

THE RATIONAL LIMITS OF THE CRIMINALIZATION OF ABORTION - LEGAL AND SOCIAL CONSEQUENCES OF THE RESTRICTIVE APPROACH

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Abstract This article aims to analyze a proposed amendment of 2021 to the Polish Criminal Code relating to abortion. The starting point for the considered legal solutions is the equalization of criminal law protection of human life before and after birth. This means that a termination of pregnancy is to be regarded as homicide, with all its attendant consequences. This article analyzes the legal implications arising from the proposed amendments both in relation to pregnant women and other persons (doctors, relatives and even employers of pregnant women). The far-reaching repressiveness of the future anti-abortion law that is rarely found in the modern world is demonstrated. The analysis is complemented with an attempt to diagnose the social consequences of the proposed amendments using historical and criminological texts concerning such situations in the past, as well as on the basis of sociological observations of current social trends. The authors believe that the proposed law will prove to be ineffective, and children (including unborn ones) will be maleficiaries rather than beneficiaries of the amendments in question.

Keywords

abortion,
homicide,
pro-life,
termination of
pregnancy,
draft amendment

1 Introduction

In the 21st century, in a European country, a citizens' draft amendment to the Criminal Code was prepared, the main goal of which is to protect life before birth to the same degree and in the same manner as the lives of all other persons. The draft amendment was prepared by an organization called Citizens' Legislative Initiative Stop Abortion, which collected signatures in its support among representatives of the public. 100,000 signatures are required for a citizens' draft to come before the Polish Parliament. This happened on September 22nd 2021.¹

The present analysis focuses on the draft act that would have amended the Criminal Code and certain other acts prepared by the aforementioned organization and posted on the website of the Pro-Right to Life Foundation.² It is a non-profit organization. One of its missions is to prevent abortion. For this purpose, it organizes various events: demonstrations, lectures, and also takes legislative initiatives. The draft act is not in force at the time of publication. Moreover, it was finally rejected in the Polish Parliament on December 2nd 2021.³ The draft, however, was a radical amendment to the legal order in terms of the criminalization of abortion. In a sense, it set the direction and virtually the threshold of radical normative solutions for supporters of a total ban on abortion. It is therefore necessary now (before another amendment) to interpret the proposed regulations in order to define the legal and social situation of women in the event of their enactment. We believe that the remarks presented here are of a universal nature, regardless of the criminal law model currently adopted in a given country, in relation to abortion or the effective legal system. Pro-life movements operate to a greater or lesser extent in every country and their ultimate aim is a prohibition on abortion along the lines of the Polish solution proposed in 2021. This may be illustrated by US press reports of a draft bill foreseeing the death penalty for a woman terminating her pregnancy (Gstalter, 2019).

¹ Serwis fundacji Pro-Prawo do życia (2021) *List przyjaciół: Podpisy pod projektem Stop aborcji trafiły do Sejmu*, retrieved from: <https://stronazycia.pl/list-do-przyjaciol-podpisy-pod-projektem-stop-aborcji-trafily-do-sejmu/> (30 September 2021).

² Serwis fundacji Pro-Prawo do życia (2021), retrieved from: <https://stronazycia.pl/fundacja> (30 September 2021).

³ Państwowa Agencja Prasowa (2021) *Obywatelski projekt ustawy zaostrzający przepisy aborcyjne. Posłowie zdecydowali*, retrieved from: <https://www.pap.pl/aktualnosci/news/%2C1017042%2Cobywatelski-projekt-ustawy-zaostrzajacy-przepisy-aborcyjne-poslowie> (27 December 2021).

This article employs a dogmatic approach complemented with a social assessment of the effects of the proposed criminalization policy, carried out based on criminological, sociological and historical texts. At the same time, a very important point of a legislative nature should be made. The wording used in the Polish debate on the issue under analysis is strongly marked by ideology. For instance, supporters of the legalization of abortion use the terms “fetus” or “embryo”, whereas the opponents – “conceived child”. Even the word “abortion” is more often used by representatives of the former group while the opponents often employ the term “murder of an unborn child”. This article will use the most neutral wording “conceptus”, which does not often appear in the Polish discourse and is therefore not associated with a specific worldview. Moreover, the Latin term that defines “one that is formed” may be used by both supporters and opponents of the criminalization of abortion.

2 Brief Historical Overview of the Criminalization of Abortion in Poland

Significantly, the 2021 draft amendment is not the first proposal by the Pro-Right to Life Foundation designed to introduce new anti-abortion solutions.⁴ In order to place the current proposed legislation in proper context it is necessary to first briefly summarize the history of the last hundred years of Polish criminal law regulations relating to the termination of pregnancy. It was a turbulent history full of twists and turns (Sitarz & Jaworska-Wieloch, 2020, pp. 239–240). The first Polish Criminal Code of the 20th century (1932)⁵ provided that abortion was a prohibited act. Specifically, a woman committing that act was liable to a penalty of up to three years' imprisonment, while other persons assisting in the act faced a maximum of five years in prison. The exceptions concerned two circumstances precluding criminal liability – there was no crime where the health and life of the pregnant woman were at risk and where the pregnancy resulted from a crime. The situation changed drastically with the introduction of a special Act of 1956⁶, pursuant to which the termination of pregnancy was legal where it was justified by medical indications, difficult living conditions of the woman or if there was a reasonable suspicion that the pregnancy

⁴ *Draft act amending the act – the Criminal Code and certain other acts*, retrieved from: https://www.stopaborcji.pl/wp-content/uploads/2016/03/projekt_2016.pdf (30 September 2021).

⁵ Presidential Decree of 11 July 1932 – Criminal Code (Journal of Laws of 1932, No. 60, item 571 as amended).

