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Success of the strategic litigation for the protection of reproductive rights, triumph of constitutionalism or 'escape into formalism'? Commentary on the judgment of the European Court of Human Rights of 14 December 2023, no. 27617/04 in M.L. v. Poland

Introduction

The tightening of the abortion law, following the entry into force of the Constitutional Tribunal's judgment of 22nd October 2020[1], in which an improperly appointed body declared unconstitutional the provision allowing termination of pregnancy for embryopathological reasons, opened a new chapter in the inglorious record of unlawful restriction upon the reproductive rights of Polish women. The widely commented ruling was not only faced with strong social resistance, expressed through large-scale protests, but also actions of individuals and civil society organisations aimed at obtaining protection under international and regional human rights protection systems[2]. Judgment

[1] Judgment of the CT of 22nd October 2020, K 1/20, (OTK-A 2021/1).

[2] In January 2021 The Foundation for Women and Family Planning launched the 'Women's Complaint' campaign, in which women whose rights were threatened by the 22nd October 2020 judgment (i.e. women in their reproductive age for whom the tightening of the abortion law involved a threat to their rights under the European Convention on Human Rights, in particular the principle of respect for private and family life and the prohibition of torture and inhuman or degrading treatment) filled complaints on the basis of the template published on the Foundation's website. However, the ECtHR, in its decision of 16th May 2023, No. 4188/21, A.M. v. Poland, dismissed them on the grounds that there was no individual and direct violation of the applicants' fundamental rights.

of 14th December 2023[3], which is part of the long history of strategic litigation on abortion before the ECtHR, is also the first result of the wave of complaints that the Court received after the repeal of 4a (1)(2) of the Act of 7th January 1993 on Family Planning, Protection of the Human Foetus and the Conditions for the Permissibility of Abortion[4].

It will perhaps be a truism to state that the ruling, in which the ECtHR found unlawful the interference in the claimant's private life caused by the tightening of the law on termination of pregnancy as a result of the judgment of an improperly appointed constitutional court, sets a precedent of considerable importance. On one hand, it opens the way for other direct victims of the 22nd October 2020 ruling to pursue financial claims in Strasbourg. In addition, it sanctions the right and obligation of Polish courts, bound by the Constitution[5] and international law, to refuse to take the faulty decision of the Constitutional Tribunal into account. In the long run, on the other hand, the obligation of the state to take individual and general measures to remedy the violation of the Convention against the claimants or to eliminate the causes of the violation in the law or in the practice of the authorities may constitute a further argument in favour of amending the existing legislation in this respect.

Nevertheless, the direction of the Court's argumentation implies that – also because of the way in which the complaint was formulated – it opted for a sort of 'escape into formalism'. After all, it decided to inherently link the issue of protection of reproductive rights with matters relevant from the standpoint of constitutional law. At the same time, it consistently shies away from any direct reference to the question of the proportionality of restrictions on the possibility of abortion. The strong focus of the narrative on issues far from the essence of the problem of reproductive rights thus means that the judgment in M.L., rather than

[3] ECtHR judgment of 14thDecember 2023, no. 40119/21, M.L. v. Poland.

[4] Act of 7th January 1993 on family planning, protection of the human foetus and conditions of permissibility of abortion (Journal of Laws of 2022, item 1575).

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

in the context of the ECtHR's decisions on abortion, should be seen as a continuation of the line of jurisprudence centered around the right to a 'court established by law', which is part of the right to a fair trial (Article 6 ECHR[6]).

On the other hand, the present judgment must be critically assessed regarding the part in which the ECtHR addressed Ms. M.L.'s claim of violation of Article 3 of the Convention. Indeed, the Court's failure to take sufficient account of the context in which the claimant's rights were violated means that the dismissal of the complaint in this part must be seen as unjustified and therefore arbitrary.

Normative and factual background of the case

I. Faulty composition of the Tribunal

Given that the present case involves an integral interrelation of human rights and constitutional law issues, a brief commentary on the defectiveness of the CT ruling of 22nd October 2020 is warranted. Indeed, it is of key importance from the perspective of the Court's line of argumentation. I would like to make a disclaimer that the subject of this article is not a comprehensive analysis of the course of the institutional crisis around the Polish Constitutional Tribunal. Therefore, my considerations in this regard will be limited primarily to the question of proper appointment of the constitutional court, i.e. the issue on which the ECtHR focused in the M.L. ruling[7].

The first act of the dispute over the Constitutional Tribunal occurred on 8th October 2015. At that time, during the last session of the

[6] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2 (Journal of Laws of 1993, No. 61, item 284, as amended).

