PRZEGLĄD PRAWA MEDYCZNEGO

Criminal liability for incitement or the assistance to terminate pregnancy (Selected Issues)

Reference version

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Summary

This paper focuses on selected Issues of the criminal liability for the participation in the abortion on the basis of provisions being in force. Analysis concerns the possibility of punishing for the incitement and the assistance to terminate pregnancy. The following paper examines the criteria of the act prohibited under Article 152 of the Polish Criminal Code with the blanket clause referring to the Act on Family Planning after the Constitutional Tribunal's Judgment of 22 October 2020, K 1/20 which judgment eliminated the embryopathological grounds for termination of pregnancy.

Key words

abortion, termination of pregnancy, pregnant woman, incitement to terminate pregnancy, assistance to terminate pregnancy, criminal liability, self-abortion, case K 1/20

1. Introductory remarks

This article examines selected issues relating to the offences defined in Article 152(2) of the Polish Criminal Code (CC), namely inciting or assisting in the termination of a pregnancy, with the woman's consent, in breach of the provisions of the relevant legislation. In this context, it also addresses in greater detail the unlawfulness and criminal liability associated with facilitating and performing abortions on therapeutic grounds, i.e. where the pregnant woman's life or health is at risk[1], as well as the criminal liability of persons participating in the termination of a pregnancy, with the woman's consent, on embryopathological grounds. The analysis adopts the perspective of substantive criminal law, focusing in particular on the practical interpretation of the offences set out in Article 152(2) CC in the context of law enforcement and adjudication. Given the scope of this article, criminological, medical and social issues, as well as axiological controversies, have been left aside. Also beyond its scope are issues relating to the legislative process, namely de *lege ferenda* proposals and doubts as to whether, in the light of the fundamental principles of criminal law, such a broad scope of criminalisation of conduct in breach of the provisions of the Act on Family Planning, Protection of the Human Fetus and Conditions for Termination of Pregnancy, as provided for under the current legal framework, can be justified. The analysis does not address the constitutionality of the legislation currently in force governing access to lawful abortion.

As demonstrated by statistics published by law enforcement authorities and data on final criminal convictions, as well as figures presented by civil society organisations whose activities include facilitating women's access to self-managed abortion in a home setting, lawful abortion

[1] The impetus for supplementing the discussion and making several observations somewhat outside the main subject of this paper was provided by a case that understandably aroused strong emotions and occurred in September 2021 in the gynaecology and obstetrics department of the District Hospital in Pszczyna. A 30-year-old patient died there as a result of septic shock. The patient had been healthy, and the septic shock developed during a process lasting several dozen hours, in the course of which a 22-week-old fetus affected by serious congenital abnormalities and anhydramnios was dying (https://serwisy.gazetaprawna.pl/zdrowie/artykuly/8286968,aborcja-legalna-w-sytuacji-zagrozenia-zycia-lub-zdrowia-kobiety.html; https://serwisygazetaprawna.pl/zdrowie/artykuly/8304160,szpital-w-pszczynie-kontrola-rpp-izabela.html?fbclid=IwAR33A_auem-VjelLJmdLk7maytuhkZHweL-Ho0miiE4kI8PpaM3BPvtJvJQ; https://www.gov.pl/web/zdrowie/zycie-i-zdrowie-matki-najwazniejsze?fbclid=IwAR2kMvB4JHeVV9zySk-g4qRMpzROduWIQEOwa9yTHnOMNHYDRCZNjk7GIAQY – accessed on 10 December 2021). Another case that significantly influenced the decision to broaden the scope of the discussion concerned a patient at the University Clinical Hospital in Białystok, whose serious risk to life and health, associated with mental disorders arising from the necessity of carrying the pregnancy to term and giving birth to a child affected by a severe lethal abnormality (absence of the bones forming the cranial vault), was confirmed by two independent psychiatrists. The patient was refused a lawful abortion at the hospital in Białystok; a lawful abortion was ultimately performed at another hospital (https://bip.brpo.gov.pl/index.php/pl/content/rpo-aborcja-odmowa-szpital-bialystok – accessed on 10 December 2021).

in Poland and lawful abortion abroad, these issues are currently of considerable practical significance[2].

In this article, I have deliberately omitted an issue that is currently the subject of considerable disagreement in legal scholarship and case law, namely the assessment under criminal law of 'cross-border arrangements' involving: (1) where, according to the intention of the instigator or facilitator, the termination of a pregnancy with the woman's consent is to be carried out lawfully in a country whose legislation governing access to abortion differs from the Act on Family Planning, Protection of the Human Fetus and Conditions for Termination of Pregnancy applicable in the Republic of Poland; and (2) a situation in which the instigator or aider and abettor engages in acts of perpetration in a state where the abortion which is the subject of the incitement or assistance, would be lawful, but where, according to the perpetrator's intention, the termination of the pregnancy is to take place within the territory subject to Polish jurisdiction and in breach of the provisions governing access to abortion applicable in the Republic of Poland. These are not only issues of considerable practical importance, but also complex doctrinal problems requiring in-depth analysis and argumentation, and therefore warranting a separate study.

Accordingly, with a few exceptions, the following analysis will focus on situations in which a person inducing or facilitating the termination of a pregnancy engages in acts of perpetration within the jurisdiction of Poland, which does not necessarily mean that the perpetrator must be physically present within Polish territory. For example, this may involve a situation in which a perpetrator located outside Polish jurisdiction incites or facilitates an abortion by means of distance communication, or by sending packages containing kits for self-managed medical abortion from outside Polish territory, or by transferring funds intended to cover the cost of an

[2] See, for example, the data presented in: Report of the Council of Ministers on the Implementation and Effects of the Application in 2018 of the Act of 7 January 1993 on Family Planning, Protection of the Human Fetus and Conditions for Termination of Pregnancy (Journal of Laws, item 78, as amended) https://sejm.gov.pl/Sejm8.nsf/InterpelacjaTresc.xsp?key=2F92367F; https://www.gov.pl/web/premier/sprawozdania-sejm-2020; https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8276237,wyrok-tk-ws-aborcji-turystyka-aborcyjna.html?fbclid=IwAR2o1-rrmaU-NXb0m1sF-LhhIFl6Fuk1bhCnAA9RZSHtx7AeZ-r7lZi-dA_k; https://oko.press/przez-rok-dzialaczki-aborcji-bez-granic-pomogly-34-tys-osob/?fbclid=IwAR3uIvO8rftoeOzZlD_t3utYCJwatLv0P2y-Tj1CpKz8474gDwFBE70VYHA. A comprehensive analysis of statistics, legal regulations concerning abortion and the criminalisation of conduct associated with unlawful termination of pregnancy, together with observations from a comparative-law perspective up to 1990, was presented by E. Zielińska in her outstanding monograph: *Przerywanie ciąży. Warunki legalności w Polsce i na świecie*, Warsaw 1990.

abortion[3], where, according to the perpetrator's intention, the termination of the pregnancy is to take place in Poland.

The Constitutional Tribunal's judgement in case K 1/20 of 22 October 2020, which declared unconstitutional the ground permitting the termination of a pregnancy on the basis of a high probability of severe and irreversible fetal impairment or an incurable illness threatening the fetus's life (Article 4a(1)(2) of the Act on Family Planning, Protection of the Human Fetus and Conditions for Termination of Pregnancy), gave rise to considerable interpretative doubts, including those concerning the criminalisation of conduct involving, inter alia, inciting or facilitating the termination of a pregnancy. Criminal law scholars have raised the question of whether, since the judgement was published on 27 January 2021, inciting or facilitating the termination of a pregnancy on embryopathological grounds has been 'merely' unlawful or is also punishable, thereby fulfilling the elements of an offence under Article 152(2) or (3) of the Criminal Code.

The answer to this question determines the answers to more specific questions, such as: Does a doctor commit a criminal offence by informing a pregnant patient whose fetus has been diagnosed with a lethal anomaly that, should she present at hospital with a miscarriage 'in progress' already diagnosed, she may expect to receive appropriate medical care, and that investigating the cause of the miscarriage without the patient's consent falls outside the practical capabilities of medical staff and is not among their legal duties? Is a doctor criminally liable for providing a patient with the telephone number of a recommended specialist employed at a foreign clinic performing lawful abortions on embryopathological grounds, or for recommending a specific clinic abroad? Is a partner criminally liable for inciting a woman to terminate her pregnancy on account of a lethal fetal anomaly, or for providing her with financial, psychological or organisational support in obtaining a lawful abortion on embryopathological grounds outside Poland?

This article explains the circumstances in which facilitating or inciting an abortion does not constitute a criminal offence. Can a doctor who issues a medical certificate confirming that the continuation of a pregnancy poses a risk to the woman's health, together with a statement that the conditions for a lawful termination of pregnancy on therapeutic grounds have been met (Article 4(1) of the Act on Family Planning, Protection of the Human Fetus and Conditions for

[3] Act of 7 January 1993 on Family Planning, Protection of the Human Fetus and Conditions for Termination of Pregnancy (Journal of Laws No. 17, item 78, as amended).

Termination of Pregnancy: 'pregnancy poses a threat to the life or health of the pregnant woman'), incur criminal liability for aiding and abetting another person, other than the woman herself, in performing an unlawful abortion with the woman's consent (Article 18(3) in conjunction with Article 152(1) CC), or for assisting the woman in obtaining an unlawful abortion (Article 152(2) CC)? Does a doctor commit a criminal offence by performing an abortion on therapeutic grounds if the diagnosis confirming a risk to the patient associated with the continuation of the pregnancy is subsequently challenged by another specialist, a public official or a representative of a civil society organisation? Is a representative of a civil society organisation who supports a woman in obtaining access to a lawful abortion in Poland criminally liable where the woman has been refused a lawful abortion at another facility to which she applied? Are representatives of civil society organisations who provide advice and information to women fleeing to Poland from armed conflict criminally liable for informing them about access to lawful abortion in Poland, including the practical possibilities of obtaining a lawful abortion on criminal grounds (for example, following wartime rape of which the refugee is a victim), as well as about the availability of effective, rather than merely theoretical, assistance in this regard?