⁶ Act of 27 April 1956 of Conditions for the Permissibility of the Termination of Pregnancy (Journal of Laws of 1956, No. 12, item 61).

resulted from a crime. The Criminal Code of 1969⁷ did not alter significantly the legal situation (it referred to the exceptions envisaged in the above act), yet it foresaw impunity for a pregnant woman terminating her pregnancy regardless of the circumstances. The Act of 7 January 1993 on Family Planning, Human Fetus Protection and Conditions for the Permissibility of the Termination of Pregnancy (hereinafter 1993 Family Planning Law)⁸ redefined the exceptional situations allowing for a legal abortion that were introduced into the Criminal Code. They (initially) included the following circumstances: the pregnant woman's health and life, serious and irreversible damage to the fetus and suspicion that the pregnancy resulted from a prohibited act. In 1996, new conditions for the legalization of abortion were introduced – difficult living conditions or a difficult personal situation of the pregnant woman. However, these conditions were quickly removed from the Polish legal order because the following year the Constitutional Tribunal found them to be unconstitutional.⁹ Another Criminal Code (1997)¹⁰ – currently in force – did not change much in this regard because the provisions proscribing the criminalization of abortion referred to the above act in matters of legal exceptions. Finally, a judgment of the Constitutional Tribunal of 2020¹¹ had revolutionary implications, as it held that another existing condition – severe and irreversible damage to the fetus - is unconstitutional and must therefore be removed from the Polish legal system. As the law currently stands, abortion is allowed in Poland only in two situations: where necessary to save the life and health of the pregnant woman and where the pregnancy results from a prohibited act. A termination of pregnancy by a woman continues to go unpunished. The arguments advanced in the recent judgment of the Constitutional Tribunal give grounds for presuming that these changes are not final. The Tribunal took the view that the Constitution ensures the value of a person's life from conception and a right of such value may not be sacrificed for the exercise of rights of lower value. In the light of the considerations of the Tribunal, one individual (conceptus) may not be worth less than another individual (pregnant woman), and in particular her health or mental well-being (suffering detriment due to the fact that the pregnancy results from, for instance, rape). Clearly, the draft amendment to the Polish Criminal Code under analysis is

⁷ Act of 19 April 1969 – Criminal Code (Journal of Laws of 1969, No. 13, item 94).

⁸ Journal of Laws of 1993, No. 17, item 78 as amended.

⁹ Judgment of the Polish Constitutional Tribunal of 28 May 1997, K 26/96, LEX no. 29143.

¹⁰ Act of 6 June 1997 – Criminal Code (consolidated text Journal of Laws of 2020, item 1444, as amended).

¹¹ Judgment of the Polish Constitutional Tribunal of 22 October 2020, K 1/20, LEX no. 3071397.

consistent with the interpretation of the Polish Constitution announced by the Tribunal.

3 Criminal Law Consequences for Women for Intentional Crimes Against Life and Health

The draft amendment envisaged adding to Article 115 of the Criminal Code (hereinafter: CC), which is a glossary of statutory terms, a new provision (§ 25) containing the following legal definition of the child: *“A child is a human person in the period of conception until reaching the age of majority; a conceived child is a child in the period until the onset of childbirth within the meaning of Article 149.”* The addition of this definition, while repealing the 1993 Family Planning Law, that defines conditions for the legal termination of pregnancy, and removing Articles 152–154 (relating to illegal abortion) from the Criminal Code, has the effect that the notion of abortion – as a crime – in fact ceases to exist in the Polish legal order. Since then, a termination of pregnancy would be qualified as homicide, depending on the satisfaction of the remaining offense elements either of the basic or modified type. As intended by the proposer, a woman who chooses to terminate her pregnancy and has an abortion will have to bear full criminal liability and her only legal recourse would be to argue for an extraordinary mitigation of penalty or waiver of its imposition.

In essence, the Polish legislator provides for the possibility of bearing criminal liability on the basis of the Polish criminal act for a crime committed abroad only in situations where the committed prohibited act constitutes a prohibited act also in the place of its commission (that is in a foreign country). A pregnant woman could then terminate her pregnancy abroad with no fear of bearing criminal liability. However, there are cases where a pregnant woman could be held liable for a homicide of the conceptus even where the termination occurs abroad. This would occur where, as a result of a termination of pregnancy abroad, a financial benefit was achieved, even indirectly, on the territory of the Republic of Poland.

Upon the entry into force of the draft amendment, a perpetrator that terminates a pregnancy will most often fulfil the elements of the crime of homicide of the basic type (Article 148 § 1 CC: *“Whoever kills a human person shall be subject to a penalty of deprivation of liberty for no less than 8 years, a penalty of deprivation of liberty for 25 years or a penalty of deprivation of liberty for life”*). A mother who would commit this act personally,

for example by taking abortifacients, would be liable for the individual perpetration of this act. By contrast, where she terminated the pregnancy with the help of a doctor, she would be liable for incitement to commit homicide.

In both cases, the woman's liability may be mitigated pursuant to Article 148 § 5 CC, which provides that the court may apply an extraordinary mitigation of penalty or waive its imposition. Choosing to make use of this benefit of the law, the proposer was motivated by the lesser degree of guilt of the woman who decided to terminate her pregnancy. This is borne out, among other things, by the substantiation of the draft in which attention is drawn to the pressure exerted on many women who are induced to kill the conceptus. The proposer does not seem to be aware that it is not only pressure from third parties that can lead to a reduction in the degree of the pregnant woman's guilt. A woman who chooses to have an abortion is always in an abnormal motivational situation in which compliance with the law is difficult. The need to carry, give birth to and raise an unwanted child (for example resulting from a prohibited act or having genetic defects) may bring strong pressure on the woman's psyche and make it much harder for her to comply with the law, namely to carry the child to term and give birth. Were the court to apply an extraordinary mitigation of penalty for the crime of homicide, the minimal level of a penalty of deprivation of liberty imposed on the woman would be two years and eight months (Article 60 § 6 item 2 in conjunction with Article 148 § 1 CC), and the maximum – seven years and 11 months. It would not be possible to suspend conditionally a penalty of deprivation of liberty of such length, given that pursuant to Article 69 § 1 CC, this probationary measure may be imposed only in case of a person sentenced to a penalty of imprisonment not exceeding one year.