[7] More on the crisis around the Constitutional Tribunal: M. Małdziński, *Kryzys wokół Trybunału Konstytucyjnego w latach 2015-2018. Raport przygotowany na potrzeby Parlamentarnego Zespołu do Spraw ładu Konstytucyjnego i Praworządności*, Warsaw 2019, https://orka.sejm.gov.pl/opinie8.nsf/nazwa/401_20190402/$file/401_20190402.pdf, accessed 7th February 2024; M. Szwed, *Wyrok TK wydane w nieprawidłowych składach. HFPC Report,* Warsaw 2023, https://hfhr.pl/upload/2023/07/raport-wyroki-tk-wydane-w-nieprawidlowych-skladach.pdf, accessed 7th February 2024.

Seventh-Term Lower House of Parliament (Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności z dnia 4 listopada 1950 r., zmieniona następnie Protokołami nr 3, 5 i 8 oraz uzupełniona Protokołem nr 2 (Dz.U. z 1993 r. Nr 61, poz. 284 z późn. zm.).Sejm), resolutions on the election of five judges were adopted: three to replace the members of the Constitutional Tribunal whose terms were due to expire in November 2015, and two to replace Zbigniew Cieślak and Teresa Liszcz, whose terms were due to start after the new chamber had already been constituted following the parliamentary election of 25th October 2015[8]. Their appointment was based on the law on the Constitutional Tribunal, amended in June 2015[9] in a way that allowed for the early election of judges. Referring to irregularities related to their appointment, President Andrzej Duda, in breach of his obligation under Article 21 (1) and (2) of the Constitutional Tribunal Act, refused to take the oath from the newly elected members.

On 17th November 2015, a group of deputies filed a request to examine the constitutionality of the provisions of the aforementioned Act[10]. However, without waiting for a verdict in this case, in the following days an amendment to the Constitutional Tribunal Act was adopted containing, inter alia, provisions on the repeated election of five judges[11]. On the basis of it, the Sejm passed resolutions declaring the resolutions on the election of judges of 8th October 2015 to be of no legal force, and on 2nd December it elected, in place of the destituted ones, five members of the Constitutional Tribunal. The Sejm's resolutions in this regard were

[8] Pursuant to Article 98 (1) of the Constitution of the Republic of Poland, the terms of office of the Sejm and Senate begin on the day the Sejm convenes for its first sitting and last until the day before the next Sejm convenes. The seventh term of the Sejm therefore lasted until 11th November 2015 and included the expiry of the terms of office of three judges (Maria Gintowt-Jankowicz, Wojciech Hermeliński and Marek Kotlinowski), which occurred on 6th November 2015.

[9] Act of 25th June 2015 on the Constitutional Tribunal (i.e. Journal of Laws 2016, item 293).

[10] Request by a group of PO and PSL MPs for constitutionality control of 17th November 2015, https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=16426&cid=1, accessed 7th February 2024.

[11] Act of 19th November 2015 amending the Act on the Constitutional Court (Journal of Laws of 2015, item 1928, as amended).

published in the Official Gazette, and the President took the oaths of office from the nominees[12]. Thus, a 'resumption' of a resolution of the Seventh-Term Sejm by the Eighth-Term Sejm, foreign to the Polish legal order, took place.

In its judgment of 3rd December 2015[13] the Tribunal declared that the challenged provision of the June 2015 Law on the Constitutional Tribunal was constitutional in the part that concerned the three judges whose term of office began in November 2015 and unconstitutional in the part that referred to the judges elected in place of Zbigniew Cieślak and Teresa Liszcz. The ruling also indicated the President's obligation to promptly take the oaths from the duly elected judges. The judgment in case K 35/15, handed down six days later, decided in turn on the unconstitutionality of the provisions of the amendment to the Act on the Tribunal containing provisions on the repeated election of judges[14]. Despite the unambiguous position of the Constitutional Tribunal[15], Despite the unambiguous position of the Constitutional Tribunal, the President refused to have Roman Hauser, Krzysztof Ślebzak and Andrzej Jakubecki sworn in, claiming that all seats in the Tribunal had already been filled. Thus, he petrified the irremovable constitutional defect in the election of the three judges[16], and in the longer run opened the way for the so-called 'stand-in judges' (i.e. Mariusz Muszyński, Lech Morawski and Henryk Cioch) to adjudicate, which, however, only took place after the change in the position of President of the Tribunal in December

[12] Between 2nd and 3rd December 2015, the President took the oath of office from four judges (including Henryk Cioch, Lech Morawski and Mariusz Muszyński, appointed to replace three duly elected judges). In contrast, the swearing-in of Julia Przyłębska took place on 9th December 2015.

[13] Judgment of the TK of 3rd December 2015, K 34/15 (185/11/A/2015).

