MEDICAL LAW

CASES AND COMMENTARIES

Zbigniew Banaszczyk ▪ Maria Boratyńska
Witold Borysiak ▪ Leszek Bosek
Beata Janiszewska ▪ Marek Safjan
Przemysław Sobolewski

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Warszawa 2012

Wydanie publikacji zostało dofinansowane przez Wydział Prawa i Administracji Uniwersytetu Warszawskiego.
Publication co-financed by the Faculty of Law and Administration, University of Warsaw.

Wydanie publikacji zostało dofinansowane przez Fundację Uniwersytetu Warszawskiego.
Publication co-financed by the University of Warsaw Foundation.

Wydawca/Publisher:
Izabella Małecka

Redaktor prowadzący/Senior Editor:
Adam Choiński

Tłumaczenie/Translation:
Magdalena Arent, Monika Chudzyńska, Wojciech Wołoszyk (IURIDICO Doradztwo Prawne i Tłumaczenia) oraz Autorzy/and the Authors

Łamanie/Text design:
Violet Design

Autorzy/Authors:
Zbigniew Banaszczyk – Chapter III: paras 4–7; Chapter IV: para. 10;
Maria Boratyńska – Chapter VI: paras 4, 5, 7; Chapter VII: paras 1–3, 6;
Witold Borysiak* – Chapter I: para. 7; Chapter II: para. 4; Chapter III: para. 12; Chapter IV: paras 1–4, 13, 16, 18–20; Chapter V: paras 4, 5, 7; Chapter VI: paras 2, 3; Chapter VII: para. 5;
Leszek Bosek – Chapter I: paras 1–6, 8–10; Chapter II: paras 1, 2, 5–12; Chapter IV: para. 12; Chapter V: paras 1–3, 5, 6; Chapter VI: para. 6; Chapter VII: para. 4;
Beata Janiszewska – Chapter III: paras 8, 10, 11; Chapter IV: paras 4, 5, 7–9;
Przemysław Sobolewski – Chapter II: para. 3; Chapter III: paras 1–3, 9; Chapter IV: paras 6, 11, 14, 15, 17; Chapter VI: para. 1.

*Author is a fellow of the Foundation for Polish Science.

Niniejsza publikacja jest uaktualnioną i rozszerzoną wersją książki *Prawo wobec medycyny i biotechnologii. Zbiór orzeczeń z komentarzami* (Warszawa 2011).

This book is an expanded and updated edition of *Prawo wobec medycyny i biotechnologii. Zbiór orzeczeń z komentarzami* (Warszawa 2011).

ISBN: 978-83-264-1120-5

ISBN PDF-a: 978-83-264-4658-0

Wydane przez/Published by:

Wolters Kluwer Polska Sp. z o.o.

01-231 Warszawa, ul. Płocka 5a
tel. 22 535 82 00, fax 22 535 81 35

e-mail: ksiazki@wolterskluwer.pl

www.wolterskluwer.pl
Księgarnia internetowa www.profinfo.pl

CONTENTS

ABBREVIATIONS

Periodicals

Acta UWr.	–	Acta Universitatis Wratislaviensis
Apel.-W-wa	–	Apelacja. Orzecznictwo Sądu Apelacyjnego w Warszawie
CMLRev.	–	Common Market Law Review
Dz. U.	–	Dziennik Ustaw
ELRev.	–	European Law Review
ECR	–	European Court Reports
KPP	–	Kwartalnik Prawa Prywatnego
M. Praw.	–	Monitor Prawniczy
NP	–	Nowe Prawo
OJ	–	Official Journal of the European Union
OSA	–	Orzecznictwo Sądów Apelacyjnych
OSNC	–	Orzecznictwo Sądu Najwyższego. Izba Cywilna
OSNCK	–	Orzecznictwo Sądu Najwyższego Izby Cywilnej i Izby Karnej
OSNCP	–	Orzecznictwo Sądu Najwyższego. Izba Cywilna, Pracy i Ubezpieczeń Społecznych
OSNKW	–	Orzecznictwo Sądu Najwyższego. Izba Karna i Wojskowa
OSP	–	Orzecznictwo Sądów Polskich
OSPiKA	–	Orzecznictwo Sądów Polskich i Komisji Arbitrażowych
OTK	–	Orzecznictwo Trybunału Konstytucyjnego
OTK-A	–	Orzecznictwo Trybunału Konstytucyjnego; zbiór urzędowy, Seria A
PiM	–	Prawo i Medycyna
PiP	–	Państwo i Prawo
PPUW	–	Przegląd Prawniczy Uniwersytetu Warszawskiego
Prok. i Pr.	–	Prokuratura i Prawo
Prz. Leg.	–	Przegląd Legislacyjny
Prz. Sejm.	–	Przegląd Sejmowy
PS	–	Przegląd Sądowy
RPEiS	–	Ruch Prawniczy, Ekonomiczny i Socjologiczny
St. Cyw.	–	Studia Cywilistyczne
St. Praw.	–	Studia Prawnicze
TPP	–	Transformacje Prawa Prywatnego
WPP	–	Wojskowy Przegląd Prawniczy

Others

CC	–	Civil Code
CCP	–	Code of Civil Procedure
CPP	–	Code of Penal Procedure
CT	–	Constitutional Tribunal
ECHR	–	European Court of Human Rights
EEC	–	European Economic Community
ECJ	–	European Court of Justice (as of 1.12.2007 – Court of Justice of the European Union)
FGC	–	Family and Guardianship Code
HCFA	–	Health Care Facilities Act
HRD	–	Human Rights Defender
LEX	–	Legal Information System LEX
MDDPA	–	Medical Doctor and Dentist Profession Act
PC	–	Penal Code
SC	–	Supreme Court
TEC	–	Treaty establishing the European Community
TEU	–	Treaty on European Union
TFEU	–	Treaty on the Functioning of the European Union

INTRODUCTION

I. The role of judicial decisions in development of medical law

Medical law is slowly evolving into a classic research discipline, also lectured on at third-level law faculties. The need of a modern lawyer to complement his/her knowledge within this area has increased for two fundamental reasons.

First of all, more and more cases arise that touch upon various aspects of health care operation and provision of medical services connected not only, as it used to be formerly the case, with penal or civil liability of a doctor, but also concerning the most complex dilemmas, legal as much as ethical, such as assessment of the legal relevance of *pro futuro* declarations (concerning medical proceedings when a patient is not capable of expressing consent), determining filiation in medically assisted procreation treatment, protection of personal rights of transsexuals, the quality of life of a person with irremovable genetic defects, criteria for ordering services when it is impossible to satisfy the needs of all awaiting persons, required medical intervention standard, considering the more and more diversified "offer" from modern medicine of fundamentally different effectiveness and, last but not least, the costs. These are only a few examples of problems, far from exhausting the list, which until recently, as it seemed, could not and even should not have been brought to court.

Secondly, the process of specific "juridisation" of medicine has commenced and is related to fundamental changes in the sphere of legal awareness among average individuals, whose expectations as regards exercising their right to health protection have been steadily rising, while at the same time, the distance between social aspirations and possibilities to fulfil them has increased, which results in tensions and further legal and ethical dilemmas.

Given the circumstances, judicial decision-making has begun to reflect quite accurately discussions on the borderline of modern medicine and law. There is an array of significant reasons for which an analysis of medical law problems from the angle of judicial decisions seems fruitful for further reflections and academic research, as well as beneficial from the perspective of practitioners' needs and university teaching. In the foreground, there is the nature of issues to be resolved. The statement that the so-called "case law" plays a far more important role in medical law than in any other area of law is not exaggerated, for here the research perspective is far more strongly influenced by issues arising against the background of particular cases, where the diversity of legal assessments

and qualifications depends on the context, certain facts of the case and circumstances. The catalogue of "variables", which must be considered when resolving certain problems, is quite naturally developed at a high level of generality through normative and deontological regulations, and already the confrontation of those criteria with circumstances of a given case allows one to find a satisfactory solution or answer. The search for rightness and correctness of a certain solution more often requires from adjudicating authorities a higher level of latitude, creativity and particular ease in decision-making (which by no means should be identified with arbitrariness) than in other areas of law. The methodology of resolving legal and medical disputes is based not only on the subtlety of dogmatic reasoning, but also on professional, constant confrontation of fundamental assumptions and values of the system (very often of hierarchically highest levels) with individualised circumstances of specific cases. Thus, presenting the methodology against the background of the "case law" seems necessary in order to understand interpretation of modern medical law. Deliberations on, e.g. autonomy of the patient, the concept of "informed consent" and the scope of duty to inform, would be up in the air, become a pure, empty abstract unless they were confronted with the circumstances of a specific case. The law, as per our continental legal tradition, may not (and should not) be excessively casuistic in its nature, in particular as regards medical law, since this would pose too considerable a risk of issuing unfair decisions, and such a risk, in consequence, additionally reinforces the need to exercise necessary judicial discretion.

Third of all, medical law, more often than other fields, involves problems which the law maker has not yet responded to, has not yet provided adequate solutions to, but which, in practice, require adoption of a specific stance against the background of particular cases. The silence of the law, and strictly speaking of the law maker, does not exempt one from the obligation to search for a correct answer with respect to cases that arise in practice. The law detests emptiness, what is more, it may not admit to helplessness and avoid decision-making. It is in such cases that the creative role of courts is revealed, which "case by case" identify correct decisions and search for answers, which with time become established norms. That was the case in many legal systems with respect to problems relating to medically assisted procreation, where at the first stage, the rules developed by judicial decisions were established to eventually take the form of normative rules introduced to relevant codes. Such a phenomenon could also be noticed in the case of transsexualism, which issue in the Polish law is to this day still resolved by way of controversial interpretation of provisions of the Act on Registry Office Records. Similarly, in most countries assessment and classification of claims as the so-called *wrongful conception, wrongful life* and *wrongful birth* are based on judicial decisions. In most of legal systems, it is also difficult to find express and clear legal rules referring to medical proceedings at the last stage of life, when the essence of such is a decision on discontinuance or continuance of therapy, applying extraordinary measures or the so-called persistent therapy, or respecting patient's wishes expressed in advance (in the so-called *pro futuro* declarations). Without the knowledge of judicial decisions in these fields and most of all gradually consolidating interpretation trends in judicial practice, probably future legal solutions could not be brought up for discussion.

Judicial decisions in medical law mean a sequence and turning points, continuation and dramatic turns at the same time. Naturally, the qualities of law should include stability and predictability, yet as it can be seen from past experiences, radical changes in assessment and classification of different phenomena were often triggered under the influence of fundamental and significant judicial decisions. Such phenomena were noticed in many legal systems, for instance in the American case law concerning the so-called cessation of therapy in persons connected for many years to apparatus sustaining blood circulation and breathing processes (case *K. Quinlan* in the USA, etc.), resolutions of the Federal Constitutional Court of Germany or the *Cour de Cassation* in France concerning wrongful life, etc. In medical cases, the concepts evolve not only with regard to phenomena emerging under the influence of modern biotechnology and medicine, but also surface in spheres traditionally pertaining to the area of legal reflections and analyses and, most of all, civil liability, its premises, scope and rules. It is enough to take a closer look at the evolution that has taken place in this area within the last several dozen years in the Polish law against the background of the substantially the same normative solutions, to see how much the approach expressed in judicial decisions has changed with respect to main categories of liability such as fault and classification of cases of undue diligence, malpractice and a distinction between the culpable and non-culpable error, fault of an institution in the context of hospital liability, causation, risk in vicarious liability, compensation for immaterial harm, concurrence of *ex delicto* and *ex contractu* medical liability, etc.

