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THE RIGHT TO THE PROTECTION OF THE UNBORN CHILD IN THE CONTEXT OF THE JUDGMENT OF THE POLISH CONSTITUTIONAL TRIBUNAL OF OCTOBER 22, 2020 IN THE CASE K 1/20

ABSTRACT

The countries of the European Union have decided to share a peaceful future based on common values. However, there are still disputes over the understanding of the most fundamental issues related to the protection of human rights, including protection of the right to life. The author shows that the source of European culture is Christian. However, it is not the only source of shaping the values of Europe. As an example, she cites the differentiation of constitutional legal regulations or controversies related to the jurisprudence of the ECHR. She analyzes the judgment of the Polish Constitutional Tribunal declaring the unconstitutionality of the provisions allowing abortion if prenatal tests or other medical conditions indicate a high probability of a severe and irreversible fetal impairment or an incurable life-threatening disease. This judgment caused enormous opposition from a part of the society. This problem proves that a compromise has not yet been made on the issue of abortion. It is, therefore, difficult to claim that human rights protected in the European Union are given universal meaning.

Keywords: the right to life, the right to the protection of the life of an unborn child, Christian civilization, judgment of the Polish Constitutional Tribunal

I.

The countries of the European Union have decided to share a peaceful future based on common values. The Charter of Fundamental Rights of the European Union emphasizes that the peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values. Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality, and solidarity; it is based on the principles of democracy and the rule of law. The Union contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the peoples of Europe as well as the national identities of the Member States...¹ Although it seems that the process of building the Union as a community of values is on a well-established path, the history of recent years has brought some dilemmas in the area of the most fundamental issues. It puts the above concept into question. For example, there are serious doubts related to the definition of the scope of the right to protection of life. The importance of this issue, resulting primarily from its multidimensionality and role as a motive and catalyst for social divisions, is a good field for discussion on the above topic.

The considerations contained in this study of the right to protect human life before birth result from the judgment of the Polish Constitutional Tribunal of October 22, 2020, ref. no. K 1/20. It ruled that the provision of the act allowing termination of pregnancy to be performed if prenatal tests or other medical grounds indicate a high probability of severe and irreversible impairment of the fetus or an incurable life-threatening disease is inconsistent with the Polish Constitution. In connection with the numerous protests carried out in Poland and abroad in a social reaction to the content of this judgment, the question arose whether universally accepted values lie at the basis of human rights in the European Union countries, and therefore whether they can actually be given a universal dimension. When recognizing the legal and natural origin of these rights, and thus giving them the feature of universality, reduced to the fact of their existence in human consciousness, and recognizing them in all cultures and religions, they can undoubtedly be considered universal rights.² However, because of the divergence of legal and moral concepts shared by the EU Member States and the societies inhabiting them, it can be said that they do not

¹ "Charter of Fundamental Rights of the European Union", *Official Journal of the European Union*, 2012 no. C 326, i. 02

² M. Piechowiak, *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*, Lublin 1999, p. 113; Idem, "Powszechność praw człowieka. Zagadnienia filozoficzno-prawne", in T. Jasudowicz, C. Mik (eds.), *O prawach człowieka. W podwójną rocznicę Paktów. Księga Pamiątkowa w hołdzie Profesor Annie Michalskiej*, Toruń 1996, pp. 51-54; F.J. Mazurek, *Godność osoby ludzkiej podstawą praw człowieka*, Lublin 2001, p. 207; J. Finnis, *Natural Law and Natural Rights*, Oxford-New York 2011, pp. 81-97; H. Wąskiewicz, "Historia teorii prawa naturalnego", *Roczniki Filozoficzne*, vol. 17, no. 2 (1969), p. 69.

have universal content.³ The dispute over the understanding of the right to life and the scope of protection of the right to human life before birth seems to confirm this. Moreover, it is worth noting that the mechanisms of its resolution (referendums initiated in these cases in European Union countries and judgments issued by courts) were not sufficient to lead to the conclusion of this dispute, and actually resulted in the emergence of a new axis of social divisions.

II.

It is said that present Europe is a fruit of two millennia of civilization which took shape *on three hills: Areopagus, Capitoline, and Golgotha*.⁴ Its roots go back to the philosophy of ancient Athens and the law of ancient Rome, Judeo-Christian ethics, and common law.⁵ Without a doubt, Christianity had a significant influence on shaping the world's value system. While the extent of this influence may be disputed, its role in shaping the foundations of European culture, art, and science is rather difficult to challenge.⁶ The process of penetration of Christian values into various areas of the culture of the nations of Europe has brought them together to become *natural, cultural and European*,⁷ while Christianity has become the carrier and guardian of European identity.⁸

One of the European Union founding fathers, Robert Schuman, wrote that democracy owes its existence to Christianity. It was born when man was called to realize the principle of human dignity in earthly life within the framework of personal freedom, respect for rights, and by practicing brotherly love for everyone. It was a source of equality and non-discrimination, as it assumed that every human being descended from one God.⁹ It meant seeing every human being as equal in essence, which suggests a common

³ G. Żuk, *Edukacja aksjologiczna. Zarys problematyki*, Lublin 2016, pp. 105-116.