[14] Judgment of the TK of 9th December 2015, K 35/15 (186/11/A/2015).

[15] E. Łętowska, A. Wiewiórowska-Domagalska, *A "good" change in the Polish Constitutional Tribunal?*, "Osteuropa Recht", 2015 no. 1, p. 91.

[16] E. Łętowska, *The twilight of the liberal rule of law in Poland*, "Human Rights Quarterly", no. 1–2, 2017, p. 13.

2016.[17] This, in turn, led to inherent defects in the judgments made with their participation[18].

II. Judgment of the CT of 22nd October 2020.

While pointing out the formal defects of the judgment of 22nd October 2020, one must not, however, disregard the serious consequences of the judgment. Indeed, the entry into force of the ruling in January 2021 initiated a causal sequence that took the claimant L.M. before the Strasbourg court. Although a detailed analysis of the reasoning behind the ruling is therefore beyond the scope of this commentary[19], it is justified to at least briefly discuss the circumstances in which the ruling was made and the effects it had.

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[17] The circumstances under which this change occurred were a self-contained 'component' of the constitutional crisis around the Constitutional Tribunal. Given the limited scope of the article and the fact that the legality of entrusting Julia Przyłębska with the function of the President of the Tribunal (and, consequently, her mandate to lead the work of the Tribunal) was ultimately beyond the subject of detailed consideration by the ECtHR in M.L. judgement, I would like only to draw attention to the procedural shortcomings constituting the defectiveness of her appointment (see: A. Rakowska-Trela, *Wyrok czy "niewyrok". Glosa do wyroku TK z dnia 22 października 2020 r., K 1/20*, „PS" 2021, no. 6, p. 112–114).

[18] As Romuald Kmiecik points out (R. Kmiecik, *O skutki procesowych wyroku Trybunału Konstytucyjnego w kwestii abolicji indywidualnej*, Prok. i Pr. 2020, no. 3, p. 9), a separate issue of the theory of constitutional law is whether judgments issued by an improperly appointed CT should be deemed null and void (*sententia nulla*) or non-existent (*sententia non existens*). In the Supreme Court's decision of 13 December 2023, I KZP 5/23, the Supreme Court stated that a judgment of the Constitutional Tribunal should be treated as if the Tribunal had not adjudicated on the case, which may suggest the endorsement by the Supreme Court of the position according to which judgments of a faulty staffed constitutional court should be treated as 'non-judgments' (more on the effects of declaring a judgment as *sententia non existens*: Resolution of the Supreme Court of 26 September 2000, III CZP 29/00, "OSNC 2001", no. 2, item 25).

[19] The body of doctrine includes commentaries dedicated to a substantive legal analysis of the CT judgment K 1/20, e.g. B. Grabowska-Moroz, K. Łakomiec, *(Nie)dopuszczalność aborcji. Glosa do wyroku TK z dnia 22 października 2020 r., K 1/20*, PiP 2021, no. 8, p. 251–259; R. Adamus, *Przesłanka eugeniczna* (*embriopatologiczna*) *jako przesłanka legalnego przerywania ciąży – glosa* do *wyroku Trybunału Konstytucyjnego z 22.10.2020 r.* (*K 1/20*), "Palestra", 11/2020, https://palestra.pl/pl/czasopismo/wydanie/11-2020/artykul/przeslanka-eugeniczna-embriopatologiczna-jako-przeslanka-legalnego-przerywania-ciazy-glosa-do-wyroku-trybunalu-konstytucyjnego-z-22.10.2020-r.-k-1-20, accessed 7th February 2024.

In November 2019, at the request of 118 members of the lower house of parliament, proceedings were initiated before the Constitutional Tribunal to challenge the constitutionality of Article 4a (1)(2) of the Family Planning Act, providing for the permissibility of abortion motivated by the occurrence of an embryopathological premise. Thus, parliamentarians aimed to eliminate from the legal order the 'high probability of severe and irreversible disability of the foetus or an incurable disease threatening its life' as a prerequisite legalising this kind of procedure, and thereby excluding the responsibility of the doctor on the basis of Article 152 (1) of the Penal Code[20], criminalizing the termination of pregnancy of a woman with her consent, but in breach of law. It may be presumed that the use of the constitutional court, which, under Article 188 (1) of the Constitution, has been granted the ability to annihilate the will of the 'positive lawmaker'[21] in this respect, was a reaction to the failure of attempts to tighten up abortion laws through legislative measures between 2016 and 2018.