II. Assumptions of the study

The intention of the authors of this book was to present the above-discussed tendencies by means of selected, characteristic, significant and sometimes even landmark decisions from the last several dozen years.

The selected judicial decisions are not exhaustive, however, an effort was made to include all most notable settlements, which today affect the accepted manner of interpretation and the approach to the issues of medical law. The authors, due to their specialisation, focus on judicial decisions in civil cases, entering the area of the penal law only when in civil judicial decisions no relevant provisions were found that would be good examples of certain basic issues emerging in medical law (e.g. problems of psychiatric confidentiality, Decision of the Supreme Court of 20 April 2005, I KZP 6/05; scope of duty to provide help, Decision of the Supreme Court of 14 June 1956, IV KO 17/55; consent against the background of subsidiary function of the penal law, Judgment of 28 November 2007, V KK 81/07).

Due to the fundamental meaning of constitutional regulations for development of medical law, an attempt was made to present decisions of the Polish Constitutional Tribunal relating to this subject in the possibly most exhaustive manner. Today, such decisions are a significant point of reference for establishing a proper axiological framework when settling particular problems, especially if there is a need, due to interpretative difficulties,

to refer to such principles as respect for the dignity of each person, protection of life and bodily integrity, autonomy and privacy of an individual.

International and foreign judicial decisions are presented only in an illustrative manner for the study is not of comparative nature and does not aim at comprehensive presentation of tendencies in this area within international and foreign legal systems. Such a study would have to be of quite a different character and require alternative methodology and criteria for selecting relevant decisions. Thus, the authors decided to choose decisions, which are of special importance for debates taking place in Poland and problems that emerge today against the background of the Polish practice (e.g. case of *Pretty* before the ECHR concerning the right to assisted suicide in the case of terminal illness, the case of wrongful life in German and French judicature, issues of transsexualism in European judicature, or the issue of forced sterilisation in American judicature, all of which have been brought up for discussion in Poland).

Decisions and commentaries were grouped in 7 sections. Whereas the first two sections include constitutional and European decisions that touch upon various issues, the remaining five sections concern the merits and are related to particular branches of medical law. The content of a conclusion to a particular decision, which in most cases is consistent with the conclusions expressed in published judicial decisions, was the criterion for the classification of that decision to a particular section. Instances, in which the conclusion is of "author's" nature (that is, it provides separate reasons for settlement adopted by the authors) were expressly stressed in the text.

The authors' commentaries are not glosses on decisions in the direct meaning of the term. Their main purpose was to identify the most important problem of a given resolution, place the decision in the context of previous trends in judicial decisions, point out new elements and arguments, and to indicate primary moot points. References to basic literature for particular sections are specified in the introductory parts thereto. Each commentary refers also to the most significant titles in literature and earlier judicial decisions, which are relevant to issues raised in specific decisions.

III. Tendencies and principles in modern medical law versus judicial decisions

Judicial decisions, as previously mentioned, reflect well the evolutionary process which has been taking place in the sphere of medical law for several dozen years. It is worth stressing two fundamental stimuli that substantially determine the directions of that evolution. On the one hand, it results from universal recognition of the principle of respect for the dignity of each person, and on the other hand, from the principle of autonomy and freedom of an individual, i.e. values of special relevance in the entire array of cases concerning the protection of life, health, bodily integrity and privacy. Both values – dignity and autonomy – are interdependent: there is no protection of autonomy and freedom without prior recognition of dignity as a fundamental value constituting the source of other rights and freedoms, but the dignity will also be violated each time a person is fully deprived of freedom to decide about himself/herself. Any other basic

normative interpretations and principles within the confines of medical law are to some extent derivatives of the principle of dignity and autonomy, and this concerns matters related, among others, to the concept of informed consent, protection of confidentiality and privacy, equal access to benefits from public funds, medical personnel's duty to inform, etc.

It is impossible to understand modern solutions in the area of medical law without referring to those key "initial" values. The development of the concept of patient's autonomy and a fundamental change of the paradigm in the patient – doctor relation is strongly inspired by the values placed at higher levels of the legal system, which is the reason for such frequent and even indispensable references to constitutional or conventional standards in modern, both medical and bioethical, discussions. The law, also judicial law in this area, is no longer a field in which purely dogmatic analysis could lead to correct conclusions and settlements.

More and more often, serious disputes are resolved in modern medical law by searching for a proper point of balance between values of fundamental meaning which are in conflict in given circumstances. Thus, a most frequently required analysis is that going beyond the purely formal, juridical scope since it proves necessary to determine proper relations in an axiological order. The indispensability of such an approach is evident not only against the background of judicial decisions relating to questions which, due to their nature, are entangled in the constitutional or conventional context (as in cases decided by constitutional and international courts), but also in the light of very specific questions about the character of prerequisites and the scope of civil liability (e.g. in the case of claims due to wrongful life or wrongful birth), about the scope of duty to inform in the case of bad prognoses (or life saving intervention), questions about the limits of doctor's actions, or even about the availability of certain types of medical services and the criteria for fair distribution of health care costs in the society, which always has insufficient resources in order to equally satisfy all the needs and expectations. The conflict of values and principles is inherent in problems considered by modern courts in medical cases, and each judge, to a certain extent, plays the role of Dworkin's Hercules, searching for a possible "compromise" by applying rational and balanced arguments. The presentation of many judicial decisions in this book is a sort of "*ad hoc* snapshot" of ideas and debates in the current phase, which in many respects is still far from finding clear and uncontroversial answers.

Apart from tendencies, which I believe may be recognised as established trends in judicial decision-making, there are also areas of considerable uncertainty and heated discussion. The first group comprises among others trends in judicial decisions that clearly express the idea of protection of the patient's autonomy in medical relations, including his/her right to choose between alternative therapies, and to reject (even irrationally) the appropriate of treatment, as well as the right to obtain full information about one's condition regardless of prognoses and expectations of successful treatment. The value, as per freedom of an individual, more and more often prevails in medical context over other traditional interpretations, based for instance on the absolute necessity. Acknowledgement of the fact that a person in matters concerning his/her life and health is not always rational and may not be guided by objectively appropriate choices, moreover,

he/she may even make decisions which are clearly against his/her interest, seems to be a truly revolutionary change in interpretation of medical law. A number of decisions following this approach can be found in this book, e.g. Judgment of the Supreme Court of 3 October 1962, III CR 250/62, concerning contributory negligence of the injured, along with a commentary in Chapter IV.

Established tendencies include also substantial changes in the sphere of civil liability for damage, which are expressed among others by continuously extended liability of medical institutions and increasing objectivisation of related requirements. Today, treatment has become a complicated process involving cooperation at multiple levels, based on complex organisation and necessary, broadly understood infrastructural elements: from properly qualified staff to equipping and establishing procedures. The tendency to impose more stringent liability on medical institutions, may be, in a way, deemed a compensation for normative changes which took place in the field of liability of public authority under the influence of new constitutional regulations. In the current normative situation, the State Treasury generally does not bear liability for damage inflicted in relation to treatment provided by public health care institutions, excluding the cases where such damage is a result of unlawful acts of public authorities (e.g. in the event of malfunctioning of relevant organisational structures due to faulty acts of public authorities). In this case, an appropriately broad concept of the institutional fault referring to operations of certain medical institutions, as well as more and more comprehensive understanding of superiors-subordinates relations with respect to medical services performed in teams (as well as acts classified as diagnosis and therapy) make it possible to look for grounds for liability of a medical institution in Article 430 of the Civil Code, that is to base the liability on the principle of strict liability.

One of the most difficult issues being a current topic for discussion in the field of liability is the problem of the required medical standard in times of more and more variable medical offer, both with regard to its availability and accessibility, and, most of all, with reference to cost. Judicial decisions are also undergoing a specific evolution in this respect (which is well illustrated by this book), expressed, on the one hand, by the decision of the Supreme Court issued in the early eighties (Judgment of 28 October 1983, II CR 358/83, along with commentary in Chapter IV) on the necessity to apply the highest medical standards, and on the other hand, by the decision issued ten years later (Judgment of 1 December 1998, III CKN 741/98, along with a commentary in Chapter IV), where the court presents a more moderate approach, excluding the possibility of ensuring access to the most expensive medical technologies to every person and the need to account for an actual economic situation of the country where the health care system operates. However, it is difficult to recognise judicial decisions in this matter as established.

Interesting and significant changes are also taking place with respect to damage compensation, in particular immaterial damage. This tendency is related to the increasing role of patient's autonomy and higher respect for his/her rights as regards privacy and right to avail of information. Decisions, which, regardless of the appropriateness and rationality of doctor's actions, acknowledge the violation of patient's autonomy, with respect to whom the duty to inform has been breached and who has not given a proper

consent to medical intervention, may be deemed characteristic for this trend. In such circumstances, compensation for immaterial harm and infringement of the patient's rights has become a real protection measure of immaterial interest, the extent of which is far greater than it used to be over ten years ago, when in medical context compensation was exclusively awarded in connection with the violation of bodily integrity, bodily injury and bodily disorder caused by medical malpractice. This tendency, which is clearly emerging from today's judicial decisions, is affected not only by normative changes, but also, as stressed hereinabove, by a different perspective from which a patient–medical personnel relation is assessed with the aim of effective protection of immaterial interests. At this point it is worth mentioning that modern jurisdiction seems to acknowledge the necessity of a more flexible approach to the issue of concurrence of *ex delicto* and *ex contractu* liability for medical damage in order to avoid negative consequences of the – more and more outdated in the context of modern private law – solution in our system associating compensation solely with the grounds for liability in tort (see judgment of the Supreme Court of 17 December 2004, II CK 300/04, along with a commentary in Chapter IV).

The tendency, which is more and more noticeable in modern legal systems, concerns case law entering the areas which until recently have not been considered the subject of juridical analyses and court decisions. This phenomenon, as indicated hereinabove, referred to as the juridisation of medicine, is most popular in the Anglo-Saxon world, especially in the United States. Particularly characteristic debates in this respect are those concerning issues related to terminal care for incurably ill persons, including also persons in a vegetative condition, whose life is sustained by means of artificial feeding apparatus or blood circulation and breathing devices. Decisions in this matter have become the subject of heated legal disputes, in the course of which threads of constitutional nature have also appeared. The authors decided to present only several foreign rulings that touch upon this problem, since by this day Polish jurisdiction has not included any decisions issued by appropriate court instances (these are, among others, the case of *Pretty* before the ECHR with a commentary in Chapter II and American decisions in the case *Karen Quinlan* and *Harold Glucksberg,* with a commentary in Chapter VI). In the context of these circumstances, fundamental questions for modern medical law seem inescapable, namely, to what extent the law should (may?) enter the sphere of medical decisions and assessments and "substitute" doctors themselves in making complicated ethical and medical decisions? For instance, is it justified and appropriate for the law to make an attempt to establish the limits of doctor's obligations in terminal cases, specify a set of measures belonging to the so-called extraordinary and persistent therapy, and define the time when not only therapy but also artificial feeding may be terminated? Should the law definitively resolve on the relevance of the so-called *pro futuro* declarations (in the Anglo-Saxon terminology referred to as "living will")? A wide-ranging public discussion about the aforementioned issues has commenced recently in Poland and one may believe that the published foreign judicial decisions provide an adequate illustration of the problems. Different arguments weigh in favour of each of possible approaches. On the one hand, certainty and detailed nature of the law may exclude arbitrariness of courts and assessments articulated in specific cases and more effectively protect of rights and interests of such persons. On the other hand,

excessively casuistic normative regulations may lead to a dangerous tendency to evaluate human life, to an attempt at applying objective measures and criteria, where it seems especially risky considering protection of dignity of each individual. Undoubtedly, we reach the limits of legal regulations here and caution should be exercised not to overstep those bounds.

