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Principles of liability under the Polish Criminal Code for behavior relating to the termination of pregnancy undertaken in Poland and the Czech Republic

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Summary: The article explores the problem of significance the termination of pregnancy in the context of criminal responsibility. In the first step, the legal analysis is focused on establishing the change of legal status connected with abortion and all the consequences for criminal responsibility. The second section refers to the current act, trying to find the answer how to recognized the termination of pregnancy. The third part refers to legal situation in Czech Republic at this area. Finally, some reflections on the criminal liability for the place of the offence have been presented. The possibility of conviction for abortion in a country where it is legal should be examined..

Keywords: abortion, pregnancy, rights of the child, right to life.

1 Introduction

There have been ongoing disputes in Poland for several years over the punishability of the termination of pregnancy. This issue is regulated differently in the legal systems around the world. The present state of the law is not commonly accepted almost everywhere and, consequently, action is taken in many places worldwide to amend the applicable legislation on abortion.

Recognizing that the international regulations affect the shape of the Polish legal order, it should be noted that no act of international law legally binding on the Republic of Poland, including the Convention on the Rights of the Child,[1] guarantees the embryo "any personal protection in the form of subjective right to life."[2] Although the preamble to the aforementioned Convention states that bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the

1 Journal of Laws of 1991, No. 120, pos. 526.

2 ZIELIŃSKA, Elżbieta. Konstytucyjna ochrona prawa do życia od momentu poczęcia (uwagi krytyczne do projektu zmiany art. 38 Konstytucji), *Państwo i Prawo,* 2007, no. 3, pp. 6–7.

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child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth", the fact remains that, pursuant to Art. 1 of the Convention, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." At the same time, Art. 24 refers to prenatal health care for mothers.

Giving shape to the right to life, the Convention for the Protection of Human Rights and Fundamental Freedoms[3] does not mention conceived children. In view of complaints against abortion, The European Court of Human Rights gave its view on the right of unborn children to life. First of all, it ruled that, due to the sensitive nature of the issue, States Parties be given a certain degree of freedom of action (decision H. v. Norway, 19 May 1992, Application No. 17004/90, DR 73, p. 155). In another case, it held that authorization from UK authorities to perform an abortion was not contrary to Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (decision X v. The United Kingdom, 13 May 1980, Application No. 8416/79, DR 19, pp. 248, 253). It also ruled that the protection envisaged in Art. 2 of the Convention does not apply to the unborn child, but only to the born child (decision Paton v. The United Kingdom,[4] 13 May 1980, Application No. 8416/79, DR 19, p. 244, as well as decision H. v. Norway, 19 May 1992, Application No. 17004/90, DR 73, p. 155).[5]

Moreover, on 12 May 1990, a resolution was adopted – Permitted abortion in the European Community. As is apparent from the document, the European Parliament is of the opinion that the punishment of women and doctors who terminate a pregnancy in countries where it is allowed is a practice that should be opposed and that women throughout the European Community must be granted the right to self-determination, including the right to decide on maternity and termination of unwanted pregnancy. The European Parliament expressed its "urgent wish" that all European Community countries in which this had not yet been done legalize the termination of pregnancy and that they undertake to provide all women with reasonable assistance necessary to terminate a pregnancy.[6]

3 Journal of Laws of 1993, No. 61, pos. 284

4 "The restrictions listed in Art. 2 in essence concern persons already born and cannot be applied to the fetus. Thus both the general usage of the term "everyone" in the Convention and the context in which this term is employed in Art. 2 (...) tend to support the view that it does not include the unborn."

5 Judgment of 21 November 2003, V CK 16/03, http://www.sn.pl/sites/orzecznictwo/Orzeczenia1/V%20CK%2016-03-1.pdf

6 HOFMAŃSKI, Piotr. Granice kryminalizacji aborcji w Europie Zachodniej. Analiza prawnoporównawcza, *Przegląd Prawa Karnego,* 1992, no. 6, pp. 108–109 – annex.

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2 The history of Polish abortion law

The history of Polish regulations regarding the termination of pregnancy is fairly long and complicated.[7]

The first 20th century Polish Criminal Code of 1932 penalized abortion in Art. 231–234. Pursuant to the provisions of Art. 233, an abortion performed by a medical doctor shall not be a criminal offense as long as the "the medical procedure was required due to the health of the pregnant woman or the pregnancy was the result of a specific crime specified in Art. 203, 204, 205 or 206."

In the history of criminalization of abortion in Poland, the Act of 27 April 1956 on the Conditions for the Permissibility of Termination of Pregnancy is of the utmost importance.[8] Repealing the provisions of Art. 231–234 of the Criminal Code of 1932, the legislator developed a list of circumstances warranting the termination of pregnancy and the relevant criminal provisions. Consequently, the termination of pregnancy became legal where it was justified by medical indications, difficult living conditions of the woman and in cases where there was a reasonable suspicion that the pregnancy was the result of a crime. A detailed analysis of the provisions applicable at that time led J. Potulski to conclude that, in fact, those regulations introduced a model of the admissibility of termination of pregnancy "on demand" – selecting terms more akin to contemporary American or British regulations.[9] The situation was evaluated differently by a well-known Polish writer, social activist with left-wing views – Tadeusz Boy Żeleński. Initially, before the introduction of the aforementioned code, he campaigned against the extensive criminalization of abortion, then, he fiercely criticized the adopted solutions pointing to their life consequences – women's tragedies caused by the prohibition of abortion. He compiled and released a series of his column pieces from that period tellingly titled "Women's Hell" in 1930 and 1933, where he called the criminalization of abortion "the greatest crime of criminal law."[10]

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7 It is discussed in a thorough manner in various publications: KUNICKA-MICHALSKA Barbara., WOJCIECHOWSKA Janina., Prawna regulacja przerwania ciąży w świetle przepisów i poglądów nauki, *Studia Prawnicze,* 1985, no. 1–2, p. 213, POTULSKI, Jacek. *Dziecko jako przedmiot czynu zabronionego*, Gdańsk 2007, pp. 149–171, WIAK, Krzysztof. *Ochrona dziecka poczętego w polskim prawie karnym*, Lublin 2001, pp. 27–35, 127–202, ZNAMIEROWSKI, Jakub. Dzieje prawa aborcyjnego w Trzeciej Rzeczypospolitej cz. I., lata 1989–1993, *Prawo i Medycyna,* 2012, vol. 47, no. 2, p. 64, idem: Dzieje prawa aborcyjnego w Trzeciej Rzeczypospolitej cz. II., lata 1993–2002, *Prawo i Medycyna,* 2012, vol. 48–49, no. 3–4, p. 151, GIEZEK, Jacek. [in:] GIEZEK, Jacek. (ed.), *Kodeks karny. Część szczególna. Komentarz*, Warsaw 2014, pp. 197–198.

8 Journal of Laws No. 12, pos. 61, as amended.

9 POSTULSKI, Jacek. [in:] Warylewski, Jarosław. (ed.), *Przestępstwa przeciwko dobrom indywidualnym. System prawa karnego*. Vol. 10, Warsaw 2012, p. 163.

10 BOY ŻELEŃSKI, Tadeusz. *Piekło kobiet*, Warsaw 1060 (reprint).

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The entry into force of the Criminal Code of 1969 did not significantly change the scope of criminalization of abortion – the provision of Art. 154 bore the wording similar to the provisions of the 1956 Act.

