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Legal consequences of the judgment of the Polish Constitutional Tribunal of 22 October 2020 (K 1/20) regarding wrongful conception, wrongful birth, wrongful life claims

Skutki prawne wyroku Trybunału Konstytucyjnego z 22 października 2020 (K 1/20) wobec roszczeń wrongful conception, wrongful birth, wrongful life

Abstract

Wrongful conception, wrongful birth and wrongful life claims emerged with 20th-century medical progress. Though uncommon in Poland, these claims are increasingly raised. Given growing patient awareness and the ongoing abortion debate, it is necessary to assess their legal admissibility in Poland and whether liability can arise for „unlawfully preventing a legal abortion," resulting in the birth of a sick child. The judgment of the Constitutional Tribunal of 22 October 2020 (K 1/20) effectively negated the validity of such claims, affirming that wrongful claims contradict the constitutional principles of life and dignity protection.

Key words: abortion, wrongful conception, wrongful birth, wrongful life claims

Streszczenie

Roszczenia wrongful conception, wrongful birth and wrongful life pojawiły się wraz z postępem medycyny w XX wieku. Choć w Polsce rzadko spotykane, roszczenia te są coraz częściej podnoszone. Biorąc pod uwagę rosnącą świadomość pacjentek i toczącą się debatę na temat aborcji, konieczna jest ocena ich prawnej dopuszczalności w Polsce oraz tego, czy

może powstać odpowiedzialność za „nielegalne uniemożliwienie legalnej aborcji", skutkujące urodzeniem się chorego dziecka. Wyrok Trybunału Konstytucyjnego z 22 października 2020 r. (K 1/20) skutecznie zanegował zasadność takich roszczeń, potwierdzając, że roszczenia wrongful są sprzeczne z konstytucyjnymi zasadami ochrony życia i godności.

Słowa kluczowe: aborcja, roszczenia wrongful conception, wrongful birth, wrongful life

Introduction

Wrongful claims remain rare in Poland, unlike in Western Europe or the United States. However, increasing awareness and the abortion rights debate require analysis of whether such claims are permitted and whether liability may arise from preventing a lawful abortion that results in the birth of a sick child.

This article outlines the types of wrongful claims and evaluates their compatibility with Polish law. A key focus is the Constitutional Tribunal's judgment of 22 October 2020 (K 1/20) and its legal implications. The analysis is limited to the Polish legal framework.

Types of wrongful conception, wrongful birth and wrongful life claims

Wrongful claims gained relevance with medical advances. Before analyzing their legal reception in Poland, terminological issues must be addressed. The word „wrongful"[1] implies illegality, injustice, or harm – the latter being the most accurate in this context. Polish translations vary and often inadequately capture the nuance, hence the preference for English terminology.

Wrongful conception arises when medical negligence leads to unintended conception despite attempts to prevent it (e.g. failed sterilization[2]

[1] Cambridge Dictionary, Entry: „wrongful", link: https://dictionary.cambridge.org/pl/dictionary/english/wrongful. (accessed: 28 of March 2025).

[2] Tubal ligation – salpingectomy, in Poland it is an illegal procedure, treated as a crime criminalized in art. 156 § 1 of the Polish Penal Code – deprivation of the ability to fertilize, which is treated as a serious impairment of health.

or abortion). The claim focuses on improper medical procedure – not the child's health – and often relates to failed sterilization (treated in Poland as illegal) or ineffective abortion. The resulting obligation to raise the child is claimed as damage, though the core issue lies in the disrupted right to family planning and breach of patient rights[3].

The content of the wrongful conception claim will therefore be an allegation of an incorrectly performed procedure by a doctor due to negligence, lack of care, as a result of which conception occurred, or – in the case of an incorrectly performed abortion – the birth of a child. As a result of this action, a child is born and it will be irrelevant whether it is healthy or sick, the structural element of the wrongful conception claim will not be a defect or illness of the child[4]. The allegation in this claim will consist in the fact that the doctor "caused" the conception of a child and did not destroy the already conceived life contrary to his obligation (unsuccessful abortion), as a result of which an "unwanted" maintenance obligation[5] was created.

However, taking into account the subjective rights of a person, the unity of the legal system, the personal good that is human life, their inherent dignity[6], it should be formulated in such a way that the content of this claim will be the defective performance of a medical procedure. The basis for the parents' complaint may be the disrupted right to family planning[7], the personal good in the form of privacy, and in this form it is a debatable issue. A doctor performing a sterilization or abortion procedure that was performed incorrectly, commits a technical error, which means that the procedure is performed incorrectly in technical terms[8].