The criterion of quality of life as the basis for ethical, legal and medical assessment is becoming more and more visible in the disputes within the area of modern medicine and the law.

IV. Intentions and expectations

One may hope that the present study, which is the first publication of this kind that falls within the ambit of medical law in Poland, will meet the expectations of both lawyers dealing with this discipline and representatives of the medical profession. Each discussion on the topics raised in this book must account for the existing state of knowledge, views and modern tendencies, and the judicial decisions are, from this perspective, a particularly exhaustive field for analyses. As it appears from this study, a number of questions, very often of fundamental meaning, still remains unanswered and encourages discussion. The discussion in Poland is currently very intense and the belief that it encounters obstacles related to the difficulty in identifying the most serious problems and disputable issues seems reasonable. One of the most significant purposes of this study is to attempt to draw up a catalogue of such fundamental problems arising from judicial decisions.

Chapter I

CONSTITUTIONAL STANDARDS

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1. RIGHT TO CONSCIENTIOUS OBJECTION

freedom of conscience – human dignity – medical ethics – horizontal effect of human rights and fundamental freedoms – abortion – unborn child – euthanasia

Ruling of the Constitutional Tribunal of 15 January 1991, U 8/90

Conclusion[1]

"The freedom of conscience does not only mean the right to have a specific view or belief, but, first and foremost, to follow one's own conscience and to be free from coercion to act against one's conscience. This understanding of freedom of conscience is supported by the International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16 December 1966 and ratified by Poland on 3 March 1977 (Dz. U. [*Journal of Laws*] No. 38, items 167 and 168)".

Facts of the case

The Human Rights Defender moved for declaring that section 14 of the Regulation of the Minister of Health and Social Care dated 30 April 1990 concerning professional qualifications that are required of doctors performing abortions and the manner of issuing medical reports on admissibility of performing such procedures (Dz. U. [*Journal of Laws*] No. 29, item 178) contravenes Article 2 sections 1 and 2 of the Act dated 27 April 1956 on Admissibility of Pregnancy Termination (Dz. U. [*Journal of Laws*], No. 12, item 61 as amended by Dz. U. [*Journal of Laws*] of 1969, No. 13, item 95). The Human Rights Defender explained that the Regulation exceeds statutory authorisation for it allows the doctor to evade the duty to issue appropriate medical reports.

Reasons for the ruling of the Constitutional Tribunal

Article 2 section 2 of the Act of 27 April 1956 on the Conditions of Admissibility of Abortion authorised the Minister of Health and Social Care to determine by regulation professional qualifications required of doctors performing pregnancy termination procedures and the manner of issuing medical reports on the admissibility of such procedures. Section 14 of the Regulation of the Minister of Health and Social Care of 30 April 1990 concerns neither professional qualifications nor the manner of issuing medical reports. Consequently, its content is not supported by statutory delegation. The Constitutional Tribunal in its decisions on many occasions pointed out the necessity for keeping legal regulations contained in lower-ranking acts within statutory authorisation. This position is still believed to be right and applicable.

The presented assumptions do not allow, however, the assertion that in the analysed case the statutory authorisation has been exceeded. First of all, it has to be made clear that in

[1] Author's conclusion.

our legal system there is no provision imposing a duty to make a report on the admissibility of termination of pregnancy, to which exceptions could be provided to excuse "evading" such duty. No such duty is imposed particularly by the Act on Admissibility of Pregnancy Termination […]. The duty to issue a medical report, as the Human Right Defender suggests, does not follow from the fact that the Act in Article 2, section 1 does not stipulate the possibility that a doctor may evade preparation of the report on the admissibility of the procedure. The Act specifies the conditions of admissibility of termination of pregnancy, which means that by its very premises it concerns situations which should involve extraordinary legalisation of a conduct that is, in principle, unlawful. Therefore, penal law experts and commentators treat the provisions as defining a countertype, that is a circumstance excluding the unlawfulness of the act. The duty to follow the countertype may be exceptional and usually concerns specific services who act to restore public order or execute the authorities' decision […].

The law as it applies provides for provisions allowing a doctor to "evade" issuing a report on admissibility of pregnancy termination or performing the procedure. The right of a doctor to "evade" should be derived from Article 82 section 1 of the Constitution guaranteeing freedom of conscience. **The freedom of conscience does not only mean the right to have a specific view or belief, but, first and foremost, to follow one's own conscience and to be free from coercion to act against one's conscience. This understanding of freedom of conscience is supported by the International Covenant on Civil and Political Rights adopted by the UN General Assembly on 16 December 1966 and ratified by Poland on 3 March 1977 (Dz. U. [*Journal of Laws*] No. 38, item 167 and 168).** Article 18 section 2 of the Covenant reads: "No one shall be subject to coercion which would impair his/her freedom to have or to adopt a religion or belief of his/her choice". The doctor's right to evade issuing the report on admissibility of pregnancy termination or performance of the procedure follows directly from Principle 7 of the Ethical and deontological principles of a Polish medical doctor reading that: "A doctor shall refuse to perform such acts that in his/her belief and according to his/her conscience may be harmful or unethical". The Ethical and deontological principles, by virtue of Article 4, section 1, para. 2, Article 41 and, in particular, Article 63, section 2 of the Act of 17 May 1989 on Medical Chambers (Dz. U. [*Journal of Laws*], No. 30, item 158), have been incorporated into the system of law, thus becoming rules of conduct binding on doctors. […] In light of the foregoing, section 14 of the said Regulation does neither introduce a new provision into the current system of law nor a provision regulating a matter that has not been regulated yet or regulating the same matter in a different manner. Therefore, what we face here is a clear *superfluum* on the part of the lawmaker, which while being a defect in the legislative technique, cannot be judged as a violation of the statutory delegation. Not regulating anything, section 14 cannot contravene the delegation constituting an authorisation to regulate a segment of social life. A repetition of a provision of a statutory rank in a lower-ranking act cannot be deemed a development of a new provision, which would constitute the issue of exceeding the delegation. Such a repetition may be treated only as information on already existing provisions of law […].

Commentary

1. The decision concerns several issues, however, the most significant is the legal interpretation of the so-called conscience objection clause. The Constitutional Tribunal stated that the conscience objection is an important aspect of the directly applicable fundamental right to freedom of conscience enshrined in the Polish Constitution and in art. 18 of the International Covenant on Civil and Political Rights. Although the decision of the Tribunal was delivered under the Constitution of 1952 ("communist constitution"), the decision is still relevant today, under the Constitution of the Republic of Poland of 1997. The Constitution of 1997 expressly protects the freedom of conscience to a far greater extent than the former one (Preamble, Article 25 section 2, Article 48 section 1, Article 53 sections 1 and 3–7, Article 85 section 3 and Article 233 section 1).

2. The decision refers to global standards of the United Nations. A General Comment No. 22 on Article 18 of the the International Covenant on Civil and Political Rights provides, *inter alia*, the following interpretation of that provision: "The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief […]". This position is enforced by the United Nations Human Rights Committee (UNHRC). On 3 November 2006 in the cases of *Yeo-Bum Yoon v. Republic of Korea* and *Myung-Jin Choi v. Republic of Korea* the UNHRC held that conviction and sentence of two Jehovah's Witnesses for refusal of military service amounts to a restriction on their ability to manifest their religion or belief. The UNHRC went on to conclude that the interference with the applicants' rights guaranteed by Article 18 was not necessary and that there had been a violation of that provision.[2]

3. The decision of the Constitutional Tribunal conforms to the Convention for the Protection of Human Rights and Fundamental Freedoms from 1950, which also enshrines an individual right to conscience objection as an aspect of the right to freedom of conscience (art. 9 of the Convention). On 7 July 2011 the Grand Chamber of the European Court of Human Rights held in the case *Bayatyan v. Armenia* that art. 9 of the Convention is directly applicable at least in cases, where there is no doubt that there is "a serious and insurmountable conflict between the obligation to serve" and "a person's conscience or his deeply and genuinely held religious or other beliefs of sufficient cogency, seriousness, cohesion and importance". The Court found that even article 4 § 3 (b) of the Convention expressly leaving the choice of recognising conscientious objectors in military context to each Contracting Party, cannot wave the guaranty of art. 9 of the Convention.[3] The Court stressed that the member States of the Council of Europe must reconcile the possible conflict between individual conscience and legal obligations. "Accordingly, a State which has not done so enjoys only a limited margin of appreciation and must advance convincing and compelling reasons to justify any interference. In particular, it must demonstrate that the interference corresponds to a 'pressing social need'".[4]

[2] Communications Nos. 1321/2004 and 1322/2004, U.N. Doc. CCPR/C/88/D/1321-1322/2004, 23 January 2007.

[3] Judgment of the Grand Chamber of the ECHR, 7th July 2011, *Bayatyan v. Armenia,* appl. no. 23459/03, para. 109.

[4] Judgment of the Grand Chamber of the ECHR, 7th July 2011, *Bayatyan v. Armenia,* appl. no. 23459/03, para. 100, 123.

4. The conscience clause is regulated by Article 39 MDDPA. Pursuant to the provision, the doctor may refrain from providing a medical service against his or her conscience subject to Article 30 of the Act,[5] provided that the doctor indicates possible ways of receiving such service from another doctor or in another health care facility and provide grounds for and take down this fact in medical records. A doctor who performs the profession under an employment contract or when on service, shall moreover provide a prior written notification to his or her superior. The provision applies if under contractual or statutory duties a doctor is obliged to perform a specific service with respect to a specific patient. The non-contractual source of the duty may be, for instance, the patient's right "to receive immediate health care services by reason of a threat to life or health" (Article 7 section 1 of the Act on Patients' Rights and the Patient's Ombudsman, which does not clarify the claims of the addressee) or Article 30 MDDPA which is directly referred to by Article 39 MDDPA.

5. The provision resolves the conflict of the patient's interest in receiving a health care service (positive conduct) and the doctor's interest in refraining from some acts, which regardless of the patient he or she deems inacceptable (negative freedom). The assumed solution is criticised for lack of precision and disproportionate restriction of professional and personal freedom of a doctor (especially in part establishing the obligation to "indicate possible ways of obtaining such service from another doctor" which presupposes that a doctor shall have the positive knowledge about axiological preferences of other doctors; the Act does not specify the manner of obtaining such knowledge.[6]

6. A more precise regulation is stipulated in the Act of 5 July 1996 on Nurse and Midwife Professions. Article 23 of the Act reads that a nurse and midwife may refrain, upon prior written notification of the superior, from performing a health care service against his or her conscience, subject to Article19 (a nurse, midwife shall provide aid in each case of a threat of losing life or suffering a severe detriment to health in accordance with their professional qualifications).