A change in the legal situation occurred with the entry into force of the Act of 7 January 1993 on Family Planning, the Human Fetus Protection and Conditions of Permissibility of Termination of Pregnancy.[11] The provisions of Art. 149a, Art. 149b and Art. 157 § 2 were introduced into the Criminal Code. The Act imposed restrictions on the permissibility of abortion – a model of indications was put in place. The four indicated prerequisites included mother's health and life, severe and irreversible damage to the fetus, and the suspicion that pregnancy is the result of a criminal act. The type of termination of pregnancy against the will of the pregnant woman remained essentially unchanged. Moreover, a new type of offense was introduced – causing a bodily injury or a life-threatening health disorder to a conceived child (Art. 156a).

In 1996, the Act on Family Planning, the Human Fetus Protection and Conditions of Permissibility of Termination of Pregnancy was amended and the provisions of Art. 149a, Art. 149b and Art. 156a of the Criminal Code of 1969 were repealed. More importantly, a new prerequisite for legalizing the termination of pregnancy was introduced into the legal order – difficult living conditions or difficult personal situation of a pregnant woman. That legislative solution was subsequently subjected to constitutional review. The Constitutional Tribunal in its judgment of 28 May 1997[12] ruled that the regulation allowing abortion for so-called social reasons is unconstitutional. The Constitutional Tribunal held that "human life is a constitutional value also in the prenatal phase, any attempt to reduce the legal protection of health of certain subjects in that phase would have to show a non-arbitrary criterion justifying such differentiation. The current state of empirical science does not provide grounds for the introduction of such a criterion."[13]

The Act on Family Planning, the Human Fetus Protection and Conditions of Permissibility of Termination of Pregnancy underwent another amendment and the prerequisites for the legality of abortion do not include abortion for social reasons. The Act has been in force since then, with the provision of Art. 152 of the Criminal Code of 1997 referring directly to it (the wording: "in violation of the statutory provisions.")

11 Journal of Laws No. 17, pos. 78, as amended.

12 K 26/96, OTK 2/1997.

13 Judgement of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK ZU 1997, no. 2, pos. 19.

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3 The crimes connected with abortion in polish law

In essence, the provisions of the current Criminal Code penalize three types of behavior relating to the fetus – termination of pregnancy with the consent of a pregnant woman (Art. 152 and Art. 154 § 1 and 2), termination of pregnancy against the will of a pregnant woman (Art. 153 and Art. 154 § 2), as well as causing a bodily injury or a life-threatening health disorder to a conceived child (Art. 157a).

Given that, as a blanket provision, Art. 152 refers to the provisions of the aforementioned Act on Family Planning, the Human Fetus Protection and Conditions of Permissibility of Termination of Pregnancy, the scope of prohibited behavior, conditions for the legal termination of pregnancy and the legal nature of conditions giving entitlement to the termination of pregnancy should be determined based on that Act. Pursuant to the provision of Art. 4a item 1, the Act provides for three so-called indications giving entitlement to the termination of pregnancy. An abortion may be performed only by a medical doctor in the case where:

1. the pregnancy is a threat to the life or health of a pregnant woman;
2. prenatal examinations or other medical indications point to a strong likelihood of severe and irreversible fetus impairment or an incurable disease threatening its life;
3. a reasonable suspicion exists that the pregnancy was the result of a criminal act.[14]

The assessment of the legal nature of the above prerequisites appears to be vital for the criminal-law analysis of the offense of termination of pregnancy. In other words, the question is whether the termination of pregnancy in the situations indicated in the provision of Art. 4a of the Act is legal from the outset, or whether it requires (subsequent) justification, and if so, on what level. Under Polish criminal law, two options would be permissible: exclusion of unlawfulness or exclusion of guilt.

It should be noted that neither the Act on Family Planning, the Human Fetus Protection and Conditions of Permissibility of Termination of Pregnancy nor the Criminal Code specifies the legal nature of the indication. The most commonly adopted construction is the concept of circumstances excluding unlawfulness. Referring to the basic assumption of justification, in the event of an attack on a legally protected interest with a simultaneous conflict of interests which cannot be avoided, it is assumed that the termination of pregnancy under the conditions

14 Further detailed requirements are governed by Art. 4a item 2: In cases specified in items 1 and 2, the termination of pregnancy is permissible until the moment when the fetus achieves the capability of living independently outside the pregnant woman's body; in cases specified in items 1 point 3 or 4, if no more than 12 weeks have passed since the start of pregnancy.

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of Art. 4a of the Act is secondarily legal.[15] J. Śliwowski considers that type of medical procedure to be a justification and he is of the opinion that the legal termination of pregnancy is an act within the limits of entitlement.[16] In contrast, as stated by K. Indecki and A. Liszewska, the legal termination of pregnancy is a justification for a non-therapeutic medical procedure regulated by law.[17] In its resolution of 2006, The Supreme Court recognized the prerequisites envisaged in Art. 4a of the Act of 1993 to be circumstances "of a nature similar to a justification."[18]

The resolution of the above doubts is essential considering that although in line with each concept, the physician performing an abortion does not ultimately bear criminal liability, any medical error he makes during surgery must be recognized differently. More importantly, the rights of other persons who intend to prevent abortion differ depending on the adopted concept. For instance, assuming that the indicated legal circumstances of termination of pregnancy are circumstances excluding guilt, then the prevention of a specific abortion, even in violation of the rights of the pregnant person (or doctor), does not constitute a criminal offense. By comparison, where the statutory indications are circumstances excluding unlawfulness (so-called justifications) or they determine the primary legality, then actions taken to prevent an abortion involving the violation of the rights of others may constitute a criminal offense.

Being aware of a certain simplification of criminal law, it should be stated that the primarily legal act does not do any wrong, a justified act does wrong, but is socially acceptable due to the so-called social profitability, lastly, a non-culpable prohibited act does wrong and is unacceptable, but its perpetrator is justified due to an abnormal motivational situation (narrow margin for decision-making).

The assessment of the legal nature of the indication must mainly take into account the assumptions of the Family Planning Act and the axiology adopted by the legislator. The will of the legislator may be above all understood from the contents of the preamble, which constitutes a particular solemn introduction to a legal act of a special rank indicating, among others, the purpose of the regulation. In the opinion of the Constitutional Tribunal, although the preamble in itself does not produce legal effects for the addressees of a normative act,

15 E.g.: POTULSKI Jacek. *Dziecko jako przedmiot czynu zabronionego*, Gdańsk 2007, p. 184 and idem [in:] WARYLEWSKI, Jarosław. (ed.), op. cit., p. 191 and the indicated literature. Similarly KANIA, Agnieszka. Kontrowersje związane z kryminalizacją przerywania ciąży. Część I, *Nowa Kodyfikacja Prawa karnego*, Vol. XXVII/2011, p. 97.

16 ŚLIWOWSKI, Jan. *Prawo karne*, Warsaw 1979, p. 155, quote after: POSTULSKI Jacek. [in:] WARYLEWSKI Jarosław. (ed.), op. cit., p. 191. Similarly – as regards the eugenic and criminal indication –FILAR, Marian. *Lekarskie prawo karne*, Cracow 2000, pp. 196–197.

17 INDECKI, Krzysztof. LISZEWSKA, Agnieszka. *Prawo karne materialne*, Warsaw 2002, p. 146.

18 Resolution of 22.02.2006, III CZP 8/06, http://www.sn.pl/sites/orzecznictwo/orzeczenia1/iii%20czp%208-06.pdf, viewed 1 December 2016.