Bearing criminal liability, even resulting ultimately in a waiver of penalty, is an extremely severe consequence for a woman who chooses to terminate her pregnancy. The court may waive the imposition of penalty only once the criminal proceedings are conducted and guilt for the committed crime is assigned to the perpetrator in the procedural sense. A mother who terminated her pregnancy and in relation to whom the court chose to waive the imposition of penalty remains a person convicted of homicide with all the negative attendant consequences, except for the need to serve a criminal penalty. Apart from the life-long social stigma and condemnation by the state resulting from the conviction, the woman will face disadvantages due to her status of a convicted person for a year from that moment

until the time when her conviction is deleted (as is formally confirmed by an entry in the National Criminal Records).

Under the Polish legal system, even a person who has attained 15 years of age may be subject to criminal liability for his/her act if it is expedient due to the circumstances of the case and due to the degree of the perpetrator's development, characteristics and personal conditions (Article 10 § 2 CC). A fifteen-year-old person may also be liable to a penalty of imprisonment, but its upper limit cannot exceed 15 years because the Polish criminal law makes it impossible to impose a sentence of life imprisonment on a person who was under 18 years of age at the time of commission of the act, and also limits the maximum statutory penalty imposed on a person who has not attained 17 years of age at the time of commission of the act to two-thirds.

Under the Polish legal system, prescription of criminality of homicide occurs after the expiry of 30 years. A woman who terminated her pregnancy would have to live in a state of uncertainty about her fate during this time. In case of being sentenced to a penalty of imprisonment, the deletion of conviction would take place ten years after its completion or remission, or prescription of its enforcement. By contrast, were she to be sentenced to a penalty of deprivation of liberty not longer than three years (for example in case of an extraordinary mitigation of penalty), then upon her request the court might order a deletion of conviction after the expiry of five years, provided that she obeyed the legal order during that period. Until that time, she would have to face the disadvantages of the status of a person convicted of a crime.

The proposer admits, by the construction of the postulated provision of Article 148 § 5 CC, the possibility of qualifying the act consisting in a termination of pregnancy by a woman under Article 148 § 4 CC, which penalizes the so-called murder in the heat of passion. In such a case, punishment would consist of a penalty of imprisonment between one and ten years. The elements of this privileged type of offense are satisfied by a person who kills a human person under the influence of intense agitation justified by the circumstances. Given that intense agitation is considered in the Polish case law to be a physiological affect taking a sudden and violent course, strong enough to cause the domination of the emotional sphere over

the intellectual one,¹² it seems doubtful whether the qualification under Article 148 § 4 CC in relation to a woman terminating her pregnancy would be a measure often adopted by the judicial authorities. This argument is reinforced by the fact that intense agitation would have to be justified by the circumstances.

An affect is an almost involuntary reaction; it is an impulse to engage in illegal behavior that is particularly difficult to stop.¹³ An affect may occur, for instance, in a situation where a woman, surprised by the news about her pregnancy, decides to take abortifacients, or where the pregnancy is terminated after receiving information about genetic defects of the fetus. It is unclear whether such cause of affect could be deemed to be justified, thus partially forgivable, in the light of objective criteria and the moral norms prevailing among the public, and consequently result in the acceptance of qualification under Article 148 § 4 CC.¹⁴

As discussed above, the draft foresees the removal of the two remaining *de lege lata* conditions under which the termination of pregnancy is legal. In the event of its entry into force, conflicts of rights in the form of the right of the conceptus to exist and the mother's right to life will have to be settled on the basis of the general provisions of the Criminal Code relating to such conflicts. The introduction of the provisions in question into the Polish legal order will imply that the existence of the conceptus will surely constitute a legal right of the same value as human life. These rights may come into conflict with each other in some situations. In a tubal pregnancy, for example, the development of the conceptus is a threat to the mother's life and no methods have thus far been developed to save both of these lives (Pilch, 2013, pp. 51–53). It is possible to save only the mother's life because if no spontaneous fetal death occurs, or no further medical steps are taken, the fallopian tube will rupture, causing the death of both the woman and the conceptus (Pilch, 2013, p. 53).

It should be considered whether the conditions for the state of higher necessity laid down in Article 26 § 2 CC are actualized in the factual state outlined above; that is, whether a legal right in the form of the woman's life is under direct threat that cannot be averted otherwise than by sacrifice of a legal right in the form of the existence of

¹² Judgment of the Court of Appeal in Białystok of 18 July 2019, II AKa 119/19, LEX no. 2766154.

¹³ Judgment of the Polish Supreme Court of 14 April 2011, II KK 71/11, LEX no. 794969.

¹⁴ Judgment of the Court of Appeal in Cracow of 10 December 2013, II AKa 241/13, LEX no. 1403740.

the conceptus – in the opinion of the proposer, a right of the same value. Given that between 47 to 82 percent of ectopic pregnancies spontaneously resorb, many physicians may choose not to perform surgery or not to apply pharmacological procedures that result in a removal of the conceptus (Sowa et al., 2015, p. 311). In some cases, the gynecologist may instead conduct a clarification procedure consisting of closely observing clinical symptoms and some baseline parameters (Sowa et al., 2015, p. 311). In such situations, the threat to the woman's life may be deemed to be indirect, and any potential termination of pregnancy may then not be justified by a state of higher necessity. However, this is not a procedure that guarantees full safety to the woman because the currently used diagnostic methods do not provide a basis for an unambiguous diagnosis and differentiation between pregnancy with a ruptured and non-ruptured fallopian tube (Knafel et al., 2009, p. 737).

Another example of a situation where continuing the pregnancy may pose a risk to the woman's life is the case where the pregnant woman suffers from pulmonary hypertension. The mortality rate of pregnant women suffering from this disease ranges between 30 to 50 percent (Bassily-Marcus et al., 2012, p. 1). In the light of the views expressed by some conservative doctrine representatives, this percentage is lower and the pregnancy may be successful with proper diagnosis and therapy (Banasiuk et al., 2018, p. 201). These discrepancies may lead some doctors to assess the threat to the woman's life as not direct. Some may choose to terminate the pregnancy too late, not saving the pregnant woman's life on time. Similar conclusions can be drawn with regard to the cases of pregnant women suffering from coronary heart disease with complications; the risk of their death is 20 percent (Wielgoś et al., 2016, p. 94).