Wrongful birth is claimed by parents of a sick child, alleging the doctor failed to inform them of fetal defects that could justify a legal abortion. Breaches include omitted or misinterpreted prenatal tests, and failure to inform about risks or diagnostic options. This omission deprives parents of a lawful decision and leads to the birth of a disabled child,

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[3] See: K. Szutowska, *Odpowiedzialność za szkodę z tytułu wrongful conception i wrongful birth w świetle funkcji odpowiedzialności odszkodowawczej w polskim prawie cywilnym – część 1*, „Transformacje Prawa Prywatnego" 2008, vol. 1, p. 59.

[4] T. Justyński, *Poczęcie i urodzenie się dziecka jako źródło odpowiedzialności cywilnej*, Kraków 2003, p. 20.

[5] T. Justyński, *Poczęcie i urodzenie...*, p. 24.

[6] More: M. Skwarzyński, *Podmiotowość prawna i godność dziecka w systemie praw człowieka a problem aborcji*, [in:] W. Lis (ed.), *Prawo do życia*, Warszawa 2022, p. 291.

[7] S. Bondaruk, *Postulaty de lege ferenda w zakresie skargi wrongful birth* [in:] J. Mazurkiewicz, P. Mysiak, (eds.) *Dobro pojemne jak krzywda. Prawna ochrona dziecka. Deklaracje a rzeczywistość*, Wrocław 2017, p. 69.

[8] A. Fiutak, *Prawo w medycynie*, Warszawa 2013, p. 85.

generating claims for damages and compensation[9]. A doctor committed a violation when, due to negligence, he failed to conduct standard prenatal tests; in the case law, the most common tests indicated were blood type and antibody tests or tests for the presence of IgG and IgM antibodies, which allowed for the detection of a possible ongoing rubella infection during pregnancy, especially in the first trimester[10].

Wrongful life is initiated by the child, alleging that negligent medical conduct led to their birth in a state of suffering that could have been avoided. The claim challenges the legality of causing life under harmful conditions. The concept implies a right to non-existence, which poses fundamental ethical and legal contradictions – life cannot be legally valued as inferior based on disability.

However, the question arises, how can one differentiate on the basis of law who should be born and who should not? The law should not differentiate the value of human life. However, when it comes to supporting families in which a sick child is born, the most correct postulate is to provide financial and psychological assistance to families, and its implementation lies within the reach of the state's authority and from the point of view of scale, the creation of a real system of assistance is not and will not be any financial burden.

In Poland, wrongful claims remain rare and case law underdeveloped, although interest increased in the 1990s alongside medical progress. Despite the lack of specific statutory provisions, general civil liability principles apply. Doctrinal debate persists, and academic literature addresses damage definitions and compensation frameworks relevant to these claims. Questions about the shape of these claims, the way of shaping liability for damages, the concept of damage and what it is in the light of these claims were asked by M. Safjan in 1998[11]. However, this statement does not provide any specific solutions; in fact, it is probably one of the first scientific texts on wrongful claims and is mainly a reference to American and German judicature. Nevertheless, it should be

[9] The admissibility of performing an abortion in Poland is regulated by the Act of 7 January 1993 on family planning, protection of the human fetus and the conditions for the admissibility of terminating pregnancy (Journal of Laws 1993, No. 17, pt 78), hereinafter referred to as: the „Act on the conditions for the admissibility of terminating pregnancy".

[10] See: M. Wild, *Roszczenia z tytułu wrongful birth w prawie polskim (Uwagi na tle wyroku Sądu Najwyższego z dnia 21 listopada 2003 r., V CK 16/03)*, „Przegląd Sądowy" 2005, vol. 1, p. 49. M. Nesterowicz, *Prawo medyczne, komentarze i glosy do orzeczeń sądowych*, Warszawa 2012, p. 373.

[11] M. Safjan, *Prawo wobec wyzwań współczesnej medycyny*, „Palestra", 1998, vol. 42/11-12, p. 23-34.

noted that the issue of wrongful claims appeared in the Polish sphere relatively late.

There are certain areas of wrongful claims in the doctrine, which constitute a space for polemics. Due to the fact that in Polish law there are no provisions in the strict sense regulating the issue of liability for damages, as well as the institutions of wrongful claims themselves, it is necessary to refer to the general provisions regulating the principles of liability in the Civil Code. In the legal doctrine, a number of works[12], monographs on the subject of wrongful conception, wrongful birth and wrongful life claims, on the principles of liability for damages in individual wrongful conception, wrongful birth and wrongful life claims[13], on the protection of the conceived child[14] have been created.

The premise legalizing abortion for eugenic reasons before and after the judgment of the Polish Constitutional Tribunal of October 22, 2020 (case no. K 1/20)

The admissibility of abortion in Poland is governed by the Act of 7 January 1993 on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy. The public and legal interest in wrongful birth claims intensified after the high-profile "Łomża case."