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this does not mean that it has no normative significance.[19] The preamble to the Act of Family Planning, the Human Fetus Protection and Conditions of Permissibility of Termination of Pregnancy stipulates that „(…) life is a fundamental human good and that care for life and health is one of the basic responsibilities of the state, society and citizen." Further, it recognizes "everyone's right to decide responsibly on having children, and the right of access to information, education, counselling and resources to benefit from that right." It must therefore be concluded that the termination of pregnancy in all situations referred to in Art. 4a of the Act on Family Planning is secondarily legal *de lege lata* (the identified indications are circumstances excluding unlawfulness – justifications), the subjective right to terminate a pregnancy exists, third parties are not entitled to prevent an abortion, and errors should be recognized in the light of Art. 29 § 1 of the Criminal Code.

Given that as justifications the above indications affect the scope of application of the norm sanctioned by the provision of Art. 152 of the Criminal Code, it is necessary to give a brief description of the individual prerequisites for the legal termination of pregnancy.

The first of the prerequisites indicated in the Act is a pregnancy which represents a "threat to the life or health of a pregnant woman" (therefore it is called a medical or therapeutic prerequisite). In practical terms, it resembles a state of higher necessity regulated in the Criminal Code, yet it has a broader scope, given that the prerequisites making it possible to invoke that circumstance are not prescribed in a particularly strict manner. It is in fact argued that the threat to a woman's health need not be immediate or serious.[20] The principle of subsidiarity was likewise not clearly expressed (i.e. consent to a violation of interest if a threat cannot be otherwise avoided). Doubts may arise in relation to the concept of health. Pursuant to the constitution drawn up by the WHO, health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.[21] Such a broad understanding of the term "health" would nonetheless imply that a medical indication effectively amounts to full consent to abortion. Certain restrictions in this respect stem from procedural provisions. They provide that a pregnant woman's health risk assessment should be carried out by a physician specializing in the field of medicine relevant to the type of

19 Judgment of 11 May 2007. (K2/07)

20 In the opinion of R.Kubiak, the model of "indications" in force in the Polish legal system should be interpreted as a restrictive solution – the sacrifice of the child's life must be socially justified by the need to save the mother's interest. KUBIAK, Rafał. *Medical Law*, Warsaw 2014, p. 485. However, that approach is groundless, at least in the context of criminal law and the applicable prohibition of extensive interpretation.

21 http://www.who.int/about/mission/en/, viewed 26 October 2016.

I It should be noted that the world literature mentions about 120 different definitions of health, and the definitions, models and indicators of health and disease reflect the thinking styles existing in society (and science) –DOMARADZKI, Jan. O definicjach zdrowia i choroby, *Folia Medica Lodziensa*, 2013, no. 40, pp. 5 and 8.

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illness of the pregnant woman. The Act does not specify which medical circumstances should be taken into account, or what the impact of the disease on pregnant woman's health should be (e.g. serious, significant). In the opinion of A. M. Kania, the use of the term "threat" by the legislator means that it is a serious risk of health loss of a nontrivial nature.[22]

The Act does not introduce any time limits for the performance of such a medical procedure, which means that it can be conducted until the time of delivery. However, M. Filar notes that an abortion carried out at an advanced stage of pregnancy may itself pose a threat to the woman's health, thus the decision should be made after careful consideration of the risk.[23] A different position on the issue is adopted by A. Zoll who holds that the time limit for the permissibility of termination of pregnancy is reached when the fetus achieves the capability to live independently outside the mother's body, as there are no grounds for the termination of pregnancy at the expense of his life.[24] Although justified, it is nonetheless a narrowing interpretation which concerns an exception to the principle of punishability, placing the perpetrator at a disadvantage and thus violating the constitutional standards.

In the light of the Act of Family Planning, in the case under analysis, an abortion may be performed only in hospital by a physician having the relevant specialization.[25]

The so-called eugenic prerequisite (recently named teratologic[26]) occurs in a case where prenatal examinations or other medical indications point to a strong likelihood of severe and irreversible impairment of the fetus or an incurable disease threatening its life. The literature review shows that the *ratio legis* of that normalization is to avoid future suffering of a child born with serious defects, as well as the good of the mother whose psyche may be adversely affected by the birth of such a child.[27]

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22 Cf. KANIA, Agnieszka. Kontrowersje związane z kryminalizacją przerywania ciąży. Część I, *Nowa Kodyfikacja Prawa karnego*, 2011, Vol. XXVII, pp. 98–101.

23 FILAR, Marian. Lekarskie op. cit., p. 192.

24 ZOLL Andrzej. [in:] ZOLL Andrzej. (ed.), *Kodeks karny, Część szczególna. Komentarz*, Warszawa 1999, p. 3002.

25 Cf. Ordinance of the Minister of Health and Social Welfare of 22.01.1997 on the professional qualifications of doctors granting them authority to terminate a pregnancy and state that pregnancy threatens the life or health of a woman or points to a high likelihood of severe and irreversible impairment of the fetus or an incurable disease threatening its life, Journal Of Laws No. 9, pos. 48.

26 Teratology – is the study of inherited or pathological abnormalities in humans, animals and plants. Dictionary of the Polish Language, http://sjp.pl/teratologia, viewed 10 October 2016.

27 KUBIAK, Rafał. op. cit., p. 489.

In the opinion of M. Królikowski, that prerequisite protects "two potential situations: 1) a situation where due to a serious illness or impairment, the child's life is considered too expensive for its close relatives and leading to an excessive personal burden, or 2) a situation

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Given that the eugenic prerequisite was constructed alternatively (separately), the first part – severe and irreversible impairment of the fetus – does not have to be linked to the threat to fetal life.[28] As reported in the literature, the terms used by the legislator to determine the eugenic prerequisite are vague – they require that in each case a physician give an assessment of the permissibility of abortion and any each assessment must be made *in concreto*.[29]

Pursuant to the provision of Art. 4a item 2 of Act on Family Planning, the termination of pregnancy is allowed until the fetus has achieved the capability to live independently outside the pregnant woman's body. It is an individual and evaluative issue, also dependent on the incubation techniques. It is assumed that the fetus achieves that capability after 6 months of pregnancy. Based on the criteria adopted by the WHO, the fetus achieves the capability to live outside the mother's body in the 21st week of pregnancy, having reached the body weight of 500 grams.[30] It appears that the specification "independently" used by the legislator as a criterion for fetal maturity is entirely unnecessary. It is not so much the capability of living independently (a healthy newborn, or even a sick child does not have it), but rather of living outside the mother's body with the support of various techniques resulting from the development of medicine.

The occurrence of circumstances justifying abortion for eugenic reasons must be confirmed by a physician other than that who is to perform an abortion (Art. 4a item 5 of Act on Family Planning). Further issues regarding the requirements for physicians are regulated by the aforementioned Ordinance of the Minister of Health and Social Welfare of 22 January 1997.