Even where a doctor chooses to terminate a pregnancy posing a threat to the mother's life in a state of higher necessity under Article 26 § 2 CC, the doctor's action will be marked by unlawfulness. It is clear that in such a case, the doctor rejects the life of the conceptus in order to save the mother's life and thus satisfies the offense elements of the prohibited act under Article 148 § 1 CC without the occurrence of any circumstances legalizing this type of behavior. For this reason, the ability to act in necessary defense is actualized on the part of other natural persons in order to counter an unlawful and direct attack on the existence of the conceptus carried out by the doctor and the mother. In extreme cases, this may lead to

abducting and holding the woman so that she is unable to have an abortion, or restraining the gynecologist, or even causing damage to the doctor's health.

Although it seems obvious, it should be emphasized that in the event of the entry into force of the provisions in question, the Polish legal order will contain no regulation justifying an act consisting of a termination of pregnancy resulting from a prohibited act (for example the crime of rape or incest). A conflict between the existence of the conceptus and the woman's freedom from giving birth to a child resulting from a prohibited act will be settled by way of criminalization each time in favor of the conceptus.

In the event of the entry into force of the draft in question, criminal liability for one of the forms of acting as an accomplice in the commission of the crime of homicide will be incurred not only by the mother or doctor performing the abortion, but by all those who cooperate with the pregnant woman in the termination of pregnancy. A mother who solely commits the act, for example by means of taking abortifacients, would be liable for individual perpetration, whereas in the case where she had an abortion with the assistance of a doctor, she would be liable for incitement to commit homicide. The doctor would be liable either for the commission of a crime under Article 148 § 1 CC in the form of individual perpetration (if he performed the abortion), or for assistance to commit that act (if the doctor advised the pregnant woman of a method of killing the conceptus). The offense elements of the crime of assistance to homicide would also be satisfied by anyone who would in any way make it easier for a woman to abort a child, for instance, by recommending a doctor who would perform such a procedure in Poland, as well as anyone who would strengthen her intention to do so (mental assistance). Further, anyone who would induce a woman to terminate her pregnancy would be liable for either incitement to kill the conceptus (if the pregnant woman decided to use abortifacients independently) or for incitement to incitement (so-called chain incitement) if the mother decided to have an abortion. Under the Polish criminal law, incitement and assistance are in essence both equally punishable within the limits of the statutory penalty attached to perpetration. The court may apply an extraordinary mitigation of penalty only in case of assistance. The deterring effect of a severe sanction for homicide (penalty of deprivation of liberty for a term not shorter than eight years, penalty of deprivation of liberty for a term of 25 years or for life) would thus result in the reluctance to provide any help to a pregnant woman who contemplates a termination of

pregnancy. In the case of a relationship of dependence between the mother and a person inducing her to abort the conceptus (for example a husband-wife relation), where the influence took a more decisive form than inducing (order), that person could even be liable for homicide in the form of ordering the perpetration.

The additional repressive nature of the proposed amendment is related to the wording of the norms imposing in the Polish legal system the obligation of denunciation of certain crimes of the highest general degree of social harmfulness – including homicide. The criminal liability for a failure to comply with the obligation of denunciation would apply to all those who had reliable information on an act consisting of an attempted or performed abortion, that is a felony of homicide, and did not immediately notify the authority appointed to prosecute crimes. As intended by the legislator, the conduct of those who failed to notify the authorities for fear that they or their loved ones could bear criminal liability would be exempt from criminal liability on general principles. For instance, liability for the act under Article 240 § 1 CC would not be incurred by the husband of a woman who decided to have an abortion, although it cannot be ruled out that mental assistance in the crime of homicide could be ascribed to him if he strengthened his wife in her decision. By contrast, such liability could be incurred by a friend or fiancé if they previously did not assist or induce the woman (or it cannot be proven), yet they knew of the abortion.

Significantly, the Polish legislator has intended for some time to criminalize preparation for the crime of homicide (Kokot, 2020, p. 112; Bek, 2020, p. 34). Provided that this intention is ultimately accomplished and the draft amendment to the anti-abortion law under analysis enters into force, women will incur criminal liability for the mere creation of conditions for an attempted termination of pregnancy. A pregnant woman will satisfy the offense elements of preparation for the crime of killing the conceptus when, for instance, she starts investigating the possibilities or ways of aborting a fetus in Poland, as well as when she comes into possession of abortifacients. The offense elements of preparation in the form of entering into an agreement will also be fulfilled by the doctor who agrees to perform an abortion.

Apart from the provisions criminalizing the effective termination of pregnancy, the draft amendment under analysis introduces criminal liability for causing serious and medium bodily harm to the conceptus, excluding criminal liability only for an unintentional act committed by the mother. It appears that a legal qualification based on the types indicated above would nonetheless be uncommon, given that the pregnant woman does not intend to inflict bodily harm on the fetus, but wishes to remove it entirely. This qualification could be adopted in a situation where the termination of pregnancy fails and the conceptus suffers bodily harm during the medical procedure. Then the woman would be held liable for an attempt to kill the conceptus qualified cumulatively with causing bodily harm to the conceptus. Taking into account the construction of conditional intent that enables the commission of any intentional crime (including causing bodily harm – severe or medium) by a person who foresees that possibility and accepts it, there is a risk of criminal liability for third parties who provide a pregnant woman with alcohol or cigarettes. This possibility will arise where the perpetrator is aware that the woman is pregnant and accepts the fact that such conduct will cause bodily harm to the conceptus.

