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CONDITIONS FOR LAWFULNESS OF ABORTION

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1. VALUE OF HUMAN LIFE IN THE PRENATAL PHASE: INTRODUCTION

Opinions presented in literature and case law on the issue of the importance of human life have been in harmony for years.[1] It is almost unanimously raised that human life is not only the most important value in our culture and civilisation but also the interest that determines an individual's possession and exercise of other rights and freedoms.[2] Many statements in case law and the doctrine also emphasise that the right to life is inherent and thus not bestowed, and its placement in the first constitutional provision concerning personal freedoms and rights (Article 38 Constitution of the Republic of Poland) *prima facie* reflects its superior value.[3] It is worth pointing out that the wording of the above-mentioned Article 38 Constitution does not contain a typical phrase stating that everyone shall have the right to life but expresses an obligation of public authorities to ensure the necessary legal protection

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1 "Human life and the right to life is not subject to an agreement and negotiation but a fundamental right of every man and every democratic community should ensure its full and absolute protection". A. Szmyt, *Opinia prawna w sprawie poprawki do propozycji zmiany art. 38 Konstytucji*, Biuro Analiz Sejmowych No. 3, 2007, p. 88; H. Sokorowski, *Problematyka praw człowieka*, Warsaw 2005, p. 84; M. Cieślak, *Polskie prawo karne. Zarys systemowego ujęcia*, Warsaw 1990, p. 274.

2 The Constitutional Tribunal judgement of 30 September 2008, K 44/07, OTK-A 2008, No. 7, item 126; M. Błażewicz, *Prawo do życia*, [in:] A. Florczak, B. Bolechów (ed.), *Prawa i wolności I i II generacji*, Toruń 1999, p. 35; M. Chmaj, *Konstytucyjna zasada godności człowieka i praktyka jej stosowania w orzecznictwie Trybunału Konstytucyjnego*, [in:] T. Gardocka, J. Sobczak (ed.), *Dylematy praw człowieka*, Toruń 2008, p. 35 ff; A. Preisner, *Prawo do ochrony życia i do zachowania naturalnej integralności psychofizycznej człowieka*, [in:] L. Wiśniewski (ed.), *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, Warsaw 2006, pp. 135–146.

3 The Constitutional Tribunal judgement of 9 July 2009, SK 48/05, OTK-A 2009, No. 7, item 108.

of this right.[4] The editorial form of the provision does not specify temporary limits to the protection of human life, either.[5] Thus, the general wording of this constitutional norm makes it possible to draw a conclusion that the protection of human life does not, in fact, have an absolute nature. Admissibility of differentiating the intensity of this protection has been expressly confirmed in the opinions of the Constitutional Tribunal, which emphasised that just "Stating that human life at its every stage of development constitutes a constitutional value that is subject to protection does not mean that the intensity of this protection at every stage of life and in all circumstances shall be the same. The intensity of legal protection and its type are not a direct consequence of the value of the protected interest. Beside the value of the protected interest, a whole series of different factors have impact on the intensity and the type of legal protection and deciding which type of legal protection and what intensity to choose, and the legislator must take them all into account. However, this protection should always be sufficient from the perspective of the protected interest".[6] Continuing this thread, in the further part of the opinion, at the same time directly referring to the issue of legalisation of abortion, the Constitutional Tribunal also stated that differentiating the protection of human life requires a detailed analysis establishing: "(…) (a) whether the interest the infringement of which the legislator

[4] As it was stated in case law: "(...) Article 38 indicates that public authorities are obliged to undertake steps to protect life. Hence, if the Constitution provides a certain objective system of values, the legislator is obliged to enact law with such provisions that would make it possible to protect and exercise those values to the broadest extent possible". The Constitutional Tribunal judgement of 23 March 1999, K 2/98, OTK 1999, No. 3, item 38; the Constitutional Tribunal judgement of 8 October 2002, K 36/00, OTK-A 2002, No. 5, item 63.

[5] See, the Supreme Court judgement of 26 November 2014, III CSK 307/13, OSNC 2015, No. 12, item 147, which states that: "The right to life constitutes a constitutional value, Article 38 Constitution ensures legal protection of life of every man. The protection of this right is also laid down in the provisions of the International Covenant on Civil and Political Rights open to be signed in New York on 19 December 1966 (see, Article 6, Journal of Laws [Dz.U.] of 1977, No. 38, item 167), the Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989 (see, Article 6, Journal of Laws [Dz.U.] of 1991, No. 120, item 526, as amended) and the Convention on the Protection of Human Rights and Fundamental Freedoms adopted in Rome on 4 November 1950 (see, Article 2, Journal of Laws [Dz.U.] of 1993, No. 61, item 284, as amended). In accordance with Article 1 of the Act of 7 January 1993 on planning a family, the protection of a human foetus and the conditions for admissibility of abortion (Journal of Laws [Dz.U.] No. 17, item 78, as amended), the right to life is subject to protection, including life at the prenatal stage within the limits laid down in statute. Also, the provisions of the Civil Code ensure the protection of an unborn child. For example, Article 446 Civil Code, in accordance with which a born child can seek redress for damage incurred before birth, or Article 927 §2 Civil Code, in accordance with which a child already conceived at the moment of inheritance opening may be an heir if he/she is born alive. On the other hand, in accordance with Article 182 Family and Guardianship Code, a guardian may be appointed for a conceived but not yet born child in order to secure the child's future rights. Finally, the Criminal Code protects the right to life at the prenatal stage as its Articles 152–154 penalise abortion violating the provisions of statute and assisting a pregnant woman in abortion or inciting her to do it, and lay down aggravated sanctions in a situation when a conceived child obtained the possibility of living outside a mother's body". Also see, the Supreme Court judgement of 13 May 2015, III CSK 286/14, OSNC 2016, No. 4, item 45.

[6] The Constitutional Tribunal ruling of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19; also see, E. Zielińska, *Opinia prawna o poselskim projekcie zmiany art. 38 Konstytucji RP*, Biuro Analiz Sejmowych No. 3, 2007, p. 11.

legalises constitutes a constitutional value, (b) whether legalisation of the infringement of the interest is justified on the basis of constitutional values, in particular being the expression of the resolution of the collision of particular values, rights and freedoms guaranteed in the Constitution, and (c) whether the legislator has satisfied the constitutional criteria for resolving the collision, especially whether the legislator has fulfilled the requirement of maintaining proportionality when resolving collisions between constitutionally protected interests, rights and freedoms, which has been repeatedly determined by the Constitutional Tribunal based on Article 1 of the Constitution (the principle of a democratic state of law)".[7] In the context of the judgement, one may conclude that although human life at its prenatal stage undoubtedly constitutes a considerable constitutional value, the presented assumption does not prejudge *per se* that in some extraordinary circumstances the protection of this value may be limited or even excluded, provided that the necessity to protect or exercise other constitutional rights or freedoms is justified. However, it is unquestionable that the legislator's decision on this matter may take the form of a discretionary or, in other words, arbitrary solution. It is rightly emphasised that the criteria determining the scope of admissibility of infringement of an individual's rights should be adequate to the essence of the collision resolved.[8]