In this case[15], the court of second instance[16] acknowledged the failure to perform abortion as grounds for compensation but denied the doctor's liability. The Supreme Court's 2005[17] ruling (I CK 161/05) introduced the controversial notion of a "right to abortion," derived from Article 4a of the Act on the conditions for the admissibility of terminating pregnancy. The ruling did not focus on the dignity of the unborn child or

[12] See: T. Justyński, *Poczęcie i urodzenie się dziecka jako źródło odpowiedzialności cywilnej*, Kraków 2003, pp. 78-95. Z. Pepłowska, *Odpowiedzialność cywilna lekarza z tytułu wrongful life, wrongful birth i wrongful conception w prawie USA*, „Prawo i Medycyna" 2004, no. 1, pp. 100-115. K. Kawecka, *Skarga wrongful life – charakter prawny i dopuszczalność*, „Rozprawy Ubezpieczeniowe" 2013, no. 15, pp. 71-85. A. Jacek, *„Złe urodzenie" jako źródło odpowiedzialności odszkodowawczej zakładu opieki zdrowotnej*, „Prokuratura i Prawo" 2008, no. 12, pp. 92–104.

[13] S. Bondaruk, *Wrongful conception po raz pierwszy na wokandzie Sądu Najwyższego*, „Studia Prawnoustrojowe", 2019, vol. 46, pp. 5–17.

[14] J. Haberko, *Cywilnoprawna ochrona dziecka poczętego a stosowanie procedur medycznych*, Warszawa 2010, pp. 10–17.

[15] For more: M. Bilecka: *Proces o złe urodzenie (uwagi do wyroków Sądu Okręgowego w Łomży oraz Sądu Apelacyjnego w Białymstoku)*, „Prawo i Medycyna" 2005, no. 3, pp. 29-44.

[16] Judgment of the Court of Appeal in Białystok of 5 November 2004, case no. I ACa 550/04, no. 1, pt 3.

[17] Judgment of the Polish Supreme Court of 13 October 2005, case no. IV CK 161/05.

constitutional protection of life but on a causal link between hospital negligence and the damage – birth of a sick child.

The Court emphasized the obligation to provide patients with comprehensive and reliable information as a precondition for making personal decisions. Misleading or missing information constituted professional fault. The doctor's misconduct, in this context, was forcing the parents to bear the costs of raising and treating the disabled child[18]. On this basis, damages were awarded under Article 444 §1 in conjunction with Article 361 §1–2 of the Civil Code. This issue intersects with the right to conscientious objection, addressed in the Constitutional Tribunal's judgment of 7 October 2015 (K 12/14), which declared unconstitutional the obligation to refer a patient to another facility for abortion. It confirmed that no one can be forced by law to act against their conscience – especially in abortion-related matters[19].

The obligation to provide information is closely related to the issue of conscientious objection[20] and was already addressed in the judgment

[18] T. Justyński, *Naruszenie przez lekarza prawa rodziców do planowania i przerywania ciąży jako podstawa roszczenia odszkodowawczego. Glosa do wyroku SN z dnia 13 października 2005 r., IV CK 161/05*, „Państwo i Prawo" 2006, vol. 7, pp. 110-116.

[19] This obligation, referred to as the „information obligation", was deemed by the Constitutional Tribunal in its judgment of 7 October 2015, case no. K 12/14, OTK-A 2015, no. 9, pt 143 to be incompatible with the Polish Constitution.