Moreover, the proposer foresees the possibility of holding criminally liable anyone who exposes the conceptus to the direct risk of loss of life or severe bodily harm. In a case where the mother is the perpetrator of an intentional act, the court could apply an extraordinary mitigation of penalty or waive its imposition. Conversely, where the act was unintentional, she would not be subject to a penalty. The proposed draft amendment could lead to the criminalization of various socially harmful behavior undertaken by pregnant women, such as drinking alcohol or smoking, as well as socially irrelevant behavior that is potentially dangerous for pregnant women – mountain climbing, skiing, parachute jumping or bungee jumping. Further, it cannot be excluded that the persons who exposed the pregnant woman (including the conceptus) to the danger by providing a rope for bungee jumping or enabling a parachute jump, or even skis or ski-related equipment, will also be held criminally liable. This criminalization gives rise to reasonable doubts in the light of the principle of proportionality under Article 31 item 3 of the Constitution of the Republic of Poland, in particular taking into account the requirement of the need to introduce a criminal ban in order to eliminate an undesirable phenomenon.

4 Unintentional Causing the Death of the Conceptus in the Light of the Proposed Amendments

De lege lata, the provisions relating to abortion did not foresee criminal liability for an unintentional termination of pregnancy, regardless of the role played by a given person in the event. Consequently, the careless behavior of the pregnant woman, a doctor or another third party, leading to the death of the conceptus is not a crime.

The repeal of the abortion provisions of the Criminal Code and the view that a human person is an individual from the moment of conception will activate, *inter alia*, the provision of Article 155 CC for the assessment of careless behavior during pregnancy. The draft foresees that it will have the following wording: “§ 1 Whoever unintentionally causes the death of a human person shall be subject to a penalty between 3 months and 5 years. § 2 A mother of a conceived child who commits the act defined in § 1 to the detriment of such child shall not be subject to a penalty.” This way the occasionally expressed call for the introduction of criminal liability for an unintentional termination of pregnancy will be put into practice (Postulski, 2009). This crime will be referred to in legal language as the unintentional causing the death of a human person. In the light of the provision in question, the mother of a conceived child shall be exempt *ex lege* from criminal liability. It must be highlighted that the legal construction adopted by the proposer means that she commits a crime (of unintentional causing the death of her child), yet she may not be held criminally liable for that act.

The proposer referred in the substantiation to a specific exception envisaged in Article 155 § 2 in very enigmatic terms. It is indicated only that “In a situation where the mother of a conceived child is the unintentional perpetrator of the acts described in Articles 155 (...) CC, the draft provides for the exclusion of the possibility of punishing her by using the phrase: ‘not subject to a penalty’. This exclusion applies to unintentional forms of acts, which, as a rule, consist in a failure of the mother of a conceived child to observe the caution required of a person in her condition.” The question arises what rationale was behind the adoption of that solution in view of the fact that a mother causing the death of her already born child bears the same liability as any other person who causes such effect. It appears that this is not a case of diminished guilt resulting from the social pressure indicated above. Such pressure may provide the motivation to undertake a specific intention, but not to breach the

precautionary rules. Is it thus an issue of diminishing the guilt at the level of cautious behavior of a pregnant woman because of the condition she is in? It is clear that pregnancy is associated with the so-called hormone storm causing various psychological disorders (Trifu et al., 2019), which may incline the legislator to mitigate or exclude criminal liability. Suffice it to recall that English law has a provision that envisages more lenient criminal liability for infanticide, which the legislator links to mental instability due to the process of lactation.¹⁵ However, such an interpretation of the provision raises the question why the lack of mental balance does not lead to an exemption from criminal liability with regard to other unintentional crimes committed by a woman during pregnancy – for example related to her older children. The indicated doubts may suggest that it is the intentional termination of pregnancy by a woman that should lead to greater liberalization of criminal liability than her careless behavior.

The criminalization of unintentional causing the death of a conceived child raises numerous other doubts concerning, *inter alia*, a properly defined range of criminalization and interpretative issues. To begin with, there is no doubt in medicine that it is a natural biological phenomenon that spontaneous miscarriages occur during the course of pregnancy. The literature review shows that among women who know that they are pregnant, the miscarriage rate is between 10 to 20 percent, whereas among all fertilizations, approximately 30 to 50 percent (McNair & Altman, 2011). This article is not of a medical nature and this issue will therefore not be further explored (Dulay, 2020), yet it is not difficult to imagine a problem of determining whether the miscarriage that occurred was a natural (and ultimately desirable) response of a woman's body to some abnormalities, or whether it resulted instead from careless behavior of doctors or other persons. Researchers place emphasis on the fact that a miscarriage may be due to numerous reasons, not all of which can be identified. One can even distinguish a chemical pregnancy that is detected during testing, but ends in a miscarriage prior to or near the next expected menstruation (Dulay, 2020; Bourne & Condous, 2006, p. 28–29). Nonetheless, the criminal liability that a doctor faces for causing a miscarriage stemming from not

¹⁵ Section 1(1) of the Infanticide Act 1938 states: “Where a woman by any willful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of felony, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.”

exercising proper care with respect to the patient will mean that, for the doctor's own safety, recommendations given to the pregnant woman will be very (excessively?) strict, aiming to eliminate the risks of miscarriage that may be removed. Notably, in 2016, in connection with public debate on the proposed amendments in the area of legal permissibility of performing a termination of pregnancy, the Polish Society of Gynecologists and Obstetricians (PTG) expressed (Wielgoś et al., 2016, pp. 91–99), concern over the ongoing public debate on the total ban on abortion. In the opinion of PTG, the imposition of a ban on abortions with the exception of a situation of “a direct threat to the mother's life” will cause uncertainty in clinical practice as to the compliance of a medical decision with the law.

For the sake of precision of further considerations, unintentional causing the death of a conceptus may be connected with the acts or omissions of third persons. The most important issues below will be indicated on the basis of this division. In the case of a careless (active) act of third parties, it will be necessary to establish whether there is a cause-and-effect relationship to which the law gives a normative meaning between a given act and the death of a conceptus. Given that studies enumerate alcohol consumption, smoking, obesity, eating disorders, diseases and even shift work among the risk factors for miscarriage (Wielgoś et al., 2016, pp. 91–99; Arck et al., 2008), expert witnesses in the field of gynecology appointed in the course of criminal trial will face a considerable challenge.