⁴ P. Hahne, *Dość tej zabawy. Koniec społeczeństwa przyjemności*, Katowice 2007, p. 51. See also: R. Tokarczyk, "Kultura prawa europejskiego", *Studia Europejskie*, no. 1 (2000), p. 12; Benedykt XVI, "Ocasione Diei quo studium peragitur de dialogo inter Culturam et Religiones", *Acta Apostolicae Sedis*, no. 101 (2009), p. 57, cit per: O. Szczypiński, "Chrześcijaństwo jako źródło kultury europejskiej w myśli Josepha Ratzingera", in H. Czakowska, M. Kuciński (eds.), *Człowiek z perspektywy religii, rodziny i szkoły*, Bydgoszcz 2013, p. 101.

⁵ See: H. Kiereś, "Modernizm vs. postmodernizm a chrześcijaństwo", in R.T. Ptaszek, M. Piwowarczyk (eds.), *Uniwersalizm chrześcijaństwa wobec alternatywnych propozycji współczesności*, Lublin 2012, p. 102; R. Tokarczyk, "Kultura prawa...", p. 12; R. Sobański, "Kultura prawna Europy", *Studia Europejskie*, no. 3 (1998), p. 119; H.J. Berman, *Prawo i rewolucja. Kształtowanie się zachodniej tradycji prawnej*, Warszawa 1995, p. 664.

⁶ M. Rusecki, "Chrześcijańskie wartości podstawą jedności Europy", in E. Cyran, A. Czaja, P. Gutowski (eds.), *Chrześcijaństwo a jedność Europy*, Lublin 2006, pp. 213-240; O. Szczypiński, "Chrześcijaństwo jako źródło...", p. 118.

⁷ M. Rusecki, "Chrześcijańskie wartości...", p. 83.

⁸ Ibid., p. 53.

⁹ R. Schuman, *Dla Europy*, Kraków 2003, pp. 34-35.

essence of humanity. The man began to be perceived as a subject of rights, moving away from seeing him as an 'object,' a property to benefit from.¹⁰

However, two cultures were developing in Europe in parallel over the centuries. Both aspire to the title of European and both are assessed to be in a state of crisis. The first is the already mentioned Christian culture, and the second is the Enlightenment culture based on scientific rationalism.¹¹ Modern supporters of the latter tried to ignore the issue of religion when pointing to the values underlying the EU. According to the Treaty of Lisbon of 13 December 2007 (Article 1.1.a) to the preamble to the Treaty on European Union of 7 January 1992, a recital concerning the axiological foundations of the Union was introduced. As a result of a compromise, primarily under the pressure of secular France, the following content was accepted: *Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.*¹² Although the compromise adopted does not satisfy all adherents of Christian values, they are nevertheless crucial to a large part of European societies. R. Schuman claimed that the second, secular cultural trend was also based on Christian principles, even if contrary to the intention of its creators, leading to the proclamation and dissemination of human and civil rights.¹³

The most outstanding authorities of contemporary Christianity dealt with the phenomenon of the parallel existence of two cultures, Christian and humanist. Pope John Paul II warned against such ideas as autonomy, humanism, anthropocentrism, naturalism, materialism, subjectivism, etc., in Europe.¹⁴ In his opinion, they became the basis of the criticism of religion and the praise of atheistic humanism, proclaiming that religion alienates and dehumanizes man. According to the Pope, they contributed to the formulation of social and political programs that came to be the basis of totalitarian systems, including communism that persecuted the Church in the name of atheism.¹⁵ The Pope noticed the cultural crisis of Europe caused by the turmoil around the truth about man and anthropological errors, resulting in ideological emptiness, loss of identity, and spiritual and moral confusion. *This is the stage of the crisis in which human life is neglected, the killing of the weakest, the unborn is approved, and it tolerates evil*, he said.

¹⁰ Ł. Kleska, "Kryzys Kościoła katolickiego w teologii Josepha Ratzingera", *Forum Filozoficzne*, no. 5 (2010), pp. 153-162.

¹¹ J. Ratzinger, *Europa Benedykta w kryzysie kultur*, Częstochowa 2005, pp. 45-46.

¹² See: M. Piechowiak, "Aksjologiczne podstawy Karty Praw Podstawowych Unii Europejskiej", *Studia Prawnicze*, vol. 1, no. 155 (2003), pp. 13-16.

¹³ R. Schuman, *Dla Europy...*, p. 35.

¹⁴ Jan Paweł II, "Bądźcie gorliwymi poszukiwaczami Niewidzialnego Boga" (przemówienie z okazji jubileuszu naukowców, 25 V 2000), *L'Osservatore Romano* 21 (2000), no. 7-8, pp. 22-23, no. 1; K. Kaucha, "Chrześcijaństwo a kultura europejska (w świetle nauczania Jana Pawła II)", *Studia Nauk Teologicznych*, t. 5 (2010), p. 31; M.A. Krąpiec, "Ludzki wymiar kultury chrześcijańskiej – wspólnego dziedzictwa narodów Europy", in M. Radwan, T. Styczeń (eds.), *Ewangelia i kultura. Doświadczenie środkowo-europejskie*, Rzym 1988, p. 284.

¹⁵ K. Kaucha, "Chrześcijaństwo a kultura...", pp. 29-31.