[20] More about conscientious objection: P. Stanisz, Klauzula sumienia [in:] A. Mezglewski, H. Misztal, P. Stanisz (eds.) *Prawo wyznaniowe*, Warszawa 2011, p. 104. A. Zoll, *Klauzula sumienia* [in:] P. Stanisz, J. Pawlikowski, M. Ordon (eds.), *Sprzeciw sumienia w praktyce medycznej – aspekty etyczne i prawne*, Lublin 2014, pp. 77–85. M. Skwarzyński, *Sprzeciw sumienia w europejskim i krajowym systemie ochrony praw człowieka*, „Przegląd Sejmowy" 2013, vol. 6, pp. 17–21. L. Bosek, *Prawo osobiste do odmowy działania sprzecznego z własnym sumieniem na przykładzie lekarza*, „Forum prawnicze", 2014, vol. 1, pp. 92–95. L. Bosek, Problem zakresowej niekonstytucyjności art. 39 ustawy o zawodach lekarza i lekarza dentysty, [in:] P. Stanisz, J. Pawlikowski, M. Ordon (eds.), *Sprzeciw sumienia w praktyce...*, pp. 87–90. O. Nawrot, *Prawa człowieka, sprzeciw sumienia i państwo prawa* [in:] P. Stanisz, J. Pawlikowski, M. Ordon (eds.), *Sprzeciw sumienia w praktyce..., pp. 107–109. R. Sztychmiler, Nowa interpretacja klauzuli sumienia* [in:] P. Stanisz, A. Abramowicz, M. Czelny, M. Ordon, M. Zawiślak (eds.), *Aktualne problemy wolności myśli, sumienia i religii,* Lublin 2015, pp. 327–345. R. Sztychmiler, *Klauzula sumienia w ochronie życia i zdrowia w prawie Trzeciej Rzeczypospolitej* [in:] M. Skwarzyński, P. Steczkowski (eds.), *Polityka wyznaniowa a Polityka wyznaniowa a prawo III Rzeczypospolitej*, Lublin 2016, pp. 135–152. M. Skwarzyński, *Korzystanie ze sprzeciwu sumienia w kontekście zasady równouprawnienia i kryterium zawodu*, „Studia z Prawa Wyznaniowego" 2016, vol. 16, pp. 63-83. M. Skwarzyński, *Orzecznictwo Europejskiego Trybunału Praw Człowieka w zakresie klauzuli sumienia* [in:] P. Stanisz, A. M. Abramowicz, M. Czelny, M. Ordon, M. Zawiślak (eds.), *Aktualne problemy wolności myśli, sumienia i religii*, Lublin 2015, pp. 285–293. M. Nesterowicz, N. Karczewska-Kamińska, *Prawa pacjenta do świadczeń medycznych a prawo lekarzy (szpitali) i osób z innych zawodów medycznych do klauzuli sumienia*, „Prawo i Medycyna" 2015, vol. 2, pp. 5-10. J. Pawlikowski, Spór o klauzulę sumienia z perspektywy celów medycyny i etyki lekarskiej [in:] P. Stanisz, J. Pawlikowski, M. Ordon (eds.) *Sprzeciw sumienia w praktyce..., pp. 145–170. B. Dobrowolska, Sprzeciw sumienia w praktyce pielęgniarki i położnej. Analiza rozwiązań Polskich i wybranych rozwiązań europejskich,* „Studia z Prawa Wyznaniowego" 2013, vol. 13, pp. 249–263. M. Skwarzyński, *Korzystanie z klauzuli sumienia, jako realizacja wolności wewnętrznej czy/i zewnętrzne*j, „Opolskie Studia Administracyjno-Prawne", 2015, vol. 4, pp. 9-21.

of the Polish Constitutional Tribunal of 7 October 2015[21]. The subject of the Tribunal's examination was to determine whether Article 39 of the Act on the Professions of Doctor and Dentist[22] is consistent with the Constitution of the Republic of Poland. This case is important for this work, because – in essence – it concerned the issue of abortion. When weighing the protection of the physician's conscience[23] in the scope of the so-called obligation to provide information, the Polish Constitutional Tribunal compared it with the constitutional foundations of performing an abortion (i.e. the right to health and the right to privacy of a woman). The dignity of a child conceived in the prenatal phase of development was also in the obvious sphere of considerations. This obligation was questioned as inconsistent with the Polish Constitution; the state cannot force its citizens to act contrary to their conscience, and such an obligation would be to indicate a place where an abortion can be performed.

In another Supreme Court case (II CSK 580/09), a doctor failed to act on irregular ultrasound findings and did not refer the pregnant woman for further diagnostics. The woman learned of the defects after the child's birth. The Court ruled that the doctor's negligence deprived her of the ability to decide about a legal abortion. However, it rejected the argument that Article 444 §1 applied, as there was no direct bodily harm to the woman. The court still found that the physician violated statutory duties under the Act on the professions of physician and dentist, by failing to inform the patient of fetal defects and to act with due diligence[24].

Until the judgment of the Polish Constitutional Tribunal of 22 October 2020 (case no. K 1/20), abortion was permissible in Poland in three cases, this legal status was in force in Poland until 27 January 2021, i.e. until the date of publication of the Polish Constitutional Tribunal's judgment in the Journal of Laws, which resulted in the loss of legal force of the above provision. In the current legal status, the premise of a high probability of severe and irreversible impairment of the fetus or a serious disease no

[21] Judgment of the Polish Constitutional Tribunal of 7 October 2015, case no. K 12/14, OTK-A 2015, no. 9, pt 143.

[22] Act of 5 December 1996 on the professions of physician and dentist (Journal of Laws of 2021, pt 790).