The last prerequisite – called legal, or criminal – is a reasonable suspicion that the pregnancy is the result of a criminal act. In contrast to the regulations set out in the Criminal Code of 1932 (Art. 233), the provision under discussion does not contain a list of prohibited acts that may constitute grounds for a legal abortion. There is no doubt that those crimes mainly include crimes against sexual freedom and decency (rape, incest). In the opinion of R. Kubiak, they can even include a forced *in vitro* fertilization (Art. 192 of the Criminal Code).[31] As emphasized in the literature, the modern legislator used the term "prohibited act," which means that guilt need not be ascribed to the perpetrator of the act. Consequently, a criminal act committed by a juvenile or insane person resulting in pregnancy may represent a prerequisite for abortion. Pursuant to the provision of Art. 4 item 5 of the Act on Family Planning, the prosecutor shall assess

where due to a fetal defect the right or interest to life is explicitly denied using the false humanistic justification of the need to eliminate the child's suffering," – KRÓLIKOWSKI, Michał. [in:] KRÓLIKOWSKI, Michał. ZAWŁOCKI, Robert. *Kodeks karny. Część szczególna. Tom I*, Warszawa 2013, p. 244.

28 The Supreme Court in a judgment of 6 May 2010, II CSK 580/09, Legalis

29 KUBIAK, Rafał. op. cit., p. 489.

30 KANIA, Agnieszka. op. cit., p. 102.

31 KUBIAK, Rafał. op. cit., p. 493.

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the occurrence of circumstances in the form of a reasonable suspicion that the pregnancy was the result of a criminal act.[32] Pursuant to the aforementioned provision, abortion is permissible until the 12th week of pregnancy. It may be performed by an authorized doctor, not necessarily in hospital; it may be a private surgery, provided that it meets the relevant technical requirements.[33]

A separate issue is the consent of the pregnant woman to abortion. The provision of Art. 4a item 4 establishes that "a written consent of a woman is required to terminate a pregnancy. In the case of a minor or totally incapacitated woman, the written consent of her legal representative is required. In the case of a minor above 13 years of age, her written consent is also required. In the case of a minor under 13 years of age, the consent of the guardianship court is required, and the minor has the right to express her own opinion. In the case of a fully incapacitated woman, her written consent is also required, as long as her mental state allows her to give such consent. In the absence of consent from the legal representative, the consent of the guardianship court is required to terminate the pregnancy." In this context, two issues are worth noting. The first is the relatively low age of granting relative autonomy to a pregnant woman – 13 years (unlike the Doctors and Dentists Act – 16 years of age).[34] Moreover, attention should be paid to the separate mode of acquiring the status of an adult after reaching 16 years of age. Pursuant to the provision of Art. 10 § 1 of the Civil Code, an adult is any individual who has attained eighteen years of age, although a minor becomes an adult upon entering into marriage (§ 2). Meanwhile, pursuant to Art. 10 § 1 of the Family and Guardianship Code, for important reasons the guardianship court may permit a woman who has reached the age of 16 to enter into marriage, where the circumstances show that the marriage will be in the best interest of the newly established family.

The criminal law provisions relating to the termination of pregnancy essentially fall into two groups: termination of pregnancy with the consent of a pregnant woman – Art. 152 and Art. 154 of the Criminal Code, and termination of pregnancy (or inducing a pregnant woman to terminate the pregnancy) without the consent of a pregnant woman – Art. 153 and Art. 154 § 2 of the Criminal Code. Moreover, the provision of Art. 83 of the Act of 25 June 2015 on the Treatment of Infertility[35] provides for criminal liability for the destruction of an

32 Contrary to the claims of R.Kubiak (cf. KUBIAK, Rafał. op. cit., p. 493, footnote 41), a change in the mode of prosecuting the crime of rape is not relevant for assessing the legitimacy of such a form of establishing a criminal prerequisite.

33 Art. 4a item 8 of the Act on Family Planning – separate provisions are applicable to private doctor's surgeries where pregnancy is terminated regarding the requirements which should be met in terms of professional and sanitary conditions of the premises and equipment, as well as the scope of medical documentation and management control over those surgeries.

34 Art. 31 and 32, Journal of Laws of 2015, pos. 464.

35 Journal of Laws of 2015, pos. 1087

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embryo capable of proper development created in the course of a procedure of medically assisted procreation.

The type of prohibited act of the termination of pregnancy takes the following form (Art. 152 of the Criminal Code):

> *§ 1. Whoever, with the consent of a pregnant woman, terminates her pregnancy in violation of the statutory provisions, shall be subject to a penalty of deprivation of liberty for a term not exceeding 3 years.*
>
> *§ 2. Whoever provides assistance to a pregnant woman to terminate her pregnancy in violation of the statutory provisions, or incites her to do so, shall be subject to the same penalty.*
>
> *§ 3. Whoever commits an act referred to in § 1 or 2 after the conceived child has achieved the capability to live independently outside the body of the pregnant woman shall be subject to a penalty of deprivation of liberty for between 6 months and 8 years.*

The type qualified due to the consequence is defined in Art. 154 of the Criminal Code:

> *§ 1. If the consequence of an act referred to in Art. 152 § 1 or 2 is the death of the pregnant woman, the perpetrator shall be subject to a penalty of deprivation of liberty for between 1 year and 10 years.*
>
> *§ 2. If the consequence of an act referred to in Art. 152 § 3 or Art. 153 is the death of the pregnant woman, the perpetrator shall be subject to a penalty of deprivation of liberty for a term between 2 years and 12 years.*

The termination of pregnancy with the consent of a pregnant woman is a blanket provision (requiring reference to the above-mentioned Act on Family Planning, the Human Fetus Protection and Conditions of Permissibility of Termination of Pregnancy), which is negatively evaluated by A. M. Kania due to its legal uncertainty and difficult recognition of the scope of criminalization.[36]

The subject-matter of protection of the provision under consideration is clearly the *conceptus*, in other words – life in the prenatal *in utero* phase. The literature review shows that such individual subject-matter of protection is referred to as the life of a conceived child,[37] life of a child in the prenatal

36 KANIA, Agnieszka. op. cit., pp. 103–104.

37 WIAK, Krzysztof. [in:] GRZEŚKOWIAK, Alicja. WIAK, Krzysztof. (ed.), *Kodeks karny. Komentarz*, Warsaw 2015, p. 868.
In the earlier legal situation: MAJEWSKI, Jarosław. WRÓBEL, Włodzimierz. (Prawnokarna ochrona dziecka poczętego, *Państwo i Prawo,* 1993, no. 5, pp. 35–37), who correctly attributed the axiological connotation to the fact that the legislator used the term "conceived child" in the provisions of Art. 149a and Art. 149b of the Criminal Code of 1969 – the personal nature of the object of the performed act, and thus, the assumption that "the aim is to protect human life without qualitative differentiation." The authors recall that the

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phase,[38] or pregnancy.[39] The last concept is all the more justified as it directly corresponds to the statutory provision, while limiting the scope of criminalized behavior to the fetus developing in the female body. At the same time, there is an issue of how to define pregnancy itself and, above all, determine its initial moment. It is most commonly assumed that pregnancy is a woman's condition from fertilization to delivery.[40] The beginning of pregnancy is determined slightly differently in medical sciences – implantation of a fertilized egg (blastocyst) in the uterine endometrium (nidation)[41] or outside the uterus (most often within the fallopian tube – the so-called ectopic pregnancy). The acceptance of one of the two competing interpretations of the term "pregnancy" is of utmost importance for the criminal assessment of the use and provision of contraceptives that prevent the implantation of a fertilized egg in the uterus (including the intrauterine device). It appears that the statutory differentiation of the prenatal phase made in the provision of Art. 152 into "pregnancy" (§1) and "conceived child" (§3) allows for the application of the indications accepted in medicine to the interpretation of the provision of law.[42]

As regards the subject-matter of protection decoded from the provision of Art. 152 of the Criminal Code, it appears necessary to cite a view that the life of a conceived child is the major whilst the health and life of a pregnant woman minor subject-matter of protection,[43] which nonetheless seems to contradict the interpretation of the wording of the provision ("with the consent of the woman")

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classification of the Code leads to the conclusion that those provisions concern another privileged type of murder. In a subsequent period – MAJEWSKI, Jarosław. Karalność aborcji w Polsce w świetle ostatnich zmian legislacyjnych, *Państwo i Prawo*, 1997, no. 5, p. 66.