These issues are of considerable practical importance. The exact number of medication abortions performed at home in Poland is unknown. It is sufficient to note that organisations which provide free supplies of medicines for self-managed medical abortion to women in Poland, and offer advice and information on how to use the medication abortion kits delivered to them, report that they 'respond' to 'over 80,000' messages from Poland each year[4]. It is not known how many women each year obtain access to abortion at home without assistance from civil society organisations. Nor are data available on the number of women who, each year and without assistance from such organisations, finance and organise trips abroad to obtain a lawful abortion outside the territory of the Republic of Poland. It is also unknown how many surgical abortions and deliberate inductions of miscarriage take place within the 'Polish abortion underground', with the pregnancy loss subsequently managed in hospital rather than at home and recorded as a miscarriage of unexplained aetiology. A further feature specific to Poland is that the same case may raise no doubts as to whether the legal grounds for performing a lawful abortion are met at one medical facility, whereas at another medical facility the applicable law may be interpreted differently and the case classified accordingly. The available data indicate

[4] https://womenhelp.org/; https://oko.press/przez-rok-dzialaczki-aborcji-bez-granic-pomogly-34-tys-osob/?fbclid=IwAR3uIvO8rftoeOzZlD_t3utYCJwatLv0P2y-Tj1CpKz8474gDwFBE70VYHA

that, for many years, there have been not only hospitals but entire 'voivodeships free of abortion' in Poland. It would appear that, in order to protect medical staff from potential risks, many healthcare facilities informally apply a procedure of 'pushing back' patients who meet the legal criteria for termination of pregnancy, referring them to facilities whose management adopts a somewhat less risk-averse approach[5]. Consequently, patients seeking access to a lawful medical procedure frequently turn to representatives of civil society organisations for assistance. These organisations support them in finding a medical facility willing to perform a lawful termination of pregnancy or help them obtain financial assistance to undergo an abortion outside Poland, not only on social grounds but also on therapeutic, embryopathological and criminal grounds. Can such conduct be characterised as criminal assistance in the commission of an abortion, potentially involving the organised and coordinated activities of a group established for this purpose? It may be assumed that, after 24 February 2022, these same organisations also took on the role of providing 'care' to women refugees wishing to terminate pregnancies resulting from criminal acts committed in the territory of Ukraine. Will the arrival in Poland of millions of war refugees, primarily women and children – people particularly vulnerable to victimisation, including sexual offences systematically committed by the aggressor's soldiers – be reflected in the statistics on legal abortions for 2022? To date, official statistics have consistently confirmed that, in a country with a population of almost 40 million, there are virtually no cases in which a woman wishes to terminate a pregnancy resulting from a criminal act. The absence of such cases from official statistics may indicate that the assistance provided to refugee women takes the form of facilitating abortions outside Poland or facilitating access to medicines enabling women to terminate their pregnancies themselves.

There can be little doubt that the K 1/20 judgement is likely to have further increased the scale of the phenomena outlined above. This is because, during the period in which the so-called

[5] See, for example, the conclusions of the Commissioner for Human Rights concerning the State's compliance with its obligation to ensure patients' effective access to lawful abortion procedures, set out in a letter addressed to the Minister of Health dated 2 June 2020: https://bip.brpo.gov.pl/sites/default/files/WG%20do%20Ministerstwa%20Zdrowia%20ws%20dost%C4%99pu%20do%20legalnej%20aborcji.pdf. See also the comments of the Helsinki Foundation for Human Rights on the implementation of the judgements of the European Court of Human Rights in the cases of P. and S. v. Poland (application no. 57375/08), R.R. v. Poland (application no. 2761/04) and Tysiąc v. Poland (application no. 5410/03): https://www.hfhr.pl/wp-content/uploads/2018/08/P-i-S-v.-Poland-komunikacja-lipiec-2018_POL.pdf. See also the concerns raised by the Commissioner for Human Rights regarding respect for patients' rights at the University Clinical Hospital in Białystok: https://bip.brpo.gov.pl/index.php/pl/content/rpo-aborcja-odmowa-szpital-bialystok [accessed on 10 December 2021]. The website of the Federation for Women and Family Planning contains accounts of numerous cases in which representatives of the organisation 'find a hospital' for a patient seeking a lawful abortion on therapeutic grounds (and, previously, also on embryopathological grounds) in Poland, who has been unable to obtain assistance from the healthcare facility serving the region in which she resides (https://federa.org.pl/).

abortion compromise was in force, i.e. from December 1997 to January 2021, the vast majority of lawful pregnancy terminations performed in Poland were carried out on embryopathological grounds[6]. The data for 2021 are likely to show a substantially lower number of lawful abortions than in previous years, as well as that the overwhelming majority of lawful abortions which would previously have been performed on embryopathological grounds are now being carried out on therapeutic grounds (Article 4(1) of the Act on Family Planning, Protection of the Human Fetus and Conditions for Termination of Pregnancy: 'pregnancy poses a threat to the life or health of the pregnant woman'). It would appear that the practice developing since January 2022 demonstrates that the therapeutic ground is subject to even greater variation in interpretation across individual medical facilities[7], than the ground that prevailed until the publication of the K 1/20 judgement, namely 'a high probability of severe and irreversible fetal impairment or an incurable illness threatening the fetus's life'[8].

2. General characteristics of aiding and abetting the termination of a pregnancy with the woman's consent

Article 152(2) of the Polish Criminal Code (CC) defines offences consisting in assisting a pregnant woman in terminating a pregnancy in breach of the provisions of the relevant legislation, and in inciting a pregnant woman to terminate a pregnancy in breach of those provisions. According to the consistent and established view expressed in case law and legal scholarship, the offences defined in Article 152(2) CC constitute sui generis forms of aiding and abetting and, at the same time, 'fully correspond to aiding and abetting as understood under Article 18(2) and (3) CC'[9]. This finding establishes that, when interpreting the constituent

[6] For example, the Belgian Government allocated public funds from the Ministry of Health and the Institute for the Equality of Women and Men to finance abortions, in accordance with the rules applicable in Belgium or other European countries, for Polish citizens who had been deprived of access to lawful abortion in Poland. Similarly, on 24 November 2021, the Dutch House of Representatives (Tweede Kamer) adopted a resolution allowing the Government to use funds from the Human Rights Fund for 2022–2027 to finance abortions for European women, including Polish women (https://www.gazetaprawna.pl/wiadomosci/swiat/artykuly/8258452,belgijski-rzad-gotow-placic-za-aborcje-polek.html; https://www.radiomaryja.pl/informacje/belgijski-rzad-zaplaci-za-tzw-aborcje-polek/; https://www.gazeta.pl/0,0.html?mtpromo=enc02qhrmpup536udraocblescrjdksifjfcroec2jemjmmt24gsjmudrqmcblet2mgrbnqt3ig2ri&utm_campaign=amtpc_FB_Gazeta).

[7] See, for example, the comments made by the Commissioner for Human Rights regarding the official position of the Director of the University Clinical Hospital in Białystok (https://bip.brpo.gov.pl/index.php/pl/content/rpo-aborcja-odmowa-szpital-bialystok), as well as the guidelines published by the Ministry of Health in response to the death of a patient at the District Hospital in Pszczyna (https://www.gov.pl/web/zdrowie/zycie-i-zdrowie-matki-najwazniejsze?fbclid=IwAR2kMvB4JHeVV9zySkg4qRMpzROduWIQEOwa9yTHnOMNHYDRCZNjk7GIAQY) – accessed on 10 December 2021.

[8] https://www.gazetaprawna.pl/wiadomosci/kraj/artykuly/8166757,legalne-aborcje-w-polsce-statystyki.html.

[9] See, for example, the judgement of the Court of Appeal in Gdańsk of 9 February 2017, II AKa 294/16, LEX No. 2341089; the judgement of the Supreme Court of 20 November 2014, IV KK 257/14, LEX No. 1941900; the judgement of the Court of Appeal in Katowice of 30 September 2008, II AKa 231/08, LEX No. 477588; the

elements of the offences defined in Article 152(2) CC, it is possible to draw on the extensive body of legal scholarship and case law developed in relation to the general principles governing the attribution of criminal liability for incitement and aiding and abetting. The introduction into the Special Part of the Criminal Code of an offence comprising the constituent elements of *sui generis* incitement and aiding and abetting resulted from the legislature's decision not to criminalise a woman's unlawful termination of her own pregnancy. This precludes the prosecution of instigators and accomplices under the general rules. The legislature adopted a similar legislative approach when criminalising, under Article 151 CC, the act of persuading another person to take their own life or facilitating their suicide, since, de *lege lata*, the conduct of an individual who attempts suicide but survives remains outside the scope of criminalisation.

The non-accessory nature of the non-perpetrator forms of criminal participation means that incitement and aiding and abetting constitute separate types of prohibited conduct, distinct from the types of offences that are the subject of the incitement or assistance (i.e. the offence to whose commission the instigator incites another person or the offence whose commission the accomplice facilitates)[10]. This thesis is reflected in case law. It follows that the person at whom the perpetrator's conduct is directed need not take any steps towards unlawfully terminating the pregnancy, or even 'feel incited' to do so.

It should be noted that, given the possibility, undisputed in legal scholarship and case law, of 'overlap' between incitement and aiding and abetting, on the one hand, and the successive stages of committing an offence (attempting), on the other, criminal liability may also be attributed for an attempted offence, including an ineffectual attempt to incite or facilitate the termination of a pregnancy, in circumstances where no pregnancy actually exists that could be unlawfully terminated. For example, a partner who incites his female partner to undergo an unlawful abortion may incur criminal liability for an ineffectual attempt to incite the termination of a pregnancy if the woman whom he seeks to incite is not pregnant or if the pregnancy has ended spontaneously (a missed miscarriage), provided that the perpetrator was unaware of this

judgement of the Court of Appeal in Warsaw of 16 March 2015, II AKa 33/15, LEX No. 1680078; the judgement of the Court of Appeal in Warsaw of 21 December 2015, II AKa 401/15, LEX No. 2004473; M. Królikowski (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Komentarz*, Warsaw 2013, vol. 1, pp. 246-247.

[10] By way of illustration, reference may be made to an example from the case law (judgement of the Supreme Court of 3 April 2006, V KK 316/2005), in which a person was convicted of incitement to murder after offering a financial reward to have an 'inconvenient business partner' killed. However, after receiving payment of US$10,000, the persons who had accepted the contract to commit the murder proved dishonest and notified the law enforcement authorities (according to the reasoning of the judgement, they did so because the instigator, disappointed that the service had not been performed, was demanding repayment of the money with excessive insistence). It was established that the persons whom the instigator had commissioned to carry out the contract killing had never intended to kill anyone, but had intended from the outset merely to extort the money.

when undertaking the acts of incitement or assistance (Article 13(2) in conjunction with Article 152(1) CC)[11].

There are no theoretical obstacles to applying the concept of chain incitement and chain aiding and abetting to conduct involving inciting or facilitating an abortion in breach of the provisions of the relevant legislation. In the factual circumstances under consideration, this would mean that a perpetrator who does not direct the acts of incitement or assistance towards the pregnant woman herself, but rather towards another person who is expected to undertake such acts in relation to the woman, also fulfils the constituent elements of the offence[12].

Such a broad scope of criminalisation gives rise to concern in the light of the subsidiary role of criminal law in a state governed by the rule of law. *De lege lata*, it can only be observed that the chain nature of incitement and aiding and abetting, which, with each additional human 'link', places the perpetrator further away from an actual attack on the legally protected interest (i.e. 'the life of the conceived child'), should be reflected in the assessment of the degree of social harmfulness of the conduct, towards its reduction to a level at which it becomes negligible (Article 1(2) CC), thereby excluding the criminal nature of the prohibited act. A similar conclusion should be reached in the case of an ineffectual attempt to incite or facilitate an unlawful abortion. After all, Article 115(2) CC expressly provides that 'when assessing the degree of social harmfulness of an act, the court shall take into account the type and nature of the interest infringed, the extent of the harm caused or threatened, the manner and circumstances in which the act was committed, the significance of the duties breached by the perpetrator, as well as the form of intent, the perpetrator's motivation, the type of rules of caution infringed and the degree of their infringement'.