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[7] The Constitutional Tribunal ruling of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

[8] *Ibid*. In the face of considerations presented here, it is worth mentioning the opinions presented in literature and case law connected with an undoubtedly sensitive issue concerning the possibility of determining the moment when full legal protection of human life starts. As far as this is concerned, various criteria were used, inter alia, ones referring to: obtaining the possibility of living independently outside a mother's body, labour pains occurrence, the moment of separating a child from a mother's body, a baby's first intake of breath. K. Daszkiewicz, *Zabójstwo dziecka w okresie porodu*, Nowe Prawo No. 9, 1976, p. 1233; B. Kieres, *Początek życia ludzkiego w aspekcie ochrony prawnokarnej*, Nowe Prawo No. 2, 1976, p. 209; T. Hanausek, *Z problematyki dzieciobójstwa*, Państwo i Prawo No. 2, 1962, pp. 686–687; O. Sitarz, *Ochrona prawna dziecka w polskim prawie karnym na tle postanowień Konwencji Praw Dziecka*, Katowice 2004, p. 44; J. Giezek, R. Kokot, *Granice ludzkiego życia a jego prawna ochrona*, [in:] B. Banaszak, A. Preisner (ed.), *Prawa i wolności obywatelskie w Konstytucji RP*, Warsaw 2002, pp. 107–108; V. Konarska-Wrzosek, *Ochrona dziecka w polskim prawie karnym*, Toruń 1999, p. 9. For the same issue, also see W. Lang, *Ochrona prawna płodu ludzkiego. Materiały III Krajowej Konferencji Lekarzy i Humanistów*, Gdańsk 1981, pp. 94–97; by the same author, *W sprawie prawnego statusu nasciturusa*, Państwo i Prawo No. 6, 1993, pp. 103–104. Moreover, the issues also constituted the subject matter of analysis of judicial decisions. In accordance with the Supreme Court opinion: "An unborn child has the right to full legal protection of health and life: (a) from the moment (natural) delivery starts, (b) in case of caesarean delivery terminating pregnancy on a pregnant woman's demand, from the moment the first medical activity starts in order to perform this surgery, (c) in case of medical necessity to perform caesarean delivery or another alternative termination of pregnancy, from the moment when medical indications for such treatment occur". The Supreme Court decision of 30 October 2008, 13/08, OSNKW 2008, No. 11, item 90; the Supreme Court resolution of 26 October 2006, I KZP 18/06, OSNKW 2006, No. 11, item 97; the Supreme Court decision of 25 November 2009, V KK 150/09, Legalis No. 304121. In the light of the presented stand, not only a "born" child is subject to full legal protection but also, in certain indicated circumstances, a child "being born". See, judgement of the Appellate Court in Łódź of 27 November 2012, I ACa 856/12, LEX No. 1267346.

2. CONDITIONS FOR LEGALISING ABORTION IN THE LIGHT OF THE ACT OF 7 JANUARY 1993 ON PLANNING A FAMILY, THE PROTECTION OF A HUMAN FOETUS AND THE CONDITIONS FOR ADMISSIBILITY OF ABORTION

The conditions for legalising abortion are not directly laid down in the provisions of the Criminal Code (hereinafter: CC) but in the Act of 7 January 1993 on planning a family, the protection of a human foetus and the conditions for admissibility of abortion (hereinafter: APF)[9]. However, the above model of regulation is not in conflict with the principles of legislative technique. It is rightly reminded in the judicature that: "There are situations (…) known in criminal law in which the description of a prohibited act is not complete and requires specification (supplementing) in a separate provision laid down in another legal act. It does not always have to be a legal act in the area of criminal law in the strict sense. It does not have to be a statutory normative act; it can be a lower-rank act. The adoption of the feature of a prohibited act in the form of 'abortion with the violation of statute' laid down in Article 152 CC does not mean the infringement of the *nullum crimen sine lege* principle as the conditions for admissibility of abortion are laid down in statute and there is a lack of a requirement for statute to be a criminal law act".[10]

In accordance with the provisions of the above-mentioned statute, abortion is admissible in the following cases: (1) when pregnancy constitutes a threat to the life or health of the pregnant woman (Article 4a para. 1(1) APF), (2) prenatal examinations or other medical indications suggest that there is a high probability of severe and irreversible damage to the foetus or incurable disease endangering its life (Article 4a para. 1(2) APF), (3) there is a justified suspicion that the pregnancy resulted from a prohibited act (Article 4a para. 1(3) APF).

At the same time, it is worth highlighting that the regulation determining the conditions for admissibility of abortion is applicable to extraordinary circumstances in which, in fact, it legalises extraordinary conduct that is in general classified as unlawful. Thus, when assessing the relation between the general ban on abortion and the exceptions to it, it should be stated that the ban on abortion turns to be primary and the above-mentioned statute only lays down some exceptions to the ban.[11] As a result, one might say that except for the cases listed in statute, a physician's failure to perform abortion can never be treated as unlawful conduct.[12]

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[9] Journal of Laws [Dz.U.] No. 17, item 78, as amended.

[10] The Supreme Court decision of 25 May 2016, IV KK 156/16, LEX No. 2071606; also see, the Supreme Court decision of 29 January 2009, I KZP 29/08, OSNKW 2009, No. 2, item 15, in which it is stated that: "It is admissible and sometimes even necessary to specify in more detail the statutory features of some prohibited acts in legal regulations of lower rank, i.e. sub-statutory regulations. Such legislator's action does not infringe the *nullum crimen sine lege* principle laid down in Article 1 §1 CC". Also see, the Supreme Court judgement of 21 December 1995, II KRN 158/95, LEX No. 24869; the Constitutional Tribunal judgement of 20 February 2001, P 2/00, OTK 2001, No. 2, item 32; the Constitutional Tribunal judgement of 8 July 2003, P 10/02, OTK-A 2003, No. 6, item 62.

[11] The Constitutional Tribunal ruling of 15 January 1991, U 8/90, OTK 1991, No. 1, item 8.