38 GIEZEK, Jacek. op. cit., p. 198.

39 Cf. e.g. SZWARCZYK, Maciej. [in:] BOJARSKI, Tadeusz. (ed.), *Kodeks karny. Komentarz*, Warsaw 2009, p. 294.

40 Cf. e.g. GIEZEK, Jacek. op. cit., p. 199.
M.Królikowski advanced a somewhat isolated definition stating that pregnancy is a biological and personal relation between the woman and the conceived child occurring in her organism, established at the moment of fertilization and lasting until delivery – KRÓLIKOWSKI, Michał. op. cit., p. 243.

41 PLEBANEK, Ewa. Przestępstwa aborcyjne – praktyczna interpretacja znamion czynności wykonawczej, *Prawo i Medycyna* 2011, vol. 47, no. 2, p. 35.

42 Also M. Safjan points to nidation as the start of pregnancy citing the change occurring in the woman's organism since that moment, which allows for the diagnosis of pregnancy to be made – SAFJAN, Marek. *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warsaw 1990, p. 317. Yet it seems that the argument of functionality should be of secondary nature in view of the indications of medical sciences, also KONARSKA-WRZOSEK, Violetta. [in:] KONARSKA-WRZOSEK, Violetta. (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 745.
Similarly, R.Kubiak is of the opinion that the Act on Family Planning and Art. 152 do not apply to emergency contraception because there can be no pregnancy before nidation (implantation) – KUBIAK, Rafał. op. cit., pp. 496–497.

43 KUBIAK, Rafał. op. cit., p. 498. See also POTULSKI, Jacek. [in:] WARYLEWSKI, Jarosław. (ed.), op. cit., pp. 177–180 and BUDYN-KULIK, Magdalena. op. cit., p. 420.

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and would have to be construed as another manifestation of the paternalistic approach to the human being.

The following paragraphs of Art. 152 of the Criminal Code, i.e. 1 and 3, also allow for the conclusion that if the subject-matter of protection is human life in the prenatal phase, then the Act differentiates the value of life depending on the duration of pregnancy.[44] The fetus can therefore be said to enjoy differentiated protection depending on its development and acquired (growing) survival capacity.

The legislator described the performed act in an extremely vague manner. The phrase "terminates a pregnancy" does not describe any specific behavior, but merely indicates a relationship between an unspecified causative act and a marked effect, which J. Majewski defines, though somewhat wrongly, as the blanket nature of the constituent element of the performed act.[45] E. Purbanek made a practical interpretation of the constituent elements of the objective side of the offense drawing attention to numerous detailed problems related to the development of medicine, in particular in relation to the so-called pharmacological abortion.[46]

The determination of the scope of criminalization as regards the objective side of the offense also requires specifying the end of pregnancy. In the simplest definitions, pregnancy ends with the birth of a child. In the light of the provision under analysis, it is therefore a distinction between the concept of 'fetus' (as 'conceived child') and the concept of 'human' (as 'born child').[47] Against this background, four basic theories have emerged in the history of Polish criminal law science, based on various criteria:

- developmental criterion – the moment when the fetus achieves the capability of living outside the mother's body;
- obstetric criterion – the boundary is marked by the beginning of labor (i.e. the occurrence of the first labor pains, or alternatively, the second stage of labor called expulsion);
- physical (spatial) criterion – the boundary is set at the moment of the spatial separation of the newborn from the mother's body, completely or partially, which typically occurs when the umbilical cord is cut;

44 Cf. MAJEWSKI, Jarosław. Karalność aborcji w Polsce op. cit., p. 67

45 MAJEWSKI, Jarosław. Karalność aborcji w Polsce op. cit., p. 69; similarly "induces a pregnant woman to terminate the pregnancy," but there are some modal restrictions in that case.

46 PLEBANEK, Ewa. op. cit., pp. 33–55.

47 As early as 1988, it was assumed in the doctrine that "artificial induction of miscarriage, during the period in which the fetus is already capable of living outside the womb can be qualified as a murder of a human, when the objective of the perpetrator's actions is that such a premature child, due to its premature birth and the ensuing necessity of special protection of its life, could not survive" – KULESZA, Witold. *Odpowiedzialność karna lekarza*, Warsaw 1988, pp. 43–44.

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- physiological criterion – the boundary is set at the moment when the newborn starts to breathe independently through its own lungs.[48]

It appears that one of the recent resolutions of the Supreme Court relating to this issue represents a significant breakthrough. Pursuant to the resolution of 2006, the subject-matter of protection envisaged in Art. 160 of the Criminal Code (concerning a born person) is the life and health of a human from the beginning of labor (uterine contractions giving rise to delivery), whereas in the case of cesarean section performed to complete pregnancy, from the moment of taking (preparatory) actions aimed at conducting that medical procedure.[49] That line of case-law of the Supreme Court was confirmed and even reinforced by its decision of 2008 whereby the full criminal law protection of health and life is granted to a child (as a born person) from:

a) the start of (natural) labor – occurrence of labor pains;
b) in the case of cesarean section performed to complete pregnancy upon request from the woman – from the moment when the first medical action directly aimed at conducting that medical procedure is undertaken;
c). in the event of medical necessity to perform a cesarean section or other alternative form of completion of pregnancy – from the occurrence of medical reasons for such necessity. The Supreme Court was well aware of the imbalance in the area of criminal law protection of the life of an unborn child during a normal pregnancy ending in natural childbirth and in the event where the pregnancy is completed by cesarean delivery, but as stated in its ruling, that imbalance can only be rectified by the legislator.[50]

48 For detailed views of Polish criminal law specialists on the issue cf.: SITARZ, Olga. *Ochrona praw dziecka w polskim prawie karnym na tle postanowień Konwencji o prawach dziecka*, Katowice, 2004, pp. 50–51, also: MAJEWSKI, Jarosław. Karalność aborcji w Polsce, op. cit., pp. 70–71.

49 Resolution of the Supreme Court of 26 October 2006, I KZP 18/06, OSNKW 2006, no. 11, pos. 97.
Cf. also: SROKA, Tomasz. Granica stosowania czynów zabronionych zawierających znamię „człowiek". Uwagi na marginesie uchwały Sądu Najwyższego z 26 października 2006, *Palestra,* 2008, no. 11–12, and PAPRZYCKI, Lech. Granice prawnokarnej ochrony życia i zdrowia człowieka na tle uchwały Sądu Najwyższego z 26 października 2006 r. (I KZP 18/06), *Prawo i Medycyna,* 2007, vol. 28, no. 3.

50 Decision of the Supreme Court of 30 October 2008, I KZP 13/08, OSNKW 11/2008, pos. 90. In connection with the latest thesis of the Supreme Court, see the imbalance in the protection of health (and life) of a healthy and sick fetus (with cesarean section required) and the postulate formulated by T. Sroka with respect to it. In his opinion, "it seems necessary for the legislator to intervene to broaden the scope of criminal law protection of human life against unintentional attacks on the above legal interest in every situation where a conceived child has achieved the capability to live independently outside the mother's body." – SROKA, Tomasz. *Odpowiedzialność karna za niewłaściwe leczenie. Problematyka obiektywnego przypisania skutku*. Warsaw 2013, p. 82.