By way of concluding these introductory remarks, it should be noted that even the knowing provision of support to a woman following an unlawful abortion does not fulfil the constituent elements of criminal aiding and abetting. Under the general principles of criminal law,

[11] As early as 1934, the Supreme Court expressed its approval of applying the concept of impossible attempt to unlawful termination of pregnancy in a situation where the fetus was dead, although the perpetrator was unaware of this fact (judgement of the Supreme Court of 29 October 1934, III K 1052/34, OSN 5/1935, item 195).

[12] Examples include the following: a pregnant woman's partner persuades her friend to, in turn, persuade the woman to terminate the pregnancy; an 18-year-old man persuades his parents to finance the termination of his partner's pregnancy; the mother of a pregnant teenage girl persuades a doctor she knows to provide her daughter with information and pharmaceutical products enabling her to induce a miscarriage herself, or to issue a false certificate stating that a ground permitting lawful termination of pregnancy exists (for example, a risk to the woman's life); a gynaecologist persuades another person to act as an intermediary in supplying a woman with early abortion pills which she had previously 'ordered' from him; the father of a young woman persuades a prosecutor he knows to issue a false certificate stating that the pregnancy resulted from a prohibited act.

punishable assistance in the commission of a prohibited act must take place before its commission or, at the latest, while it is being committed. This means that providing assistance after an abortion has been performed (e.g. medical assistance, psychological support, financial support or childcare during the recovery period) does not constitute unlawful facilitation of an abortion.

Assistance in concealing evidence of an unlawful abortion does not constitute the offence of harbouring an offender under Article 239 CC[13], since the woman is not an 'offender' within the meaning of that provision. An extensive interpretation of this concept (so as to include a woman terminating her own pregnancy as an 'offender' within the meaning of Article 239 CC) would constitute an interpretation to the detriment of the perpetrator, which is impermissible under criminal law.

It should also be added that, where it cannot be established that abortion pills were not intended for the woman who ordered them, paid for them or collected the delivery, any doubts must be resolved in favour of the accused. For example, if it is not possible to refute the thesis that the recipient of a package containing early medical abortion pills, who is also the mother (flatmate or friend) of a woman whose pregnancy (or termination thereof) has been confirmed, is herself the person who intended to use the medicines, the recipient of the package should be acquitted of the offence under Article 152(2) CC. After all, it cannot be ruled out that a prudent person may wish to keep a medical abortion kit at home in case she becomes pregnant.

Failure to notify law enforcement authorities of a suspected unlawful abortion does not constitute criminal aiding and abetting or any other prohibited act. Abortion-related offences are not included in the list of offences subject to the statutory duty to report under Article 240 CC. However, where information concerning an unlawful abortion has been obtained by a doctor or nurse in circumstances warranting its protection under medical confidentiality, disclosure of such information – apart from the exceptions expressly provided for in the

[13] Article 239(1). Anyone who obstructs or frustrates criminal proceedings by helping the perpetrator of an offence, including a fiscal offence, to evade criminal liability, in particular by concealing the perpetrator, concealing traces of the offence, including a fiscal offence, or serving a sentence on behalf of a convicted person, shall be liable to imprisonment for a term of between 3 months and 5 years. Article 239(2). A perpetrator who conceals a person closest to them shall not be subject to punishment. Article 239(3). The court may apply extraordinary mitigation of the penalty or even waive its imposition if the perpetrator provided assistance to a person closest to them or acted out of fear of criminal liability to which they themselves or their next of kin might be exposed.

legislation governing the medical profession[14] and the professions of nurse and midwife[15] – is permissible only where the healthcare professional has been released from the duty of confidentiality in accordance with the procedure prescribed by law. It should be unequivocally emphasised that a doctor's or nurse's unilateral decision to waive professional confidentiality in order to report a patient who has undergone an unlawful abortion to law enforcement authorities may give rise to criminal liability for an offence against the duty to protect professional confidentiality incumbent upon, inter alia, healthcare professionals (Article 266(1) CC)[16].

3. Lawful incitement and facilitation of lawful abortion. Intent as a necessary condition for attributing criminal liability under Article 152(2) of the Criminal Code.

Inciting or facilitating an abortion 'in accordance with the provisions of the relevant legislation' constitutes lawful conduct. The prohibited act is the intentional (Articles 8 and 9(1) CC) incitement or facilitation of an abortion 'in breach of the provisions of the relevant legislation'. The following conduct does not constitute a criminal offence when committed negligently: terminating a pregnancy, inciting the termination of a pregnancy or facilitating the termination of a pregnancy in breach of the provisions of the relevant legislation. An extensive interpretation aimed at criminalising all conduct directed towards inciting or facilitating a woman to terminate her pregnancy, including a lawful termination of pregnancy, is impermissible in view of the fundamental safeguards and principles of criminal law. The same applies to an interpretation that could extend criminalisation to negligent (Article 9(2) CC) infringements of the life or health of the fetus. The legislation to which the constituent elements of the offences defined in Article 152 CC refer is the Act on Family Planning[17]. Providing a patient with reliable information concerning the following does not constitute a prohibited act: the health status of the fetus; the possibility of obtaining a lawful abortion in Poland; the options available after leaving the territory of the Republic of Poland; maintaining Polish-language websites containing detailed information on lawful abortion available outside Poland; and the

[14] Act of 5 December 1996 on the Professions of Physician and Dentist (consolidated text: Journal of Laws of 2021, item 790, as amended).
[15] Act of 15 July 2011 on the Professions of Nurse and Midwife (consolidated text: Journal of Laws of 2021, item 479, as amended).
[16] For a more detailed discussion, see E. Plebanek, *Zachowanie a ujawnianie tajemnicy lekarskiej i pielęgniarskiej – kolizja obowiązków oraz próba jej rozwiązania*, "Palestra" 2020 no. 6, pp. 137-160.
[17] Act of 7 January 1993 on Family Planning, Protection of the Human Fetus and Conditions for Termination of Pregnancy (Journal of Laws 1993 No. 17, as amended).

possibility of obtaining financial support from a civil society organisation or from public funds provided by the state in which the lawful abortion is performed.

Informing a patient about the health status of the fetus, the clinical management algorithms recommended in such circumstances in contemporary international medical practice, the legal framework applicable in Poland and neighbouring countries, and the practical operation of specific foreign medical facilities performing lawful abortions cannot even constitute an unlawful act, since it essentially amounts to the fulfilment of the doctor's duty to provide information to the patient. Nor does assisting a pregnant woman in finding a medical facility willing to perform a lawful abortion constitute a prohibited act where the termination of pregnancy has been refused at another facility.

It is self-evident that the constituent elements of the subjective aspect of an offence (in the present case, the perpetrator's intent), like those of its objective aspect, must be established through the evidential process. They cannot be presumed to the detriment of the perpetrator, and any doubts must be resolved in favour of the accused. The 'burden of proving' the circumstances demonstrating that the perpetrator has fulfilled the objective and subjective elements of the offence, or, in other words, positively establishing through the evidential process that all the constituent elements of the offence have been satisfied, always rests with the prosecution. The same applies to challenging circumstances indicating the existence of grounds excluding criminal liability[18]. Although intent exists only in the perpetrator's consciousness, it constitutes a psychological fact and is subject to the same evidential requirements as circumstances relating to the objective aspect of the offence, applying the relevant rules of evidence and inference[19].

The subjective aspect of an offence, as an element defining the perpetrator's mental attitude towards the act, should not be equated with culpability, understood as the possibility of reproaching the perpetrator for having acted contrary to a legally enforceable norm. The absence of culpability precludes the criminal nature of a prohibited act (Article 1(3) CC), whereas the degree of culpability determines the severity of the penalty (Article 53(1) CC). In cases involving incitement or assistance in an unlawful abortion on embryopathological grounds, but also on account of a woman's difficult personal circumstances or the criminal origin of the pregnancy, circumstances may arise which reduce the degree of culpability

[18] P. Hofmański, S. Waltoś, *Proces karny. Zarys systemu*, WKP 2018, pp. 213-340.
[19] Order of the Supreme Court of 2 December 2006, II KK 92/06, OSNwSK 2006/2576.

because of the abnormal motivational situation in which the instigator or accomplice finds themselves. The assessment of the degree of culpability of a perpetrator who assists in an abortion should take into account: the psychological pressure exerted on the accomplice by the pregnant woman; the impact that the arrival of a child would have on the accomplice's circumstances in life; the nature of the relationship between the accomplice and the woman seeking assistance in terminating her pregnancy; and the circumstances motivating the woman to terminate the pregnancy. This may occur, for example, where a refugee woman's family and social environment, motivated by compassion for a victim of wartime rape and wishing to protect her from secondary victimisation, advises her against seeking access to a lawful abortion on criminal grounds and instead encourages her to undergo an unlawful termination of pregnancy at home. The parents of a young woman may likewise find themselves in an abnormal motivational situation reducing their degree of culpability where their daughter lacks sufficient financial resources and practical means to support a child, and the prospect of premature motherhood, rather than the fulfilment of her life plans, causes her to suffer a mental breakdown. A similar situation may arise in the case of a husband whose wife learns that their next child will be affected by a severe and incurable disease, which will have a significant impact not only on the future life of the prospective child but also on every aspect of the lives of the woman, the father and the couple's other minor children.

The perpetrator's motivation (e.g. genuine compassion for the circumstances of a woman wishing to terminate her pregnancy) is also relevant to the assessment of the degree of social harmfulness of the prohibited act (Article 115(2) CC).