[23] A broad and comprehensive analysis of the sources of conscientious objection, with reference to national and European case law: M. Skwarzyński, *Protecting conscientious objection as the "hard core" of human dignity*, „Ius Novum" 2019, vol. 13, pp. 270–291.

[24] Based on the justification of the judgment of the Polish Supreme Court of 6 May 2010, case no. II CSK 580/09.

longer applies, and therefore, in accordance with the Act, a legal abortion procedure cannot be performed for these reasons.

Although certain media narratives suggest that a fetus becomes a human being only at a specific developmental stage–such as the 12th week or viability outside the womb–this view contradicts both scientific and legal understanding[25]. Medical science defines human life as beginning at fertilization, i.e. at the union of male and female gametes[26]. This position is reflected in Polish legal doctrine and codified in Article 38 of the Constitution, which affirms the legal subjectivity of the unborn child[27].

In its judgment of 22 October 2020, the Polish Constitutional Tribunal reviewed the compatibility of Article 4a para. 1 pt 2 and Article 4a para. 2 first sentence of the Act on the Conditions for the Admissibility of Termination of Pregnancy with the Constitution–specifically with Articles 38, 30, 31 para 3, and 32 para 1–2. The applicants argued that the challenged provisions effectively legalized eugenic practices by allowing abortion based on a high probability of severe fetal impairment.

In its reasoning, the Tribunal referenced the historical concept of eugenics, introduced by Francis Galton as a form of species optimization through selective reproduction. The Tribunal emphasized that Galton's notion involved assessing human worth based on genetic traits, which is ethically and constitutionally unacceptable.

By recognizing that Article 4a para. 1 pt 2 had a eugenic character, the Tribunal rejected the notion that the state could prefer certain categories of citizens – such as the healthy or able-bodied-over others. This reaffirmed the principle that the protection of human life is unconditional and applies equally to all persons, regardless of developmental stage or health status.

[25] Among those who spoke against granting legal capacity to a conceived but unborn child were: S. Grzybowski, *System prawa cywilnego. Część ogólna*, t. I, Kraków-Warszawa-Wrocław 1985, p. 309. T. Smyczyński, *Nasciturus jako dobro prawne*, [in:] S. Sołtysiński, (ed.) *Problemy kodyfikacji prawa cywilnego. Studia i rozprawy. Księga pamiątkowa ku czci Profesora Zbigniewa Radwańskiego*, Poznań 1990, p. 72. S. Dmowski, [in:] S. Dmowski, S. Rudnicki (eds.) *„Komentarz do kodeksu cywilnego. Księga pierwsza. Część ogólna"*, Warszawa 2006, p. 70. J. Strzebińczyk, [in:] E. Gniewek (ed.), *„Kodeks cywilny. Komentarz, t. I"*, Warszawa 2006, p. 33. However, in favor of granting this ability: B. Walaszek, *Nasciturus w prawie cywilnym*, „Państwo i Prawo" 1956, vol. 7, p. 121. A. Stelmachowski, *Wstęp do teorii prawa cywilnego*, Warszawa 1984, p. 244. A. Szpunar, *Szkoda wyrządzona przed urodzeniem dziecka*, „Studia Cywilistyczne" 1969, vol. XIII-XIV, p. 378. S. Chrempiński, *Czy dziecko poczęte winno być uznane za podmiot prawa?*, „Nowe Prawo" 1958, vol. 2, p. 83. Z. Radwański, *Prawo cywilne – część ogólna*, Warszawa 2005, p. 154.

[26] This is a terminological simplification, therefore reference should be made to specialist literature, see e.g.: G. H. Bręborowicz, *Położnictwo i ginekologia*, Warszawa 2019, vol. I, p. 4.

[27] J. Haberko, *Cywilnoprawna ochrona...*, p. 44.

The judgment of the Polish Constitutional Tribunal of 22 October 2020, in which it was found that the provision of art. 4a para. 1 pt 2 of the Act of 7 January 1993 on family planning, protection of the human fetus and the conditions for the admissibility of termination of pregnancy was inconsistent with art. 38 in conjunction with art. 30 in conjunction with art. 31 sec. 3 of the Constitution, was widely commented on and caused a great deal of social commotion and became a political tool, as well as the subject of numerous media distortions. Meanwhile, this judgment is in fact a continuation of the Tribunal's line of jurisprudence. The judgment of the Constitutional Tribunal of 22 October 2020 includes in its considerations the issue of the conflict of goods. These goods are the life of the child and the goods to which the mother is entitled, i.e. freedom, family planning and family life, privacy, health.