7. Other medical legislation does not include provisions implementing the freedom of conscience guarantees indicated by the Constitutional Tribunal. This may give rise to a question whether, in the face of the lawmaker's idleness, vertical or horizontal effectiveness of the guarantees in medical relations is permissible. The Constitutional Tribunal provides an affirmative answer to the question mentioning a *superfluum* on the part of the lawmaker in the analysed regulation. A similar view was provided by the Hungarian Constitutional Tribunal which concluded that the lack of conscience clause with respect to doctors in statutory provisions did not mean that a legislation omission occurred, for a doctor may always invoke the directly effective constitutional guarantee and effectively evade the duty to participate in a pregnancy termination procedure (judgment of the Hungarian CT of 17 December 1991, ref. 54/1991[7]).

[5] Article 30 reads that a doctor shall provide medical aid in each case, where the culpable delay in the provision thereof could result in loss of life, severe bodily injury or health disorder and in other urgent cases.

[6] See, for instance, R. Kubiak, *Prawo medyczne,* Łódź 2010, p. 225.

[7] *Hungarian Report and General Report*, [in:] *Constitutional Jurisprudence in the Area of Freedom of Religion and Belifes. 11th Conference of the European Constitutional Courts*, Warsaw 2000. See also G. Kiss, *Die Wirkung der Grundrechte*

8. The Constitution of 1997 classifies the freedom of conscience as a personal right under special protection and excludes the restriction of the protection thereof also in times of martial law and states of emergency (Article 233 section 1). Therefore, the commentators of the Constitution are induced to claim that the human dignity, which is a source of personal rights and freedoms, stays in close relation to the freedom of conscience.[8] As opposed to dignity, the freedom of conscience is not, however, under absolute protection to the extent to which it is interpersonal. Article 85 section 3 of the Constitution is an indication of possible restrictions of the freedom of conscience allowed under the statute. Pursuant thereto, even the duty to defend the Republic of Poland does not justify the restriction of freedom of conscience.

9. A similar significance of the freedom of conscience is ascribed by the Council of Europe in the Resolution of the Parliamentary Assembly of 7 October 2010, No. 1763 (2010) on the right to conscientious objection in lawful medical care. Paragraph 1 of the Resolution reads that no person, hospital or institution (legal person) shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason (http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta10/ERES1763.htm).

10. The Council of Europe took a stance in quite a complex and embroiled in disagreements issue of the conscience clause with respect to legal persons and institutions. On the one hand, the opinion that legal persons are not entitled to a personal right, i.e. conscience, seems reasonable. Conscience may not be fully compared with, for instance, such other personal rights as good name or reputation attributed to legal persons (see Article 43 CC). On the other hand, the opinion that axiological valuations are of absolutely no meaning to legal persons is not convincing. Some organisational entities for their legal nature, e.g. religious associations, or for the purpose of the establishment or core objects of operations, e.g. running a hospice, school or hospital, may be based on certain significant choices of ethical nature of their members or founders. The Polish Constitutional Tribunal has recognised (act call W 11/91) that the provisions regarding the protection of rights and freedoms of citizens pertain not only to natural persons but also to legal persons that combine their actions. The Tribunal has referred to the example of co-operatives, companies and associations (thus legal persons of corporate type) as well as churches and religious organisations if they operate as institutions associating citizens and implementing their rights and freedoms (to celebrate religious cult, upbringing

in ungarischen Arbietsrecht: Versuche zur Widerherstellung eines umgestürzten Gleichgewichts [in:] *Festschrift für Rolf Birk zum siebzigsten Geburtstag*, H. Konzen, S. Krebber, Th. Raab, B. Veit, B. Waas (eds.), Tübingen 2008, p. 364

[8] B. Lewaszkiewicz-Petrykowska, *General Report*, [in:] *Constitutional jurisprudence in the area of freedom of religion and beliefs, 11th Conference of the European Constitutional Courts*, Warszawa 2000, p. 20; M. Safjan, *Wolność religijna w konstytucjach państw europejskich*, [in:] *Materiały III Międzynarodowej Konferencji na temat "Religia i wolność religijna w Unii Europejskiej", Warszawa, 2–4 września 2002*, J. Krukowski, O. Theisen (ed.), Lublin 2003, p. 73; M. Granat, *Granice wolności religijnej w społeczeństwie pluralistycznym*, [in:] *Materiały III Międzynarodowej Konferencji na temat "Religia i wolność religijna w Unii Europejskiej", Warszawa, 2–4 września 2002*, J. Krukowski, O. Theisen (ed.), Lublin 2003, p. 176. Similar view: P. Sarnecki, *Komentarz do art. 53* [in:] *Konstytucja Rzeczypospolitej Polskiej,* L. Garlicki (ed.), Warszawa 2003, p. 3.

and charity).[9] Would forcing such persons to act against their identity and in a manner discrediting the sense of their establishment be necessary or *sensu stricto* proportionate? At this point, there is no need to determine whether the protection would be required under the effective *per analogiam* guarantee of the freedom of conscience or directly effective general freedom of association or business activity or whether it would be not justified. A pragmatic resolution for the purpose of medical law is proposed by Article 18b of the Act on Health Care Facilities, pursuant to which a health care facility may make the information about the scope or type of provided health care services public, as well as by corresponding Article 12 of the Act on Patients' Rights and the Patients' Ombudsman, pursuant to which the patient has a right to information about *the scope and type* of health care services provided by an entity rendering health care services, including preventive schemes financed from public funds implemented by such entity. These provisions do not indicate that the Polish legal system provides for an absolute duty to render all health care services by every health care facility.

Additional information

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2. MEDICAL ETHICS

Code of Medical Ethics – rules of reference – protection of human life – supervision over due performance of the medical profession – self-governments in professions of public trust – abortion – *nasciturus* – conceived child – human foetus – conflict of duties – corporate autonomy

Decision of the Constitutional Tribunal[10] of 7 October 1992, U 1/92

Conclusion

"The subject of assessment by the Constitutional Tribunal shall not be an ethical norm itself but only a legal norm, which is clarified by the ethical norm".

Facts of the case

The Human Rights Defender by the application of 7 January 1992 moved for deciding inter alia whether Article 37 of the Code of Medical Ethics, as a regulation – in the opinion of the HRD – issued by a state administrative body, is compliant with the Constitution and the Act of 24 April 1956 on Admissibility of Pregnancy Termination. In the opinion of the HRD, the Code of Medical Ethics limits circumstances in which termination of pregnancy is admissible since it vests an extensive right in a doctor to be guided by his or her conscience, thus diverging from previously applicable provisions of the law.

Reasons for the ruling of the Constitutional Tribunal

"[…] Norms specified in the Code of Medical Ethics which were questioned by the Human Rights Defender in the application are of deontological nature and do not pertain to the norms of state administration. **Establishment of deontological norms does not fall within the competence of state authorities. Thus, the state is not authorised to order the establishment of such norms from anyone, not even from self-government of the medical profession. The state may only order development of legal norms. Deontological norms themselves are not of legal nature.** They belong to a collection of ethical norms which is independent of the law. Authorisation included in the Act on Medical Chambers which allows the convention of doctors to adopt deontological norms is only a statutory approval of the commonly recognized right of the medical corporation (and also of other professional corporations) to specify the deontological rules in compliance with the system of values recognized by such bodies. The authorisation is not, however, a statutory delegation of right understood as assignment to the medical self-government functions falling within the competence of the state administration. No state administrative body has ever been or may be authorised to specify deontological norms with respect to doctors.

[10] Full panel.

Legal norms should be founded on the system of values accepted by the society, especially when it comes to fundamental values. However, collections of legal and ethical norms do not coincide and form two relatively independent areas. Therefore, a statement that the ethical norm must be consistent with the legal norm is groundless. Such a statement would presume the priority of legal norms over ethical norms. It is the law that should have ethical legitimacy. Ethics does not require legal legitimacy.

[…] Ethical norms may be incorporated into the applicable legal system by way of legal acts. The Act on Medical Chambers has incorporated the norms of the Code of Medical Ethics. The norms specified in this code clarified the content of legal norms included in the Act on Medical Chambers. The legal norms thus clarified may naturally constitute the subject of examination by the Constitutional Tribunal from the perspective of their lawfulness. […]

Considering the relation of norm defined under Article 15 para. 1, Article 41 and 42 section 1 of the Act on Medical Chambers, clarified by Article 37 of the Code of Medical Ethics, to the norm of Article 1 section 1 of the Act on Admissibility of Pregnancy Termination, the Constitutional Tribunal determined as follows:

Actions, which both norms concern, may consist in either a doctor's refraining from a pregnancy termination procedure or conducting such a procedure. In the latter case, the indications for conducting the procedure need to be examined.

Should the doctor refuse to conduct the pregnancy termination procedure, then, with the exception of the case specified in Article 12 of the Medical Doctor and Dentist Profession Act, [risk of loss of life or a detrimental effect on health], his or her actions may not be deemed illegal under the provisions of the Act on Medical Chambers clarified by the norms of the Code of Medical Ethics. Such actions may not be deemed illegal either in the light of the Act of 27 April 1956 on Admissibility of Pregnancy Termination. The Act does not impose an obligation to conduct the procedure but only establishes the exclusion of penal liability for conducting the procedure on terms specified therein. A doctor may refuse to issue the decision on the admissibility of pregnancy termination and to conduct the procedure. […]

The Act on Admissibility of Pregnancy Termination allows of (thus rendering lawful) pregnancy termination conducted by a doctor if there are: medical indications or difficult life conditions of a pregnant woman and if there is a justified suspicion that the pregnancy is a result of an offence. The procedure is legal provided that there are no medical contradictions to conduct the procedure. Article 15 para. 1 of the Act on Medical Chambers clarified by Article 37 of the Code of Medical Ethics allows of pregnancy termination only in order to save a mother's life or health and in cases where the pregnancy is a result of an offence. Based on thus clarified norm, termination of pregnancy for reason of difficult life conditions of a pregnant woman shall be deemed unlawful and subject to sanctions pursuant to Article 41 and 42 section 1 of the Act on Medical Chambers. The same action of the doctor (termination of pegnancy due to difficult life conditions of a pregnant woman) is expressly recognized as admissible, and thus lawful, by one Act, whilst it is deemed unlawful and subject to legal sanctions by the other Act. Therefore, there is a conflict of the Acts, which may be resolved only by the lawmaker".

Dissenting opinion of K. Działocha on the decision

"[…] As opposed to ethical norms, which are formed spontaneously and not established by way of normative acts – even though they may be codified and published in the form of codes or collections of rules – the Code of Medical Ethics was established by the self-government of the medical profession based on the competence norm awarded by the state and in accordance with procedure instituted by the Act. Provisions of Article 4 section 1 para. 2 of the Act on Medical Chambers impose on the medical self-government an obligation ("task") of "establishing rules of ethics and professional deontology applicable to all doctors, as well as an obligation to observe them"… If one assumes, as it is sometimes the case, that thus established norms are usually of only declaratory nature, that they are only a reflection of a practical need for more clarified articulation or elaboration and detailing of applicable and previously recognized moral principles (W. Lang), and the delegation itself included in the binding Act on Medical Chambers is, most of all, a confirmation of commonly recognized rights of medical corporations to specify the ethical and deontological rules compliant with the system of values recognized by their members, the doubts as to the normative nature of the Code of Medical Ethics must give way to conclusions derived from subsequent provisions of the Act on Medical Chambers. Pursuant to the provisions of the aforementioned Article 4 section 1 para. 2 of the Act, and Article 15 para. 1 and Article 41 thereof, the provisions of the Code of Medical Ethics are commonly applicable to doctors and their observance is guaranteed under the provisions of the Act, which impose on the authorities of the medical self-government an obligation to ensure compliance with the Code of Medical Ethics (Article 4 section 1 para. 2 *in fine*), and under the provisions, which define medical liability (Chapter 6 of the Act) […]".