In the judgment issued on 22nd October 2020, as intended by the applicants, the Tribunal, acting in its full composition and chaired by Julia Przyłębska[22], found that Article 4a (1)(2) of the Family Planning Act was incompatible with Article 38 in conjunction with Article 30 in conjunction with Article 31(3) of the Constitution of the Republic of Poland, i.e. with the constitutional guarantees of protection of human life and respect for the dignity of the individual, due to the contradiction of the assessed regulation with the requirements arising from the principle of

[20] Act of 6th June 1997 Criminal Code (i.e. Journal of Laws of 2024, item 17).

[21] A. Mączyński, J. Podkowik, [in:] *Konstytucja RP. Tom II. Komentarz do art. 87–243*, edit. M. Safjan, L. Bosek, Warsaw 2016.

[22] The claimant M.L. argued in her application to the ECtHR that the ruling of 22nd October 2020 was issued with the participation of judge Krystyna Pawłowicz, who was the co-author of the motion to control the constitutionality of the so-called embryopathological prerequisite for termination of pregnancy filed by a group of MPs in 2017, which, as a result of the principle of discontinuation of proceedings initiated by the Sejm, was replaced in November 2019 by a motion identical in content filed by MPs of the new term. Therefore, there is a conflict of interest in this type of situation, which is the basis for excluding a judge from adjudication. However, the ECtHR did not see the necessity to examine in detail the deficiencies in this respect.

proportionality. However, due to the large-scale protests that followed the ruling, the judgment along with the justification was not published in the Journal of Laws until 27th January 2021.

In principle, under such circumstances, the promulgation of the judgment (unless the TK has reserved the postponement of its entry into force pursuant to Article 190 (3) of the Polish Constitution) should imply the loss of binding force of the unconstitutional norm. This, in turn, would inevitably entail the elimination from the legal order of one of the premises excluding the doctor's liability for performing an abortion with the woman's consent. Therefore, despite the fact that the binding character of the judgment from the very beginning was the subject of justified concerns formulated in the doctrine, indicating a substantive fault in the judgment[23], the risk of criminal liability on the basis of Article 152 (1) prevented these objections from being translated into the legal practice. Thus, from the 'fictional' (non-existent, invalid) judgment, a real subjudice automatically arose[24]: in practice, from the date of its publication, Polish hospitals ceased to perform abortions due to a high probability of severe and irreversible impairment of the foetus or its incurable disease.

III. Factual background of the case

An exception in this regard was not made for procedures planned before the ruling came into force, such as in the case of the applicant M.L. On 12th and 20th January 2021, while she was fourteen and fifteen weeks pregnant respectively, the woman underwent prenatal tests. These revealed that the foetus was burdened with a genetic defect: Trisomy 21. In the following days, she obtained the required opinions from doctors at Bielański Hospital in Warsaw, who stated that its condition made her eligible for an abortion under Article 4a (1)(2) of the Family Planning Act.

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[23] I.a. Fundacja im. Stefana Batorego, Stanowisko Zespołu Ekspertów Prawnych w sprawie rozstrzygnięcia Trybunału Konstytucyjnego dotyczącego aborcji, dated 26th October 2015, https://www.batory.org.pl/oswiadczenie/stanowisko-zespolu-ekspertow-prawnych-w-sprawie-rozstrzygniecia-trybunalu-konstytucyjnego-dotyczacego-aborcji/, accessed 7th February 2024.

[24] M. Foucault, *Nadzorować i karać. Narodziny więzienia*, Warsaw 2020, p. 197.

The procedure was to be performed on 28th January at the same medical center. However, the day before, i.e. on 27th January, the Constitutional Tribunal's judgment of 22nd October 2020 came into force. Thus, the so-called embryopathological premise of abortion was declared unconstitutional and repealed. As a result, several hours before the planned procedure, the doctor informed the woman that, due to changes in national law, the surgery had been cancelled and that a high probability of severe and irreversible impairment of the foetus or an incurable disease threatening its life was no longer a basis for performing a legal abortion in any medical facility in Poland. Given the crucial time factor in such cases, despite the intense stress and confusion, as well as the travel restrictions associated with the SARS-CoV-2 pandemic, Ms. M.L. immediately travelled to the Netherlands, where on 29th January she terminated the pregnancy in a private hospital. She also bore the travel costs and medical fees, amounting to €1,220, for the procedure herself, which placed a significant burden on her budget.

In July 2021, lawyers cooperating with the Foundation for Women and Family Planning filed a complaint to the ECtHR on behalf of Ms. M.L., alleging unlawful interference with the claimant's right to private life (Article 8 (1) of the ECHR) as a result of the entry into force of a decision of the Constitutional Tribunal Court issued in violation of Article 6 of the Convention (right to a fair trial) and violation of her freedom from torture and inhuman or degrading treatment (Article 3 of the ECHR)[25].