The view that life is the most important human good is confirmed in case law[28] and in doctrine, it does not raise any doubts. Life is the foundation of the legal system, and its protection „is an obvious assumption of every state, not only democratic and law-abiding, but also civilized"[29]. The protection of life expressed in art. 38 of the Constitution of the Republic of Poland is the basis of other human rights and freedoms, is a point of reference, and is also a hallmark of civilization and a democratic state of law. The state, providing everyone with legal protection of life, bases it on the inherent dignity of man, without differentiating or conditioning this belonging on any factors, conditions, or situations. The right to life is not and cannot be limited, even in situations of martial law and a state of emergency. The duty of the state and its bodies is to protect the life of every person, regardless of their situation and location[30].

The justification of the Polish Constitutional Tribunal's judgment (case no. K 1/20) essentially determines the issue of the admissibility of abortion in the event of a high probability of a fatal and incurable disease in an unborn child. The Tribunal stated almost 20 years ago that shortening life "for now", because it will probably end the same way, is always inconsistent with the Polish Constitution. In its judgment of 22 October 20202, the Tribunal basically confirmed and expressed the

[28] Judgment of the Court of Appeal in Białystok of 20 August 2015, I ACa 332/15, LEX No. 1808608.
[29] P. Sarnecki [in:] L. Garlicki, M. Zubik (eds.), „Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II", Warszawa 2016, art. 38.
[30] J. Boć [in:] J. Boć (ed.) „Konstytucja Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 roku", Wrocław 1998, p. 78.

continuity of the line of case law – life remains protected by the Constitution regardless of all external circumstances, condition, health, stage of development. The Constitution, which provides legal protection of life, is essentially a pro-dignity Constitution and there can be no situation in which provisions in legal circulation are in conflict with these values.

The Constitutional Tribunal has already taken a similar position in this respect when deciding other cases[31], which did not cause such a great social stir. In the judgment of 22 October 2020, the Tribunal did not rule anything new, did not change its previous line of jurisprudence, the views contained in the justification do not differ from the views in the judgments quoted above – on the contrary, they are consistent and correspond to this established line of jurisprudence, being confirmed by constitutional provisions. Human life has an identical value, regardless of the stage of development, because it is objective and unchanging from the moment of conception to natural death, the protection of life manifests itself in two ways – firstly, as an objective value, secondly, as the right of every individual, and since life is an objective value and the right of everyone, it is subject to protection regardless of the will of the mother, who can only represent the interests of her child[32]. On this basis, the remaining rights expressed in the provisions of the Constitution give way to the right to life and are not able to dominate it or diminish its significance and legal significance. There can be no legal interests in civil law, criminal law or administrative law that are in conflict with a constitutionally protected right. Even less can there be claims that do not arise only when the constitutional right to life is violated.

It is also not true that the Polish Constitutional Tribunal wrote "something new" in its judgment of 22 October 2020, the Constitutional Tribunal has already dealt with the problem of shortening the life of a person who will most likely die and found that the norms and regulations that allow this are inconsistent with the Constitution of the Republic of Poland. In case reference number K 44/07, the Constitutional Tribunal, examined the conformity with the Constitution of the Republic of Poland of art. 122a of

[31] See, e.g.: Judgment of the Constitutional Tribunal of 7 January 2004, case no. K 14/03, OTK-A 2004, no. 1, pt 1.; Judgment of the Constitutional Tribunal of 28 May 1997, case no. K 26/96, OTK 1997, no. 2, pt 19.; Judgment of the Constitutional Tribunal of 7 January 2004, case no. K 14/03, OTK-A 2004, no. 1, pt 1.; Judgment of the Constitutional Tribunal of 30 September 2008, case no. K 44/07, OTK-A 2008, no. 7, pt 126.

[32] A. Zoll, *Prawna ochrona życia* [in:] „Prawa człowieka – idea czy rzeczywistość", V Tydzień Społeczny, Warszawa 1998, p. 119.

the Act of 3 July 2002 – Aviation Law[33], which specified that: "if required by national security considerations and the air defence command body, taking into account in particular the information provided by institutions providing air traffic services, determines that a civil aircraft is being used for illegal activities, in particular as a means of a terrorist attack from the air, the aircraft may be destroyed under the principles specified in the provisions of the Act of 12 October 1990 on the Protection of the State Border", also with passengers and crew on board[34].

The Constitutional Tribunal further noted that "human life is a value of the highest rank in our civilization and legal culture. The value of a legal good, which is human life, is not subject to differentiation on the basis of the Constitution. Polish and foreign constitutional case law emphasizes the scope of the right to legal protection of life as a fundamental right of an individual, conditioning the possession and realization of all other rights and freedoms. The significance of the right to life, however, goes beyond the individual-subjective context thus understood"[35] and stated that "the condition for limiting the right to legal protection of life is therefore the existence of a situation in which it is beyond doubt that it cannot be reconciled with analogous rights of other persons. This premise can be generally defined as the requirement of symmetry of goods: the sacrificed and the saved".