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At the same time, it is clear that the subject-matter of protection under Art. 152 of the Criminal Code is the life of the child in the prenatal phase from conception, and the termination of pregnancy is the killing of the child. The above leads to the conclusion that the termination of pregnancy with a dead fetus by way of the curettage of the uterine cavity does not satisfy the constituent elements of the offense arising from the provision of Art. 152 of the Criminal Code,[51] insofar as the perpetrator is aware of that fact.

The offense of termination of pregnancy referred to in Art. 152 § 1 of the Criminal Code is a consequence crime whereby the termination of pregnancy – the death of the fetus (conceived child) – must be deemed to be its consequence.

That offense may be committed by action or omission to act. The latter form may be illustrated by a refusal to take appropriate therapeutic measures to prevent miscarriage, but pursuant to Art. 2 of the Criminal Code, that offense may be committed only by the guarantor of effect non-occurrence.[52]

Abortion is a prohibited act if it is committed "in violation of the statutory provisions." This term applies to the aforementioned Act of 1993 on Family Planning, the Human Fetus Protection and Conditions of Permissibility of Termination of Pregnancy. The legal nature of the circumstances authorizing the termination of pregnancy is discussed above. It seems necessary to raise the issue whether it is a violation of material provisions (i.e. the prerequisites for a legal termination of pregnancy – Art. 4 (1) of the Family Planning Act), or whether it is sufficient – for the existence of a criminal act – to fail to comply only with the formal requirements. The thesis supporting the latter solution is presented in the literature, with the proviso that the type of provision may affect the social harmfulness of the act, and therefore the level of penalty.[53]

The constituent elements determining the causative act indicated in the provision of Art. 152 § 2 of the Criminal Code encompass providing assistance to a pregnant woman to terminate her pregnancy in violation of the statutory provisions or inciting her to do so. The legislator established that assistance and instigation to terminate pregnancy are so-called *sui generis* crimes, in other words, assistance and instigation were accorded the status of direct perpetration. The reason for that legislative procedure lies in the impunity of the woman undergoing abortion, which would in turn make it impossible to prosecute the acces-

51 Judgment of the Court of Appeals in Katowice of 16 October 2008, II AKa 255/08, KZS, 2009, no. 1, pos. 88.

52 The question posed in the literature is whether the father of a conceived child may be held liable for the termination of pregnancy by omission to act – MAJEWSKI, Jarosław. WRÓBEL, Włodzimierz. op. cit., p. 37. Nonetheless, it seems rather difficult to indicate the source of that obligation.

53 KUBIAK, Rafał. op. cit., p. 498.
M.Królikowski goes as far as claiming that the consent given by the pregnant woman must be recorded in writing – KRÓLIKOWSKI, Michał. op. cit., p. 246.

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sory and instigator based on applicable law.[54] However, there is no doubt in the literature that the causative act described in the provision of Art. 152 § 2 of the Criminal Code fully corresponds to assistance within the meaning of Art. 18 § 3 of the Criminal Code or incitement within the meaning of Art. 18 § 2 of the Criminal Code, although it is limited to one type of prohibited act.[55] In the opinion of the Court of Appeals in Katowice, assistance in terminating a pregnancy may be provided in various ways, e.g. by providing tools for that purpose, but also advice or information. Assistance in the form of passing a telephone number satisfies the constituent elements of the attributed crime set out in Art. 152 § 2 of the Criminal Code. The assistance rendered in that particular case proved to be significant, as it facilitated the implementation of further actions aimed directly at the termination of pregnancy, which ultimately occurred.[56] For the recognition of typification under Art. 152 § 2 of the Criminal Code, it is necessary to prove that the perpetrator's behavior is targeted at a specific pregnant woman.[57]

The provision of Art. 152 § 3 envisages a qualified type – the perpetrators of the described acts (i.e. termination of pregnancy, assistance and instigation) are subject to more severe criminal liability in the case where the conceived child has achieved the capability to live independently outside the mother's body. In the opinion of B. Michalski, the indicated qualifying prerequisite implies such a stage of development of a conceived child that the organs performing basic life functions, in particular breathing, are fully formed.[58] A. Zoll adds that the issue concerns the chance of survival of the child using appropriate devices (e.g. an incubator after removing it from the mother's body.)[59] Under this approach, it seems that the limitation of the qualified type by specifying the capacity to live

54 Cf. judgment of the Supreme Court of 20 November 2014, IV KK 257/14, LEX No. 1941900 – the offense under Art. 152 § 2 of the Criminal Code (similar to Art. 151 of the Criminal Code) is a type of *sui generis* crime involving incitement (a synonym for instigation under Art. 18 § 2 of the Criminal Code) or assistance (a form of aiding under Art. 18 § 3 of the Criminal Code). As regards instigation and aiding to perform an act which on the part of the perpetrator is not a prohibited act, the General Part of the Criminal Code regarding forms of criminal complicity does not apply to instigation and aiding under Art. 152 § 2 of the Criminal Code, as such does not occur in that case. Therefore, the correspondence of the description of the offense specified in Art. 152 § 2 of the Criminal Code to a description of instigation under Art. 18 § 2 or aiding under Art. 18 § 3 refers only to the characteristics of the constituent elements of perpetration.

55 Cf. e.g.: ZOLL, Andrzej. [in:] ZOLL, Andrzej. (ed.), Kodeks karny, op. cit., p. 334.

56 Judgment of the Court of Appeals in Katowice of 30 September 2008, II AKa 231/08, Biul. SAKa 2008/4/5.
Other forms of assistance – giving pharmaceuticals, abortion tourism and website design – cf. PLEBANEK, Ewa. op. cit., p. 40 et seq.

57 Cf. POTULSKI, Jacek. op. cit., p. 193.

58 MICHALSKI, Bogusław. [in:] WĄSEK Andrzej. (ed.), *Kodeks karny. Część szczególna. Tom I. Komentarz*, Warsaw 2004, p. 271. The interpretation of that constituent element is given above – with the analysis of the prerequisites of the legality of termination of pregnancy.

59 ZOLL, Andrzej. [in:] ZOLL, Andrzej. (ed.), Kodeks karny., op. cit., p. 336.

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outside the mother's body by means of adding the wording "independently" is totally unnecessary. Moreover, the interpretation of that article must lead to *contra legem* conclusions or a breach of the prohibition of *per non est* interpretation.

It is quite apparent from the commentaries determining the subjective side that "the misdemeanors specified in Art. 152 § 1–3 are intentional offenses, and the perpetrator's guilt may take the form of both direct and conditional intent."[60] As stated by A. Zoll, the limitation of intentionality only to the direct intent seems to adequately determine the subjective side of the offense of basic type specified in Art. 152 § 1.[61] However, it appears rather difficult to find statutory grounds for such limitation of the subjective side of the misdemeanor of abortion with the consent of the pregnant woman. Similarly in conceptual terms, the termination of pregnancy with the consent of the pregnant woman, when the perpetrator foreseeing the possibility of such an act agrees to it, is clearly permissible.