More legal and evidential problems are created by the unintentional termination of pregnancy connected with omission. Regardless of the manner of resolution of the criminal law issue of the causality of omission, it is clear that the liability for the death of the conceptus will be ascribed to the one who had the obligation to support the pregnancy, and where the omission led to its loss. Such liable person will certainly be a doctor taking care of the pregnant woman, a nurse, and possibly a midwife. However, an important question arises as to whether the obligation to care for pregnancy also rests on the father of the child, and if so, what such obligation derives from. Regardless of the answer, the persons obliged to support the pregnancy will have to do everything possible to prevent a miscarriage under the threat of criminal liability. This conclusion in turn leads to a question whether the obligation to support a pregnancy will mean the possibility, or perhaps the necessity, of taking appropriate

steps in relation to a pregnant woman who behaves in a careless manner, posing a threat to the life of the conceptus.

In the light of the Polish criminal law solutions, persons who indirectly influenced the careless behavior of the pregnant woman resulting in a miscarriage also will be liable for an unintentional termination of pregnancy. Such liability may apply to a person who induced a pregnant woman to engage in a careless behavior, or as an employer, issued such order.

In the light of the provisions in question concerning the unintentional termination of pregnancy, it should be noted that although in the event of enactment of the draft amendment under analysis the woman will not bear criminal liability for careless behavior resulting in a miscarriage, she will be a kind of “hostage” to the extremely cautious treatment by her doctor, employer, partner, and possibly others. Although the provisions on criminal liability for unintentional causing bodily harm (Article 156–157 CC) and unintentional exposition to danger of loss of life or health (Article 160 CC), which will also refer to the conceptus, will not directly create liability for the pregnant woman, it is the criminal liability that other persons incur for the consequences defined in them that makes the argument concerning the extreme caution even more probable.

5 Social Consequences Connected with the Radicalization of the Criminalization of Abortion

Describing the anticipated social effects, the proposer sees abortion as the cause of many pathologies – “Consent to killing the weakest undermines the foundations of the Republic of Poland. The moral corruption and acts of aggression that we can observe in the streets of Polish towns are the realization of the warning formulated many years ago by Mother Teresa of Calcutta: If a mother can kill her own child – what is left for me to kill you and you kill me?” In the opinion of the proposers of the draft amendment, the criminalization of abortion to the full extent “is a necessary condition for building social peace.” They point out that “being open to children leads to economic recovery and, in the long term, to prosperity.” It is hard to predict the consequences of future events and decisions, but the activity of a rational human being must include such element, too. This article attempts to present a brief overview of the social consequences of the proposed amendments, with particular

emphasis on those to be borne by women. These considerations will be based on the experiences from the times when abortion was almost completely prohibited, which are described in criminological, sociological and journalistic works. The suffering of Polish pregnant women in the years 1919–1939 was movingly described by the then columnist Tadeusz Boy-Żeleński, who titled his subsequent series of feature articles “Women’s Hell” (Boy-Żeleński, 1958). It is unfortunate that many of his descriptions may become reality a hundred years later. Conclusions can also be drawn from the Romanian demographic policy under the rule of Nicolae Ceaușescu, which was connected with an almost complete ban on abortion (and a practical ban on contraceptives).

No one has any illusions that a criminal prohibition will eliminate a specific phenomenon of social pathology – there will be persons who will engage in prohibited behavior despite the penalty it carries. A particularly significant increase in illegal behavior is to be expected in case of the termination of pregnancy. On the one hand, this is due to a different moral assessment of this act, as hardly any other crime evokes such radically different ethical assessments, which surely is conducive to a decision to commit an illegal act. Moreover, the reasons for a decision to terminate a pregnancy are sometimes so serious and “necessary” in practical terms that the effective criminal provision is not a sufficiently strong impediment. Illegal abortions will surely be performed in Poland. In turn, a direct consequence of abortions performed in the underworld is a breach of medical standards. A termination of pregnancy is a medical procedure that must be carried out while fulfilling appropriate standards. It requires trained personnel and ensuring the proper technical and organizational conditions, including an aseptic environment. A work by Łodyga (Łodyga, 2016) aptly illustrates what the illegal termination of pregnancy looked like when these standards were not met. Suffice it to mention that out of 37 disclosed cases relating to abortion, the woman died in as many as 15. The figures for Romania look equally bleak. Women's mortality rate in Romania as a result of abortion was the highest in Europe. In 1980, in Poland, out of 100,000 live births, the rate of that mortality was 11.7, in Czechoslovakia 9.2, whereas in Romania 132.1. In 1989, these figures were, respectively: 11.0 – 8.0 – 169.4 (Lataianu, 8). In this sense, Vladimir Trebici shows also that only between 1982 and 1988 (years for which statistical data are available), 3,360 women died, leaving 6,880 orphaned children (Lataianu, 8).

A serious social consequence of the ban on abortion is an increase in the number of unwanted children. This problem became strikingly manifest in Romania where a generation of such unwanted children called (Ceausescu's babies) emerged. Some of them, born in difficult and unstable family conditions, were abandoned from the beginning in maternity hospitals, and later in hospitals for children with disabilities. In the opinion of specialists, the ban on abortions may partially account for the great number of children placed in Romanian care facilities (Lataianu, 8). Those children suffered a cruel fate, especially so regarding those placed in the country (Ducati Flister, 2013). A close analysis of data relating to children born in Romania under Nicolae Ceaușescu performed using observable background variables shows that children born after the imposition of the abortion ban had worse academic and labor market achievements than adults (Pop-Eleches, 2005). At the same time, the worsening economic situation of families led to an increase in the number of murders of small children and infanticides (Ducati Flister, 2013, p. 294–322).

To avoid the above-mentioned consequences for future pregnant women and future (unwanted) children, women will in advance make decisions about abandoning motherhood altogether. Lacking the possibility to terminate a pregnancy due to the child's severe disease or threat to the mother's health may reinforce the decision of temporary or permanent infertility (through contraceptives or sterilization) in order to eliminate the undesirable risk, even at the cost of having no children.