4. Removal of a non-viable pregnancy as an ordinary therapeutic procedure.

Therapeutic procedures undertaken in relation to a patient following the diagnosis of a non-viable pregnancy are not classified as procedures for the termination of pregnancy and are not subject to the restrictions laid down in the Act on Family Planning. The condition is that the death of the 'conceived child' has been confirmed. In the case of a pregnancy at a stage too early for embryonic cardiac activity to be detected, such confirmation may, for example, be provided by hormone concentration test results indicating that the pregnancy is not progressing. The removal of such a pregnancy, or rather its remnants, does not constitute the 'termination'[20]

[20] The Dictionary of the Polish Language defines the transitive verb "przerwać" ('to interrupt') as follows: 'to stop doing something before the activity in question has been completed'; 'to prevent something from continuing, not to allow it to be completed, to suspend the operation of something' (*Słownik języka polskiego PWN*, Warsaw 1979, vol. II, p. 1001).

of the pregnancy as a process taking place within the woman's body. Conduct consisting in the evacuation of a dead embryo (fetus) from a woman's body does not infringe the legally protected interests safeguarded by Article 152 CC (the uninterrupted development of pregnancy and the life of the conceived child). A person removing a non-viable pregnancy does not fulfil the constituent elements of the offence defined in Article 152 CC[21]. The removal from a woman's body of the remnants of a pregnancy that has ceased to develop (uterine curettage) does not constitute an unlawful act. Nor does the administration to a woman of pharmacological agents intended to induce the expulsion of the remnants of a non-viable pregnancy from the uterus constitute an unlawful act. The condition for the lawfulness of the conduct described above is that the person providing assistance to the woman acts in accordance with the principles of contemporary medical knowledge and is aware that the pregnancy is non-viable[22]. For example, a gynaecologist who, having diagnosed a non-viable pregnancy in a private practice, provides the woman with pharmacological agents intended to facilitate the expulsion of the non-viable pregnancy from her body, or performs a procedure to mechanically evacuate such remnants from the uterine cavity, does not commit an offence[23]. Conversely, a doctor's erroneous classification of a pregnancy as non-viable and the subsequent commencement of its removal cannot result in the attribution to the medical practitioner of criminal liability for the offence of unlawful termination of pregnancy (Article 152(1) CC). This is because the offence is intentional, and the doctor's lack of awareness that the pregnancy being removed is still viable means that the subjective elements of the offence are not fulfilled. Such conduct remains unlawful, but does not constitute a criminal offence, provided that the woman does not simultaneously suffer bodily harm as a result of the incorrect medical intervention. For the same reasons, a doctor's lack of awareness, at the time of undertaking medical interventions that result in miscarriage, that the woman is carrying a viable pregnancy excludes criminal liability for offences against the life or health of the 'conceived child' as defined in Articles 152 and 157a CC.

A diagnostic error on the part of the perpetrator resulting in the termination of a viable pregnancy will not give rise to criminal liability (for example, where, before commencing a procedure to remove the remnants of a miscarriage from the uterus, a doctor mistakenly believes

[21] Judgement of the Court of Appeal in Katowice of 16 October 2008, II AKa 255/08, LEX No. 477889. For a more detailed discussion, see E. Plebanek, P*rzestępstwa aborcyjne – praktyczna interpretacja znamion czynności wykonawczej*, "Prawo i Medycyna" 2011, no. 2, pp. 33-55.
[22] See the judgement of the Court of Appeal in Katowice of 16 October 2008, II AKa 255/08, LEX No. 477889.
[23] Judgement of the Court of Appeal in Katowice of 16 October 2008, II AKa 255/08.

that the pregnancy is non-viable when it is in fact viable, or where a doctor performing an abortion mistakenly believes that the conditions for a lawful therapeutic abortion have been met). A doctor performing an abortion who is unaware that the condition constituting the legal basis for termination of pregnancy was incorrectly established by another specialist cannot be held criminally liable for unlawful termination of pregnancy.

The above theses follow from the fact that offences directed against the life or health of the fetus (the 'conceived child') are intentional offences (Article 157a CC and Articles 152 and 153 CC), requiring proof of an intention to attack the life or health of the 'conceived child'. In other words, an unintentional attack on the life or health of the 'conceived child', for example as a result of an error in treatment or insufficiently critical reliance on the opinion of a specialist from another field of medicine, is irrelevant for the purposes of criminal law[24].

5. Failure to perform an abortion on therapeutic grounds as an error in treatment

Where an embryo or fetus exhibits unequivocal signs of life, the requirements of the Act on Family Planning must be observed. In practice, this means that doctors, sometimes guided by considerations other than medical ones, avoid interventions that would accelerate the natural process of miscarriage, despite being certain that the miscarriage cannot be prevented, that the child is not capable of surviving outside the woman's body, and that it will die during the miscarriage or immediately after leaving the mother's body. In such circumstances, it should be emphatically stressed that, where the natural course of miscarriage or fetal demise begins to pose a threat to the woman's health (for example, when the first symptoms of inflammation appear), the medical staff become obliged to provide the patient with medical assistance appropriate to the risk to her health. Where necessary, this may also involve a medically justified and therefore lawful therapeutic abortion or pharmacological acceleration of the miscarriage process, provided that these are the optimal methods from the perspective of effectively neutralising the increasing risk to the patient's health[25].

Failure to implement medical procedures appropriate to the risk to the patient's health, including allowing the risk to the woman's health to escalate spontaneously as a result of an

[24] A comprehensive analysis of the criminal-law protection afforded to the human being before birth in the context of medical malpractice can be found in: E. Plebanek, *Ochrona płodu ludzkiego w perspektywie odpowiedzialności za niewłaściwe leczenie* [in:] *System Prawa Medycznego*, vol. III, eds. T. Dukiet Nagórska, A. Liszewska, Wolters Kluwer, Warsaw 2021, pp. 667-689.

[25] For a more detailed discussion, see E. Plebanek, *Życie i zdrowie dziecka poczętego jako przedmiot prawnokarnej ochrony (wybrane problemy wykładnicze w perspektywie najnowszych propozycji legislacyjnych)*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2016, no. 4, pp. 7-34.

inadequately medically supervised or prolonged process of miscarriage or fetal demise, may constitute grounds for attributing criminal liability to those who were under a specific legal duty to provide medical care to the patient, for an offence directed against the life or health of the woman (Articles 160, 155, 156(2) and 157(2) CC, depending on the outcome). For example, in order to establish the legal classification under Article 160(2) CC, it is sufficient that those responsible for the patient's medical care, contrary to the principles dictated by contemporary medical knowledge, allowed a situation to arise in which the prolonged natural course of miscarriage or pregnancy demise directly exposed the patient to a risk of serious harm to her health, in the form of, for example, an illness posing a real threat to life, mental illness or loss of reproductive capacity[26]. As the Supreme Court rightly observed in its judgement of 21 August 2012 (IV KK 42/12), delivered in a case in which a doctor was held criminally liable for an offence under Article 160 CC: 'Since the consequence of the offence is the mere "exposure" to danger (that is, the creation of the possibility itself that certain consequences dangerous to health or life may occur), a doctor acting as a guarantor is subject to criminal liability under Article 160 of the Criminal Code where, by failing to provide appropriate healthcare, the doctor's inactivity has accelerated the course and progression of disease processes in the patient, causing them to pose a direct threat to the patient's life and health'[27].

In this context, it should be emphasised that, for a therapeutic abortion to be lawful, the Act on Family Planning does not require: the threat to the woman's health or life to constitute (1) an immediate danger; (2) the threat to her health to be associated with a risk of serious bodily harm of the kind listed in Article 156(1) CC; or (3) the threat to concern aspects of health other than mental health. On the contrary, downplaying the threat to a woman's mental health as a medical condition justifying a lawful abortion on therapeutic grounds is an interpretation that conflicts with all the definitions of 'health' recognised in the doctrine of medical law, and even with the understanding of 'health' adopted in criminal law. It is sufficient to note that, in its exhaustive list of the most serious forms of 'serious' bodily harm (Article 156(1) CC), the legislator

[26] See also, for example, T. Sroka: 'the consequence of an act prohibited under Article 160 of the Criminal Code consists in the occurrence, in the factual circumstances of the case, of a specific degree of immediate danger of loss of life or serious bodily harm. As a rule, this consequence may arise in the factual circumstances of a case in two ways. First, a situation may arise in which, before the perpetrator engaged in the conduct under criminal-law analysis, the aforementioned danger to human life or health did not exist, whereas following that conduct, the danger described in Article 160 of the Criminal Code arose. Secondly, it is also possible that, before the perpetrator engaged in the conduct being assessed, a danger of the degree specified in Article 160 of the Criminal Code already existed, and that, following the perpetrator's conduct, only the level of that danger changed, increasing to a correspondingly higher degree' (*4. Treść obowiązku gwaranta nienastąpienia skutku* [in:] idem: *Odpowiedzialność karna za niewłaściwe leczenie. Problematyka obiektywnego przypisania skutku*, Warsaw 2013, SIP Lex).

[27] Judgement of the Supreme Court of 21 August 2012, IV KK 42/12, LEX No. 1220930.

expressly includes ‘permanent mental illness’ and ‘total or substantial permanent incapacity to work in one’s profession’, alongside loss of reproductive capacity (e.g. loss of a fallopian tube as a result of a procedure to remove an ectopic pregnancy being performed too late, or uterine rupture resulting from delayed medical intervention), other serious disability, a serious incurable or long-term illness, an illness posing a real threat to life (e.g. septic shock or internal haemorrhage), and permanent, significant disfigurement or deformity of the body. Such incapacity need not necessarily result from a substantial deterioration in health in the purely physiological sense.

For these reasons, there is no legal basis for the assertion that performing an abortion, or facilitating an abortion, on the basis of a potential (rather than ‘immediate’) threat to a woman’s life or health[28], including her mental health, constitutes unlawful conduct, let alone that it may fulfil the constituent elements of the offence under Article 152(1) CC.

An interpretation of the therapeutic indication set out in Article 4a(1) of the Act on Family Planning, Protection of the Human Fetus and Conditions for Termination of Pregnancy that restricts its scope beyond the meaning established through linguistic interpretation would simultaneously broaden the scope of criminalisation of the offences defined in Article 152 CC. This would be incompatible with the fundamental principles of criminal law in a state governed by the rule of law (*nullum crimen sine lege* and the prohibition of analogy to the detriment of the accused, as enshrined in Article 42 of the Constitution of the Republic of Poland, Article 7 of the European Convention on Human Rights[29], Article 15 of the International Covenant on Civil and Political Rights[30], Article 49 of the Charter of Fundamental Rights of the European Union[31] and Article 1 CC).

Consequently, criminal liability cannot be attributed for performing an abortion contrary to the provisions of the Act, facilitating such an abortion or inciting another person to undergo such an abortion on the basis of an interpretation of Article 4a(1) of the Act on Family Planning,

[28] A threat to a woman’s life or health justifying the performance of a lawful abortion may include, for example, a possible suicide attempt associated with serious depressive disorders caused by the stress of a pregnancy complicated by a serious fetal abnormality, or possible sepsis resulting from the need to evacuate a dead fetus where, in view of the fetus’s condition, it would be medically justified to terminate the pregnancy at a considerably earlier stage.

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

[30] International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 (Journal of Laws of 1977, No. 38, item 167).

[31] Charter of Fundamental Rights of the European Union (OJ EU C 303, 2007, p. 1, as amended).

Protection of the Human Fetus and Conditions for Termination of Pregnancy that is more restrictive than the meaning established through grammatical interpretation.

Issuing a certificate confirming, for example, a state of depression caused by the necessity of continuing a pregnancy affected by a severe pathology, together with the conclusion that this disorder poses a threat to the patient's health, cannot fulfil the constituent elements of aiding and abetting an unlawful abortion by a person other than the woman herself (Article 18(3) in conjunction with Article 152(1) CC), or of providing assistance to a woman in this regard (Article 152(2) CC), even if that conclusion is challenged by another specialist. The assessment of whether a particular impairment of bodily functioning, including a mental health disorder, poses a threat to a person's life or health falls within the competence of a specialist in the relevant field of medicine (e.g. a psychiatrist), rather than, for example, a lawyer, politician, journalist, social activist or public official. Such an assessment cannot be made *in abstracto*, without an individual evaluation of the patient's overall health circumstances.