Another assessment of the subjective side of the offense should be made in relation to the behavior specified in the provision of Art. 152 § 2 of the Criminal Code. Referring to the subjective side of assistance and instigation (Art. 18 § 3 and 2 of the Criminal Code), it should be noted that providing assistance to a pregnant woman in the termination of her pregnancy in violation of the statutory provisions must be subject to intentionality in both forms of intent, whereas inciting a woman to do so is subject only to direct intent. In the latter case, consideration should be given to the existence of so-called quasi-conditional intent, where the perpetrator foresees and accepts the fact that the pregnancy which he incites the woman to abort is at such an advanced stage that the child has achieved the capability to live independently outside the mother's body.

The offense of termination of pregnancy, in its all forms, is of a general nature and may be committed by anyone (even by a doctor who terminates a pregnancy in violation of the statutory provisions). The content of the provision of Art. 152 § 2 of the Criminal Code allows for the formulation of a thesis (since the Act itself does not do it directly) that a pregnant woman engaging in the behavior specified in the regulation does not in fact commit a crime.[62] However, the literature review shows some discrepancies regarding the legal nature of the lack of liability of a pregnant woman who terminated the pregnancy in violation of the provisions of the Act on Family Planning. Besides the view on the absence of

60 MICHALSKI, Bogusław. op. cit., p. 270. Cf. MAJEWSKI, Jarosław. WRÓBEL, Włodzimierz. op. cit., p. 38, GÓRNIOK, Oktawia. [in:] GÓRNIOK, Oktawia. HOC, Stanisław. PRZYJEMSKI, Stanisław. *Kodeks karny. Komentarz*, Gdańsk 1999, p. 96, GIEZEK Jacek. op. cit., p. 201.

61 ZOLL, Andrzej. [in:] ZOLL, Andrzej. (ed.), Kodeks karny., op. cit., pp. 259–260; see also: DUKIET-NAGÓRSKA, Teresa. [in:] DUKIET-NAGÓRSKA, Teresa. (ed.), *Prawo karne. Część ogólna, szczególna i wojskowa*, Warsaw 2014, p. 324.

62 Cf. BOJKE, Jakub. WANTOŁA, Michał. Wyłączenie odpowiedzialności karnej kobiety ciężarnej za aborcję. Wybrane zagadnienia, *Czasopismo Prawa Karnego i Nauk Penalnych* 2015, no. 3, p. 90 et seq.

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criminality of the act,[63] a largely isolated idea on the absence of punishability of such an act also emerged.[64]

At the same time, as indicated by the Supreme Court, a woman with the consent of whom a pregnancy was terminated in violation of the provisions of the Act of 7 January 1993 on Family Planning, the Human Fetus Protection and Conditions of Permissibility of Termination of Pregnancy is not a victim of the types of offenses described in Art. 152 § 1–3 of the Criminal Code within the meaning of Art. 49 § 1 of the Code of Criminal Procedure, provided that the acts described in these provisions do not simultaneously satisfy the constituent elements specified in another provision of the Criminal Code by means of which her legal interest was directly violated or jeopardized. Neither does she acquire the right to act in the case in the capacity of a subsidiary accuser as a substitute party (Art. 52 § 1 of the CCP).[65]

The so-called subjective right of a pregnant woman to have an abortion appears to be a separate, fairly broad and controversial issue.[66] It seems necessary to point out that in its judgment of 6 May 2010,[67] the Supreme Court ruled that the right to undergo abortion is a mother's personal interest and that its violation results in a claim for damages.

The last type of the misdemeanor of abortion with the consent of the pregnant woman concerns the types qualified by the consequences specified in Art. 154 of the Criminal Code. They provide for stricter liability in the case where the termination of pregnancy, assistance or incitement to terminate a pregnancy result in the death of a pregnant woman (§ 1) and where that consequence occurred in the event of termination of pregnancy and the conceived child was

63 See – MAREK, Andrzej. *Kodeks karny. Komentarz*, Toruń 2007, p. 322, ZOLL, Andrzej. [in:] ZOLL, Andrzej. (ed.), Kodeks karny, op. cit., p. 302.
M. Królikowski uses the concept of "mother as an intermediary for the performance of an act," which means that she does not implement the constituent elements of a prohibited type herself, also in the case of modification of that type by the adoption of the appropriate form of perpetration – KRÓLIKOWSKI, Michał. op. cit., p. 243.

64 KANIA, Agnieszka. op. cit., pp. 104–105 and the cited overview of the positions.

65 Decision of the Supreme Court of 26 March 2009, I KZP 2/09, OSNKW 2009, no. 5, pos. 37

66 Cf. OLSZÓWKA, Marcin. Dopuszczalność przerywania ciąży – kontratyp przekształcony w prawo podmiotowe?, *Przegląd Prawniczy Uniwersytetu Warszawskiego*, 2009, no. 1–2, pp. 222–233 and the literature cited there, according to which the subjective right to abortion is difficult to reconcile with the acceptance of the constitutional value of life of the unborn child and the interpretative directive *in dubio pro vita humana*. And also: KRÓLIKOWSKI, Michał. op. cit., p. 236, who does not approve of interpretations that treat the prerequisites lifting the application of a criminal prohibition in Art. 4a of the Act on Family Planning as a basis for the reconstruction of the mother's subjective rights to claim a termination of pregnancy and of deriving from it positive obligations of the state to introduce procedures enabling the effective exercise of that right.

67 Case No. II CSK 580/09, similarly judgement of 21 November 2003, V CK 16/03, MoP, 2004, no. 10, p. 468.

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capable of living independently outside the mother's body (§ 2). Pursuant to the provision of Art. 9 § 3 of the Criminal Code, the perpetrator shall be subject to stricter liability if he foresaw or could have foreseen the consequence in the form of the death of a pregnant woman. At the same time, the fact that the perpetrator's intention (intentionality) covers the woman's death will give rise to liability not under Art. 154 § 1 or 2, but under Art. 148 § 1 – murder. It should also be noted that the consequence – as a special variation of effect in criminal law – must be causally linked to the perpetrator's behavior, with the whole issue of cause and effect relationship being updated in that regard. In the light of the prevailing theory of objective attribution of effect, this means that in addition to establishing the causal link, it should also be determined that the perpetrator violated a specific rule of conduct intended to protect the woman's life during the abortion procedure.[68]

Liability for the stages of the misdemeanor of abortion should be determined based on applicable law. The Act does not provide for the punishability of preparatory activities (cf. *a contratrio* Art. 16 § 2 of the Criminal Code). Such behavior may be punishable in the case where it satisfies the constituent elements of another type of prohibited act (for instance, an unauthorized person who diagnoses a pregnant woman for the subsequent performance of the "procedure" may consequently be held liable under the provision of Art. 58 of the Doctors and Dentists Act). In the event of criminal termination of pregnancy, the norm forbidding attempts at such acts is fully updated (Art. 13 of the Criminal Code). This could include attempt (the perpetrator did not manage to complete the procedure due to the intervention of third parties) and impossible attempt (the perpetrator undertook actions to perform an abortion not realizing that it was a stillbirth). It cannot therefore be ruled out that the perpetrator may show active repentance resulting in impunity (Art. 15 § 1 of the Criminal Code), although liability may arise under Art. 157a of the Criminal Code in the case where the performed abortion causes damage to the body of a conceived child (so-called qualified attempt).

