judgement it is important to underline that a negative assessment of a disease, handicap, or disability is not legally tantamount to a negative assessment of the affected human being, their dignity and the value of their life. The axiological foundations of Polish constitutional law do not encourage reduction of the value and legal protection of human life based on a poor health status. In contrast, the sick have the right to have their health protected, and the disabled are guaranteed easier access to healthcare. Human life valued so highly on normative grounds, regardless of the person's health condition, means that the life of a conceived child with malformations should be protected under penal law to the same extent as the life of a conceived and properly developing child. The admissibility of selective abortion based on the health status of the foetus must be recognized as unacceptable, just as abortion based on gender, race or social origin of the foetus. Furthermore, selective abortion based on potential disability of the foetus supports a false assumption that life of a disabled person must be unhappy, and that one of the major problems of mothers, families and society is living with people with disabilities. This could result in the stigmatization of the disabled and the fossilization and deepening of discriminatory and exclusionary attitudes.

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