Accepting the primacy of matter over spirit leads to a denial of freedom, dignity, and the value of the human life, to a crisis of values. He called it a *materialistic civilization*.¹⁶

The next Pope, Benedict XVI, spoke in a similar vein, referring to the concept of Romano Guardini, who wrote that the dignity of a person belongs to everyone by nature. He noted that the mere fact of being alive is not enough to make man inviolable. *Man's life is inviolable because he is a person*. This personhood gives man dignity, and it distinguishes him from the world of things. *The prohibition against killing a human being expresses in a stricter form the prohibition to treat him as if he were a thing*.¹⁷ The Pope emphasized that the blurring of the concept of a person led to the possibility of perceiving it as an effect of the production process to be decided by another person. This is the process of building a society out of a certain number of individuals who meet the characteristics accepted by others, and it contradicts seeing another human being as an equal, having the dignity of a neighbor.¹⁸

Many contemporary authors describe this issue. It is emphasized that in today's times, focused on the values of tolerance and pluralism, the most important consequences are brought to the European cultural heritage by secular humanism, which was shaped on the basis of the philosophy of the Greeks and Italian Renaissance, as well as the ideals and values of three revolutions: the English, the French, and the American.¹⁹ It caused the disappearance of the common culture due to the weakening of faith, the breakdown of Christianity, the separation of morality and religion, and the domination of technical sciences. As a consequence, there emerged the so-called neopaganism based on monistic philosophical concepts.²⁰

III.

The value underlying the international acts and European acts constituting the achievements of the 20th century, which was shaped as a result of World War II experiences, is the recognition of the dignity of the human person. On its basis, the human rights system is founded, in which the right to life should undoubtedly occupy the first place. A lifeless person cannot enjoy other rights, so the formulation of the entire human rights system does not matter when we take this fundamental right from him. Human rights are defined differently. For the purposes of this study, let us acknowledge

¹⁶ Jan Paweł II, *Jaka wolność? Jaka Europa? Homilia podczas mszy św. na lotnisku wrocławskiego aeroklubu* (7 VI 1991), *L'Osservatore Romano*, 12 (1991), no. 6, pp. 6-8, no. 4-5.

¹⁷ O. Szczypiński, "Chrześcijaństwo jako źródło...", p. 110.

¹⁸ Ibid., p. 111.

¹⁹ S. Jedynak, "Porządek demokratyczny Zachodu a wychowanie bez dogmatu", in A. Jamrozikowa, E. Jeliński (eds.), *Wokół ideałów i wartości. Dylematy filozoficzne i praktyczne. Księga dedykowana pamięci Profesora Seweryna Działmskiego*, Poznań 2005, p. 80. See also: H. Kiereś, *Człowiek i cywilizacja*, Lublin 2007, pp. 172-173; K. Rojek, "Kultura europejska w stanie kryzysu: diagnoza Josepha Ratzingera", *Studia Gilsoniana*, vol. 6, no. 3 (2017), pp. 489-496.

²⁰ M.A. Krąpiec, "Ludzki wymiar kultury...", pp. 284-302.

that human rights are all subjective rights of a supranational nature that can be derived from the innate dignity of the human person and correlative obligations. By being proclaimed in constitutions and international law, they take the form of positive laws without losing their natural character. They are characterized by universality, inalienability, inviolability, and dynamism, corresponding to the dignity of the human person and protecting it vertically and horizontally.²¹ Since human rights are of a legal and natural character, they are given the character of universality, reduced to the fact that they exist in human consciousness and are recognized in all cultures and religions.²²

The right to life has been at the fore from the earliest times. It is also the subject of disputes and differences, although it is the fundamental value accepted by all ethical systems and constitutes the starting value of other freedoms and rights. The discrepancies result mainly from the understanding of the issue of the protection of life. The question arises whether the individual's personal right to life is protected or whether life is an objective value that does not allow for its evaluation. Each human life has the same weight, and the introduction of any differentiation of the lives of individuals may lead to consequences dangerous for the rule of law. Another issue is the determination of the point in time from which human life is protected and the resulting disputes regarding the protection of human life from the moment of conception.²³

Among the legal acts that deal with the right to life, there are, among others, the Universal Declaration of Human Rights of 1948, according to which everyone has the right to life (Art. 3).²⁴ American Convention on Human Rights states that every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life (Art. 4.1).²⁵ According to the International Covenant on Political and Civil Rights of 1966, every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life (Art. 6.1).²⁶ The European Convention on Human Rights and Fundamental Freedoms (ECHR) states that everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally

²¹ F.J. Mazurek, *Godność osoby...*, p. 195.

²² H. Waśkiewicz, "Powszechność prawa naturalnego", *Studia Philosophiae Christianae*, no. 1 (1970), pp. 236-268.

²³ A. Jończyk, "Aksjologiczne podstawy prawnej ochrony życia dziecka poczętego", *Kościół i Prawo*, vol. 7 (20), no. 1 (2018), pp. 201-219; P. Kuczma, "Prawna ochrona życia", in M. Jabłoński (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Wrocław 2014, pp. 35-41.

²⁴ Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly in Paris on 10 December 1948, at <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>>, 15 April 2021.

²⁵ American Convention on Human Rights adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, at <<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>>, 15 April 2021.