Commentary

1. The ruling of the Constitutional Tribunal concerns the question about the essence of deontological norms expressed in the Code of Medical Ethics, the meaning of obligations resulting from such norms and competence of the self-government of the medical profession to codify the rules of ethics.

2. The ruling of the Constitutional Tribunal indicates that norms expressed in the Code of Medical Ethics are ethical norms, to which the provisions of medical law, including the Act on Medical Chambers, refer. Deontological norms are not administrative acts or legal norms, but the rules of legal significance specified by referring provisions. As the Tribunal holds, legal norms do not legitimize ethics, but ethics legitimizes the law.

3. The autonomous nature of deontological norms and legal norms is indicated in the Convention on Human Rights and Biomedicine of 1997, Article 4 of which reads as follows: "Any intervention in the field of health, including research, must be carried out in accordance with relevant professional (corporate) obligations and standards". The commentary to the aforesaid provision, approved by the Committee of Ministers of the Council of Europe, provides that the rules of medical deontology clarify the content of legal norms also when the rules are not codified (para. 30); that doctors and other medical professionals are subject to legal and ethical imperatives, though it is the law that should provide solutions to a possible conflict of duties (para. 31); that the content of

deontological rules varies between states and depends on the societies and professional corporations (para. 31); that the rules of medical deontology take into account the rights and interests of the patient and any right of conscientious objection by a doctor (para. 30). Article 4 MDDPA reads that a doctor is obliged to perform his/her profession in accordance with the standards of current medical knowledge and exercising due diligence, as well as in compliance with the rules of professional ethics. In the light of the Convention and the Medical Doctor and Dentist Profession Act, the opinion that deontological norms are statutory norms may not be convincingly presented.

4. The ruling of the Constitutional Tribunal raises a question about the effects of the conflict of deontological and legal obligations. In the analysed decision, the Tribunal holds that the duty of the lawmaker is to remedy the consequences of the so-called horizontal conflict of legal norms. In the resolution of 17 March 1993, W 16/92, the Constitutional Tribunal additionally explained that in the case of a conflict a doctor, who performs statutory duties, shall not bear professional liability for infringing on deontological obligations. A question arises whether a doctor acting in compliance with deontological obligations is not legally liable due to lack of fault or unlawfulness. The interpretation adopted by the Constitutional Tribunal is dogmatically and pragmatically justified, and makes it possible to avoid, difficult to accept, etatisation of such a specific sphere of social relations as the relations between doctor and patient.

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3. RESEARCH EXPERIMENT ON HUMANS

research – human dignity – human freedom – autonomy of will – risk – conceived child – human foetus – human embryo in vitro – Code of Medical Ethics – conflict of duties

Resolution of the Constitutional Tribunal[11] of 17 March 1993, W 16/92

Conclusion

"1) Article 41 in connection with Article 15 para. 1 of the Act of 17 May 1989 on Medical Chambers […] is not applicable to the extent in which the doctor's actions are compliant with an order, prohibition or authorisation of the binding Act,

2) biomedical experiment on a human being, which purpose is not therapeutic and which is conducted without an express consent of a person subjected thereto, is not permitted by the law".

Facts of the case

The Human Rights Defender requested the Constitutional Tribunal to determine a commonly applicable interpretation of, among others, Article 23(a) of the Penal Code by providing an explanation whether a biomedical experiment on humans may be conducted on persons incapable of expressing their consent and whether actions of a doctor compliant with Article 1 sections 2 and 3 of the Act of 27 April 1956 on Admissibility of Pregnancy Termination (Dz. U. [*Journal of Laws*] No. 12, item 61 as amended), but in circumstances not allowed under Article 37 of the Code of Medical Ethics, justify the professional liability under Article 41 of the Act on Medical Chambers (Dz. U. [*Journal of Laws*] No. 30, item 158 as amended). The application of the Defender referred to the decision of the Constitutional Tribunal of 7 October 1992, U 1/92, which drew the attention of the Sejm of the Republic of Poland to doubts connected with those two issues.

Reasons for the resolution of the Constitutional Tribunal

"[…] In the case resulting in a decision of 7 October 1992 (U 1/92), the Constitution Tribunal decided that Article 41 in connection with Article 15 para. 1 of the Act on Medical Chambers was a general clause referring to extra-legal rules included in the Code of Medical Ethics. The Human Rights Defender also shares this point of view. This has been expressed in the application. The norm of Article 41 in connection with Article 15 para. 1 of the Act on Medical Chambers clarified with the extra-legal rule was examined by the Constitutional Tribunal in the case U 1/92 from the angle of its compliance with the Constitution and other statutory norms of the binding legal system. The Constitutional Tribunal did not find the norm inconsistent with the constitutional provisions and stated only that the norm was in conflict with Article 1 section 1 of the Act of 27 April 1956

[11] Full panel.

on Admissibility of Pregnancy Termination within the scope, in which the Act allows termination of pregnancy for reason of difficult life conditions of a pregnant woman […].

Providing the reasons for the decision in the case U 1/92, the Constitutional Tribunal held that the Act of 27 April 1956 on Admissibility of Pregnancy Termination in no way introduced an order to conduct the procedure. With the exception of a situation referred to in Article 12 of the Medical Doctor and Dentist Profession Act [risk of loss of life or a detrimental effect on health], refusal on the part of a doctor to conduct the procedure may not, in any case, be deemed unlawful. Therefore, in the case of refusal to conduct the procedure, there is no conflict between the Act of 27 April 1956 and Article 41 in connection with Article 15 para. 1 of the Act on Medical Chambers. […]

The Act of 27 April 1956 on Admissibility of Pregnancy Termination was repealed by Article 10 of the Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy (Dz. U. [*Journal of Laws*] No. 17, item 78). The latter Act did not, however, remove the conflicts in the legal system with respect of human foetus protection, which were presented to the Sejm in the decision of the Constitutional Tribunal. In particular, the Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy excludes the criminal character of causing death to a conceived child in a public health care facility, if antenatal examination certified by two doctors, other than the doctor conducting the procedure, indicates serious and irremediable damage to the foetus (Article 7 para. 2).

In the light of Article 41 in connection with Article 15 para. 1 of the Act on Medical Chambers clarified by Article 37 of the Code of Medical Ethics, such actions remain unlawful. Thus, there still is a conflict, though to a narrower extent than previously, between the Acts referring to admissibility of pregnancy termination. Termination of pregnancy under the conditions defined in Article 7 para. 2 of the Act of 7 January 1993 on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy is, in the light of this Act, permissible under the law, whilst in the light of the Act on Medical Chambers clarified by Article 37 of the Code of Medical Ethics it is an unlawful act. […]

When introducing to the Act on Medical Chambers a general clause referring to the rules of medical ethics and deontology, the lawmaker, against the statements included in the application, could not assume that all the rules of medical ethics and deontology determined by the medical self-government would be compliant with previously applicable provisions of the law. Disregarding the fact that legal norms that regulate problems of the medical profession come from various times and periods, in which the lawmaker was guided by axiology different from currently accepted, first of all it should be emphasised that ethical norms in particular are autonomous with respect to legal norms. It is legal norms that should be axiologically legitimate, ethical norms do not need to be juridically legitimate. Positive law, in particular in a pluralistic system, is always a result of a compromise of different political and social powers that play a role in public life. The law may not be a complete reflection of morality. Therefore, there exist differences in scope between the legal system in force and systems of ethical norms present in the society.

However, **a reasonable lawmaker may not impose legal sanctions on acts which are compliant with an order, a prohibition or permit resulting from applicable legal norms. When introducing to the Act on Medical Chambers legal sanctions specified in Article 42 relating to actions inconsistent with the rules of professional ethics and deontology, the lawmaker could not link them with acts, which consisted in the fulfilment of an obligation imposed by the Act or fell within the scope of permit defined thereunder.** Therefore, the Constitutional Tribunal reached the conclusion that Article 41 in connection with Article 15 para. 1 of the Act on Medical Chambers, being the grounds for applying sanctions stipulated in Article 42 thereof, does not apply to cases, where the actions of a doctor are consistent with an order, prohibition or authorisation under the Act in force. […]

Article 23(a) of the Penal Code excludes unlawfulness of research experiments, also on humans, in circumstances specified therein. An absolute prerequisite for lawfulness of a research experiment on a human being is consent of that person to participate in the experiment (Article 23(a) section 2 PC). If we accept the interpretation of Articles 43–48 of the Code of Medical Ethics that these provisions do not exclude research experiments, then, explicitly under Article 48 of the Code of Medical Ethics, such experiments could be conducted also on patients incapable of making deliberate decisions and expressing their will. In that case, a written consent is required from a statutory representative or an actual guardian. Such a solution would legalise research experiments without the consent of a person on whom the experiment is performed. Therefore, there is a conflict between thus interpreted provisions of the Code of Medical Ethics, clarifying Article 41 in connection with Article 15 para. 1 of the Act on Medical Chambers, and Article 23(a) of the Penal Code. The conflict was also indicated in the decision of the Constitutional Tribunal of 7 October 1992.

[…] An assumption that the Act on Medical Chambers – clarified by the provisions of the Code of Medical Ethics interpreted in the manner allowing a research experiment without personally expressed consent of the experiment participant – constitutes an element of our legal system would give rise to a conflict not only between thus interpreted Act and Article 23(a) of the Penal Code, but also result in inconsistence with Article 1 of the Constitution kept in force by Article 77 of the Constitutional Act of 17 October 1992 on mutual relations between the legislative and executive institutions of the Republic of Poland and on local self-government. […] **Allowing a research experiment without the consent of a person on whom it is performed, contravenes the principle of a democratic state governed by the rule of law by violating the dignity of a human being, who in this case is downgraded to a laboratory object.** Conducting a research experiment that puts at risk the legally protected rights of an individual on whom the experiment is performed, may, in the light of specified conditions, be permitted by virtue of anticipated knowledge-enriching benefits from such an experiment. However, the freedom of the experiment participant may not, in any case, be violated. **Persons incapable of making deliberate decisions and expressing their will shall not be the object of research experiments**".

Commentary

1. The resolution of the Constitutional Tribunal concerns two issues. First of all, the resolution sets constitutional limits of lawfulness of research experiments on a human being, that is research the purpose of which is not a direct benefit to the health of a person being subjected thereto. Second of all, the resolution confirms the opinion expressed in pervious judicial decisions, according to which the Code of Medical Ethics is not a legal act and the Constitutional Tribunal has no competence to examine deontological norms. Therefore, the resolution provides the criteria for resolving conflicts of statutory and deontological duties, which may not be resolved by way of interpretation.

2. The resolution was prepared on the basis of Article 1 of the Constitution in the wording of the Act of 29 December 1989, i.e. based on the principle of the democratic state governed by the rule of law. It is of relevance under the Constitution of the Republic of Poland. The resolution of the Constitutional Tribunal, within the scope referring to biomedical experiments, is confirmed not only by Article 2 of the Constitution of the Republic of Poland expressing the principle of the democratic state governed by the rule of law, but also by Articles 30 and 39 of the Constitution of the Republic of Poland that provide for special protection of human dignity and freedom. In accordance with the latter provision: "no one shall be subjected to scientific experimentation, including medical experimentation, without his/her voluntary consent". The resolution of the Constitutional Tribunal is relevant also for resolving the conflict of deontological and legal duties. The Constitution of the Republic of Poland ensures professional self-governments' autonomy with regard to the state or administrative authorities, which is particularly expressed in the obligation to specify and enforce deontological standards within the "supervision over due performance of the medical profession" (Article 17).