Where differing opinions arise as to whether a particular medical condition constitutes a 'threat to the patient's health' or a 'threat to the patient's life', a doctor need not fear criminal liability for aiding and abetting an unlawful abortion or performing an unlawful abortion, provided that, in dealing with the patient, the doctor has observed the standards of reliable professional assessment. Any doubts or disagreements concerning the assessment of a particular case between representatives of different medical schools of thought should always be resolved in favour of the accused.

The burden of proving that a specialist knowingly certified false information in a medical certificate on the basis of which an abortion on therapeutic grounds was to be performed, and that the perpetrator intended, or at least accepted the possibility of, facilitating an unlawful abortion, rests with the prosecution. The offences defined in Article 152 CC are intentional offences (Article 8 CC and Article 9(1) CC). Accordingly, in factual circumstances of this kind, criminal liability for assisting a person other than the woman in an unlawful abortion with the woman's consent (Article 18(3) in conjunction with Article 152(1) CC), or for assisting a woman in undergoing an unlawful abortion with her consent (Article 152(2) CC), is in principle possible only where the doctor knowingly fabricates a false medical certificate stating that the conditions for performing a lawful abortion on therapeutic grounds have been met, and does so with the intention of facilitating the termination of pregnancy in breach of the provisions of the Act. A doctor who mistakenly diagnoses a threat to the patient's life or health associated with the continuation of pregnancy will not incur criminal liability. Nor will a doctor incur criminal

liability where the patient's condition has been assessed reliably, but another specialist reaches a different conclusion as to whether a threat to the patient's health justifying a therapeutic abortion exists.

A doctor who performs an abortion will incur criminal liability for the intentional termination of pregnancy in breach of the provisions of the Act only if they are aware that the medical certificate confirming fulfilment of the condition required for a lawful abortion falsely certifies that this condition has been met. A doctor will not incur liability merely because they ought to have suspected that this was the case. Failure to prove intent means that the subjective elements of the offence are not fulfilled and precludes the attribution of criminal liability.

6. Impunity for incitement and aiding and abetting *ad incertam personam*

Providing information within Poland about the services offered by specific foreign medical facilities specialising in the lawful termination of pregnancies for women travelling from Poland, and disseminating publicly information about methods and options for self-managed abortion at home, does not constitute a prohibited act. Presenting arguments in support of the above propositions poses no particular difficulty and requires reference to views generally accepted in legal doctrine and case law concerning the attribution of criminal liability for incitement or aiding and abetting under the general principles (Article 18(2) and (3) CC). For the purposes of attributing liability for incitement and aiding and abetting, it is accepted that the conduct of the instigator or accomplice must be directed at an individually identified person (in the present case, a specific pregnant woman) or, alternatively, at an individually identified group of persons, and must relate to a specific prohibited act[32]. So-called incitement and aiding and abetting *ad incertam personam* are regarded as non-punishable.

As P. Kardas observes, the 'identifiability' of the direct perpetrator should be understood as the establishment of circumstances relating to the person or persons at whom the instigator's or accomplice's conduct is directed, which make it possible to conclude that the conduct was directed at a specific addressee, rather than at an unspecified and insufficiently individualised circle or group of persons[33]. Acceptance of this conclusion determines the non-punishability of conduct consisting in the dissemination in the public sphere of information that may

[32] J. Giezek, K. Lipiński [in:] D. Gruszecka, G. Łabuda, J. Giezek, K. Lipiński, *Kodeks karny. Część ogólna. Komentarz*, Warszawa 2021, Article 18, thesis 48.
[33] P. Kardas [in:] *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1-52*, 5th ed., eds. W. Wróbel, A. Zoll, Warsaw 2016, Article 18, thesis 143.

significantly facilitate either the performance of an unlawful medical abortion at home or the obtaining of a lawful abortion outside the territory of the Republic of Poland.

The non-punishability of incitement and aiding and abetting *ad incertam personam* should not be equated with a requirement to prove that the perpetrator personally knew the woman at whom their conduct was directed. As the Court of Appeal in Kraków rightly observed, 'the instigator need not know the direct perpetrator personally; it is sufficient that the latter is a specific person, a natural individual, who need not necessarily be identified by their first and last name in the proceedings'[34]. For criminal liability for incitement or aiding and abetting to be attributed, it is not necessary to prove that the perpetrator knew the personal details of the persons whom they assisted or the precise circumstances in which the advice, information or means provided were used. Accordingly, there is no obstacle to attributing criminal liability to a perpetrator who did not personally know, or have direct contact with, the women to whom they sent postal packages containing early medical abortion pills[35]. Providing assistance or inciting a person to undergo an abortion must relate to a specific woman in a specific factual situation. It is non-punishable to incite a woman to undergo an abortion, or to provide advice, information and support in this regard, 'in the event that' she becomes pregnant in the future and decides to terminate the pregnancy. For example, a partner does not commit an offence by informing his partner that, should she become pregnant unintentionally, he will provide her with all the assistance she needs to terminate the pregnancy, or even by gathering appropriate resources or information in anticipation of such a pregnancy. A mother does not incur criminal liability by providing advice and information to her teenage daughter, who is becoming sexually active, about what she could do if she became pregnant unintentionally. Nor does a doctor incur criminal liability by providing a patient with general information about the options for self-inducing a miscarriage at home and completing the miscarriage in hospital.

7. Only 'objective' and 'material' assistance constitutes punishable aiding and abetting

Under Article 18 CC, it is unanimously accepted that punishable assistance in the commission of a prohibited act must be 'objective' and 'material' in nature. There are no grounds for interpreting this issue differently in the context of Article 152 CC. Punishable assistance in an abortion does not encompass every form of assistance that facilitates the implementation of a decision to undergo an unlawful abortion. Rather, it requires assistance without which the

[34] Judgement of the Court of Appeal in Kraków of 8 February 2006, II AKa 207/05, KZS 2006, issue 3, item 30.
[35] See, for example, the judgement of the Court of Appeal in Szczecin of 14 April 2016, II AKa 36/16, OSASz 2/2016, items 38-48.

woman cannot manage to implement her decision to undergo an unlawful abortion, and which objectively facilitates the implementation of that decision. For example, as P. Kardas points out, attributing liability for aiding and abetting requires the conduct of the accomplice to produce a result in the form of a situational change, manifested in the creation of conditions in which the commission of a prohibited act by another person becomes easier than it would have been had the accomplice not engaged in that conduct. Only conduct which 'objectively facilitates the commission of a prohibited act by the direct perpetrator' may constitute grounds for liability for aiding and abetting[36]. This means that the consequence of aiding and abetting, upon the occurrence of which criminal liability depends, is the creation of a situation that facilitates the commission of the act by the direct perpetrator[37]. As A. Wąsek observes, the conduct in question must objectively facilitate the commission of a prohibited act, as follows from the statutory term 'facilitates'[38]. At the same time, both in the context of liability for the offence under Article 152(2) CC and liability for aiding and abetting under the general principles, these propositions do not lead to the conclusion that the assistance provided by the perpetrator must constitute a *sine qua non* condition for the direct perpetrator to commit the prohibited act of a woman undergoing an unlawful abortion. Turning to an analysis of factual situations encountered in practice, it should be noted that, as recently as a dozen or so years ago, obtaining the opportunity to make direct 'contact' with a person performing unlawful surgical abortions in the 'Polish underground', providing detailed instructions on how and by what means a pharmacological abortion could be performed, or indicating how to obtain unlawful early medical abortion pills could have been regarded as 'objective facilitation' of the implementation of a decision to undergo an unlawful abortion. For example, as the Court of Appeal in Katowice observed in its judgement of 30 September 2008: 'assistance in the form of providing a telephone contact falls within the constituent elements of the offence attributed under Article 152(2) CC. This was material assistance, since it enabled further steps to be taken, directly aimed at terminating the pregnancy, which is indeed what occurred'[39]. In view of the above theses, the question must be asked whether, at present, where the assistance consists solely in providing information that constitutes a matter of common knowledge and is generally available to anyone interested (provided only that they can read and have access to the Internet), it is possible to speak of 'objective facilitation' and 'material assistance' within the meaning of

[36] Judgement of the Court of Appeal in Lublin of 28 December 2000, II AKa 250/00.
[37] P. Kardas [in:] *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1-52*, 5th ed., eds. W. Wróbel, A. Zoll, Warsaw 2016, Article 18.
[38] A. Wąsek, *Kodeks karny. Komentarz, vol. I (Articles 1–31)*, Gdańsk 1999, pp. 271-272.
[39] Judgement of the Court of Appeal in Katowice of 30 September 2008, II AKa 231/08, LEX No. 477588.

Article 152(2) CC. For example, does sending, via an online messaging service, links to websites that appear among the first results in any internet search engine when a by no means ambiguous search term is entered constitute 'objective facilitation'?

In my view, for example, financing an unlawful abortion; providing a 'contact' for a doctor willing to perform an unlawful surgical abortion in Poland or to initiate an artificial miscarriage (premature delivery) while presenting it as a miscarriage of unexplained causes; selling or providing abortion pills free of charge; and giving personalised instructions on how to use the particular pharmacological agents undoubtedly constitute 'objective facilitation' within the meaning of Article 152(2) CC. However, it is currently impossible to describe as 'material facilitation' the act of sending a pregnant woman 'links' to publicly accessible websites that appear among the top results in any search engine when search terms such as 'abortion help', 'I want to terminate my pregnancy', 'pharmacological abortion step by step' or 'abortion without borders' are entered. Naturally, this excludes cases in which the abortion is to be performed by a person who is unable to write, is digitally excluded and requires assistance with these simple tasks. Nevertheless, given the age and lifestyle of those who may potentially be affected by the issue of unlawful termination of pregnancy, such cases are likely to occur only sporadically in practice. The data cited in the introduction, made available by organisations supporting women seeking to undergo unlawful medical abortion 'at home' in the territory of the Republic of Poland, as well as women seeking to undergo a lawful abortion outside Poland, clearly indicate that awareness of the existence of such organisations, the ability to contact them and the ability to obtain their assistance are not obscure forms of knowledge among Polish citizens. Sharing such information therefore does not constitute 'objective facilitation' of the termination of pregnancy. Similarly, it is a matter of common knowledge that Polish women use the services of abortion clinics located in Slovakia, the Czech Republic, Germany and the Netherlands without hindrance. This information is currently literally 'at the fingertips' of anyone interested who has access to a device enabling them to use internet search engines.