The following fragment is also very important, in which the Polish Constitutional Tribunal directly states that if: "the decision to destroy a civil aircraft is to be justified by the need to protect the lives of other people on the ground in the probable range of impact, the question arises whether Article 38 of the Constitution allows state authorities to legally, in the manner specified in the Act, sacrifice the lives of those on board to save the lives of others. Can it be considered that the lives of passengers of an aircraft taken over by terrorists, which is most likely coming to an inevitable end anyway, have less value than the lives of other people, in particular those at risk of a terrorist attack? (...) The state's granting itself the right to kill them, even in defense of the lives of other people, is a denial of this right. The awareness of passengers of a civilian aircraft taken over by terrorists that it may be deliberately

[33] Journal of Laws of 2006 No. 100, pt 696, No. 104, pts 708 and 711, No. 141, pt 1008, No. 170, pt 1217 and No. 249, pt 1829, of 2007 No. 50, pt 331 and No. 82, pt 558 and of 2008 No. 97, pt 625 and No. 144, pt 901.
[34] Judgment of the Constitutional Tribunal of 30 September 2008, case no. K 44/07, pt 1.1.
[35] Judgment of the Constitutional Tribunal of 30 September 2008, case no. K 44/07, pt 7.1.

destroyed by air defense forces may also weaken their will to fight to save their own lives from the threat posed by the terrorists"[36].

Polish constitutional standard for the protection of life

There is one coherent legal system[37], in Poland, and within it, the illegality of abortion on eugenic grounds–confirmed by the Constitutional Tribunal's judgment of 22 October 2020 (K 1/20) – must be interpreted monistically. This means that no civil claim (including wrongful birth or wrongful life) can arise if its basis contradicts the constitutional right to life.

A legal claim cannot be based on a violation of a right that is itself constitutionally protected. The source of harm (basis for the claim) cannot stem from the violation of a constitutional right. Nor can legal responsibility arise from failure to commit an act that was, under current law, criminal (such as a prohibited abortion).

Both the pregnant woman and the unborn child are vulnerable entities who require legal protection. Although the Polish Constitution formally grants this protection, there is still a lack of systemic support for women in crisis pregnancies.

Polish Constitution is a legal act that stands at the top in the hierarchy of legal acts in Poland. The provisions contained in the Constitution are universal in nature, express the general principles of the state system, define the system of the supreme state bodies, and designate the basic rights, freedoms, and obligations of an individual[38], although some of them are of a pre-normative, secondary nature, meaning that the state only expresses the foundation through a legal act, confirms its essential place in the legal order[39], an example of which is the right to life or human dignity[40].

[36] Judgment of the Constitutional Tribunal of 30 September 2008, case no. K 44/07, pt 7.5.

[37] More: J. Sadomski, *Naruszenie dóbr osobistych przez media*, Warszawa 2003, pp. 1-174, a proponent of the monistic concept of illegality, according to which conduct within the legal system is either illegal or not illegal, and even the fact that a particular branch of law does not regulate sanctions, or does not refer at all to a specific conduct that is prohibited in another branch of law, does not deprive such action of illegality.

[38] L. Garlicki, Polskie prawo konstytucyjne, Zarys wykładu, Warszawa 2017, p. 45.

[39] M. Skwarzyński, *Korzystanie ze sprzeciwu sumienia w kontekście zasady równouprawnienia i kryterium zawodu*, „Studia z prawa wyznaniowego", 2016, vol.16, p. 64.

[40] More: K. Orzeszyna, M. Skwarzyński, R. Tabaszewski, *International Human Rights Law*, Warszawa 2023, pp. 19-29.

The Constitutional Tribunal's role is to control the conformity of legal norms with the Constitution. Unconstitutionality of a norm means that no administrative or judicial action may rely on it. Accordingly, the state cannot allow practices, including civil claims, that would contradict constitutional values[41].

The fate of the claims of wrongful conception, wrongful birth and wrongful life in the light of the judgment of the Polish Constitutional Tribunal of 22 October 2020 (case no. K 1/20)

Prior to the judgment of 22 October 2020, abortion in Poland was permissible in cases of a high probability of severe and irreversible fetal impairment, based on Article 4a para 1 pt 2 of the Act on the conditions for the admissibility of terminating pregnancy. However, following the publication of the judgment on 27 January 2021, this provision lost legal force. As a result, abortion on eugenic grounds is now constitutionally prohibited, and the entire body of case law built on this premise–particularly wrongful birth claims–has effectively lost its legal foundation[42].