²⁶ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, at <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>, 15 April 2021.

save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law (Art. 2.1).²⁷ According to The African Charter on Human and Peoples' Rights, human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right (Art. 4).²⁸ The Cairo Declaration of Human Rights in Islam states that life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies, and states to safeguard this right against any violation, and it is prohibited to take away life except for a shari'ah prescribed reason (Art. 2.a).²⁹

The issue of the right to birth and the admissibility of both termination of pregnancy and other birth control measures have been the subject of lively discussions during the preparatory work on the international instruments discussed here. Adopting the content of the indicated legal norms resulted from the discussion, analysis, and weighting of each word used. It is widely regarded as a compromise solution. For example, in the course of work on the content of the International Covenant on Civil and Political Rights, it was raised that a declaratory formulation about the inherent nature of the right to life should not be included in an act that imposes legal obligations on states. However, eventually, it was decided to emphasize the specific nature of this right.³⁰ Characteristically, none of those mentioned above acts relating to human rights specifies the moment of protection of the right to life. The only exception here is the American solution, which explicitly states that the right to life should be protected by law *in general from the moment of conception*.³¹

The Convention on the Rights of the Child, which is in force in the European Union countries³² is another essential legal regulation. Referring to the Declaration of the Rights of the Child,³³ it was declared in the preamble to the Convention that the child, due to its physical and mental immaturity, requires special care and care, including appropriate legal protection, both before and after birth. It means that the guarantees contained in this Convention cover, among other things, the prenatal phase of

²⁷ Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome of 4 November 1950, at <https://www.echr.coe.int/documents/convention_eng.pdf>, 15 April 2021.

²⁸ The African Charter on Human and Peoples' Rights, adopted of 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, at <<https://www.achpr.org/legalinstruments/detail?id=49>>, 15 April 2021.

²⁹ Cairo Declaration on Human Rights in Islam, 5 August 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation], at <<http://hrlibrary.umn.edu/instreet/cairodeclaration.html>>, 15 April 2021.

³⁰ A. Michalska, "Prawo do życia w traktatach międzynarodowych," *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, no. 3 (1984), pp. 75-77.

³¹ Ibid.

³² Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, at <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>, 15 April 2021.

³³ Declaration of the Rights of the Child, adopted by United Nations General Assembly of 1959, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959), at <<http://hrlibrary.umn.edu/instreet/k1drc.htm>>, 15 April 2021.

human life.³⁴ The Convention also provides for the right to the dignity of life, enabling independence, and facilitating active participation in society for any mentally or physically disabled child (Art. 23). It obliges the state to provide each child with the highest level of health protection and facilities for treating diseases and health rehabilitation (Art. 24).

It is worth noting that the EU Charter of Fundamental Rights, deriving fundamental rights from personal dignity, defines neither the beginning of human life nor the initial moment of protection of human life, either. It leaves this matter to the competence of the individual Member States. In the course of work on the content of this document, it was not possible to develop a common position on this matter, and it was decided to adopt vague wording, allowing a certain margin of freedom of interpretation. It was found that Art. 2 of the Charter is based on the content contained in Art. 2.1 ECHR.³⁵ Analyzing these issues, the EU Network of Independent Experts on Fundamental Rights concluded that when a state chooses to prohibit abortion, it should at least ensure the monitoring of the impact of this prohibition on the practice of its application and make this information available to the public for debate. In situations where abortion is legal, women should have access to termination services without discrimination.

IV.

As part of the regional, European system of human rights protection mechanisms based on the European Convention on Human Rights and Fundamental Freedoms (ECHR), it is worth paying attention to its Art. 2. It states that *everyone's right to life shall be protected by law*. Based on the interpretation of this provision, it was found that the right to be born is limited by the right to life and health of his mother. However, the scope of this limitation has not been precisely defined (as opposed to abortion for economic reasons or intended to resolve demographic difficulties), which has been found to be a serious and obvious violation of the right to life). The Court of Human Rights stated in 2004 that although there was no agreement among states-parties to the Convention as to the definition of the status of the human fetus, one can speak of a general consensus of the states as to the affiliation of a fetus to *the human race* (paragraph 84).³⁶ On the other hand, in the judgment in the case of *Vo v. France*, the ECHR stressed that the issue of the beginning of life falls within the limits of the freedom of judgment which should be exercised by states. In the Tribunal's opinion, an unborn child is not a person protected

³⁴ M. Piechowiak, "Preambula", in T. Smyczyński (ed.), *Konwencja o prawach dziecka. Analiza i wykładnia*, Poznań 1999, p. 18.

³⁵ See: J. Kondratiewa-Bryzik, "Karta praw podstawowych Unii Europejskiej", in *Początek prawnej ochrony życia ludzkiego w świetle standardów międzynarodowych*, Warszawa 2009.

³⁶ Judgment of the European Court of Human Rights, of 8 July 2004, in the Case of *Vo v. France*, no. 53924/00. See also: K. Freeman, "The Unborn Child and the European Convention on Human Rights: To Whom Does 'Everyone's Right to Life' Belong?", *Emory International Law Review*, vol. 8, no. 2 (1994), pp. 650-651.

under Art. 2 of the ECHR, although it cannot be ruled out that in certain circumstances, it may be covered by the guarantees of this provision. Moreover, the ECHR denied the fetus's absolute right to life, emphasizing that this would lead to an absolute ban on abortion also in the event of a threat to the mother's life.³⁷ In a dissenting opinion to the judgment given in the case of *Vo v. France*, the statement was expressed that the right to life defined in Art. 2 of the ECHR is also available to conceived children. *Historically, lawyers have understood the notion of 'everyone' ('toute personne') as including the human being before birth and, above all, the notion of 'life' as covering all human life commencing with conception, that is to say from the moment an independent existence develops until it ends with death, birth being but a stage in that development.*³⁸