8. Punishable intellectual aiding and abetting and punishable incitement to abortion

Neither case law nor legal scholarship raises any doubts as to the view that the conduct constituting incitement may consist in communicating a message that influences the addressee's decision-making process, in any form whatsoever: written, oral or through unambiguous gestures. It is noted that incitement may take the form of a request, instruction, order, advice,

proposal or suggestion[40]. As the Court of Appeal in Krakow observed in its judgement in case II AKa 121/99, 'incitement consists in influencing the will of another person (or persons) with the aim of inducing them to perform or refrain from performing a particular act'. Punishable incitement may, for example, consist in handing over early abortion pills purchased on the black market, together with instructions for their use[41]; offering money to cover the costs of the termination of pregnancy and any subsequent recovery; undertaking to find someone willing to perform the abortion[42]; undertaking to improve the relationship between the couple if the pregnancy is terminated; or 'threatening' to end the relationship if the woman does not undergo an abortion.

In relation to aiding and abetting, Article 18(3) CC provides a non-exhaustive list of examples of conduct, including giving advice or information and supplying means or tools. It is accepted that reinforcing another person in an intention already formed does not satisfy the constituent elements of incitement, but does satisfy those of psychological aiding and abetting.

Psychological aiding and abetting, as distinct from assistance provided through an act, is understood to mean assistance rendered primarily through words. Punishable assistance may consist 'not only in providing advice and guidance intended to facilitate the commission of an offence, but also in conduct which, in a particularly suggestive manner, manifests complete solidarity with the direct perpetrator's intention and may, in certain circumstances, create an atmosphere in which that intention takes shape, matures and becomes firmly established, thereby reinforcing the perpetrator in a decision to commit the offence that has already been made'[43]. However, as P. Kardas rightly observes, psychological aiding and abetting must be reflected in the awareness of the person receiving the psychological support and must have a significant influence on that person's psyche, analogous to the influence exerted by acts consisting in the provision of advice or information, such as to make it possible to establish that the support provided facilitates the commission of a prohibited act[44]. This precludes a finding of psychological aiding and abetting where the person providing support is merely present at the scene of the criminal conduct and does not exert any actual, objectively perceptible influence on the direct perpetrator's psyche[45]. Mere presence at the scene during the

[40] Judgement of the Court of Appeal in Krakow of 8 July 1999, II AKa 121/99, "Krakowskie Zeszyty Sądowe" 8–9/1999, item 37.
[41] See the facts underlying the judgement of the Regional Court in Kalisz of 10 June 2016, III K 77/15.
[42] Judgement of the Regional Court in Warsaw of 13 November 2014, VIII K 157/14.
[43] Judgement of the Supreme Court of 9 August 1973, I KR 178/73, OSNKW 3/1974, item 43.
[44] Judgement of the Court of Appeal in Lublin of 28 December 2000, II AKa 250/00.
[45] Judgement of the Court of Appeal in Lublin of 28 December 2000, II AKa 250/00.

commission of the offence, coupled with a failure to prevent it, may be considered aiding and abetting only where the person present was subject to a specific legal duty to prevent the commission of the prohibited act[46].

Punishable assistance in the unlawful termination of a pregnancy with the woman's consent need not be intended to 'compel specific actions'. On the contrary, it may be provided at the request and on the initiative of a woman who intends to terminate her pregnancy.

9. Impunity for negligently facilitating or inciting abortion

The subjective aspect of incitement and aiding and abetting is precisely defined under Article 18(2) and Article 18(3) CC. As J. Giezek and K. Lipiński observe: 'Incitement is possible only with direct intent. Accordingly, no incitement relevant under criminal law occurs where the instigator negligently influences the perpetrator's psyche by unintentionally encouraging them to commit a prohibited act, or does so with conditional intent, that is, accepts the possibility that their influence on the perpetrator will lead the latter to form an intention to commit a prohibited act'[47]. The instigator must be aware that their conduct constitutes incitement of another person to commit a prohibited act. Incitement with conditional intent and so-called negligent incitement remain outside the scope of criminalisation *de lege lata*.

There is no reason to adopt a different interpretation in the case of offences defined in Article 152(2) CC. Accordingly, in order to attribute criminal liability for the offence of inciting unlawful abortion, it must be established that the perpetrator acted with direct intent, that is, that they were aware that they were inciting a pregnant woman to undergo an unlawful abortion and intended to do so. Since incitement with conditional intent is not punishable, a perpetrator who accepts the possibility that their remarks or conduct towards a pregnant woman may cause her to form an intention to terminate her pregnancy unlawfully will not incur criminal liability.

Since negligent incitement is not punishable, the following conduct, for example, remains outside the scope of criminalisation: making critical remarks to a woman about continuing her pregnancy in the circumstances in which she finds herself; or providing a woman with information that prompts her to form an intention to terminate her pregnancy (for example, information about her partner's infidelity, her partner's unwillingness to raise a child together, or the existence of the partner's other biological children). It should be added that the

[46] Judgement of the Supreme Court of 28 June 2002, III KKN 473/99.
[47] J. Giezek, K. Lipiński [in:] D. Gruszecka, G. Łabuda, J. Giezek, K. Lipiński, *Kodeks karny. Część ogólna. Komentarz*, Warsaw 2021, Article 18.

perpetrator's intent must encompass inciting the woman to undergo an unlawful abortion, rather than an abortion carried out in accordance with the statutory provisions.

Pursuant to Article 18(3) CC, aiding and abetting is characterised by 'intent' and may therefore be committed either with direct intent or with conditional intent. As the Court of Appeal in Gdańsk rightly observed in its judgement in case II AKa 294/16: 'The assistance referred to in Article 152(2) CC may therefore be provided with either direct or conditional intent and consists in conduct facilitating the termination of a pregnancy, for example, supplying an instrument or means of transport, or providing advice or information. In the light of the foregoing, there can be no doubt that driving a pregnant woman to a gynaecologist for the purpose of undergoing a termination of pregnancy and paying the doctor for the procedure constitute the provision of assistance within the meaning of Article 152(2) CC'[48].

Where it is impossible, in the course of evidentiary proceedings, to establish an intent to facilitate an unlawful abortion, the attribution of criminal liability for the offence is precluded[49]. For example, inadvertently leaving unsecured medicines with abortifacient properties, which are subsequently found and taken by a pregnant woman, does not satisfy the constituent elements of the offence under Article 152(2) CC. Lending a pregnant woman a car or money, collecting a parcel containing early abortion pills, or leaving a computer switched on with the website of an organisation providing women with abortion pills displayed on the screen will remain unpunishable, provided that it is not established that the perpetrator was aware, and at least accepted the possibility, that their actions were facilitating the woman's termination of pregnancy. If, on the other hand, the perpetrator could or should merely have suspected that they were facilitating an unlawful termination of pregnancy (for example, they suspected that the woman was pregnant and intended to terminate the pregnancy), but mistakenly and without reasonable grounds believed that the aforementioned items or resources were needed by the pregnant woman for a purpose other than terminating her pregnancy, the constituent elements of the subjective aspect of the offence are not fully satisfied.

10. Failure to prevent an unlawful abortion as punishable aiding and abetting

In theory, the attribution of criminal liability for facilitating the termination of a pregnancy by omission is not precluded, just as liability for aiding and abetting by omission under the general rules (Article 18(3) CC) is not precluded. It should nevertheless be noted that only a person

[48] Judgement of the Court of Appeal in Gdańsk of 9 February 2017, II AKa 294/16, LEX 2341089.
[49] Judgement of the Court of Appeal in Krakow of 9 February 2011, II AKa 103/10.

who was under a specific legal duty to undertake certain activities objectively capable of preventing (or hindering) the commission of a prohibited act by the principal perpetrator may be held liable for aiding and abetting by omission. This does not mean that, in order to attribute liability, it must be established that the accomplice's action would have prevented the offence from being committed; it is sufficient to conclude that it would objectively have made its commission more difficult.

Views have been expressed in legal scholarship to the effect that 'in the case of the father of the conceived child, who does not oppose the actions of the pregnant woman aimed at terminating the pregnancy, liability for the offence under Article 152(2) CC committed by omission cannot be ruled out'; and that 'the conduct constituting the offence would, in this case, consist in failing to prevent the pregnant woman from carrying out her intention to terminate the pregnancy (which constitutes facilitation of the abortion). At the same time, the perpetrator must have the requisite intent in relation to facilitating the termination of the pregnancy, that is, they must foresee or know that their conduct facilitates the termination of the pregnancy and at least accept that possibility'[50].

In view, however, of the general principles governing the attribution of criminal liability for aiding and abetting outlined above, the proposition that a man who impregnated a woman may incur criminal liability for failing to prevent an unlawful abortion should be firmly rejected. Similarly, the thesis that, for example, the parents of an underage girl who do not oppose their daughter's termination of pregnancy, or a doctor who does not dissuade a patient who has disclosed such an intention from terminating her pregnancy, may incur criminal liability should likewise be firmly rejected.

For the purposes of substantiating this argument, it is necessary to recall certain general points concerning the satisfaction of the constituent elements of aiding and abetting by omission.

First, aiding and abetting by omission of an action required by law always constitutes an offence that can be committed only by a person possessing a specific legal status. It is necessary to establish that the person providing assistance by omission was under a specific legal duty to prevent another person from committing a prohibited act[51]. In other words, the perpetrator of an offence under Article 152(2) CC committed by omission may only be a person who is under

[50] K. Kmąk, *Nakłanianie lub udzielanie pomocy do przerwania ciąży z naruszeniem przepisów ustawy*, "Prokuratura i Prawo" 2018, no. 2, pp. 52-80.
[51] See, for example, J. Giezek, K. Lipiński [in:] D. Gruszecka, G. Łabuda, J. Giezek, K. Lipiński, *Kodeks karny. Część ogólna. Komentarz*, Warsaw 2021, Article 18.

a specific legal duty to take certain action in order to prevent a woman from undergoing an abortion contrary to the statutory provisions. It would therefore be necessary to establish that the man who impregnated the woman is subject not to an ethical, moral or religious duty, but to a specific legal duty to protect the 'conceived child' biologically descended from him. It is impossible to identify a legal basis from which such a duty could be derived in all cases where, prior to the abortion, paternity has not been acknowledged before the head of the civil registry office and confirmed by the woman (either simultaneously or within three months of the date on which the man made his declaration), or where the conceived child's parentage follows from the presumption of paternity applicable to the husband of the pregnant woman. In these latter two cases, deriving a specific legal duty to care for the fetus from the provisions of Article 87 or Article 95(1) of the Family and Guardianship Code relies on an interpretation that appears to be extensive and impermissible under criminal law[52]. Article 92 of the Family and Guardianship Code does not specify unequivocally when parental responsibility arises, and the prevailing interpretation of this provision holds that parental responsibility arises *ex lege* upon the child's birth in respect of both parents, provided that they are married. Where the event of birth does not automatically entail the attribution of parental responsibility, such responsibility arises after the child's birth and a court order or a declaration acknowledging paternity[53].