Another adverse effect of the restrictive criminalization policy in this delicate area may be the emigration of young people. Even now, the ten most important reasons for emigration from Poland include more friendly public administration in target countries (Polski obserwator, 2021). Considering that the necessity of giving birth to an unwanted child may entail deficiencies in the other indicated reasons for emigration (for example earnings, comfort of life, possibility of development), a decision to leave the country may become easier. One must hope that unwanted pregnancies will not lead to another form of "escapes" – suicides of pregnant women. The number of suicides whose direct cause was an unwanted pregnancy has been on the decline to date (Wołodźko & Kokoszka, 2014; Surkan et al., 2018), yet at the beginning of the 20th century, abandoned pregnant women often took that step. A pregnant woman who will not want to or, in her opinion, will not be able to give birth to a child will face loneliness in solving this problem if she stays in Poland. The broad scope of joint criminal liability, as well as the criminalization of attempt

and, possibly in the future even preparation, will expose her loved ones and friends to criminal liability.

For many reasons, it will also be advantageous to conceal the pregnancy until the last moment possible. The later a pregnancy is confirmed, the longer the period of time, which includes awareness of the fact that the woman is pregnant, when the provisions on intentional behavior do not “apply”. It will concern the liability of both the woman and third persons. It will also be easier to exculpate unintentional behavior in the absence of awareness of the existence of pregnancy. From the perspective of health care, this approach will not serve the pregnant woman nor her child well. The concealment of pregnancy may also serve to implement the intention of infanticide. Criminologists are sure that there is a relationship between a repressive penal policy concerning abortion and the number of infanticides (Pitt & Bale, 1995; Sitarz, 2019). This problem is perceived in a similar manner in Senegal. (Gaestel & Shryock, 2017). It is argued that *“only since the Second World War has the contraceptive pill, the intrauterine device, and the legalization of abortion removed all valid excuses for unwanted pregnancy or infanticide. To the extent that these problems still exist, at least in western society, they are due primarily to carelessness, ignorance, or indifference”* (Oberman, 2004, p. 24). It is even pointed out that the technological advances that facilitate safe and painless abortion have contributed to a reduction in the number of infanticides (Sauer, 1978). Further, there is no doubt that both illegal abortions and infanticides carried out on a larger scale under such restrictive law will fill prisons with inmates for many years to come.

6 Conclusions

Contrary to the claims of the proposer, the draft amendment under analysis will produce many negative social consequences that will ultimately result also in economic costs. The mere social consequences of the full criminalization of abortion indicated above do not allow for a positive assessment of the proposed amendments. The scope of criminalization from the perspective of the *ultima ratio* principle of criminal law and principle of proportionality should also be critically evaluated, regardless of the ideological views. The proposed solutions are cruel and in no way proportionate to the gravity of the act. The proposers may have been inspired by the thought of Schooyans that liberal abortion law is in fact a totalitarian regulation

that discriminates against and violates the democratic legal order (Schooyans, 1991, p. 94), but we definitely do not subscribe to this view.

It must also be accepted that contrary to the applied assumptions, the proposer did not consistently implement the plan of equalizing the legal protection of life before and after birth, as he could not do it – hence the lack of punishment of the mother for unintentional behavior and mitigation of liability for intentional behavior. Such equality at the level of criminal liability for a breach of a legal right in the form of life before and after birth may not be proposed to the full extent. Regardless of the endorsed views, it would be extremely inhumane. A declaration of equality of life in the pre- and postnatal phase must give way to social and human considerations.

We also take the view that this law will eventually prove ineffective. Although unborn children are to be in principle the beneficiaries of the new legal solutions, these children along with their mothers and third persons will be (unintended) maleficiaries of the proposed amendments to the Polish criminal law.

Legislation, case Law (Polish)

Judgment of the Polish Constitutional Tribunal of 28 May 1997, K 26/96, LEX no. 29143.
Judgment of the Polish Constitutional Tribunal of 22 October 2020, K 1/20, LEX no. 3071397.
Judgment of the Polish Supreme Court of 14 April 2011, II KK 71/11, LEX no. 794969.
Judgment of the Court of Appeal in Bialystok of 18 July 2019, II AKa 119/19, LEX no. 2766154.
Judgment of the Court of Appeal in Cracow of 10 December 2013, II AKa 241/13, LEX no. 1403740.

Legal acts (Polish)

Act of 19 April 1969 – Criminal Code (Journal of Laws of 1969, No. 13, item 94).
Act of 27 April 1956 of Conditions for the Permissibility of the Termination of Pregnancy (Journal of Laws of 1956, No. 12, item 61).
Act of 6 June 1997 – Criminal Code (consolidated text Journal of Laws of 2020, item 1444, as amended).
Act of 7 January 1993 on Family Planning, Human Fetus Protection and Conditions for the Permissibility of the Termination of Pregnancy (Journal of Laws of 1993, No. 17, item 78 as amended).
Presidential Decree of 11 July 1932 – Criminal Code (Journal of Laws of 1932, No. 60, item 571 as amended).

Websites

- Draft act amending the act – the Criminal Code and certain other acts, retrieved from: https://www.stopaborcji.pl/wp-content/uploads/2016/03/projekt_2016.pdf (30 September 2021).
- Dulay, A. (2020). Spontaneous Abortion (Miscarriage) (2021), retrieved from: <https://www.msmanuals.com/professional/gynecology-and-obstetrics/abnormalities-of-pregnancy/spontaneous-abortion> (30 September 2021).
- Państwowa Agencja Prasowa (2021). *Obywatelski projekt ustawy zaostrzający przepisy aborcyjne. Posłowie zadecydowali*, retrieved from: <https://www.pap.pl/aktualnosci/news%2C1017042%2Cobywatelski-projekt-ustawy-zaostrzajacy-przepisy-aborcyjne-poslowie> (27 December 2021).
- Polski obserwator (2021). *10 najczęstszych powodów dzisiejszej emigracji Polaków*, retrieved from: <https://polskiobserwator.de/praca/10-najczestszych-powodow-dzisiejszej-emigracji-polakow> (30 September 2021).
- Serwis fundacji Pro-Prawo do życia (2021). retrieved from: <https://stronazycia.pl/fundacja> (30 September 2021).
- Serwis fundacji Pro-Prawo do życia (2021). *List przyjaciół: Podpisy pod projektem Stop aborcji trafiły do Sejmu!*, retrieved from: <https://stronazycia.pl/list-do-przyjaciol-podpisy-pod-projektem-stop-aborcji-trafily-do-sejmu/> (30 September 2021).