The very existence of legislation regulating the conditions for permitting abortion indicates a consensus among the states-parties that life before birth should be legally protected. The requirements for allowing abortion are exceptions to the rule in this context.³⁹ Although the Court rather consistently refused to grant the unborn the absolute right to life, it nevertheless recognized the need to protect the unborn because the fetus belongs to the human race, and its *potential and ability to become human must be protected in the name of human dignity*.⁴⁰ In another ruling, it refused to grant the primacy of Art. 8 of the Convention because a woman's right to respect for her private life must be balanced against the rights and freedoms of a developing fetus, and the Convention does not recognize the right to *abortion on request*. When formulating its decision, the Tribunal also took into account the moral values of the Irish people, an important element of which is the protection of the right to the unborn. *The protection accorded under Irish law to the right to life of the unborn was based on profound moral values deeply embedded in the fabric of society in Ireland and the legal position was defined through equally intense debate.*⁴¹

In the interpretations of Art. 2 of the ECHR, we can see an attempt to find a balance and take into account the diversity of positions existing in national systems as to the definition of a human being in the legal, medical, philosophical, ethical, and religious dimensions and reflect them in the approach of the convention's institutions to this problem.⁴² However, the principle of universalism, according to which the ECHR sets universally minimum binding standards for protecting human rights, the principle of universalism would require the Court to establish a certain minimum standard

³⁷ Judgment of the European Court of Human Rights, of 8 July 2004, in the Case of *Vo v. France*, no. 53924/00, § 82.

³⁸ Dissenting opinion of Judge Georg Ress in Case *Vo v. France*, pkt. 4.

³⁹ Dissenting opinion of Judges Antonella Mularoni and Viera Strážnicka in Case *Vo v. France*.

⁴⁰ Judgement of the European Court of Human Rights, of 18 October 1982 in Case of *X v. United Kingdom* (article 50), no. 7215/75.

⁴¹ Judgement of the European Court of Human Rights, of 16 December 2010 in Case of *A, B and C v. Ireland*, no. 25579/05, pkt 82; D. Lubowiecki, "Ochrona płodu w systemie Europejskiej Konwencji Praw Człowieka", *Przegląd Prawniczy Uniwersytetu Warszawskiego*, no. 1 (2016), pp. 85-86.

⁴² T. Sroka, "Komentarz do art. 38", in M. Safjan, L. Bosek (eds.) *Konstytucja RP. Tom I. Komentarz do art. 1-86*, Warszawa 2016.

of protection due to the lack of a European consensus.⁴³ Specific fears of international human rights control bodies regarding creating an unambiguously definite position in this regard can be seen. These organs retain restraint towards the question about the origins of human life and, referring to the exceptional axiological context of this issue, willingly refer to the state's right to regulate this issue in internal law.

In the European Union, these standards vary in individual countries. There are various models of constitutional solutions pertaining to protecting the life of an unborn child, which is related to different experiences and traditions of these countries. However, they can be divided into several groups. In the first group of countries, norms were adopted in the constitution's content that ensures broad protection of life and applies to life before birth. These include Andorra (1992), Croatia (1990), Czech Republic (1992), Ireland (1937 and the 1989 amendment), Portugal (1976), Slovakia (1992). The second group includes states whose constitutions contain a general guarantee of the protection of life. These include, among others, Belgium (1831), Bulgaria (1991), Finland (1999), Greece (1975), Spain (1978), Lithuania (1992), Malta (1964), Germany (1949), Romania (1991), Hungary (1949). The third group includes countries where there are no provisions on the protection of life, but where reference is made to acts of international law guaranteeing the right to life, such as Sweden (1974) and Austria (1920 and 1867), or where to protect life in the catalog of the rights and freedoms. These are Luxembourg (1869), France (1958 and 1789), Denmark (1953), Italy (1947), the Netherlands (1814), Norway (1814)⁴⁴. However, it is worth emphasizing that the adoption of a specific regulation at the constitutional level is not equivalent to adopting a similar legal regulation at the level of ordinary legislation.⁴⁵

V.

Poland is one of the European countries in which the constitutional protection of life has the longest traditions, dating back to the interwar period. The Constitution of the Republic of Poland of March 17, 1921, is one of the earliest European fundamental laws protecting the right to life, next to the Constitutions of Finland of 1919 and the Czechoslovak Republic of 1920.⁴⁶ The Polish Constitution of 1997,⁴⁷ currently in

⁴³ D. Lubowiecki, "Ochrona płodu...", p. 114. See also: J. Pichon, "Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment *Vo v. France*", *German Law Journal*, vol. 7, no. 4 (2006), pp. 433-444.

⁴⁴ J. Lipski, P. Chybalski, "Informacja porównawcza dotycząca modeli zapisu konstytucyjnej gwarancji ochrony życia ludzkiego w perspektywie dopuszczalności usunięcia ciąży", in *Konstytucyjna formuła ochrony życia*, Seminarium Biura Analiz Sejmowych, 19 January 2007, pp. 77-78.

⁴⁵ Ibid., pp. 78-79; M. Zubik, "Ochrona prawna początku życia człowieka w rozwiązaniach międzynarodowych i konstytucyjnych w Europie", *Przegląd Sejmowy*, no. 3 (2007), pp. 30-31.