Secondly, even recognising the man who impregnated the woman as a person under a specific legal duty to care for the well-being of the fetus does not, in itself, determine whether criminal liability for aiding and abetting by omission may be attributed to him. Even if it were accepted that the man who impregnated the woman has parental responsibility in respect of the embryo/fetus, together with all the attributes associated with it, this would not mean that he also has such authority over the woman who is pregnant. Yet, in order to attribute liability for aiding and abetting by omission, it would be necessary to establish that the 'father of the conceived child' had an objective opportunity to take measures that could have prevented the unlawful abortion, and that his failure to take the required action objectively facilitated the commission of the prohibited act. This therefore raises the question of what specific actions the man who impregnated the woman is obliged to take in order to make it more difficult for her to terminate her own pregnancy. Is the man legally obliged to deprive the woman of access to a telephone

[52] For a more detailed discussion, see E. Plebanek, *Analiza konieczności wprowadzenia zmian legislacyjnych w rozdziale XIX KK w zakresie prawnokarnej ochrony dziecka poczętego* [in:] *Reforma Prawa karnego*, ed. I. Sepioło-Jankowska, Warsaw 2014, pp. 355-392.

[53] H. Haak, *Kodeks rodzinny i opiekuńczy. Władza rodzicielska. Komentarz*, Toruń 1995, p. 35; H. Ciepła [in:] *Kodeks rodzinny i opiekuńczy. Komentarz*, ed. K. Piasecki, Warsaw 2006, p. 621; T. Smyczyński, *Prawo rodzinne i opiekuńcze*, Warsaw 2009, p. 215 et seq.; M. Andrzejewski, *Prawo rodzinne i opiekuńcze*, Warsaw 2006, p. 137.

or the internet for the duration of the pregnancy? To confine her to a locked room for the duration of the pregnancy? To take away her money, which she might use to finance an abortion?

K. Kmąk observes that the omission in question may consist in the man from whom the child originates 'failing to attempt to prevent such a situation (for example, by failing to try to dissuade the mother from that decision)'. In the author's view, 'this undoubtedly constitutes intentional facilitation of the termination of a pregnancy contrary to the statutory provisions, provided that, without the guarantor's omission, carrying out the abortion would have been more difficult than if the guarantor had intervened to prevent it'. Leaving aside the fact that it is impossible to derive a guarantor's duty in this case, a doubt arises: does a situation in which someone 'does not dissuade' an adult from making a fairly significant life decision constitute the 'objective facilitation' of that decision being carried out? Does a situation in which any person, including 'the man from whom the child originates', refrains from discussing abortion with an adult woman who has decided to terminate her pregnancy constitute an unlawful act to which the Polish legislator attaches criminal liability? Following this line of reasoning, should criminal liability for aiding and abetting by omission consistently be attributed, for example, to the mother of an adult son who suspects that her 25-year-old son is engaged in drug dealing but refrains from giving her offspring a lecture about his conduct? Does a female partner incur criminal liability if she suspects that her husband is committing commercial offences but, in order not to disturb the pleasant atmosphere at home, refrains from having a conversation intended to dissuade him from pursuing a life of crime? Does a doctor commit an offence if, when consulting an adult patient who is overweight and does not abstain from alcohol or tobacco, the doctor limits themselves to explaining how certain habits and stimulants may affect the patient's health, but refrains from delivering a tirade about the harmful health consequences of the lifestyle the patient has chosen? How can it be demonstrated that refraining from voicing verbal criticism of the decision objectively facilitates an abortion? Is a pregnant woman's psyche so fragile, and the process of making and implementing key life decisions so chaotic and unstable, that persuasion by a man close to her is sufficient to make her change her mind without delay? Similar critical observations would need to be made in a situation where such a specific legal duty to prevent the termination of a pregnancy by means of a disciplinary conversation were imposed, for example, on a doctor or on the parents of a girl intending to terminate her pregnancy.

The foregoing observations do not mean that the offence of facilitating a woman's termination of pregnancy contrary to the statutory provisions cannot be committed by omission. Such situations can theoretically be envisaged – paradoxically, in relationships other than that between a woman and 'the man from whom the child originates'. For example, this could occur where a person responsible for the proper storage, in a pharmacy or hospital, of medicinal products with known abortifacient properties knowingly leaves them unsecured and accessible to unauthorised persons, at least accepting the possibility that, during that time, a woman wishing to terminate her pregnancy will gain unauthorised access to them. Similarly, this could occur where a medical practitioner authorised to issue prescriptions for medicinal products with known abortifacient properties knowingly leaves unsecured a computer with access to the electronic prescription system, at least accepting the possibility that, during that time, a woman intending to terminate her pregnancy (or another person acting at her request) will gain access to the system and generate such a prescription for the purpose of using the medicinal product to induce a miscarriage.

10. Termination of pregnancy on embryopathological grounds – doubts as to criminal liability

Judgement K 1/20 held Article 4a(2) of the Act on Family Planning, Protection of the Human Fetus and Conditions for Termination of Pregnancy to be unconstitutional, thereby placing the termination of pregnancy on embryopathological grounds within the scope of unlawful conduct. This raises the question of whether the publication of judgement K 1/20 expanded not only the range of unlawful conduct, but also the range of criminal conduct – that is, conduct satisfying the constituent elements of the offences defined in Article 152 CC. Legitimate doubts have been raised in legal scholarship as to whether the scope of criminalisation of the offences defined in Article 152 CC, including offences consisting in inciting or facilitating the termination of a pregnancy with the woman's consent, could have been extended by a ruling of the constitutional court having the effect of repealing a provision, without any intervention by the legislature.

First, it should be noted that views have been expressed in legal scholarship to the effect that the aforementioned ruling should not be recognised as an existing judgement of the Constitutional Tribunal[54]. Numerous problems have been raised concerning the formal legitimacy of some of the persons sitting on the Constitutional Tribunal, including those who

[54] A. Rakowska-Trela, *Wyrok czy "niewyrok". Glosa do wyroku Trybunału Konstytucyjnego z 22.10.2020 r., K 1/20, dotyczącego możliwości przerywania ciąży*, "Przegląd Sądowy" 2021, no. 6, pp. 106-118; R. Piotrowski, *Nowa regulacja przerywania ciąży w świetle Konstytucji*, "Państwo i Prawo" 2021, no. 8, pp. 62-80.

participated in issuing the ruling. These include, for example, persons elected to judicial positions that had already been filled, as well as the participation in the adjudicating panel of a person who had previously appeared in the case as one of the Members of Parliament who had applied for a declaration that Article 4a(1)(2) and the first sentence of Article 4a(2) of the Act on Family Planning and Protection of the Human Fetus were unconstitutional[55].

Focusing on the criminal-law aspect and proceeding on the assumption (which cannot be ruled out as incorrect) that judgement K 1/20 is nevertheless an existing ruling, it should be noted that J. Giezek and P. Kardas have rightly questioned whether a ruling of the Constitutional Tribunal having the effect of repealing a provision, which does not expressly concern the regulation of substantive criminal law, can result in an extension of the scope of criminalisation. In other words, the authors challenge the proposition that, as a result of the constitutional court's ruling, the conduct defined in Article 152 CC has, since the publication of that ruling, also encompassed the termination of pregnancy on embryopathological grounds, as well as inciting or facilitating such termination[56]. The authors put forward convincing arguments in support of the view that the fundamental constitutional principle of criminal law, *nullum crimen, nulla poena sine lege*, precludes the conclusion that criminal liability has been established by means of a ruling of a constitutional court, particularly one having the effect of repealing a provision. They argue that the constitutional court's power to modify the scope of criminal liability should be interpreted narrowly, and that it does not appear possible for such a body to establish criminal liability, thereby assuming the powers of the legislature[57].

To summarise, recognising abortion on embryopathological grounds as unlawful conduct does not determine that acts involving participation in the termination of a pregnancy affected by a severe fetal abnormality constitute criminal offences. According to J. Giezek and P. Kardas, only appropriate legislative intervention at the level of substantive criminal-law provisions would make it possible to regard such cases as criminal offences.

Adopting the opposite view would necessarily lead to the conclusion that a rational legislature in a state governed by the rule of law imposes criminal sanctions and determines their severity 'blindly', in a 'general and non-specific' manner, without knowing what conduct it is actually sanctioning, and leaves this matter, for example, to the constitutional court. It may be added

[55] For a more detailed discussion, see D. Szumiło-Kulczycka, K. Kozub-Ciembroniewicz, *Konsekwencje uchybień w obsadzie TK (uwagi na tle orzeczenia w sprawie K 1/20)*, "Państwo i Prawo" 2021, no. 8, pp. 81-100.
[56] J. Giezek, P. Kardas, *Kompetencje derogacyjne TK oraz ich prawnokarne konsekwencje (refeksje na marginesie wyroku w sprawie K 1/20)*, "Państwo i Prawo" 2021, no. 8, pp. 40-60.
[57] J. Giezek, P. Kardas, *Kompetencje derogacyjne TK…*, p. 44.

that, in the opinion of representatives of constitutional-law scholarship, the Constitutional Tribunal has not been vested by the Constitution with the power to create its own competences; by doing otherwise, it effectively assumes the role of the ordinary legislature. As R. Piotrowski observes: 'The role attributed to the Tribunal as guardian of the Constitution does not mean that it thereby acquires the right to resolve irresolvable moral dilemmas and becomes the author of its provisions concerning human rights – even where those provisions undermine a social consensus that is already difficult to maintain, and the Tribunal's constitutional identity gives rise to reservations'[58]. It is argued that, by assuming the role of the ordinary legislature, the Constitutional Tribunal 'not only violates Article 7 of the Constitution, but also Article 10(2), according to which it does not exercise legislative power, and Article 235 of the Constitution, in the light of which the Tribunal does not exercise constituent power'[59].

However, even adopting the opposite view to that presented above and recognising that, *de lege lata*, participation in an abortion on embryopathological grounds, with the woman's consent, makes those involved perpetrators of a prohibited act, does not yet determine that criminal liability must be attributed to them. At subsequent stages of the criminal-law assessment, liability may be excluded on the grounds that the conduct was undertaken in circumstances precluding its unlawfulness; that the act lacks the requisite degree of social harmfulness (Articles 1(2) and 115(2)); or that there is no culpability (Article 1(3) CC) as a result of an abnormal motivational situation or a conflict of legally protected interests (Article 26 CC)[60].