3. The resolution shows that in the light of the constitutional standard, it is necessary and justified to make a distinction between medical experiments performed for therapeutic reasons, aimed at a direct benefit of the person being subjected thereto, and those conducted for the purpose of research, without any direct therapeutic goal and in the interest of science and sponsors. The risk to personal rights of the person subjected to a medical experiment justifies the increased protection of persons incapable of making autonomous decisions as to their fate, i.e. of expressing consent in person. Protection of freedom and dignity of such persons requires that they are exceptionally – taking into consideration protection procedures of Articles 21–29 MDDPA – subjected to therapeutic experiments, if no excessive risk is involved in such experiments and the medical knowledge justifies the conjecture about therapeutic benefits. Persons who are not aware of the risk or unable to express their will in a manner free from any pressure or exploitation, e.g. those mentally impaired, unconscious or children, may not be put at risk of infringing their personal rights or of death. The prohibition to treat humans as objects excludes such type of experiments from the scope of substitute consent.

4. It seems, however, that the resolution of the Tribunal does not exclude research experiments on persons incapable of expressing consent which do not involve any risk to their personal rights. In the case of experiments comprising analyses of an individual's

behaviour or comparative observations which do not interference in the bodily integrity of that individual, there is no special motive that would justify increased constitutional protection. There is no doubt, however, that such interventions for non-therapeutic purposes may also violate personal rights, but it seems such rights are different in quality, ranked lower in the hierarchy of legal interests, which a third party giving the substitute consent may dispose of in a limited manner.

5. A closer analysis of the resolution suggests that criteria specified therein for conducting biomedical experiments refer also to a human being in an antenatal phase of development. It is not accidental that the Human Rights Defender confronted in their application the problem of admissibility of pregnancy termination with the problem of admissibility of biomedical experiments.

6. Article 39 of the Constitution of the Republic of Poland should be construed in the light of the resolution of the Constitutional Tribunal. Article 39, crystallizing the order to protect human dignity expressed in Article 30 of the Constitution, excludes the lawfulness of research experiments conducted without voluntary consent. The constitutional norm interpreted in the context of the resolution of the Constitutional Tribunal does not exclude the admissibility of therapeutic experiments, if conducted upon obtaining a substitute consent and fulfilment of additional terms and conditions specified in Articles 21–29 of the Medical Doctor and Dentist Profession Act of 5 December 1996.

7. The resolution of the Constitutional Tribunal makes reference to the 1st Rule of the Nuremberg Code, pursuant to which: "The voluntary consent of the human subject [to experiment] is absolutely essential. This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension of the elements of the subject matter involved as to enable him to make an understanding and enlightened decision. […]"

8. The resolution of the Constitutional Tribunal corresponds also to Article 7 of the International Covenant on Civil and Political Rights, which excludes research experiments conducted without voluntary consent.

9. The resolution of the Constitutional Tribunal affecting the content of Articles 39 and 30 of the Constitution of the Republic of Poland should have a direct effect on the interpretation and practice of applying the Act of 6 September 2001, Pharmaceutical Law and Articles 21–29 of the Medical Doctor and Dentist Profession Act of 5 December 1996. Provisions of those two legal documents do not exclude directly research experiments on persons incapable of giving consent. The resolution of the Constitutional Tribunal raises questions as to the legislative correctness of applicable provisions on medical experimentation. One should agree with opinions expressed in the scientific environment on the necessity for thorough amendment of those provisions.

10. The resolution continues and elaborates on judicial decisions of the Constitutional Tribunal referring to deontological norms. The resolution confirms the view expressed in the decision U 1/92 that deontological norms are not legal norms, and only the rule of reference is subject to control by the Constitutional Tribunal.

11. The significance of the resolution results, most of all, from the conception of resolving possible conflicts of deontological and statutory duties presented therein. In the case of doctor's actions that are consistent with statutory orders or authorisations, a question arises as to his or her professional liability for infringing deontological norms. The Constitutional Tribunal holds that the liability for infringing deontological norms may not be the case, if a doctor followed legal orders or permits. The solution makes it possible to avoid extreme approaches that are inconsistent with the axiology of the pluralistic and democratic state governed by the rule of law. In particular, it helps to avoid, on the one hand, positivisation of ethics and etatisation of professions of public trust, what was difficult to accept after the overthrow of totalitarian systems, and on the other hand, uncritical tolerance of professional sanctions, even if such sanctions were obviously contradictory to the system of rules and values of the Polish legal order.

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4. STATUS OF A CONCEIVED CHILD

human dignity – ban on differentiation of the value of human life – capacity to be the subject of rights – protection of human life – *in dubio pro vita humana* – *nasciturus* – principle of *pro iam nato* – maternity – pregnancy – hierarchy of legal values – abortion – rule of equality – civil liability – legal capacity – institutional protection – subjective rights – protection of health

Ruling of the Constitutional Tribunal[12] of 28 May 1997, K 26/96

Conclusion

1. Article 1 para. 2 of the Act of 30 August 1996 on the amendment of the Act on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy and on amendment of certain other Acts […], within the scope, in which it makes the protection of life in the antenatal phase contingent upon the decisions of a lawmaker, is inconsistent with Article 1 and Article 79 section 1 of the constitutional provisions […] since it violates constitutional guarantees of protection of human life in each phase of development.

3. Article 1 para. 5 of the Act of 30 August 1996 […] is inconsistent with Article 1 and Article 79 section 1 of the constitutional provisions […] since it legalises termination of pregnancy without sufficient grounds being the necessity to protect another value, right or constitutional freedom and uses unspecified criteria for the legalization, thus violating the constitutional guarantees for protection of human life.

5. Article 2 para. 2 of the Act of 30 August 1996 […] is inconsistent with Article 1 and Article 67 section 2 of the constitutional provisions […] since it, depriving a child of the possibility to assert property claims against his/her mother, limits his/her rights in a manner incompliant with the rule of the democratic state governed by the rule of law and contradictory to the rule of equality.

6. Article 3 para. 1 of the Act of 30 August 1996 […] is inconsistent with Article 1 and Article 79 section 1 of the constitutional provisions […] since it violates constitutional guarantees referring to the protection of health of a conceived child and his/her unimpeded development".

Facts of the case

A group of Senators of the Republic of Poland applied for examination of the compliance with the Constitution of some provisions of the Act of 30 August 1996 on the amendment of the Act on Family Planning, Protection of the Human Foetus and Conditions for Termination of Pregnancy and on amendment of certain other Acts (Dz. U. [*Journal of Laws*] No. 139, item 646). They alleged, among others, that the "provisions do not respect inviolable and inherent human rights" and the "lawmaker, freely introduced

[12] Full panel.

differentiation in the protection of human rights depending on the phase of life. Determination of such phases is not based on any empirical prerequisites. In particular, the birth criterion is of arbitrary nature since it cannot provide grounds for such far reaching discrimination of an unborn child".

Reasons for the ruling of the Constitutional Tribunal

"[…] If the principle of the state governed by the rule of law includes a set of basic directives derived from democratically established law that guarantee the minimum of justice, then the first directive must provide for respect, in the state governed by the rule of law, for the value without which any capacity to be the subject of rights is excluded, i.e. the value of human life from the beginning of its creation. The democratic state governed by the rule of law regards a human being and most valuable interests thereof as the principal value. Such value is life, which at any stage of development must be protected by the constitution in the democratic state under the rule of law.

The value of constitutionally protected legal good such as human life, including life developing in the antenatal phase, may not be subject to differentiation. There are no sufficiently accurate and reasonable criteria allowing such differentiation depending on the phase of human life development. Human life becomes then a constitutionally protected value from the moment of its creation. This concerns also the antenatal phase.

[…] protection of maternity may not involve solely the protection of interests of a pregnant woman and a mother. A nominal term applied in the constitutional provisions indicates a specific relation between a woman and a child, including a conceived child. This entire relation under Article 79 section 1 of the constitutional provisions is a value of constitutional nature, and thus includes the life of the foetus, without which the maternity relation would be broken […]

Due to the fact that human life, also in the antenatal phase, is a constitutional value, any attempt at subjective limitation of legal protection of health in this phase would have to provide a non-arbitrary criterion justifying such differentiation. The to date status of empirical science does not supply reasons for introducing such a criterion […]

The ban on violation of human life, including a conceived child's life, results from constitutional norms. In such a situation, a lawmaker may not be authorised to decide about the conditions for application of such ban, thus rendering constitutional norms the norms of conditional nature. The lawmaker, may not in particular make it contingent upon regulations included in ordinary Acts […]. The lawmaker is authorised only to specify possible exceptions, the occurrence of which – due to the conflict of values being constitutional values, rights or freedoms – requires sacrificing one of conflicting values. The consent of the lawmaker, resulting from the conflict of constitutional value with some other constitutional value, right or freedom, to sacrifice one of the values in conflict does not deprive such a value of the attribute of the constitutional right subject to protection […].

Repealing of the declaration that the right to live is inherent may not be deemed a change of normative nature. The inherent nature of a given right or freedom is not dependent on the will of the lawmaker, and therefore, this attribute may not be abolished

(derogated) with a statutory act. The act of granting or abolishing the right to live as a constitutional value does not fall within the competence of the lawmaker […]

When assessing the normative meaning of the provision of Article 4(a) section 1 para. 4, the conclusion seems inescapable that it approves of certain actions aiming at termination of pregnancy. Thus, it is a permit to undertake actions, which are prohibited as a rule. […] The conclusion about the approving nature of the regulation included in Article 4(a) section 1 para. 4 should be also drawn from the fact that the lawmaker provided for financing of procedures conducted in public health care facilities with public funds, and what is more, that Article 4(b) establishes a claim (right) of a pregnant woman to terminate pregnancy, the addressee of which are public health care facilities. Therefore, in the light of the applicable legal status, one may not claim that termination of pregnancy carried out by a doctor for the so-called social reasons, the prerequisites for which are specified in Article 4(a) section 1 para. 4 by indicating difficult life conditions or a difficult personal situation of a pregnant woman, is only the circumstance excluding the possibility of applying, in such a case, a penal sanction and does not determine the lawfulness or unlawfulness of the procedure itself […].

The right of a pregnant woman not to deteriorate her financial situation results from the constitutional protection of freedom to form, in a free way, one's life conditions and the related right of a woman to satisfy her material needs and the needs of her family. The protection may not be so far reaching as to be identified with violation of the fundamental value such as human life, with respect to which existential conditions are secondary and may undergo changes.

[…] The right to parenthood must be interpreted in the positive and negative sense. It has to mean a prohibition to undertake actions that would limit the freedom to have children and a prohibition to undertake actions that would impose an obligation to have children. This right concerns particularly the decision about conceiving a child. Any interference, whether of the state authority or any other persons, in this sphere should be deemed inadmissible violation of the fundamental right of each human being. A question arises whether the right to decide about having a child may have a broader meaning, also as the right to decide about giving birth to a child. In this case, introduction of a legal ban to give birth to a conceived child, the ban which would be enforced by the state, would be inadmissible. It would be also equally inadmissible to determine any negative legal consequences relating to the fact of giving birth to a child. […] Another issue is the consideration of the right to give birth to a child from a negative aspect. […] One may not decide about having a child, when the child is already developing in the antenatal phase and in this sense parents already *have* the child. Thus, the right to have a child may be interpreted solely from a positive aspect, and not as the right to annihilate a developing human foetus. The right to make a responsible decision about having children, from the negative aspect, comes down to the right to refuse to conceive a child. Should this be the case and the child has already been conceived, the right may be exercised only from the positive aspect, that is i.a. as the right to give birth to the child and raise him/her.