References

- Arck, P. et al. (2008) Early risk factors for miscarriage: a prospective cohort study in pregnant women, *Reproductive Biomedicine Online*, 17(1), pp. 101–113.
- Banasiek, J. et al. (2018) Remarks on the position of the Polish Gynaecological Society concerning the abortion ban proposed in 2016, *Zeszyty Prawnicze*, 18(1), pp. 193–224.
- Bassily-Marcus, A. et al. (2012) Pulmonary Hypertension in Pregnancy: Critical Care Management, *Pulmonary Medicine*, 1, pp. 1–9.
- Bek, D. (2020) Criminality of Preparation to Murder, *Krytyka Prawa*, 12(4), pp. 32–39.
- Bourne, T. & Condous, G. (2006) *Handbook of Early Pregnancy Care* (London: Informa Healthcare).
- Boy-Żeleński, T. (1958) *Piekło kobiet* (Warszawa: Państwowy Instytut Wydawniczy).
- Flister Ducati, L. (2013) Socioeconomic Consequences of Romania's Abortion Ban under Ceaușescu's Regime, *Journal of Alternative Perspectives in the Social Sciences*, 5(2), pp. 294–322.
- Gaestell, A. & Shryock, R. (2017) The Price of Senegal's Strict Anti-Abortion Laws, *The New Yorker*, 10(1).
- Gstalter, M. (2019) GOP Texas lawmaker reintroduces bill to allow death penalty for women who have abortions, *The Hill*, 4(10).
- Knafel, A. et al. (2009) Ectopic pregnancy rupture – can it be prevented? *Ginekologia Polska*, 80(10), pp. 734–739.
- Kokot, R. (2020) Criminalisation of murder preparation in the Amendment to the Penal Code of 13th June 2019, *Przegląd Prawa i Administracji*, 120(2), pp. 102–24.
- Lataianu, M. (2001) The 1966 Law Concerning Prohibition of Abortion in Romania and its Consequences. The Fate of One Generation, https://www.demogr.mpg.de/papers/workshops/010623_paper25.pdf (30 September 2021).
- Łodyga, M. (2016) Metody i środki stosowane w procedurze aborcyjnym w okresie międzywojennym na przykładzie spraw z terenu siedleckiego okręgu sądowego, *Meritum*, 8, pp. 241–54.
- McNair, T. & Altman, K. (2011) Miscarriage and Recurrent Pregnancy Loss, In: Hurts J. et al. (eds.) *The Johns Hopkins Manual of Gynecology and Obstetrics* (Philadelphia: WoltersKluwer Health).
- Oberman, M. (2004) Mothers Who Kill: Coming to Terms with Modern American Infanticide, *DePaul Journal of Health Care Law*, 8(1), pp. 3–108.

- Plich, R. (2013) The Moral Dilemma Concerning the Termination of Tubal Pregnancies by Means of Salpingostomy and Mithotrexate. An Account of the Major Reasons and Arguments of the Initial Stage of the Current Theological Debate, *Teologia i Moralność*, 14(2), pp. 51–76.
- Pop-Eleches, C. (2005) The Impact of an Abortion Ban on Socioeconomic Outcomes of Children: Evidence from Romania, *Journal of Political Economy*, 114(4), pp. 744–773.
- Sauer R. (1978) Infanticide and Abortion in Nineteenth-Century Britain, *Population Studies*, 32(1), pp. 81–93.
- Schooyans, M. (1991) *Aborcja a polityka* (Lublin: Instytut Jana Pawła II KUL).
- Sitarz, O. (2019) Kryminologiczny obraz dzieciobójstwa a jego kryminalizacja i typizacja In Klaus W. et al. (eds.) *Po co nam kryminologia. Księga jubileuszowa Profesor Ireny Rzęplińskiej*, (Warszawa: Wydawnictwo INP PAN), pp. 581–596.
- Sitarz, O. & Jaworska-Wieloch, A. (2020) Principles of liability under the Polish Criminal Code for behavior relating to the termination of pregnancy undertaken in Poland and the Czech Republic, *International and Comparative Law Review*, 20(1), pp. 237–264.
- Sowa, M. et al. (2015) Ectopic pregnancy – risk factors, diagnostics and treatment, *Education, Health and Sport*, 11(5), pp. 311–320.
- Pitt, S. & Bale, E. (1995) Neonaticide, Infanticide, and Filicide: A Review of the Literature, *The Bulletin of the American Academy of Psychiatry and the Law*, 23(3), pp. 375–386.
- Postulski, J. (2005) Gloss to an order of the Supreme Court of 30 October 2008, I KZP 13/08. *Prokuratura i Prawo*, 5, pp. 161–167.
- Surkan, P. et al. (2018) Unintended pregnancy is a risk factor for depressive symptoms among socioeconomically disadvantaged women in rural Bangladesh, *BMC Pregnancy and Childbirth*, 12(13), doi: 10.1186/s12884-018-2097-2.
- Trifu, S. et al. (2019) The Neuroendocrinological Aspects of Pregnancy and Postpartum Depression, *Acta Endocrinologica (Bucharest)*, 15(3), pp. 410–415, doi: 10.4183/aeb.2019.410.
- Wielgoś, M. et al. (2016) Stanowisko Polskiego Towarzystwa Ginekologicznego w sprawie debaty publicznej dotyczącej postulowanych zmian w zakresie prawnej dopuszczalności wykonywania zabiegu przerywania ciąży, *Ginekologia i Perinatologia Praktyczna*, 3(1), pp. 91–99.
- Wołodźko, T. & Kokoszka, A. (2014) Classification of persons attempting suicide. A review of cluster analysis research, *Psychiatria Polska*, 48(4), pp. 823–834.