⁴⁶ R. Grabowski, "Ochrona życia w polskich przepisach konstytucyjnych w latach 1921-1939", *Przegląd Prawa i Administracji*, no. 77 (2008), p. 87.

⁴⁷ The Constitution of the Republic of Poland of 2nd April, 1997 (Dz. U. no. 78, item 483).

force, in Art. 30, states that the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.⁴⁸ Dignity is therefore not a law, but it is the foundation and source from which rights are only derived. It is the reference point for the entire constitutional system of values and it underpins the whole legal order. Human dignity becomes the source of, among others, the right to life. However, the exact wording of Art. 38 of the constitution is: *The Republic of Poland shall ensure the legal protection of the life of every human being*. Therefore, it emphasizes the responsibility of the organs of the state for enacting a law that would protect the life, and this is the life of every human being regardless of the situation he or she is in. In the jurisprudence of the Polish Constitutional Tribunal, it is consistently emphasized that the inherent and inalienable dignity of every human being and its uniformity implies the prohibition of differentiating the value of a given person, and thus also the value of his life, regardless of the stage of development he is at. Irrespective of birth, the quality of a given being, which is human, does not change. Moreover, the right to life cannot be restricted on the grounds of values that are not equivalent to life. The Constitutional Tribunal recognized as such values those listed in Art. 31.3 of the Polish Constitution. Pursuant to this article, any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights. The Constitutional Tribunal, in its judgment of October 22, 2020, ref. no. K 1/20 upon a motion submitted by a group of deputies of the 9th term of the Sejm, ruled that in the light of Art. 38 in connection with Art. 30 and in connection with Art. 31 sec. 1 of the Constitution, it is unconstitutional that the termination of pregnancy may be performed if prenatal tests or other medical reasons indicate a high probability of severe and irreversible fetal impairment or an incurable life-threatening disease.⁴⁹ Moreover, it pointed out that the analyzed provision contains criteria of an assessment nature. It considered that the admissibility of termination of pregnancy due not to the current health condition but to the high probability of severe and irreversible impairment of the fetus or an incurable disease that threatens its life constitutes the presumption to the detriment of the conceived child.⁵⁰

⁴⁸ See: M. Granat, "Godność człowieka z art. 30 Konstytucji RP jako wartość i jako norma prawna", *Państwo i Prawo*, no. 8 (2014), pp. 3-22.

⁴⁹ The judgment refers to Art. 4a para. 1 point 2 of the Act of January 7, 1993, on family planning, protecting the human fetus and conditions for the admissibility of termination of pregnancy (Journal of Laws 1993, no. 17, item 78, as amended).

⁵⁰ The Constitutional Tribunal's judgment was not the first to refer to the Act on family planning, protection of the human fetus, and conditions for permitting termination of pregnancy. In the judgment of May 28, 1997, it found abortion unconstitutional in a situation where „a pregnant woman is in difficult living conditions or a difficult personal situation”.

The discussed judgement of the Constitutional Tribunal aroused great emotions. Despite the restrictions related to the Covid-19 pandemic, anti-government protests and demonstrations were organized throughout the country. Their participants used violence against, among others, members of the government, judges of the Constitutional Tribunal, and police officers. They attacked churches, shouted vulgar slogans, threw stones, tried to break police cordons, and used roadblocks. The police decided to use pepper spray and physical force in some cases to restore order. These protests also activated the so-called "Defenders of life" who began to gather in front of the churches to defend not only temples but also Christian values.

The opponents of the judgment issued by the Constitutional Tribunal emphasize that the lack of access to legal abortion in the case of serious and irreversible impairment of the fetus can be qualified as subjecting a woman to inhuman treatment, prohibited under 3 of the ECHR and Art. 4 of the Charter of Fundamental Rights of the European Union. Moreover, they accuse the judgment of ignoring the compromise worked out in Poland, which assumed the permissibility of abortion in the case of a serious damage to the fetus. However, according to the content of the Polish constitution, it is challenging to adopt an interpretation that allows the limitation of the right to life of *a being of the human race* due to a different constitutional value, which is considered to be a woman's right to respect for her dignity, which will be violated by degrading, inhuman treatment resulting from the compulsion of giving birth to a child, even of a child at risk of severe illness or disability. In this case, the equivalent values, i.e., the right to life of the unborn child, are compared to the threat to the life of their mother. Only these two values are comparable to each other. Human life in the prenatal phase is not only a value, but it is protected as a subjective right, whose potential limitation must be proportionate.⁵¹ Indeed, the dignity of an unborn child implies his right to life. Because of the dignity of a woman, she has the right to be shown due respect to herself and her choices. But certainly, when the value of these two rights is compared, the right to life must be given priority. Moreover, taking a human being's life is not only a restriction of his right but a complete and irreversible deprivation of his right. Incidentally, it should also be noted that the rights of children are protected by the Ombudsman for Children in Poland. According to the Act of January 6, 2000,⁵² it safeguards children's rights, which are considered to be every human being from conception to coming of age, without making any exceptions in this regard. Taking into account that this act is a legal act passed after the entry into force of the Polish constitution, it should be considered that the protection of children's rights was extended to unborn children.

⁵¹ See also: J. Roszkiewicz, "Nasciturus' Right to Life in the Light of Constitutional Law and International Law", *Forum Prawnicze* 2017, pp. 117-118.