[12] The Constitutional Tribunal resolution of 17 March 1993, W 16/92, OTK 1993, item 16. From the perspective of civil law solutions, it should be mentioned here that: "In the Polish

As far as the first of the conditions for legalisation of abortion is concerned, i.e. a situation when pregnancy constitutes a threat to life or health of the pregnant woman (Article 4a para. 1(1) APF), it should be stated that the legislator was satisfied with a very general statement indicating that this type of medical treatment is admissible if pregnancy constitutes a threat to a mother's life or health. In such

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legal system, it is admissible to pursue compensation by parents, based on Article 4a para. 1(2) Act of 7 January 1993 on planning a family, the protection of a human foetus and the conditions for admissibility of abortion (Journal of Laws [Dz.U.] of 1993, No. 17, item 78) in conjunction with Article 24 Civil Code and Article 448 Civil Code in a situation when a pregnant 'woman is illegally deprived of the possibility of performing abortion in case the law admits it. The claim is the equivalent of the 'wrongful birth' claim defined in the American case law, i.e. a legal cause of action in which the parents of a child with serious genetic abnormalities is born as a result of a defendant's, most often a physician's fault (faulty prenatal diagnosis, failure to inform parents about the possible genetic defects or other serious diseases of the foetus). It is aimed at providing compensation for depriving parents of the right to decide on abortion. It is a claim to redress financial loss and harm incurred (pain, suffering, emotional stress, child treatment expenditures, increase in the cost of maintenance, etc.). In accordance with the Polish law, it is also possible to claim compensation for the increased cost of maintenance of the impaired child based on the provision of Article 415 Civil Code. In the Polish legal system, the right of a child to claim compensation for depriving his/her mother of the possibility of performing lawful abortion (an equivalent of the American legal action called 'wrongful life', i.e. an impaired child's claim of compensation for 'bad quality life', 'unhappy existence', the fact of being born, which would not have occurred but for the accused sued physician) is not admissible. A minor does not have the right not to be born in the event his/her foetus is impaired". See, the judgement of the Appellate Court in Białystok of 24 April 2013, I ACa 787/12, Legalis No. 998801; the Supreme Court judgement of 6 May 2010, II CSK 580/09, Legalis No. 248326; judgement of the Appellate Court in Białystok of 4 July 2008, I ACa 278/08, Legalis No. 158117; the Supreme Court resolution of 22 February 2006, III CZP 8/06, Legalis No. 72852; the Supreme Court judgement of 21 November 2003, V CK 16/03, Legalis No. 62304. However, in the context of the discussed issue, there is a problem of a conscience clause (Article 39 Act of 5 December 1996 on the professions of a physician and a dentist, uniform text of 10 March 2015, Journal of Laws [Dz.U.] item 464, as amended), which, inter alia, gives a physician the right to refuse to perform abortion. A conscience clause is interpreted as a possibility of not undertaking due action, which is in compliance with the law but in conflict with the worldview. In accordance with the Constitutional Tribunal judgement of 7 October 2015, K 12/14, OTK-A 2015, No. 9, item 143: "1. Article 39 first sentence in conjunction with Article 30 Act of 5 December 1996 on the professions of a physician and a dentist (Journal of Laws [Dz.U.] of 2015, item 464) in the scope in which it imposes on a physician an obligation to perform a medical procedure that is in conflict with his conscience in 'other urgent cases' is in conflict with the principle of appropriate legislation derived from Article 2 Constitution of the Republic of Poland and Article 53 para. 1 in conjunction with Article 31 para. 3 Constitution; 2. Article 39 first sentence of the Act referred to in 1. in the scope in which it imposes on a physician refraining from performing a medical service procedure that is in conflict with his conscience an obligation to indicate real possibilities of obtaining such a service from another physician or another medical institution is in conflict with Article 53 para. 1 in conjunction with Article 31 para. 3 Constitution. 3. Article 39 second sentence of the Act referred to in 1. in the scope in which it obliges a physician doing the job based on an employment contract or as a service who exercises his right to refuse to perform a medical procedure that is in conflict with his conscience to advance notification of his superior in writing: (a) is in compliance with Article 53 para. 1 in conjunction with Article 31 para. 3 Constitution, (b) is in conflict with Article 53 para. 7 Constitution. 4. Article 39 first sentence of the Act referred to in 1. in the scope in which it obliges a physician exercising the right to refuse to perform a medical procedure that is in conflict with his conscience to justify and register the fact in medical documents: (a) is in compliance with Article 53 para. 1 in conjunction with Article 31 para. 3 Constitution, (b) is in conflict with Article 53 para. 7 Constitution".

situations, a physician must perform a medical operation in hospital (Article 4a para. 3 APF), and a physician other than the one who is to perform the surgery should recognise the threat to a mother's life or health, unless there is a direct danger to the woman's life (Article 4a para. 5 APF). In such a case, the Act does not lay down any time limits, which means that abortion based on medical indications is possible, regardless of the stage of pregnancy.

The normative attitude revealed in this condition clearly indicates its flexibility allowing a physician to maintain, as it seems necessary in this situation, discretion to assess a pregnant woman's state of health. It must be added that it would be really difficult to make a list of threats to a pregnant woman's life or health, which would enumerate cases justifying abortion for the discussed reason. Also, a proposal opting for the need to "more precisely specify" the condition does not seem very convincing because the statutory "threat to health" of the mother would have to be "serious".[13] This term is undoubtedly evaluative in nature and, as a result, it would only strengthen blurred nature of the discussed indication.[14]

In accordance with the legislator's intention, abortion is also admissible when it is recognised ("prenatal examinations or other medical indications" confirm *verba legis*) that there is a high probability of serious and irreversible damage to the foetus or incurable disease endangering its life (Article 4a para. 1(2) APF). In such a situation, it is possible to perform the procedure before the foetus reaches the stage in which life outside the pregnant woman's body is possible (Article 4a para. 2 APF). Even a cursory analysis of this condition makes it possible to notice that its statutory edition is full of indefinite phrases, which unavoidably results in the occurrence of a series of interpretational controversies.

Due to the above-mentioned difficulties and some specific axiological reasons, in the legislative work undertaken relatively recently, there were proposals opting not only for the justification of its modification but also for the repealing of this condition. With reference, first of all, to the attempt to interfere in the content of the abortion indication presented by the Criminal Law Codification Commission in 2013, it should be remembered that in accordance with the project, abortion for teratologic (eugenic) reasons would be admissible in case of recognition of serious and irreversible damage to a conceived child (Article 152a §1(2) Bill amending CC).[15]

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[13] According to the authors of the proposal: "(…) at present, literal interpretation of the provisions of the Act on planning a family, the protection of a human foetus and the conditions for admissibility of abortion of 7 January 1993 may lead to a conclusion that every type of threat of an even short-term and reversible disorder of (mental and physical) health may justify abortion, even at the last stage just before birth". Justification for the Bill amending the Act: Criminal Code and some other acts, p. 31, https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/komisja-kodyfikacyjna-prawa-karnego-2009-2013 [accessed on 15/10/2016]. Also see, J. Kulesza, *Prawnokarna ochrona życia człowieka w fazie prenatalnej (w projekcie Komisji Kodyfikacyjnej Prawa Karnego)*, Państwo i Prawo No. 7, 2015, p. 68; M. Urbaniak, R.Z. Spaczyński, *Wybrane aspekty prawne ochrony dziecka poczętego w świetle projektu nowelizacji Kodeku Karnego*, Ginekologia i Położnictwo No. 86, 2015, pp. 787–790.

[14] A.M. Kania, *Kontrowersje związane z kryminalizacją przerywania ciąży. Część I*, Nowa Kodyfikacja Prawa Karnego Vol. XXVII, 2011, p. 100.