In this article, I deliberately omit the fundamental objections raised against judgement K 1/20 concerning the constitutionality of the decision adopted therein and the reasoning presented in support of it[61]. By way of example only, it may be noted that R. Piotrowski argues that judgement K 1/20 raises doubts as to its compatibility with Article 2 of the Constitution, pursuant to which the Republic of Poland is a democratic state governed by the rule of law and implementing the principles of social justice, that is, a state in which 'the rationality of law, which, according to constitutional case law, forms the basis of a democratic state governed by the rule of law, precludes the replacement of dialogue in the law-making process with religious premises that merely legitimise the recognition of the absolute nature of the legal protection

[58] R. Piotrowski, op. cit. p. 71.
[59] R. Piotrowski, op. cit. p. 68.
[60] For a more detailed discussion, see, for example, S. Tarapata, W. Zontek, *Prawnokarne skutki wyroku TK z 22.10.2020 r., K 1/20 (zagadnienia wybrane)*, "Państwo i Prawo" 2021, no. 8, pp. 212-225; M. Małecki, *Przerwanie ciąży wyłączające winę*, "Państwo i Prawo" 2021, no. 8, pp. 196-210.
[61] See R. Piotrowski, *Nowa regulacja przerywania ciąży w świetle Konstytucji*, pp. 62-80, and the literature and case law cited therein.

afforded to the nasciturus'; with Article 40 of the Constitution of the Republic of Poland, which provides that 'No one may be subjected to torture or cruel, inhuman or degrading treatment or punishment. The application of corporal punishment shall be prohibited'; with Article 47 of the Constitution of the Republic of Poland, since the right 'to decide about one's personal life has been taken away by the judgement from those who will experience the consequences of that ruling, leading to the replacement of individual conscience with the conscience of public authority, while the human being ceases to be an end in themselves and instead becomes a "means to achieve some end"'; with Article 18 of the Constitution, pursuant to which 'motherhood and parenthood shall be under the protection and care of the Republic of Poland'; with Article 47 of the Constitution, which guarantees the right to legal protection of private and family life; with Article 71(2) of the Constitution, which provides that 'A mother, before and after the birth of a child, shall have the right to special assistance from public authorities, the scope of which shall be specified by statute'; and with Article 53(1) of the Constitution, since it deprives individuals of the right, inherent in their dignity, to act in accordance with their own conscience.

It is argued that, had K 1/20 been assessed according to the standard applied by the Constitutional Tribunal in case K 26/96 (proportionality and legal certainty), it would have had to be declared unconstitutional on the grounds of the proper balancing of the rights of the woman and the 'conceived child'. It may be noted that judgement K 26/96 also gives rise to certain controversy concerning the powers assumed by the Constitutional Tribunal in shaping abortion law, irrespective of the legislature's views on what is constitutionally permissible in a state governed by the rule of law, and that, in fact, the constitutional court supplemented the text of the 1956 Constitution by assigning new meaning to the provisions of the fundamental law through interpretation.

In lieu of a conclusion

In lieu of a conclusion, and by way of completing the discussion, it is worth asking whether such a broad scope of criminalisation of the conduct of persons acting in concert with a woman who wishes to terminate her own pregnancy, as currently exists *de lege lata*, is justified in the light of the fundamental principles governing criminalisation that legislators in a state governed by the rule of law are required to observe.

The constitutionality of the grounds for lawful abortion has been considered by the constitutional court on two occasions[62]. The constitutionality of the provisions criminalising abortion, however, has not yet even been subjected to a proportionality test. Yet, pursuant to Article 31(3) of the Constitution of the Republic of Poland, recourse to criminal-law measures is justified only where the desired objective cannot be achieved by other means (the requirement of necessity, the principle of the subsidiary nature of criminal law). The legislature may not impose sanctions that are manifestly inappropriate, irrational or disproportionately severe, even where this is justified by the protection of another value[63]. The protection established by criminal-law provisions must be proportionate and commensurate with the importance of the rights and freedoms being protected (the principle of axiological rationality). In accordance with the principles applicable in a state governed by the rule of law, the decision to criminalise conduct, particularly at a stage preceding any actual infringement of the legal interest concerned (as is the case with the offences defined in Article 152(2) CC), should depend on the position of that legal interest within the hierarchy of legally protected interests. The greater the importance of a given legal interest, the less serious the infringement, or even the creation of a risk to that interest, may be as a prerequisite for introducing mechanisms of criminal liability. It is accepted that the assessment of compliance with the principles of necessity and instrumental and axiological rationality in punitive law is more stringent than in other branches of law, and that the legislature's margin of discretion is narrower[64]. Under the requirement of suitability, only effective measures may be employed, that is, measures that genuinely and directly contribute to achieving the intended objective[65]. In order to justify maintaining the criminalisation of a given category of conduct, it is not sufficient for the legislature's

[62] R. Piotrowski, Nowa regulacja przerywania ciąży w świetle Konstytucji, pp. 62-80.

[63] For example, K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, pp. 166-192; idem, *Zasada proporcjonalności jako granica prawa karania*, "Czasopismo Prawa Karnego i Nauk Penalnych" 1999, no. 2, pp. 40-46; L. Garlicki, *Przesłanki ograniczenia konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, "Państwo i Prawo" 2001, no. 10, p. 16; M. Derlatka, *Konstytucyjność kryminalizacji posiadania narkotyków*, "Prokuratura i Prawo" 2010, no. 7-8, p. 89; A. Jezusek, *Przeciwdziałanie narkomanii; prawo do decydowania o ochronie własnego życia i zdrowia (konopie). Glosa do wyroku TK z dnia 4 listopada 2014 r., SK 55/13*, "Przegląd Sądowy" 2015, no. 11-12, pp. 194-204. See also the judgement of the Constitutional Tribunal of 4 November 2014, SK 55/13, OTK-A 10/2014, item 111; the judgement of the Constitutional Tribunal of 1 July 2014, SK 6/12, OTK ZU No. 7/A/2014, item 68; and the judgement of the Constitutional Tribunal of 9 October 2012, P 27/11, OTK ZU No. 9/A/2012, item 104.

[64] K. Wojtyczek, *Zasada proporcjonalności jako granica prawa karania*, [in:] *Racjonalna reforma prawa karnego*, ed. A. Zoll, Warszawa 2001, p. 314; K. Wojtyczek, *Zasada proporcjonalności jako granica prawa karania*, " Czasopismo Prawa Karnego i Nauk Penalnych" 1999, no. 2, p. 51; T. Dukiet-Nagórska, *Uwagi o znaczeniu zasady proporcjonalności dla stanowienia prawa*, [in:] *Pozbawienie wolności – funkcje i koszty. Księga jubileuszowa Profesora Teodora Szymanowskiego*, eds. A. Rzepliński, I. Rzeplińska, M. Niełaczna, P. Wiktorska, Warsaw 2013, p. 57.

[65] See, for example, the judgement of the Constitutional Tribunal of 8 July 2008, K 46/07, OTK-A 6/2008, item 104; the judgement of the Constitutional Tribunal of 5 April 2011, P 26/09, OTK-A 3/2011, item 18; and the judgement of the Constitutional Tribunal of 16 October 2014, SK 20/12, OTK-A 9/2014, item 102.

interference with the constitutionally protected rights and freedoms of individuals merely to 'promote' the achievement of the intended objectives or 'facilitate' their attainment. The requirement of instrumental rationality (suitability) means that, in the light of the available state of knowledge, criminalisation must make it possible to achieve the intended social objectives. Where doubts arise, the legislature should act (or refrain from acting) in accordance with the principle of *in dubio pro libertate*. The greater the legislature's interference with individual freedoms and rights, the more stringent the principles by which it is bound[66].

In order to demonstrate that the criminal provisions currently in force satisfy the proportionality test, the legislature should collect up-to-date data on the number of pregnancy terminations and the grounds on which they are carried out in the territory of the Republic of Poland, as well as outside its borders (by women residing in Poland who travel abroad to undergo a lawful abortion). It should also collect data that would make it possible to estimate realistically the number of unlawful abortions performed within the territory of the Republic of Poland. Data and experience from European countries with a similar social structure are also relevant, as are those from other countries, not only European ones, which have, in the recent past, abandoned restrictive abortion laws in favour of the model widely adopted in Europe.

Once such information has been collected, the following questions should be addressed: are the assumptions and objectives of the Polish abortion-law model, both following the publication of judgement K 1/20 and during the period when the legal framework known as the 'abortion compromise' was in force, being achieved in practice? Does the legislation currently in force protect human life and health more effectively than would be the case under a model similar to that adopted in other European countries with a comparable social structure? Does the legislature's use of criminal-law measures satisfy the requirement of instrumental rationality?

Are criminal-law provisions suitable for achieving the objectives declared by the legislature? Does the law currently in force make Polish women more willing to become pregnant? Does the existing model afford better protection to the life and health of Polish patients and their children than would be the case under more liberal legislation? Or, conversely, have the

[66] K. Wojtyczek, *Granice ingerencji ustawodawczej w sferę praw człowieka w Konstytucji RP*, Kraków 1999, pp. 166-192; idem, *Zasada proporcjonalności jako granica prawa karania*, "Czasopismo Prawa Karnego i Nauk Penalnych" 1999, no. 2, pp. 40-46; L. Garlicki, *Przesłanki ograniczenia konstytucyjnych praw i wolności (na tle orzecznictwa Trybunału Konstytucyjnego)*, "Państwo i Prawo" 2001, no. 10, p. 16; M. Derlatka, *Konstytucyjność kryminalizacji posiadania narkotyków*, "Prokuratura i Prawo" 2010, no. 7-8, p. 89; A. Jezusek, *Przeciwdziałanie narkomanii; prawo do decydowania o ochronie własnego życia i zdrowia (konopie). Glosa do wyroku TK z dnia 4 listopada 2014 r., SK 55/13*, "Przegląd Sądowy" 2015, no. 11-12, pp. 194-204. See also the judgement of the Constitutional Tribunal of 4 November 2014, SK 55/13, OTK-A 10/2014, item 111.

provisions currently in force led to the emergence of social phenomena that impede the optimal protection of human life and health? Has the law currently in force led to the creation of a new category of offenders, namely persons acting in concert with women who cannot afford a lawful abortion abroad for financial reasons; persons who lacked sufficiently strong informal social 'connections', resourcefulness or psychological resilience to gain access to a lawful abortion in Poland? Does the law currently in force protect human life and health, or, conversely, does it have a real impact on the medical decision-making algorithms applied to pregnant women, in such a way that, for fear of jeopardising their legal position, medical professionals are more inclined to risk a woman's life and health, expose her to traumatic and cruel treatment, and reduce her chances of giving birth to another child in the future (for example, on account of a necessary caesarean section or prolonged recovery following the termination of an advanced pregnancy complicated by a serious fetal pathology), or, in the most optimistic scenario, to 'push' a pregnant patient whose life or health is at risk towards another medical facility, simply to avoid exposing themselves to actual or alleged 'legal problems'? Do the provisions currently in force, including the criminal provisions under analysis, help ensure that patients and their children receive medical care at a level commensurate with the capabilities of modern medicine, or do they have the opposite effect? Is condemning a child affected by a lethal condition to a slow death in the body of a woman who does not accept such an outcome, or during labour or immediately after birth, an optimal solution from the perspective of the principles of modern medicine and the principle of respect for human dignity?

If an analysis of the available data leads to the conclusion that the criminalisation provided for in the provisions under discussion, which has been in force for almost 30 years, has not in fact and directly contributed to the achievement, even in part, of the objectives pursued, it must be concluded that these provisions fail the proportionality test. In Poland, the social experiment testing what the implementation of 'protection of life' through restrictive abortion laws, coupled with criminal-law provisions enacted with excessive zeal, looks like in practice has been under way for long enough, and has yielded sufficiently grim consequences, to make it possible to draw reasoned conclusions both in the field of criminal law and with regard to the provisions governing access to lawful abortion.

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