Judgment of the ECtHR in M.L. v. Poland

The European Court of Human Rights, upon examining the case of M.L. v. Poland, contrary to the Government's position, assessed that the preliminary requirements for bringing a complaint had been met. In particular, it concluded that the applicant was entitled to the status of victim (Article 34

[25] Application to the ECtHR No. 27617/04 of 26th July 2021 in case M.L. v. Poland.

ECHR). Admittedly, given the peculiarities of the constitutional position and the powers of the Constitutional Tribunal, M.L. was not a party to the proceedings before it. However, the decision of 22nd October 2020 was directly related to the sphere of the applicant's rights. Indeed, the elimination of the embryopathological premise from the legal order resulted in a modification of Ms. M.L.'s behaviour in the most intimate sphere of her personal life, i.e. she was forced to travel to the Netherlands to undergo the procedure instead of having it performed at Bielański Hospital in Warsaw[26]. The Court also found that the condition of exhaustion of domestic remedies referred to in Article 35 (1) of the Convention was met. After all, it assessed that the mechanisms existing in the Polish legal order (measures of a compensatory, penal and disciplinary nature), due to their retrospective and compensatory or penal nature, could not constitute effective instruments for the applicant to counter the violation of her rights and freedoms. Lastly, it found no basis for concluding that the present case involved an abuse of the right of complaint within the meaning of Article 35 (3) of the ECHR. It drew attention to the fact that the Government party, in formulating such an allegation, had used the term 'abuse of rights' in a manner not supported by the Court's case-law.

Turning to the assessment of the merits of the complaint, the Court considered two grounds of complaint: Poland's violation of the applicant's right to respect for private life and the prohibition of torture and inhuman or degrading treatment. However, having considered the arguments of the parties, it dismissed the complaint to the extent that Ms. M.L. invoked a violation of Article 3 of the Convention. In doing so, it pointed out that in the present case the condition of a 'minimum level of severity' of pain had not been met. This requirement is indicated, in addition to the attributability of the act to the State (and, with regard to torture, the premeditation of the acts inflicting pain and their intentional nature)[27], as one of the terms for qualifying the conduct as a form of

[26] I.a. ECtHR Judgment of 1st July 2014, no. 43835/11, S.A.S. v. France, § 57.

[27] M. Nowak, *What Practices Constitute Torture? US and UN Standards*, "Human Rights Quarterly", 2006 no. 4, p. 816.

ill-treatment listed in that provision. He thus held that the intensity of the suffering experienced by the applicant was not 'sufficient' to establish that she had been subjected to torture or inhuman or degrading treatment.

However, the subject of the ECtHR's consideration was primarily the infringement of Article 8 of the Convention. The Court argued against the view expressed by the Government that the fact that the ECHR does not guarantee the right to legal abortion implicitly undermined the view that the prohibition of termination of pregnancy in the presence of an embryopathological condition could be seen as an interference with a woman's right to private life. In doing so, it had regard to the broad interpretation of 'private life' under Article 8 (1) ECHR, well-established in case-law. At the same time, it reserved that such interference by a public authority with the exercise of the said right may be justified provided that it is 1) in accordance with law and 2) necessary in a democratic society on account of the legitimate objectives of the State set forth exhaustively in Article 8 (2). In the Court's view, the first of the requirements indicated is fulfilled in this respect only if the restriction is based on national law, which fulfills certain qualitative requirements, in particular regarding compliance with the rule of law[28]. In the present case, the basis for the interference with the applicant's right to private life was the CT judgment of 22nd October 2020, and it is therefore the subject of the review in this regard.

According to the ECtHR, the context of the right to a fair trial (Article 6 of the Convention) must be considered when examining the invoked judgment in terms of its compliance with the rule of law. Indeed, the fact that, when issuing the judgment in case K 1/20, the CT performed tasks in the sphere of control of the constitutionality of the law and not of the judiciary is irrelevant to the possibility of its being considered a court in the light of Article 6 (1) ECHR[29]. In turn, the principle of the rule of law under

[28] I.a. ECtHR judgment of 25th March 1998, no. 13/1997/797/1000, Kopp v. Switzerland, § 55.

[29] ECtHR judgment of 7th May 2021, no. 4907/18, Xero Flor v. Poland, § 194. In the abovementioned judgment, the ECtHR found that the Constitutional Tribunal's judgment, issued with the participation of a person chosen to fill an already occupied seat (a so-called 'stand-in judge') violated Article 6 (1) of the Convention, in particular the claimant's right to a 'court established by law'.

this provision is reflected by the right to a 'tribunal established by law', which must also be understood through the prism of institutional requirements, in particular the expectation that this court is appointed in accordance with the law.