[15] "A more concise phrase 'a conceived child's impairment' was substituted for the former phrase 'impairment of a foetus or incurable disease endangering life'. It was assumed that there

However, taking into consideration the proposed wording of the teratologic condition, one cannot share the belief of the Bill authors who, adding value to its "synthetic form", stated that the new approach would eliminate the former interpretational doubts which always accompany the discussed condition. It seems that the only result of the planned amendment would, in fact, be the narrowing of admissibility of abortion.[16]

On the other hand, the citizens' Bill, also developed in 2013, proposed a much more far-reaching amendment in the context of the discussed condition. Striving to eliminate the abortion indication completely, its authors suggested that in the present legal state the conceived children are differentiated based on their state of health, which is unjustified and in conflict with the provisions of the Constitution of the Republic of Poland. This type of discrimination, according to those authors, should not take place either in case of a conceived child's defects one can live with for many years or lethal defects. The arguments presented also draw attention to too many indefinite phrases in the present wording of the condition. Their indefiniteness was strongly criticised and it was stated that they are used to depreciate the contemporary medical advancements.[17] Justifying the necessity of interfering in the previous shape of abortion law, the authors indicated that allowing selective abortion, which takes place based on the present condition, is not supported by the popular arguments that law does not require its addressees to be "morally perfect" but, quite the opposite, imposes less demanding obligations on them than ethics.[18] Questioning also this assumption, they presented an opinion that giving birth to a child with defects should not be classified as the reflection of a heroic attitude because this fact is not connected in particular with the absolute obligation to take care of that child personally.[19] The opinion was finished with a conclusion that:

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were no reasons for the introduction of a procedural element such as the specification of the level of probability of occurrence of the statutory factual circumstances (medical indications suggesting high probability) to substantive legal grounds of admissibility of abortion. The issue of a justified way of drawing conclusions concerning the occurrence of serious and irreversible impairment of a conceived child and the level of probability sufficient to assume certain factual circumstances in this area to be established should not be regulated in substantive law but is the domain of procedural law". Justification for the Bill amending the Act: Criminal Code and some other acts, p. 32, https://bip.ms.gov.pl/pl/dzialalnosc/komisje-kodyfikacyjne/komisja-kodyfikacyjna-prawa-karnego/komisja-kodyfikacyjna-prawa-karnego-2009-2013 [accessed on 15/10/2016].

[16] L. Gardocki, *Uwagi do projektu Komisji Kodyfikacyjnej dotyczącego zmian przepisów o aborcji*, Prawo i Medycyna No. 1, 2014, p. 11; also see, J. Kulesza, *Prawnokarna ochrona*…, pp. 69–71.

[17] Justification for the citizens' Bill amending the Act on planning a family, the protection of a human foetus and the conditions for admissibility of abortion, Sejm paper no. 1654, pp. 3–6; http://orka.sejm.gov.pl/Druki7ka.nsf/0/5821FF7D4C575A91C1257BD400566FA1/%24File/1654.pdf, pp. 2–6 [accessed on 15/10/2016].

[18] F. Ciepły, *Aborcja eugeniczna a dyskryminacja osób niepełnosprawnych*, Czasopismo Prawa Karnego i Nauk Penalnych No. 2, 2014, p. 82.

[19] See, *Ibid.*, p. 83; F. Ciepły, *Status prawny płodu upośledzonego*, Roczniki Nauk Prawnych No. 4, 2014, p. 35; L. Dyczewski, *Prawo do życia nienarodzonych dobrem osobistym i społecznym*, [in:] A. Dębiński et al. (ed.), *Hominum causa omne ius constitutum est. Księga jubileuszowa ku czci Profesor Alicji Grześkowiak*, Lublin 2006, p. 288; also see, W. Wróbel, *Konstytucyjne gwarancje ochrony życia a przesłanki dopuszczalności aborcji*, [in:] M. Królikowski, M. Bajor-Stachańczyk, W. Odrowąż-Sypniewski (ed.), *Konstytucyjna formuła ochrony życia*, Warsaw 2007, p. 32.

"On the basis of the eugenic condition, the life of the impaired foetus competes with the indefinite interest of a pregnant woman (motherhood undisturbed by a child's illness, mental comfort), which can mean that the condition is getting closer to a type of social condition, the compliance of which with the principle of a democratic state of the rule of law was questioned by the Constitutional Tribunal".[20]

Taking into consideration the above-presented directions of change to the teratologic condition and, at the same time, losing from sight the particular sensitivity of the discussed condition, it is also worth mentioning absolutely less radical opinions concerning its binding normative form, in which it was noticed that legal permission to perform abortion for teratologic reasons does not automatically oblige anybody to undergo a surgery terminating pregnancy. In accordance with, in fact, more liberal argumentation, a woman who learns that she will give birth to an impaired child does not have to undergo abortion. She still has a choice, which she would be deprived of as a result of outlawing abortion for teratologic reasons.[21] Moreover, it was also emphasised that consideration of the teratologic condition on the basis of uncompromising weighing "sanctity of life against quality of life"[22] diminishes all the other socially critical problems. It is in particular indicated that in the discourse concerning the condition, which in fact against some suggestions does not generate interpretational freedom,[23] one should not ignore the aspect of a woman's generosity and devotion in case she decides to give birth to an impaired child.[24] Thus, it should be said here that a state that guarantees legal protection of life in the provisions of its constitution should appreciate such an attitude and, as a result, ensure appropriate support that would implement the constitutionally declared protection of life.[25] Adequate care in this area should, inter alia, cover access to healthcare services, including prenatal diagnosis, as well as create real possibility of using pro-family policy instruments prepared especially for the implementation of this aim.[26]

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[20] F. Ciepły, *Aborcja eugeniczna a dyskryminacja...*, p. 83.

[21] M. Szczepaniec, *Etyczne i prawne aspekty dopuszczalności aborcji ze względów eugenicznych*, Białostockie Studia Prawnicze No. 13, 2013, p. 82.

[22] See, W. Jedlecka, J. Policiewicz, *Prawne i moralne aspekty aborcji i eutanazji (świętość czy jakość życia?)*, [in:] K. Nowacki (ed.), *Status i pozycja jednostki w prawie publicznym. Studia i rozprawy*, Prawo CCLXVII, Acta Universitatis Wratislaviensis No. 2169, Wrocław 1999, p. 299 ff.

[23] M. Królikowski, *Problem interpretacji tzw. przesłanki eugenicznej stanowiącej o dopuszczalności zabiegu przerywania ciąży*, [in:] L. Bosek, M. Królikowski (ed.), *Współczesne wyzwania bioetyczne*, Warsaw 2010, p. 175 ff.

[24] M. Szczepaniec, *Etyczne i prawne…*, p. 83.

[25] What deserves attention is the government announcement of October 2016 about the development (until the end of that year) of a programme of support for families and mothers who decide to give birth to children from "difficult pregnancies" and rear them; https://www.premier.gov.pl/wydarzenia/aktualnosci/premier-beata-szydlo-rzad-zrobi-wszystko-zeby-chronic-ludzkie-zycie.html [accessed on 24/10/2016]. The announcement came to fruition, see the next footnote.