⁵² According to art. of the Law of 6 January 2000, about the Ombudsman for Children (consolidated text, *Journal of Laws* 2020, item 141).

VI.

The problem of protecting human life in the prenatal period analyzed in this paper is complex. In its analysis, it is difficult not to take into account the obligations and difficulties faced by the parents of a permanently ill or disabled child. The state and society's support for such families is still insufficient. However, the manner and direction of discussion on the indicated problem make it clear that it concerns the system of values. The slogans shouted out during the Polish protests, *Choice not prohibition*, openly emphasize the essence of the problem, which boils down to giving priority to the individual's freedom of choice over the right to life of a person, even if he suffers a serious defect or disease. In the light of the values professed by Christian Europe, priority is given to the protection of life, in the light of the humanistic value of Europe: the right to choose. It should be emphasized that the above dispute is not only a philosophical or legal discourse. It is a real political problem, recurring in the public space with varying intensity and in various forms, including, as indicated, street aggression. Despite the numerous legal regulations cited above, both in general-abstract and individual-specific sphere, this problem does not seem to be settled yet. The events that took place in Poland in 2020 clearly show that there is no compromise in this matter. This dispute over values has a fundamental dimension not only because it concerns the fundamental human right but also because it is a dispute of the nature of the civilization and its final result will determine the shape of European civilization. Therefore, it seems that until it is resolved, it is difficult to claim that human rights protected in the European Union are given universal meaning.

BIBLIOGRAPHY

- American Convention on Human Rights adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969, at <<https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm>>, 15 April 2021.
- Benedykt XVI, "Occasione Diei quo studium peragitur de dialogo inter Culturam et Religionem", *Acta Apostolicae Sedis*, no. 101 (2009).
- Berman H.J., *Prawo i rewolucja. Kształtowanie się zachodniej tradycji prawnej*, Warszawa 1995.
- Cairo Declaration on Human Rights in Islam, 5 August 1990, U.N. GAOR, World Conf. on Hum. Rts., 4th Sess., Agenda Item 5, U.N. Doc. A/CONF.157/PC/62/Add.18 (1993) [English translation], at <<http://hrlibrary.umn.edu/instree/cairodeclaration.html>>, 15 April 2021.
- "Charter of Fundamental Rights of the European Union", *Official Journal of the European Union*, no. 326/2, 2012/C.
- Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome of 4 November 1950, at <https://www.echr.coe.int/documents/convention_eng.pdf>, 15 April 2021.

- Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, at <<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>, 15 April 2021.
- Declaration of the Rights of the Child, adopted by United Nations General Assembly of 1959, G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959), at <<http://hrlibrary.umn.edu/instree/k1drc.htm>>, 15 April 2021.
- Dissenting opinion of Judge Georg Ress in Case Vo v. France, pkt. 4.
- Dissenting opinion of Judges Antonella Mularoni and Viera Strážnicka in Case Vo v. France.
- Finnis J., *Natural Law and Natural Rights*, Oxford–New York 2011.
- Freeman K., “The Unborn Child and the European Convention on Human Rights: To Whom Does ‘Everyone’s Right to Life’ Belong?”, *Emory International Law Review*, vol. 8, no. 2 (1994).
- Grabowski R., “Ochrona życia w polskich przepisach konstytucyjnych w latach 1921-1939”, *Przegląd Prawa i Administracji*, no. 77 (2008).
- Granat M., “Godność człowieka z art. 30 Konstytucji RP jako wartość i jako norma prawna”, *Państwo i Prawo*, no. 8 (2014).
- Hahne P., *Dość tej zabawy. Koniec społeczeństwa przyjemności*, Katowice 2007.
- International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, at <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>, 15 April 2021.
- Jan Paweł II, “Bądźcie gorliwymi poszukiwaczami Niewidzialnego Boga” (przemówienie z okazji jubileuszu naukowców, 25 V 2000), *L’Osservatore Romano* 21 (2000), no. 7-8, pp. 22-23, no. 1.
- Jan Paweł II, *Jaka wolność? Jaka Europa? Homilia podczas mszy św. na lotnisku wrocławskiego aeroklubu* (7 VI 1991), *L’Osservatore Romano*, 12 (1991), no. 6, pp. 6-8, no. 4-5.
- Jedynak S., “Porządek demokratyczny Zachodu a wychowanie bez dogmatu”, in A. Jamrozikowa, E. Jeliński (eds.), *Wokół ideałów i wartości. Dylematy filozoficzne i praktyczne. Księga dedykowana pamięci Profesora Seweryna Dziamskiego*, Poznań 2005.
- Jończyk A., “Aksjologiczne podstawy prawnej ochrony życia dziecka poczętego”, *Kościół i Prawo*, vol. 7 (20), no. 1 (2018), <https://doi.org/10.18290/kip.2018.7.1-15>.
- Judgement of the European Court of Human Rights, of 16 December 2010 in Case of A, B and C v. Ireland, no. 25579/05, pkt 82.
- Judgement of the European Court of Human Rights, of 18 October 1982 in Case of X v. United Kingdom (article 50), no. 7215/75.
- Judgment of the European Court of Human Rights, of 8 July 2004, in the Case of Vo v. France, no. 53924/00.
- Kaucha K., “Chrześcijaństwo a kultura europejska (w świetle nauczania Jana Pawła II)”, *Studia Nauk Teologicznych*, t. 5 (2010).
- Kiereś H., *Człowiek i cywilizacja*, Lublin 2007.
- Kiereś H., “Modernizm vs. postmodernizm a chrześcijaństwo”, in R.T. Praszek, M. Piwowarczyk (eds.), *Uniwersalizm chrześcijaństwa wobec alternatywnych propozycji współczesności*, Lublin 2012.