The deficiencies accompanying the appointment of the Polish constitutional court and the inclusion of so-called 'stand-in judges' (including Jarosław Wyrembak and Justyn Piskorski, elected in 2017 to replace the deceased 'original 'stand-in judges': Henryk Cioch and Lech Morawski) determine that the Constitutional Tribunal cannot in fact be considered a 'tribunal established by law' within the meaning of Article 6 (1) of the Convention. Consequently, the judgment of 22nd October 2020 as a ground for limiting the claimant's right under Article 8 (1) does not fulfil the essential requirements for compliance with the rule of law. Thus, the interference by the public authorities with Ms. M.L.'s right to respect for her private life cannot be justified. The interference could not be regarded as being 'in accordance with law' within the meaning of Article 8 (2). In the present case, therefore, there has been a violation of the applicant's Convention right under Article 8 (1) of the Convention. With this in mind, the ECtHR refrained from assessing the impact of the mistakes accompanying Julia Przyłębska's appointment as President of the Tribunal and Krystyna Pawłowicz's involvement in passing of the 22nd October judgment on the compliance of the said ruling with the principle of the rule of law and, consequently, on whether the interference with the claimant's private life could be regarded as being 'in accordance with law'.

Infringement of the applicant's right to a private life

I. The effects of the Court's decision and the legal situation of Polish women

The judgment in question should be viewed with approval insofar as the ECtHR confirmed that the applicant's right to respect for private life was violated. By adopting a systemic perspective towards the rights covered by the Convention, the Court creatively yet consistently linked the right

to respect for private life with the right to a fair trial. Further, it deduced from the violation of the requirements as to the way in which the Constitutional Tribunal ('court' within the meaning of Article 6 (1)) was appointed, that the right to respect for private life and the right to a fair trial has been infringed. It thus challenged the permissibility of such interference under Article 8 (2) of the Convention and concluded that Ms. M.L.'s right to respect for private life had been violated because of the tightening of the abortion law as a result of the entry into force of the CT judgment.

Undoubtedly, the groundbreaking nature of such a decision of the European Court of Human Rights for Polish women must be recognised. After all, it constitutes a valuable preliminary ruling on which similarly situated persons will be able to rely in their individual complaints to the ECtHR, in order to enforce equitable compensation against the state. Indeed, the judgment of 22nd October 2020 was of key importance from the perspective of the rights of Ms. M.L. and the rights of many other persons in a similar situation. In this respect, it is therefore justified to assume that its effects are analogous to the ruling in Xero Flor concerning faulty judgments of the Constitutional Tribunal in individual cases (issued in proceedings initiated by a constitutional complaint)[30].

Moreover, the ECtHR's finding of a substantial defect in the ruling eliminating Article 4a (1)(2) of the Family Planning Act from legal conduct affects the rights and obligations of all Polish courts. As they are bound by the Constitution of the Republic of Poland (Article 8(2)) and international law (Article 9 of the European Convention on Human Rights), they are authorised and obliged to refuse to take the defective ruling of the CT into account when adjudicating[31]. This, in turn, excludes the possible prosecution of a physician who, due to serious abnormalities of the foetus, would carry out a termination of pregnancy, on the basis

[30] Jak rząd zamierza wykonać strasburski wyrok ws. Xero Flor – pyta RPO premiera. Odpowiedź Szefa KPRM, Biuletyn Informacji Publicznej RPO, 5th November 2021, https://bip.brpo.gov.pl/pl/content/jak-rzad-zamierza-wykonac-strasburski-wyrok-ws-xero-flor-pyta-rpo-premiera-odpowiedz-szefa, accessed 7th February 2024.

[31] Ibid.

of Article 152 (1) of the Penal Code. Thus, the effect of the ruling is, in practice, the decriminalisation of the termination of a woman's pregnancy with her consent in cases where this is motivated by an embryopathological premise.

Finally, Article 46 of the ECHR imposes an obligation on the State to implement the judgment by taking individual and general measures to remedy the violation of the Convention against the claimants or to eliminate the causes of the violation in the law or practice of the authorities. This, in turn, may provide the impulse to change the abortion law in Poland.

II. Escape into formalism?

Therefore, one should not lose sight of the positive impact that the M.L. judgment may potentially have on the situation of Polish women. Nonetheless, when reading the reasoning of the judgment, one cannot help but feel that although the facts of the case are closely related to the problem of reproductive rights, the analysed judgment only seemingly fits into the long history of strategic litigation on abortion before the ECtHR. In fact, the Court referred to its previous decisions on abortion only when considering whether the restriction of the right to legal abortion due to the occurrence of fetal pathology constitutes an infringement of a woman's right to private life. Instead, the further part of the reasoning is aimed at proving that the tightening of the provisions of the Family Planning Act as a consequence of the CT judgment does not constitute an interference 'in accordance with law'. The unlawfulness of the restriction is indicated by the Court by connecting the human rights and constitutional issues, i.e. by demonstrating that, due to the improper staffing of the Constitutional Tribunal, the verdict of 22 October does not meet the requirements for compliance with the rule of law.