This can be seen in the reports published by the Ministry of Health[43]. Statistical data confirm that over 97% of legal abortions in Poland before 2021 were performed on eugenic grounds. Their elimination has rendered claims based on missed opportunities to terminate pregnancy inadmissible. According to the case law of the Supreme Court, provisions declared unconstitutional must not be applied to factual situations post-judgment, and in some views, even to prior ones. Consequently, no civil claim can validly arise from a failure to perform an act (i.e., abortion) that is now legally and constitutionally impermissible.

This legal change raises the question of how to treat compensation previously awarded under now-invalidated provisions. If the legal basis never existed, and the premise of damage (birth of a sick child) is invalid under constitutional law, then prior compensation may be reclassified as unjust enrichment under Articles 405–406 of the Civil Code. However, this issue remains unresolved and is controversial.

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[41] J. Podkowik, *Niekonstytucyjność prawa i jej skutki cywilnoprawne*, Warszawa 2019, p. 29.

[42] R. Zdybel, *Nasciturus a aborcja, Problemy prawne czy etyczno-moralne. Prawna ochrona na gruncie art. 927 k. c. i 148 par. 3 k. k*., „Przegląd Sejmowy", 2008, vol. 7-8, p. 42.

[43] See: Sprawozdanie Rady Ministrów z wykonywania oraz o skutkach stosowania w 2017 r. ustawy z dnia 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży, link: https://orka.sejm.gov.pl/Druki8ka.nsf/0/6F82FBB36BAA945CC125839200434FC7/%24File/3185.pdf, [accessed: 28 of March 2025).

Ultimately, the illness of an unborn child–or even a high probability of such illness–can no longer serve as a lawful ground for termination. In conflicts between the interests of the mother and the unborn child, constitutional principles require resolving doubts in favour of the child's life (in dubio pro vita humana). The legal system must not imply that one life is more valuable than another based on health, prognosis, or developmental stage[44].

A rather problematic issue, to which there is no specific answer yet, due to the "novelty" of the issued ruling, is the position to be taken on compensation already awarded on the basis of wrongful birth claims. Since the doctrine and case law hold that a provision deemed inconsistent with the Constitution should not be applied, in particular, to factual situations that occurred before it was issued, how should the decisions made by the courts regarding the acceptance of the parents' claim and awarding them compensation be recognized? The answer is not very simple. Assuming that the wrongful birth claim basically never existed, due to the assumption of the lack of damage, as well as the unconstitutionality of the provision on the basis of which it was possible to perform an abortion, which also has retroactive effect, then the awarded compensation is unjust enrichment under Article 405 of the Civil Code[45]? If so, how should Article 405 of the Civil Code be accounted for and complied with? 406 of the Civil Code, according to which someone who has obtained a benefit without a legal basis is obliged to return the benefit, but also everything that was obtained in exchange for this benefit or as compensation for damage.

Therefore, a unborn child's illness, or rather its suspicion, a high probability of its occurrence, is not a premise for performing an abortion. Due to the conflict of the mother's and her unborn child's interests, doubts should be resolved in accordance with the rule in dubio pro vita humana. The value of the life of an unborn child, even if its health condition is serious, is identical to the value of the life of a child without illnesses or genetic defects, including a child already born. The law can never differentiate according to any of the criteria whether some life is more valuable or less.

[44] K. Królikowska, *Skutki pro futuro prejudycjalnego wyroku TK („derogacja trybunalska" na przykładzie spraw cywilnych)* [in:] M. Bernatt, J. Królikowski, M. Ziółkowski (eds.), *Skutki wyroków trybunału konstytucyjnego w sferze stosowania prawa*, Warszawa 2013, p. 55.

[45] Art. 405 of the Civil Code: Anyone who, without legal basis, has obtained a material advantage at the expense of another person is obliged to return the benefit in kind, and if this is not possible, to return its value.

Summary

The admissibility of wrongful conception, wrongful birth, and wrongful life claims raises fundamental doubts–not only of an ethical nature but also regarding the coherence of the legal system and the constitutional standard for the protection of life and dignity. In its judgment of 22 October 2020, the Constitutional Tribunal found that Article 4a para. 1 pt 2 of the Act on the conditions for the admissibility of terminating pregnancy was incompatible with the Constitution of the Republic of Poland.

This conclusion was inevitable, as both the Constitution and related statutes clearly protect human life from the moment of conception. These norms are consistent and mutually reinforcing, confirming that the unborn child is treated by the legislator as a legal subject. Therefore, the existence of legal provisions permitting the termination of such a subject's life would contradict the foundational principles of the constitutional order and cannot be accepted.

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