[…] repealing of Article 8 section 2 does not mean that in general, in the entire scope of civil law, a conceived child has lost his/her capacity to be the subject of rights envisaged

within this scope […] The absence of this clause before 1993 did not hamper the courts from defining such capacity with respect to some rights stipulated in the Civil Code, on the basis of interpretation of specific provisions of the civil law. In accordance with the views of legal academics and commentators, the introduction to the Civil Code of Article 8 section 2 did not constitute "a significant novelty with respect to what the judicature and legal academics and commentators admitted in the light of the previous provisions of the Civil Code" (see A. Mączyński, K. Zawada, KPP 1995, No. 3, p. 418). There are no grounds for negating further relevance of the *acquis* after repealing of Article 8 section 2 CC […]The decision of the lawmaker to delete the general clause which granted legal capacity is, in fact, justified as, due to psychophysical status of a foetus, its capacity to "be" the subject of rights contained in civil law is quite limited. Legal capacity, referred to in the provisions of the Civil Code is of purely functional nature and refers solely to the regulations of civil law. Especially, one may not identify the legal capacity specified in Article 8 CC with the capacity to be the subject of rights within the whole legal system.

Every person has the capacity to be the subject of rights. Legal capacity in the context of the civil law may, on the other hand, be dependent on the stage of human life development. Therefore, the decision may not in any way be interpreted as depriving *nasciturus* of the legal capacity in the entire scope of civil law or the legal system. Deleting the general clause that granted legal capacity within the scope of civil law to *nasciturus* does not affect in any way the fact of protection of so significant legal values as life, health and, more importantly, dignity of *nasciturus*. […]

Depriving a child of the possibility of asserting claims against his/her mother related to damage incurred prior to birth as a result of a wilful act of the mother also constitutes violation of the rule of equality referred to in Article 67 section 2 of the constitutional provisions. One may not, based on constitutional values which are of considerable significance in this regard, explain why the mother – the perpetrator of the wilful damage – is to be exempted from the civil-law liability, whilst other persons (e.g. father of the child, doctors) are to be liable for inflicting the same damage. Another argument in support of the violation of the rule of equality is that the mother bears civil liability to the same extent as other persons for damage caused to her child after his/her birth. The moment when damage is caused in the aforesaid case (before or after birth) may not be deemed a material criterion for differentiation when the obligation to pay damages arises. […]

Under Article 3 para. 4, Article 156(a) of the Penal Code was derogated. The latter provision stipulated penal liability for bodily injury caused in a conceived child or bodily disorder endangering his/her life […] Causing the disorder of health or bodily injury is a violation of especially significant legal rights. Such acts may lead to permanent disability of a child also after he/she is born. At the same time, there are no circumstances, in particular of constitutional origin, which would justify such violation. Causing the disorder of health or bodily injury in a conceived child concerns a completely defenceless being yet capable of experiencing pain. Such an action may often bear the features of "cruel and inhumane" treatment, which is absolutely forbidden by the standards of international law. At the same time, actions causing the disorder of health or bodily injury in a child are

regarded as a brutal interference in the rights of a woman who does not agree to such an action […] Revoking the liability for wilful acts causing harm to the health of a conceived child, both with or without the consent of a pregnant woman, is a drastic restriction on the protection of the child's health, to which he/she is entitled particularly with respect to actions of the mother herself. The restriction on the scope of that protection finds no grounds in constitutionally recognised prerequisites for penal policy and was not justified in any way. Repealing of Article 156(a) led to such limitation of the intensity of protection of a conceived child's health that other remedies, available after the derogation of this provision, aiming at the respective protection do not satisfy the requirements of "sufficient protection". […]

The Constitutional Tribunal based its resolution on the applicable constitutional provisions. The Constitution of the Republic of Poland adopted on 2 April 1997 confirms, in Article 38, the legal protection of life of every person. The constitutional grounds, on which the Constitutional Tribunal based its ruling, were confirmed and expressly articulated in the Constitution of the Republic of Poland".

Dissenting opinion of L. Garlicki to para. 3 of the conclusion to the ruling

"There is no doubt that Polish constitutional provisions provide for the right to live, as a subjective right, with respect to every person. […] However, I disagree with the opinion of the Tribunal that: "the value of constitutionally protected legal good such as human life, including life developing in the antenatal phase, may not be subject to differentiation […] Mother and child are "joined twosomeness", as the German Federal Constitutional Court states, and therefore, the life of a foetus may not be treated in the same way as the life of a born child, which may develop independently outside the mother's body. The life of a foetus will always be so closely related to the mother's body that the execution of her right to life, health, dignity, privacy or family life will have to affect the situation of the foetus. […]

The recognition that the life of *nasciturus* is a separate legal value subject to constitutional protection imposes an obligation on the lawmaker to establish legal measures ensuring the necessary level of protection. "Necessary" means such that shall not lead to depriving life protection of its "essence", i.e. that shall not allow arbitrary and uncontrolled interference in such life without justified reason, e.g. by introducing "abortion on demand", which would not be limited by the necessity to meet any objective prerequisites and deadlines or to follow any procedures.

[…] A democratic state governed by the rule of law is a state based on respect for a human being and in particular on respect and protection of human life and dignity. The two values are directly linked. This is clearly expressed by the provisions [Article 38, author's note] and Article 30 of the new Constitution, which are primary for the interpretation and application of all other regulations on rights, freedoms and duties of an individual. […]

Assessment of abortion legislation must revolve around the conflict of values. On the one hand, we deal with, after all, a very significant constitutional value such as the life (and so the dignity) of a foetus. On the other hand, we deal with a number of various values defining the constitutional status of a woman, among which the dignity

of a woman should be of the essence, which refers to different spheres of her personal, social and legal situation. A question arises, on the basis of what criterion those values should be assessed, so as to answer whether a lawmaker may, in certain circumstances, allow pregnancy termination. In my opinion, the criterion may not be found in the general rule of woman's freedom (which includes, among others, the freedom to decide about her body), for, in general, recognition of such freedom would lead to admissibility of abortion at any time and for any reason. Therefore, one should agree that when consenting to become pregnant, a woman also accepts certain limitation of her freedom, as appropriate to obligations resulting from pregnancy, childbirth and child upbringing, which for ages have been invariably the same. […]"

Commentary

1. The ruling of the Constitutional Tribunal concerns several essential legal issues. Firstly, it provides an answer to the question whether a human foetus is, in the light of law, an object or a subject of law. Secondly, it specifies the place and the manner of comprehending, in the Polish constitutional system, of the rule prohibiting differentiation of the value of human life. Thirdly, it exemplifies the application of the rules of proportionality and equality in resolving a conflict of fundamental rights of a pregnant woman and a child.

2. The line of reasoning of the Constitutional Tribunal is the assumption that the value of human life may not be subject to differentiation. The assumption supports the stance that negates the fairness of legal segregation of humans into those who have rights and other "sub-standard" humans (unaware, not yet aware, weak, etc.). Absence of consent by the Constitutional Tribunal to the differentiation of the "personal quality" of humans results from the paradigm of equal human dignity of all human beings (compare judgment of the Federal Constitutional Court of Gemany of 28 May 1993 with commentary in this Book; the judgment of the Polish Constitutional Tribunal of 7 January 2004, K 14/03, with commentary in this Book and judgement of the Polish Constitutional Tribunal of 30 September 2008, K 44/07, OTK-A 2008, No. 7, item 126).

3. The ruling of the Constitutional Tribunal, delivered under the Constitution of 1952, is still relevant in the context of the Constitution of the Republic of Poland. The Constitution of the Republic of Poland guarantees "inherent, inalienable and inviolable dignity of a human being, which is the source of personal freedoms and rights" (Article 30, personal dignity), as well as the protection of life of "every human being" (Article 38). The Constitution of the Republic of Poland undoubtedly reinforces the foundations for protection of human rights in comparison with the Constitution of the People's Republic of Poland, applicable at the time when the ruling of the Constitutional Tribunal was issued. As explained by Marek Borowski – the author of the final compromised version of Article 38 of the Constitution of the Republic of Poland – during the debate of 13 March 1997 in the Constitutional Committee of the National Assembly: "foetus is naturally a human being" and "the Constitution of the Republic of Poland provides grounds for such a conclusion" (Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego [*Bulletin of the Constitutional Committee of the National Assembly*] vol. XLV, pp. 45–46). The Constitutional

Tribunal, in the final part of the ruling, also concurred with this logical and linguistic interpretation of Article 38 of the Constitution of the Republic of Poland, under which the protection of "every human being" is guaranteed. Thus, there should be no doubt that the norms specified in Chapter 2 of the Constitution of the Republic of Poland ensuring the protection of human rights, should be broadly understood, in accordance with the rule of common and universal nature of such rights.

4. The conclusion of the ruling of the Constitutional Tribunal provides that the status of a human being in the Polish legal system may not be determined by the statutory provisions. The competence of the law maker does not include making decisions about the capacity of a human being to be the subject of rights and even about the every human's right to life, "without which any capacity to be the subject of rights is excluded". Rescinding the prohibition of depersonification, that is prohibition of treating humans as objects may not, in any way, be reconciled with Article 30 of the Constitution of the Republic of Poland. Independent grounds for the capacity of every human to be the subject of rights is "the inherent dignity" or the contents of Article 30 of the Constitution of the Republic of Poland. As the Constitutional Tribunal holds: "The confirmation of the inalienable human dignity as a constitutional rule and the subjective right of each human being, regardless of its qualification or mental and physical condition and current life situation, constitutes the grounds for recognising its capacity to be the subject of rights" (see judgment of the Constitutional Tribunal of 30 September 2008, K 44/07, OTK-A 2008, No. 7, item 126). As stated by Z. Radwański "human being is differentiated from other living creatures by its characteristic (human) genotype. Therefore, every human being, whose parents are human: woman and man, is a human, which is reflected in Articles 62–86 of the Family and Guardianship Code" (*Prawo cywilne – część ogólna*, Warszawa 2003, p. 148). A similar view is also presented by L. Garlicki who emphasises that "Article 30 of the Constitution refers to the personal presentation of dignity, treats it as an immanent feature of every human being", "to which a human is entitled for the sole fact of being a human being" (L. Garlicki [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* L. Garlicki (ed.), Warszawa 2003, pp. 2, 3 and 8, commentary to Article 30). The author justifies his stance, i.a., with the fact that the interpretation of Article 30 of the Constitution of the Republic of Poland may not disregard the content of the preamble, which, not by accident, refers to the system of virtues established in the Polish reality and orders "preservation of inherent dignity of a human". The unquestionable view in legal studies and in the case law of the Constitutional Tribunal is that the preamble of the Constitution of the Republic of Poland is normatively significant, in particular it affects the interpretation and application of the guarantee of human dignity (see judgment of the Constitutional Tribunal of 30 September 2008, K 44/07, OTK-A 2008, No. 7, item 126; judgment of the Constitutional Tribunal of 7 March 2007, K 28/05, OTK-A 2007, No. 3, item 24 and judgment of the Constitutional Tribunal of 6 November 2007, U 8/05, OTK-A 2007, No. 10, item 121; J. Trzciński, M. Wiącek, *Znaczenie wstępu do Konstytucji dla interpretacji statusu jednostki w Rzeczypospolitej Polskiej* [in:] *Wolności i prawa jednostki w Konstytucji RP,* vol. I, *Idee i zasady przewodnie konstytucyjnej regulacji wolności i praw jednostki w RP*, M. Jabłoński (ed.), Warszawa 2010, p. 66; P. Tuleja, *Stosowanie konstytucji RP w świetle zasady jej nadrzędności (wybrane problemy),* Kraków 2003,

p. 117; M. Piechowiak, *Klauzula limitacyjna a nienaruszalność praw i godności*, Prz. Sejm. 2009, No. 2, pp. 73–74. See also generally Z. Ziembiński, *Problemy podstawowe prawoznawstwa*, Warszawa 1980, p. 253).