The Court's 'escape into formalism' is therefore peculiar in nature: after all, it does not imply that the body has completely shirked the need to go beyond the traditional judicial comfort zone and adjudicate on the basis of principles. Indeed, in the M.L. judgment, the ECtHR has

performed a massive amount of interpretative work aimed at reconstructing the relationship between the rule of law and the correctness of the appointment of a constitutional court. At the same time, one might get the impression that the Court wanted to avoid having to update, after several years, its otherwise conservative position on the 'margin of appreciation' of Member States regarding the manner of legal regulation of abortion. Indeed, having established the unlawful nature of the restriction on the applicant's right to private life, it completely abandoned the proportionality test of the interference, even in a restrained form. The reasoning also does not contain any 'accidental' conclusions formulated by the Court on the merits of the issue of the protection of reproductive rights. '"The 'formalism' of the reasoning of the M.L. judgment thus consists primarily in making the long-awaited decision, which would develop the ECtHR's line of case law on abortion[32], into a judgment which rather supplements the conclusions reached by the Court in the Xero Flor v. Poland case.

III. 'Xero Flor 2.0'?

The judgment of 14 December 2023 should therefore be interpreted rather in the context of judgments where the ECtHR considered the consequences of shortcomings in the process of appointing judicial bodies[33]. In fact, it is even reasonable to conclude that the Court's reflections in the present case are to a large extent a repetition of the conclusions it reached in its judgments in Xero Flor v. Poland. However, the reasoning of the judgment in M.L. also gives rise to new conclusions.

First, the Court explicitly confirmed therein the durable nature of the constitutional defect affecting the election of the so-called 'stand-in judges'. When deciding on the incompatibility of the rulings issued with

[32] I.a. ECtHR judgment of 20th March 2007, no. 5410/03, Tysiąc v Poland; ECtHR judgment of 16th December 2010, no. 25579/05, A, B and C v Ireland; ECtHR judgment of 26th May 2011, no. 27617/04, R.R. v Poland; ECtHR judgment of 9th October 2012, no. 57375/08, P. and S. v Poland.

[33] I.a. ECtHR Judgment of 1st December 2020, No. 26374/18, Goðmundur Andri Astraðsson v. Island; ECtHR Judgment of 7 May 2021, No. 4907/18, Xero Flor v. Poland.

the participation of Jarosław Wyrembak and Justyn Piskorski with the principle of the rule of law, it indicated that a broadly interpreted 'convalidation' of a faulty appointment through the election of a new judge in place of the deceased 'stand-in judge' is impossible.

Secondly, it ruled that the said defectiveness may relate not only to situations in which the judicial body adjudicates in individual cases, but also when it acts in the sphere of control of constitutionality, deciding – as a 'negative legislator' – to overrule the will of the parliament. The conclusions reached by the Court in this respect are particularly significant if we take into account the fact that significant defects in judgments issued by the Constitutional Tribunal acting in this role impinge on the rights and obligations of all Polish courts, in such cases authorised and obliged to refuse to take the defective rulings into account. They should therefore act as if a specific provision has not been eliminated from the legal system as a result of the entry into force of the Constitutional Tribunal's decision.

Allegation of violation of the prohibition of torture and inhuman or degrading treatment

A separate issue, however, is the accuracy of the ECtHR's ruling on the applicant's claim concerning a violation of the prohibition of torture and inhuman and degrading treatment by Poland. The concurring opinion expressed by Judges Ivana Jelić, Gilberto Felici and Erik Wennerström on this issue should be regarded as justified.

The ground for dismissal of the complaint, to the extent that Ms. M.L. invoked a violation of Article 3 of the Convention, was that, in the Court's view, the 'minimum level of suffering' condition had not been met in the present case. The requirement that the intensity of the victim's suffering must reach an appropriate level constitutes, in addition to the attributability of the act to the State and, in the case of torture, the premeditation of the acts inflicting pain and their intentional nature, a condition for concluding that in a particular case there has been a violation of the said prohibition. It is a requirement of a rather indefinite nature, in the sense that it is only possible to determine whether a minimum level

of ill-treatment has actually been achieved by relating the ECtHR case law to a specific factual context.