- Kleska Ł., "Kryzys Kościoła katolickiego w teologii Josepha Ratzingera", *Forum Filozoficzne*, no. 5 (2010).
- Kondratiewa-Bryzik J., "Karta praw podstawowych Unii Europejskiej", in *Początek prawnej ochrony życia ludzkiego w świetle standardów międzynarodowych*, Warszawa 2009.
- Krąpiec M.A., "Ludzki wymiar kultury chrześcijańskiej – wspólnego dziedzictwa narodów Europy", in M. Radwan, T. Styczeń (eds.), *Ewangelia i kultura. Doświadczenie środkowoeuropejskie*, Rzym 1988.
- Kuczma P., "Prawna ochrona życia", in M. Jabłoński (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Wrocław 2014.
- Lipski J., Chybalski P., "Informacja porównawcza dotycząca modeli zapisu konstytucyjnej gwarancji ochrony życia ludzkiego w perspektywie dopuszczalności usunięcia ciąży", in *Konstytucyjna formuła ochrony życia*, Seminarium Biura Analiz Sejmowych, 19 January 2007.
- Lubowiecki D., "Ochrona płodu w systemie Europejskiej Konwencji Praw Człowieka", *Przegląd Prawniczy Uniwersytetu Warszawskiego*, no. 1 (2016).
- Mazurek F.J., *Godność osoby ludzkiej podstawą praw człowieka*, Lublin 2001.
- Michalska A., "Prawo do życia w traktatach międzynarodowych", *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, no. 3 (1984).
- Pichon J., "Does the Unborn Child Have a Right to Life? The Insufficient Answer of the European Court of Human Rights in the Judgment Vo v. France", *German Law Journal*, vol. 7, no. 4 (2006), <https://doi.org/10.1017/S2071832200004764>.
- Piechowiak M., "Aksjologiczne podstawy Karty Praw Podstawowych Unii Europejskiej", *Studia Prawnicze*, vol. 1, no. 155 (2003).
- Piechowiak M., *Filozofia praw człowieka. Prawa człowieka w świetle ich międzynarodowej ochrony*, Lublin 1999.
- Piechowiak M., "Powszechność praw człowieka. Zagadnienia filozoficznoprawne", in T. Jasudowicz, C. Mik (eds.), *O prawach człowieka. W podwójną rocznicę Paktów. Księga Pamiątkowa w hołdzie Profesor Annie Michalskiej*, Toruń 1996.
- Piechowiak M., "Preambuła", in T. Smoczyński (ed.), *Konwencja o prawach dziecka. Analiza i wykładnia*, Poznań 1999.
- Ratzinger J., *Europa Benedykta w kryzysie kultur*, Częstochowa 2005.
- Rojek K., "Kultura europejska w stanie kryzysu: diagnoza Josepha Ratzingera", *Studia Gilsoniana*, vol. 6, no. 3 (2017).
- Roszkiewicz J., "Nasciturus' Right to Life in the Light of Constitutional Law and International Law", *Forum Prawnicze* 2017.
- Rusecki M., "Chrześcijańskie wartości podstawą jedności Europy", in E. Cyran, A. Czaja, P. Gutowski (eds.), *Chrześcijaństwo a jedność Europy*, Lublin 2006.
- Schuman R., *Dla Europy*, Kraków 2003.
- Sobański R., "Kultura prawna Europy", *Studia Europejskie*, no. 3 (1998).
- Sroka T., "Komentarz do art. 38", in M. Safjan, L. Bosek (eds.) *Konstytucja RP. Tom I. Komentarz do art. 1-86*, Warszawa 2016.
- Szczypiński O., "Chrześcijaństwo jako źródło kultury europejskiej w myśli Josepha Ratzingera", in H. Czakowska, M. Kuciński (eds.), *Człowiek z perspektywy religii, rodziny i szkoły*, Bydgoszcz 2013.

- The African Charter on Human and Peoples' Rights, adopted of 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986, at <<https://www.achpr.org/legalinstruments/detail?id=49>>, 15 April 2021.
- The Constitution of the Republic of Poland of 2nd April, 1997 (Dz. U. no. 78, item 483).
- Tokarczyk R., "Kultura prawa europejskiego", *Studia Europejskie*, no. 1 (2000).
- Universal Declaration of Human Rights was proclaimed by the United Nations General Assembly in Paris on 10 December 1948, at <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>>, 15 April 2021.
- Waśkiewicz H., "Historia teorii prawa naturalnego", *Roczniki Filozoficzne*, vol. 17, no. 2 (1969).
- Waśkiewicz H., "Powszechność prawa naturalnego", *Studia Philosophiae Christianae*, no. 1 (1970).
- Zubik M., "Ochrona prawna początku życia człowieka w rozwiązaniach międzynarodowych i konstytucyjnych w Europie", *Przegląd Sejmowy*, no. 3 (2007).
- Żuk G., *Edukacja aksjologiczna. Zarys problematyki*, Lublin 2016.

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