5. The Constitutional Tribunal indicated that repealing of Article 8 section 2 CC, pursuant to which a conceived child has legal capacity, does not provide grounds for the conclusion as to depriving the child of the capacity to be the subject of rights, which is attributed to every person. As emphasised by the Constitutional Tribunal, the capacity to be the subject of rights is a universal category and superior to functional civil law interpretation of the legal capacity. Derogation of the provision in no way justifies the exclusion or restriction of the protection of *nasciturus'* interests, especially its dignity and other personal interests.

6. The accuracy of the resolution by the Constitutional Tribunal in this respect is, however, questioned for various reasons. It is held that the resolution does not correspond to arguments concerning Article 446^1 CC, i.e. the provision ensuring equal protection of a conceived child against tort, also in relation to a pregnant woman. It is also pointed out that even though effective protection of personal rights and the capacity of a human to be the subject of rights is thinkable in the context of civil law without recognition of the concept of subjective rights, thanks to the so-called institutional protection, the concept may be hardly reconciled with recognition of dignity of every human being, from which the human rights originate (see B. Gawlik, *Ochrona dóbr osobistych. Sens i nonsens koncepcji tzw. praw podmiotowych osobistych,* Zeszyty Naukowe UJ 1985, p. 123 et seq. and M. Czajkowska-Dąbrowska, *Kilka uwag na temat praw podmiotowych osobistych,* PiP 1987, No. 7, p. 87 et seq.). The opinion of the Constitutional Tribunal that the lack of legal capacity is not directly inconsistent with the guarantee of "status equality" is possible to defend only if concepts of private law are construed and applied in the manner ensuring minimum protection of human dignity or a direct, horizontal application of Article 30 of the Constitution is allowed (see *System Prawa Prywatnego,* vol. 1, *Prawo cywilne – część ogólna,* M. Safjan (ed.), Warszawa 2007, p. 151). Nowadays, despite the lack of clear regulation, the legal capacity of *nasciturus* is commonly recognised (A. Brzozowski, W. Kocot, E. Skowrońska-Bocian, *Prawo cywilne. Część ogólna*, Warszawa 2010, p. 97), even though *de lege lata* its nature with reference to property rights is conditional (B. Ziemianin, Z. Kuniewicz, *Prawo cywilne. Część ogólna*, Poznań 2007, pp. 75–79; M. Mazurkiewicz, *Ochrona dziecka poczętego w świetle kodeksu rodzinnego i opiekuńczego,* Wrocław 1985, pp. 60–61. See also M. Pazdan [in:] *Kodeks cywilny,* vol. I, *Komentarz do artykułów 1–449^{11}*, K. Pietrzykowski (ed.), Warszawa 2005, p. 79; A. Stelmachowski, *Wstęp do teorii prawa cywilnego*, Warszawa 1984, pp. 243–246; B. Walaszek, *Glosa do wyroku z dnia 7 października 1971 r., III CRN 255/71*, OSPiKA 1972, No. 9, p. 415).

The guarantee of human dignity requires that the child has, most of all, ensured the protection of personal goods, which is excluded neither by the content nor system interpretation of Articles 23 and 24 CC. For the said judgment of the Constitutional Tribunal emphasising that: "Due to the fact that human life, also in prenatal phase, is a constitutional virtue, any attempt of subjective limitation of legal protection of health in this phase would have to prove non-arbitrary criterion being the grounds for such

differentiation. Previous status of empirical sciences does not provide reasons for the introduction of such criterion", cannot be otherwise interpreted. The reached conclusion is also not diminished by Article 182 FGC. The historical law maker pictured *nasciturus* as a subject of future property rights. From the essence of constitutionally recognised personal rights of *nasciturus* it follows that Article 182 FGC may be properly applied to protect those rights (similar view in relation to a similar regulation D. Medicus, *Zivilrecht und werdendes Leben*, München 1985; J. Gernhuber, D. Coester-Waltjen, *Familienrecht*, München 2010, pp. 967–968; R. Zimmermann [in:] *Sorgel Bürgerliches Gesetzbuch*, G. Hohloch (ed.), Stuttgart–Berlin–Köln 2000, p. 598).

7. Ensuring the minimum level of protection for the capacity of a conceived child to be the subject of rights, as required by the Polish Constitution, without explicitly defining his/her legal capacity, *de lege lata* creates practical problems. Even though the Supreme Court, in the previous decisions, goes beyond the orders to protect the interests of *nasciturus* specified in special acts and recognises that the protection is general and the special provisions are not exceptions, but they exemplify the general rule (see, for instance the resolution of the Full Panel of Labour Law and Social Security Chamber of the Supreme Court of 30 November 1987, III PZP 36/87, OSN 1988, No. 2–3, item 23 along with an approving gloss of J. Mazurkiewicz, PiP 1989, No. 1; ruling of the SC of 4 April 1966, Zb. Urz. 1966, item. 158 and J. Rezler, *Przyczynek do charakterystyki sytuacji prawnej dziecka poczętego*, NP, 1970, No. 9; M. Pazdan, *System Prawa Prywatnego, vol. 1, Prawo cywilne – część ogólna,* M. Safjan (ed.), Warszawa 2007, pp. 940–944; see also judgments of the Chief Administrative Court of 23 March 2006, II OSK 601/05 and of 20 July 2006, II OSK 986/05, issued after the repeal of Article 8 section 2 CC, where the conception of a person embraced directly a conceived and not yet born child), then on account of the rule of effectiveness in protection of personal rights it would be appropriate to explicate a norm concerning the legal capacity of *nasciturus* within the confines of private law. This demand is supported by the Civil Law Codification Commission in the bill of the General Part of the new Civil Code.

8. Absence of clear recognition of legal capacity of a conceived child in the private law may result in problems with interpretation of detailed regulations. Such problems may also arise in the course of law making process. The explication of this issue is included in the judgment of the Constitutional Tribunal of 16 July 2007, SK 61/06, along with commentary contained therein, under which Article 76 of the Family and Guardianship Code was repealed due to the exclusion of filiation measures with respect to a conceived child who died before birth.

9. The ruling of the Constitutional Tribunal corresponds to the most recent decisions of the Supreme Court, where the Court points out that the mere fact of a child being in a woman's body does not deprive him/her of the human status and "a conceived child is the subject of rights referred to in the provisions of Chapter XIX of the Penal Code" (see the resolution of the Criminal Chamber of the Supreme Court of 26 October 2006, I KZP 18/06, OSNKW 2006, No. 11, along with commentary contained therein; the decision of the Supreme Court of 30 October 2008, I KZP 13/08, Biuletyn Prawa Karnego 2008, No. 12).

10. The ruling of the Constitutional Tribunal is essential not only for determining the scope of protection of interests of *nasciturus*, but also the minimum level of protection of his/her interests measured pursuant to the order to maintain proportionality. The principles of proportionality and equality applied by the Constitutional Tribunal, taking into consideration the hierarchy of constitutional values (proportionality *sensu stricte*), directly affect, pursuant to the rule of direct application of the Constitution of the Republic of Poland (Article 8 section 2), normative evaluation applied within the area of penal, civil and administrative law, including decisions on a conflict of laws. Therefore, provisions legalising the annihilation of a conceived child for reason of subjective preferences or material interests were deemed inconsistent with the rule of proportional protection of human life and guarantees for protection of the maternity relation. From this perspective, there arise also doubts related to claims for *wrongful birth* or *wrongful life,* as they pose a direct threat to values protected by peremptory constitutional norms (Articles 38 and 30), which fact in the light of the civil law – also by reason of a general presumption of unlawfulness of the threat to such values (Article 24 CC) – should not be omitted in the interpretation of the provisions concerning the liability for damage.

11. The ruling of the Constitutional Tribunal indicates certain inconsistencies, as the Tribunal puts is "in bioethical sphere". This may seem odd considering the dissenting opinion of L. Garlicki, who emphasises that the provisions of law and the practice of application thereof may, in no event, deprive the right to live of its inviolable "essence", that is they may not allow arbitrary interference in such life. This means that the Constitution provides for a structurally uniform obligation – having its grounds in Article 30, 2nd sentence of the Constitution – to guarantee of an effective protection of human life and health regardless of age and place (*in utero* or *ex utero*) or social value they represent.

12. For the constitutional protection of parenthood, see the judgment of the Constitutional Tribunal of 16 July 2007, SK 61/06, in this Book.

13. For the ban on differentiation of the value of human life and the hierarchy of constitutional values, see the judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, in this Book.

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5. INFORMATION ABOUT HEALTH CONDITION

right to privacy – information autonomy – medical confidentiality – medical records – human dignity – rule of exclusivity for statutory limitation of rights and freedoms

Judgment of the Constitutional Tribunal[13] of 19 May 1998, U 5/97

Conclusion

"Section 5 section 1 of the Regulation issued by the Minister of Health and Social Care dated 17 May 1996 in the matter of Deciding Temporary Inability to Work […] to the extent in which the statistical reference number of the illness must be displayed on the doctor's certificate contravenes Article 31 section 3, Article 47, Article 51 section 1, 2 and 5 of the Constitution of the Republic of Poland of 2 April 1997 […] and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms […] and Article 17 of the International Covenant on Civil and Political Rights […] as well as Article 50 section 2 of the Act of 17 December 1974 on Pecuniary Benefits from Social Security Insurance in the event of Illness and Maternity […], since it establishes a limit on exercising the constitutional rights and freedoms of citizens, reserved for statutory exclusivity".

Facts of the case

The Human Rights Defender in the application of 5 March 1997 to the Constitutional Tribunal moved for examining the compliance of section 5 section 1 of the Regulation issued by the Minister of Health and Social Care dated 17 May 1996 in the matter of Deciding Temporary Inability to Work (Dz. U. [*Journal of Laws*], No. 63, item 302) with the Constitution and international law and with Article 50 section 2 of the Act of 17 December 1974 on Pecuniary Benefits from Social Security Insurance in the event of Illness and Maternity. The Human Rights Defender alleged that the challenged provision, by imposing the obligation to display a statistical reference number of an illness in an appropriate column of the doctor's certificate on temporary inability to work, violates the privacy of a citizen when revealing of the statistical number of the illness is not necessary to determine entitlement to the benefit and that there is no guarantee to keep the confidential nature of information about illnesses of employees.

Reasons for the judgment of the Constitutional Tribunal

[…] The Constitution of the Republic of Poland of 2 April 1997, contrary to the previously applicable constitutional provisions, directly envisages the right to privacy in Article 47, which reads that "everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about

[13] Panel of three judges.