Yet the Court's decision not to uphold the allegation of a violation of Article 3 ECHR in M.L.'s case was not preceded by a detailed analysis of the circumstances of the case to assess the intensity of the claimant's suffering. Indeed, as indicated in the concurring opinion, there are factors supporting the notion that the pain she experienced could be described as 'severe'[34]. First and foremost, it refers to the difficult to imagine fear and anxiety that Ms. M.L. experienced as a result of being forced to rapidly leave the country to undergo an abortion abroad. The serious epidemiological situation prevailing at the time must be borne in mind, as well as the fact that the whole process took place in a language foreign to the applicant, in an unfamiliar environment, and that the medical staff were not aware of the woman's particularly difficult personal situation and did not provide her with the necessary explanations and guidance. The emotional pain accompanying Ms. M.L. was also intensified by the atmosphere of uncertainty and heightened tension accompanying the entire situation, resulting, *inter alia*, from the ongoing protests in Poland against the tightening of the abortion law and the legal ambiguities regarding the legality of the judgment of 22nd October 2020[35]. When assessing the level of distress, the 'context of maternal pain', i.e. the difficult situation of the claimant as a woman forced to confront the vision of potential suffering and the illness of her future child, also cannot be disregarded. Finally, as noted by Judges Jelić, Felici and Wennerström, it is necessary to take into account the humiliation accompanying Ms. M.L. as a result of the stigmatisation and stereotyping of those seeking to terminate a pregnancy[36].

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[34] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on 10th December 1984 (Journal of Laws of 1989, No. 63, item 378).

[35] I.a. Fundacja im. Stefana Batorego, Stanowisko Zespołu Ekspertów (…).

[36] UN Human Rights Committee, General Comment No. 36, on Article 6 of the UN Convention on Human Rights, 2019, CCPR/C/GC/36, § 8.

The omission of an in-depth analysis of the context in which the applicant's rights were violated is an even greater weakness of the judgment when one considers that the factual circumstances of the M.L. case are not significantly different from those in which the UN Human Rights Committee issued its opinion in Amanda Mellet v. Ireland[37], or Whelan v. Ireland[38]. In short, these concerned women who, due to the restrictive abortion laws in Ireland, were forced to undergo a procedure, motivated by an embryopathological rationale, outside the country. Considering, *inter alia*, the intense mental suffering of the complainants, the Committee concluded that both cases involved a violation of Article 7 of the International Covenant on Civil and Political Rights[39], stipulating the prohibition of torture and inhuman and degrading treatment. The factual resemblance of the Irish cases and the M.L. case thus calls for the ECtHR to indicate what grounds determined it to decide differently on the fulfillment of the 'minimum level of severity' requirement. In this sense, therefore, it is not even the fact that the Court chose to dismiss the allegation of a violation of Article 3 of the Convention by Poland that should be criticised, but the arbitrary nature of this decision, not supported by adequate reasoning.

Conclusions

The main conclusion that emerges from the M.L. v. Poland judgment is that the verdict and its justification focus on different areas of law than the context in which the applicant's rights were violated would at first suggest. The judgment only seemingly fits into the history of the strategic litigation on abortion before the ECtHR. Instead, it essentially develops the conclusions reached by the Court in Goðmundur Andri

[37] UN Human Rights Committee Opinion of 31st March 2016, No. 2324/2013, Amanda Mellet v. Ireland.

[38] UN Human Rights Committee Opinion of 17th March 2017 No. 2425/2014, Whelan v. Ireland.

[39] International Covenant on Civil and Political Rights, opened for signature in New York on 19th December 1966, (OJ 1977, No. 38, item 167).

Astraðsson v Island and Xero Flor v Poland. Thus, it primarily concerns not the question of reproductive rights, but rather the consequences of the improper appointment of the court. In this sense, the feeling of dissatisfaction caused by the fact that after years of silence, the Court did not take the opportunity to update its position on the margin of appreciation of the Member States regarding the legal regulation of abortion, is justified. Some objections can also be raised against the ECtHR's ruling on the violation of the prohibition of torture and inhuman or degrading treatment, which cannot be considered justified.

However, the importance of the practical consequences of the Court's finding of unlawful interference with the applicant's right to private life cannot be undermined. The M.L. decision, after all, not only constitutes a preliminary ruling opening the way for other direct victims of the Constitutional Tribunal's decision to pursue financial claims in Strasbourg. Indeed, it also obliges national courts to refuse to take into account flawed judgments of the Constitutional Tribunal, in particular the judgment of 22nd October 2020. The effect of the judgment is thus, in practice, the decriminalisation of the termination of a woman's pregnancy with her consent in cases where this is motivated by an embryopathological premise. Finally, due to the Article 46 of the ECHR, the ruling of 14th December 2023 may provide a significant impulse for the statutory liberalisation of the abortion law in Poland.