[26] The justification for the "For Life" Bill of 4 November 2016 on the support of pregnant women and their families (Journal of Laws [Dz.U.] item 1860) emphasises that the addressees of the legal, organisational and financial solutions proposed in the legal act are pregnant women and families rearing children with serious health problems or handicapped ones. Thus, the Bill aims, inter alia, to: enable children until 18 years of age with serious and irreversible impairment

The justified suspicion that pregnancy results from a prohibited act (Article 4a para. 1(3) APF) is the last condition for legalising abortion. Abortion based on these grounds is admissible only until the 12th week of pregnancy (Article 4a para. 2 APF). The formulation of the condition suggests that all types of prohibited acts should be taken into account (thus, not only ones that are classified as crimes) resulting in a victim's pregnancy. Therefore, it is rightly emphasised that these will be conduct addressed against sexual liberty (inter alia, rape, incest, abuse of power and control) but also other types of prohibited acts. For example, these can also be: coercing into prostitution (Article 203 CC), bigamy (Article 206 CC), bribery in the form of providing personal gain (Article 229 CC) or performance of medical treatment consisting in in-vitro fertilisation without a patient's consent (Article 192 CC).[27] In accordance with the statutory provisions, in order to perform abortion in such cases, it would be necessary to obtain an appropriate certificate issued by a prosecutor. However, this raises a question whether in case of offences prosecuted based on a motion (see, Article 192 §2 CC) it would be necessary to file a motion to prosecute, which would result in a condition for obtaining the above-mentioned certificate. It seems that relying just on the statutory "authentication" of a statement that pregnancy results from a prohibited act and, at the same time, depriving prosecuting bodies of the possibility of verifying the fact in the course of preparatory proceedings might often prove to be insufficient.[28]

To sum up the facts established so far, it should be pointed out that the above-presented conditions legalising abortion are characterised by semantic openness, which unavoidably implies certain controversies connected with their unambiguous interpretation. Indefinite phrases used create, seemingly because of their nature, inevitable area of interpretational freedom.[29] However, it is hard to treat this statutory construction in terms of a legislative defect because equalising the use of those indefinite phrases and arbitrariness of judgement is unjustified.[30] It also

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or incurable disease endangering life that occurred at the prenatal stage or during the delivery to use palliative or hospice care services in a short order, and to ensure access to medical products specified in separate provisions on refunds up to the limit of funding from public funds determined in those provisions and a possibility of using healthcare services and pharmaceutical services provided by pharmacies in a short order. The provisions of the Bill envisage a one-off benefit of PLN 4,000 in case of giving birth to a child diagnosed as having serious and irreversible impairment or incurable disease endangering his/her life that occurred at the prenatal stage or during the delivery. See, *Uzasadnienie rządowego projektu ustawy o wsparciu kobiet w ciąży i ich rodzin „Za życiem"*, Sejm paper no. 968, pp. 1–4, http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=968 [accessed on 03/11/2016].

[27] R. Krajewski, *Problemy prawne wokół tzw. ciąży z gwałtu*, Diariusz Prawniczy No. 10–11, 2009, p. 98; J. Majewski, W. Wróbel, *Prawnokarna ochrona dziecka poczętego*, Państwo i Prawo No. 5, 1993, p. 41.

[28] R. Krajewski, *Problemy prawne…*, p. 99. According to the author, taking steps referred to in Article 308 Criminal Procedure Code could also prove to be insufficient in this area; however, see, M. Filar, *Lekarskie prawo karne*, Kraków 2000, p. 194; J. Warylewski, *Przestępstwa przeciwko wolności seksualnej i obyczajności. Rozdział XXV Kodeksu karnego. Komentarz*, Warsaw 2001, p. 67.

[29] See, W. Wróbel, *Konstytucyjne gwarancje ochrony życia a przesłanki dopuszczalności aborcji*, Biuro Analiz Sejmowych No. 3, 2007, pp. 30–33.

[30] The Constitutional Tribunal judgement of 8 May 2006, P 18/05, OTK-A 2006, No. 5, item 53.

seems that the present form of conditions for legalising abortion, in fact, constitutes an example of a compromise solution, the features of which cannot be attributed in particular to the relatively recently proposed "competitive" citizens' bills of 2016, which were rejected in the first reading. Their authors called for ensuring that women have the unconditional right to terminate pregnancy up to the 12th week, on the one hand, and for the introduction of a complete ban on abortion, on the other hand. It is worth reminding that in the justification for the more liberal abortion law in the Bill on the rights of women and conscious motherhood, it was, inter alia, raised that the binding legal solutions do not ensure sufficient possibilities of exercising reproductive rights, are unconstitutional and contribute to the development of the "abortion underground".[31] On the other hand, the other bill negated all present conditions for admissibility of abortion,[32] expressing general opposition to the binding normative solutions. It is worth mentioning that with respect to the condition for legalisation of abortion because of the threat to a pregnant woman's life or health, the justification for the Bill stated, inter alia, that contemporary medicine does not know cases that would justify depriving a conceived child of life in order to save a mother's health. Approving of, although completely exceptionally, admissibility of sacrificing a conceived child's life in order to save a mother's life, the further part of the justification introduces a restriction: it might occur exclusively in a situation when "(…) abortion surgery is the only possible way objectively making it possible to save a mother's life".[33] However, the Bill authors were unambiguously critical of the teratologic reasons treating them as discriminatory as well as the criminal conditions emphasising that there is no "right to refuse to give birth to a child".[34]

3. ADMISSIBILITY OF ABORTION IN THE LIGHT OF PUBLIC OPINION

Justifying the proposed legislative solutions by pointing to the present attitude of the public, even if they are free from populist manipulation, requires far-reaching carefulness.[35] One should approve of an assumption that a rational legislator should

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[31] Justification for the citizens' Bill on the rights of women and conscious parenthood, Sejm paper no. 830, p. 13 ff, http://orka.sejm.gov.pl/Druki8ka.nsf/0/3C2A10A649B1C39EC12580290048DCD3/%24File/830.pdf [accessed on 24/10/2016].

[32] Justification for the citizens' Bill amending the Act of 7 January 1993 on planning a family, the protection of a human foetus and the condition for admissibility of abortion and the Act of 6 June 1997: Criminal Code, Sejm paper no. 784, p. 9 ff, http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=784 [accessed on 15/10/2016].

[33] *Ibid*., p. 10.

[34] *Ibid*., p. 12.

[35] What remains an especially dangerous phenomenon in this area is penal populism with the use of which public opinion is instrumentally used. Then, the moods manipulated by the media serve to justify the introduction of certain legal and penal solutions. For this issue, see inter alia Ch. Pfeiffer, M. Windzio, M. Kleimann, *Media, zło i społeczeństwo. Wykorzystanie mediów i ich wpływ na postrzeganie przestępczości i postawy wobec polityki karnej*, Archiwum Kryminologii Vol. XXVIII, 2005–2006, p. 39; H. Gajewska-Kraczkowska, *O audiowizualnych rejestracjach rozprawy głównej – de lege ferenda*, [in:] S. Waltoś (ed.), *Problemy kodyfikacji prawa karnego. Księga ku czci*

not come under pressure from the public and be governed by those feelings of society that are "from the point of view of the contemporary knowledge of rational law, downright anachronistic".[36] A legislator's task is not to come under pressure of the public but to strive to shape it in the right way by means of enacted law.

On the other hand, it should also be taken into account that imposed normative solutions that do not find supporters in the community will not only fail to fulfil their tasks in shaping the legal awareness of the public but, what is more important, may have quite anti-educational influence.[37] Thus, a typical compromise prescribes assuming that, although public opinion is "an extraordinarily fussy phenomenon",[38] its voice cannot be a priori depreciated. Due to that, it seems that a legislator should not be indifferent to public opinion but "(…) based on reasonable selection, pick up its constructive elements".[39]

A certain moderate attitude to the role of public opinion in the process of enacting law suggested above, on the one hand, and justified fear concerning future efficiency of the proposed solutions that do not enjoy public support, on the other hand, suggest referring to the presented opinion polls illustrating public opinion on the conditions for admissibility of abortion.

The opinion poll conducted by CBOS in 2016[40] provides undoubtedly significant information about social expectations concerning the shape of abortion regulations. Within the survey, a representative group of adult citizens of Poland were asked not only to express their opinion on the conditions for admissibility of abortion but also to state what their attitude was to other reasons for lawful abortion that are unknown to Polish law.

As a form of introduction to the issue, first the respondents were asked to express their opinion on the scope of human life protection. 66% of the respondents gave a positive answer to the question: "Are you of the opinion that people who say that human life from conception to natural death should always and regardless of circumstances be protected are right?" (the rate refers to the answers: "absolutely yes" and "rather yes"). Only 28% of the respondents did not agree (gave the

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Profesora Mariana Cieślaka, Kraków 1993, p. 498; Z. Ćwiąkalski, *Głos w dyskusji*, [in:] Z. Sienkiewicz, R. Kokot (ed.), *Populizm penalny i jego przejawy w Polsce. Materiały z Ogólnopolskiego Zjazdu Katedr Prawa Karnego, Szklarska Poręba, 24–27 września 2008 r.*, Wrocław 2009, p. 79; T. Kaczmarek, *Racjonalny ustawodawca wobec opinii społecznej a populizm penalny*, [in:] Z. Sienkiewicz, R. Kokot (ed.), *Populizm penalny…*, p. 34 ff; W. Zalewski, *Populizm penalny – próba zdefiniowania zjawiska*, [in:] Z. Sienkiewicz, R. Kokot (ed.), *Populizm penalny…*, p. 24; A. Zoll, *Głos w dyskusji*, [in:] A. Marek, T. Oczkowski (ed.), *Problem spójności prawa karnego z perspektywy jego nowelizacji. Materiały Ogólnopolskiego Zjazdu Katedr Prawa Karnego, Toruń 20–22 września 2010 r.*, Warsaw 2011, p. 111; by this author, [in:] T. Bojarski et al. (ed.), *System Prawa Karnego. Źródła prawa karnego.* Vol. 2, Warsaw 2011, p. 233.

36 T. Kaczmarek, *Racjonalny ustawodawca wobec opinii społecznej a populizm penalny*, Archiwum Kryminologii Vol. XXIX–XXX, 2007–2008, p. 522.

37 S. Zabłocki, *Glosa do wyroku Sądu Najwyższego z dn. 22 III 1974 r., IV KRN 6/74*, Państwo i Prawo No. 10, 1975, pp. 180–181.

38 T. Kaczmarek, *Sędziowski wymiar kary w Polskiej Rzeczypospolitej Ludowej w świetle badań ankietowych*, Wrocław–Warsaw–Kraków–Gdańsk 1972, pp. 287–288.

39 *Ibid*.

40 *Komunikat z badań CBOS. Opinie o dopuszczalności aborcji*, No. 51/2016, Warsaw 2016, pp. 1–14.

answers: "absolutely not" or "rather not"). One in seventeen respondents (6% of the total number) did not have an opinion. The findings showed the volatility of public opinion in this area at the same time. In comparison with the former survey of 2011, the percentage of respondents giving a positive answer to the question decreased (by 20%) and the number of people disagreeing with the statement that human life should be protected from conception to natural death increased (from 9% to 28%).[41]

Going on to the essence of the matter, it is necessary to present public opinion concerning the binding circumstances and proposed cases in which abortion should be admissible.

The empirical data obtained make it possible to state that the highest rate of the respondents approves of abortion in situations that are in conformity with the standards of the national legislation. The first of the conditions presented in the table below met with the highest social consent. In March 2016, 80% of the respondents approved of admissibility of abortion when the life of a mother is in danger. Taking into account the answers given formerly, it should be pointed out that the result was the lowest over the last 24 years.[42] However, it is worth mentioning that the rate rose by 4% (to 84%) in the opinion poll conducted a month later.[43]

On the other hand, the condition for legal abortion based on a threat to a mother's health gained fewer supporters (71%).[44] However, it should be made clear that the latest survey showed an increase (by 5%) in support to this condition for abortion (76%).[45] Also, the survey of October 2016 confirms the increasing level of permissiveness towards abortion for the discussed reasons. 86% of the respondents declared support for admissibility of abortion in case of a threat to life and 77% in case of a threat to a mother's health.[46]

As far as other conditions for lawful abortion in Polish law are concerned, the teratologic reason gained the fewest supporters. Its statutory wording was simplified for the needs of the survey and the respondents were asked to assess admissibility of abortion if it was known that a child would be born impaired. Based on the empirical data collected, it was found that 53% of the respondents supported abortion in such cases, which was, at the same time, the lowest result obtained over the last twenty years.[47]

In the context of the discussed condition, it is also worth mentioning that the above version of the question was modified in a survey conducted a month later. This time, the respondents were asked to answer a question whether abortion should be admissible if, based on medical examinations, it was known that a child would be born with serious impairments. Then, 61% of the respondents gave a positive answer. In the commentary to the survey, it was stated that the increase in support

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41 *Ibid*, p. 1.

42 *Ibid*., p. 5.

43 *Komunikat z badań CBOS. Dopuszczalność aborcji w różnych sytuacjach*, No. 71/2016, Warsaw 2016, p. 2.

44 *Komunikat z badań CBOS. Opinie o dopuszczalności…*, p. 5.

45 *Komunikat z badań CBOS. Dopuszczalność aborcji…*, pp. 2–3.

46 *Komunikat z badań CBOS. Jakiego prawa aborcyjnego oczekują Polacy?*, No. 144/2016, Warsaw 2016, p. 1.

47 *Komunikat z badań CBOS. Opinie o dopuszczalności…*, p. 4.

could result from, in fact, very broad meaning of the term "serious impairments", which covers various diseases.[48]

On the other hand, taking into account the latest analysis in which the question about the assessment of admissibility of abortion when it is known that a child will be born impaired was repeated, it is necessary to point out that 60% of the respondents gave a positive answer,[49] which undoubtedly matches the general increasing social tendency to approve of pregnancy termination surgeries.

The criminal reasons, formulated in a slightly different way from their statutory wording, gained even higher support of the public than the teratologic condition. It must be highlighted here that also the wording of this condition was considerably simplified for the needs of the survey. While statute stipulates that abortion is admissible in case pregnancy results from a prohibited act, the question the respondents were asked was limited to its two (statistically most common) types, i.e. rape and incest.[50] The survey finding suggests that 73% of the respondents approve of abortion in such circumstances. It is worth mentioning that the research conducted later, this time a more detailed one, indicated that when pregnancy results from rape, abortion gains stronger support of the public (74%) than when it results from incest (58%).[51] At the same time, it should be mentioned that the latest research makes it possible to observe an increase in the support of the public for abortion based on that condition (the survey of October 2016 indicates that 79% of the respondents approve of abortion if it results from a prohibited act).[52]

However, as far as the questions of the present research concerning circumstances that are not listed in the binding law as ones justifying abortion are concerned, it must be stated that a difficult financial situation (20% approval), a difficult personal situation (17% approval) as well as unwillingness to have children (14% approval) should not constitute conditions for lawful abortion in the opinion of the majority of respondents.[53] The respondents presented similar attitudes towards unconditional admissibility of abortion (i.e. without giving a reason) after the 12th week of pregnancy (only 13% approval).[54] What is important, the presented proportions of opinions occurred in the whole population examined, which means also among

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[48] *Komunikat z badań CBOS. Dopuszczalność aborcji…*, p. 4.

[49] *Komunikat z badań CBOS. Jakiego prawa aborcyjnego…*, p. 1.

[50] *Komunikat z badań CBOS. Opinie o dopuszczalności…*, p. 4.

[51] *Komunikat z badań CBOS. Dopuszczalność aborcji…*, p. 5.

[52] *Komunikat z badań CBOS. Jakiego prawa aborcyjnego…*, p. 1.

[53] *Ibid.*, p. 3. It is worth mentioning that in the context of the challenged in 1997 condition for admissibility of abortion for the reason of difficult living conditions or a difficult personal situation, the Constitutional Tribunal stated that indefiniteness of those phrases: "(…) causes that it is not possible to determine the nature of constitutionally protected values because of which the legislator decides to legalise the infringement of another constitutional value. It is inadmissible, especially as based on them human life is taken, thus there is an infringement, as the same legislator indicates in the Preamble, of the fundamental human value". The Constitutional Tribunal ruling of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

[54] The latest survey indicates even lower public support for abortion for the above-mentioned non-statutory reasons: 11%, 11%, 12% and 13% of the respondents gave a positive answer to the questions about the above-mentioned circumstances, respectively. *Komunikat z badań CBOS. Dopuszczalność aborcji…*, pp. 7–8.

women in reproductive age, which is in fact worth emphasising.[55] The latest opinion poll findings also confirm negative assessment of non-statutory conditions for abortion. Other successive reasons, not mentioned in the CBOS surveys before, did not meet with positive opinions. The empirical material collected made it possible to establish that only one in five respondents believed that abortion should be admissible when a mother is under age (20%). A little more people (30%) expressed readiness to approve of lawful abortion in case of both parents' impairment that prevents them from taking care of a child.[56]

Thus, the conducted surveys indicate that the present abortion law in Poland, in general, satisfies the expectations of the public,[57] which, as a result, correlates with the opinion of the Constitutional Tribunal that: "Legal norms should be based on the system of values accepted by the community, especially when it concerns fundamental values".[58] Moreover, in the light of the above-presented findings, one can state that the compromise worked out over twenty years ago, although not fully satisfactory for any of the parties to the discussion on the scope of legal protection of a conceived child,[59] *in genere* proved to be the right solution meeting social preferences in this area. The essentially positive assessment of the binding abortion law makes it also possible to notice that excessive liberalisation as well as excessive tightening of the rules of abortion admissibility do not reflect the mentality of the Polish society. Due to that, it seems that any attempts to extend admissibility of abortion as well as narrowing or eliminating admissibility of such treatment would be hard to justify with the "will of the public opinion".[60]

4. CONCLUSIONS

Normative regulation of pregnancy termination surgeries is sometimes connected with an accusation addressed to the legislator and concerns the infringement of the individual sphere of citizens' liberties, the freedom of man's choice or the adopted

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[55] *Komunikat z badań CBOS. Opinie o dopuszczalności…*, p. 7.

[56] *Komunikat z badań CBOS. Dopuszczalność aborcji…*, p. 6.

[57] According to the survey of October 2016, the majority of the respondents (62%) were for the maintaining of the abortion law status quo and, this way, expressed their belief that the binding statute should not be amended. However, below a quarter of the respondents (23%) opted for liberalisation of abortion law. On the other hand, 7% of the respondents stated that the binding statute should be aggravated. *Komunikat z badań CBOS. Jakiego prawa aborcyjnego…*, p. 6. It must be pointed out, however, that the support for this opinion decreased slightly in the light of the latest survey conducted in November 2016 (58% of the respondents were for maintenance of unchanged regulations, 27% were for liberalisation and 7% for their aggravation). *Komunikat z badań CBOS. Polacy o prawach kobiet, „czarnych protestach" i prawie aborcyjnym*, No. 165/2016, Warsaw 2016, p. 16.

[58] The Constitutional Tribunal decision of 7 October 1992, U 1/92, OTK 1992, No. 2, item 38.

[59] A. Zoll, *Ochrona dziecka poczętego w fazie prenatalnej w pracach komisji kodyfikacyjnej prawa karnego*, Studia Prawnicze KUL No. 2, 2013, p. 126.

[60] It must be highlighted that, although the research covered a representative group of adult citizens of Poland, the knowledge obtained based on it is much more reliable than knowledge based on random-instinctive cognition.

worldview. As a result, a question arises whether the law, regulating the issue of abortion, does not appropriate the space that, in fact, should be left to moral and ethical assessment. Giving a positive answer to the question, one states that the introduction of a certain normative regulation does not immediately translate into giving up one's own often well-established ideological beliefs. Thus, it would mean that for the opponents of abortion as well as for its supporters, any changes aimed at liberalisation or tightening of the binding abortion provisions would not lead, in fact, to the change of individual moral assessment of abortion only because the legislator made this or that decision. Consequently, it should be pointed out that in the light of the presented situation, the law would not only be deprived of the possibility of forcing citizens to make choices being in conflict with moral beliefs of the public but would also have to tolerate and, this way, refrain from introducing sanctions if the citizens' conduct were not in conformity with the given moral standards.

In the context of the present discussion, another doubt occurs and makes us consider whether the law should really be or can be axiologically indifferent at all. The revival of the question turns to be apparent because, already *prima facie*, it is hard to imagine moral neutrality of legal provisions that are designed to disregard respecting and, this way, ensuring specific support for certain ethical values and rules.[61] Taking into account worldview pluralism, especially ethically differentiated social assessment of some types of human conduct, one should share the opinion presented in literature that we should, in fact, expect the legislator to present "(…) not just moral neutrality but mainly solutions based on reasonable compromise, which, in (…) the protection of moral values, would take into consideration the functioning of a rule and an exception".[62] Therefore, in conclusion, it should be stated that, although not all moral obligations and bans may be strengthened with the use of a sanction, especially a penal law sanction,[63] it would be hard to recognise a complete lack of legal protection, including penal law protection, as an optimum solution.[64]

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[61] W. Sadurski, *Neutralność moralna prawa*, Państwo i Prawo No. 7, 1990, p. 28 ff.

[62] T. Kaczmarek, *Prawo karne wobec moralności. Spory wokół moralnego i prawnego statusu płodu ludzkiego*, [in:] K. Krajewski (ed.), *Nauki penalne wobec problemów współczesnej przestępczości. Księga jubileuszowa z okazji 70. rocznicy urodzin Profesora Andrzeja Gaberle*, Warsaw 2007, p. 91.

[63] According to T. Kaczmarek: "The supporters of absolute legal ban on the termination of pregnancy, even that resulted from rape or incest, sometimes refer to the evangelic principle of 'a good Samaritan', who should show love to a child conceived as a result of a prohibited act and seem not to notice that expecting a raped mother to show such a heroic moral attitude, undoubtedly deserving moral appreciation, cannot be coerced by the state. The obligation to be 'a good Samaritan', like the obligation to love a neighbour, is only a moral must and not a legal one. Forced with the use of the state coercive measures, it would not only be in conflict with the internal morality of law but would also depreciate the depth and charm of Christian values", *ibid.*, p. 96. Also see, the Constitutional Tribunal decision of 7 October 1992, U 1/92, OTK 1992, No. 2, item 38, in which it was raised that: "Collections of legal norms and ethical norms are not identical and form two relatively independent circles. Thus, there are no grounds for stating that an ethical norm must be in agreement with a legal norm. Such a statement would assume the priority of legal norms over ethical norms. However, it is the law that should have ethical legitimisation. Ethics does not need legislative legitimisation".

[64] It is worth pointing out that the Constitutional Tribunal case law draws attention to the fact that: "(…) the stronger the link of the given right or freedom with the essence of

Respondents' answers according to the time of survey

Do you think abortion should be legally admissible when:	March 1992		June 1999		October 2002		January 2005		November 2006		September 2007		June 2010		August 2011		November 2012		March 2016		October 2016	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
	%																					
a mother's life is in danger	88	6	86	6	85	8	88	8	86	8	91	5	87	7	87	7	81	11	80	11	86	7
a mother's health is in danger	82	11	77	14	77	14	80	14	77	15	85	9	78	14	79	14	71	18	71	18	77	14
pregnancy results from rape or incest	80	10	72	16	73	15	77	15	73	16	79	12	78	12	78	13	78	13	73	16	79	14
it is known that a child will be born impaired	71	15	61	24	65	21	66	22	62	24	66	21	60	25	59	27	61	23	53	30	60	25
a woman is in a very difficult financial situation	47	39	38	47	44	44	42	46	27	59	34	55	26	63	24	65	16	73	14	75	20	72
a woman is in a very difficult personal situation	–	–	–	–	38	47	36	51	21	64	30	56	23	65	21	67	13	74	13	75	17	74
a woman simply does not want to have a child	–	–	–	–	28	58	28	60	16	72	23	66	18	73	16	75	14	75	13	76	14	28

Source: *Komunikat z badań CBOS. Jakiego prawa aborcyjnego oczekują Polacy?*, No. 144/2016 [CBOS communique: What kind of abortion law is expected by Poles?], Warsaw 2016, p. 3.

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human dignity is, the better (more efficiently) should public authorities protect it". See, the Constitutional Tribunal judgement of 30 October 2006, P 10/06, OTK-A 2006, No. 9, item 128; the Constitutional Tribunal judgement of 20 March 2006, K 17/05, LEX No. 182494; also see, L. Gardocki, *Subsydiarność prawa karnego oraz in dubio pro libertate – jako zasady kryminalizacji*, Państwo i Prawo No. 12, 1989, p. 65; R. Kokot, J. Jasińska, *Kilka uwag o ochronie życia poczętego w kontekście projektowanych zmian kodeksu karnego*, Nowa Kodyfikacja Prawa Karnego Vol. XXXI, 2014, p. 34.

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CONDITIONS FOR LAWFULNESS OF ABORTION

Summary

The paper is devoted to selected issues concerning legal and empirical aspects of conditions for lawfulness of abortion. During the applicable analyses, first of all, reference is made to the binding Polish legislation which allows performing abortion for reasons of medical, teratologic and criminal nature. Due to the recently proposed amendments (in this regard, Bills of 2013 and 2016 are considered) aimed at changing those regulations, the further part of the article attempts to highlight the contemporary views of the Polish society on the grounds for admissible abortion laid down in the domestic legislation and legal changes being prepared. The analysis of the available survey results made it possible to note that the present form of the abortion law is an example of a solution generally accepted by the community, which means that "the demands of public opinion" cannot justify its "drastic" modification, and it might even be perceived as some kind of abuse.

Keywords: termination of pregnancy, conditions for lawfulness of abortion, public opinion vs abortion

WARUNKI LEGALNOŚCI PRZERYWANIA CIĄŻY

Streszczenie

Niniejsze opracowanie poświęcono wybranym zagadnieniom z zakresu prawno-empirycznej problematyki warunków legalności przerywania ciąży. Podejmując stosowne w tym zakresie analizy, w pierwszej kolejności odwołano się do obowiązującego w Polsce ustawodawstwa, zezwalającego na przeprowadzenie zabiegów przerywania ciąży z przyczyn o charakterze medycznym, teratologicznym oraz kryminalnym. Wobec przygotowanych propozycji nowelizacyjnych (w tym zakresie nawiązano do projektów z 2013 r. i 2016 r.), zmierzających do zmiany wspomnianych regulacji, w dalszej części artykułu starano się naświetlić prezentowane wówczas poglądy polskiego społeczeństwa na temat obowiązujących w rodzimym ustawodawstwie przesłanek dopuszczalnej aborcji oraz projektowanych zmian prawnych. Analiza badań sondażowych pozwoliła zauważyć, że obecny kształt tzw. prawa aborcyjnego stanowi w istocie przykład rozwiązania ogólnie aprobowanego społecznie, co w konsekwencji oznaczałoby, iż uzasadnianie konieczności jego „drastycznego" przemodelowania „wolą opinii publicznej" pozostawałoby mało przekonujące, a wręcz świadczące o pewnego rodzaju nadużyciu.

Słowa kluczowe: przerywanie ciąży, warunki legalności przerywania ciąży, opinia publiczna a aborcja

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