There is no doubt in the literature that the penal provisions discussed above do not apply to embryos formed by extracorporeal fertilization.[69] In that case, the Act of 25 June 2015 on the Treatment of Infertility shall apply.[70] Pursuant to Art. 83*, whoever destroys an embryo capable of proper development formed as a result of a procedure of medically assisted procreation, shall be subject to a penalty of deprivation of liberty for between 6 months and 5 years.*

68 Cf. ZOLL, Andrzej. [in:] ZOLL, Andrzej. (ed.), Kodeks karny, op. cit., pp. 259–267–268.

69 See: KUBIAK, Rafał. op. cit., p. 496. It seems that the place of formation of the embryo is not so important as the place of the *conceptus* at the moment of its destruction (e.g. in the case of extracorporeal fertilization, but after its insertion into the woman's organism, it is a termination of pregnancy).

70 Act of 25 June 2015 on the Treatment of Infertility, Journal of Laws of 2015, pos. 1087.

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The subject-matter of protection is the human embryo, which is confirmed by the contents of Art. 4 of the Act, pursuant to which infertility treatment is carried out with respect for human dignity, the right to private and family life, with particular regard to the legal protection of the child's life, health, interest and rights.

As indicated by J. Haberko, the ban on the destruction of the embryo is subject to two restrictions, i.e. it applies only to an embryo capable of normal development and an embryo formed in a medically assisted procreation procedure.[71] This means that criminalization does not cover the destruction of embryos incapable of normal development, as well as those formed outside the procedure of medically assisted procreation.[72]

The provision of Art. 23 of the Act sets out the rules for handling embryos that have not been transferred to the recipient organism. As prescribed by its contents, embryos formed from germ cells collected for donation capable of proper development which were not used in the procedure of medically assisted procreation are to be stored under conditions ensuring their proper protection until they are transferred to the recipient organism.[73] Further, the Act stipulates that the destruction of embryos capable of proper development formed as a result of the procedure of medically assisted procreation which are not transferred to the recipient organism is impermissible.[74]

The legislator gives no indication of the manner of the perpetrator's behavior, specifying in fact only its effect. It is a consequence crime[75] which results in the destruction of the embryo. It may be committed by action or omission to act, provided that the perpetrator fails to fulfil his obligation to prevent the effect – destruction of the embryo.

The offense under analysis is an intentional misdemeanor,[76] as it may be committed with direct and conditional intent. It is an offense of a general nature, regardless of the fact that it includes an embryo formed in a medically assisted

71 HABERKO, Joanna. *Komentarz do art. 83 ustawy o leczeniu niepłodności*, Lex.

72 The Act on Family Planning and Art. 152 and 153 of the Criminal Code are not applicable to such cases. Contrary – HABERKO, Joanna. op.cit, Lex.

73 Pursuant to Art. 23 item 2, an embryo capable of proper development is an embryo that meets all of the following conditions: 1) the rate and sequence of cell division, the degree of development in relation to the age of the embryo, morphological structure make its correct development likely; 2) no defect that would result in severe and irreversible impairment or an incurable disease has been detected.

74 Although the legislator does not state it *expressis verbis*, embryos that do not show the capability to develop properly are treated as medical waste, and the manner of dealing with them shall be determined by the provisions of the Act of 14 December 2012 on Waste (Journal of Laws of 2013, pos. 21, as amended) – HABERKO, Joanna. *Komentarz do art. 23 ustawy o leczeniu niepłodności*, Lex.

75 Contrary – HABERKO, Joanna. *Komentarz do art. 83 ustawy o leczeniu niepłodności*, Lex

76 Contrary – HABERKO, Joanna., *Komentarz do art. 83 ustawy o leczeniu niepłodności*, Lex

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procreation procedure involving strictly defined parties. Surely, the involvement of persons outside the circle designated by the Act cannot be entirely excluded.

4 The abortion law in Czech Republic

The legal situation in the Czech Republic is radically different. In short, abortion was first legalized in Czechoslovakia at a relatively early date – in 1957. The termination of pregnancy was strictly prohibited in Czechoslovakia until 1950 when amendments to the Criminal Code were introduced allowing for abortion due to strict medical or eugenic indications. In 1957, the scope of exceptions was extended allowing for the termination of pregnancy "for other important reasons," which were specified only at a later date in the implementing rules as, among others, difficult housing situation, being a single mother, or a difficult financial situation. However, unlike in Western Europe, that did not occur as a result of pressure from civil society and the feminist movement. According to some indications, the legalization of abortion in Czechoslovakia that year was part of wider project inspired by a political decision made in the USSR.[77] Every abortion had to be approved by an appropriate committee. Only abortions due to poverty or health reasons were performed at the expense of the state budget. In 1986, a new law was introduced providing for abortion on demand (Zákon České národní rady o umělém přerušení těhotenství § 4 – „Ženě se uměle přeruší těhotenství, jestliže o to písemně požádá, nepřesahuje-li těhotenství dvanáct týdnů a nebrání-li tomu její zdravotní důvody)."[78] It remains in force to this day. Currently, abortion in the Czech Republic is allowed at the request of a woman in the first three months of pregnancy, subject to consent being granted by the gynecologist who must inform her about the possible effects of the procedure, and when at least six months have passed since the previous abortion. After the first three months of pregnancy, abortion may be performed only for clear medical indications. In June 2003, draft legislation providing for re-criminalization of termination of pregnancy was put to the vote in Parliament by the politicians from the Christian and Democratic Union – Czechoslovak People's Party and the Civil Democratic Party. The draft legislation was rejected by 134 votes to 23.[79] In the opinion of Radka Dudová, the discourse analysis of media and expert articles, parliamentary debates, and other documents shows that abortion in the Czech Republic was framed as a medical issue since the 1950s, not an issue of women's rights or bodily citizenship. Gynecologists were the most important actors in the

77 DUDOVÁ, Radka. The Framing of Abortion in the Czech Republic: How the Continuity of Discourse Prevents Institutional Change, *Sociologický Časopis / Czech Sociological Review*, 2010, Vol. 46, No. 6, pp. 945–975

78 Zákon České národní rady o umělém přerušení těhotenství ze dne 20. října 1986 https://web.archive.org/web/20050428021340/http://web.mvcr.cz/rs_atlantic/ftp/sbirka/1986/sb22-86.pdf

79 Wikipedia, https://en.wikipedia.org/wiki/Abortion_in_the_Czech_Republic
Cf. Aborcja po czesku, Wprost, 11 November 2003, https://www.wprost.pl/zycie/52186/sedzia-w-szponach-hazardu.html

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abortion debates. The effect of this medicalized discourse of abortion was the construction of a specific knowledge on abortion. In spite of existing alternative discourses, that original discourse now hinders the possibility of reframing abortion in terms of women's reproductive rights and this is reflected in the status quo of the abortion legislation. The continuity of dominant discourse therefore reflects and reinforces the path-dependency of the institutions.[80]

5 The scope of law

These two distinctly different manners of criminal law response to the same behavior must necessarily have caused a geographical shift in specific human behavior – from the prohibited zone (Poland) to the zone with no such prohibition (*inter alia* the Czech Republic). The word is that abortion tourism has emerged.[81] This is all the more understandable given that the social and individual moral assessment of abortion does not always and does not fully coincide with its normative assessment. However, this phenomenon raises the question whether an abortion performed by a Czech doctor in Poland may give rise to criminal liability under Polish law, and whether in the case of an abortion performed in the Czech Republic, such liability may be imposed on a doctor, a nurse or any other person who being on the territory of Poland indicated a suitable abortion center in the Czech Republic.

In accordance with the territoriality principle set out in Art. 5 of the Polish Criminal Code, the Polish criminal law shall apply to the perpetrator who has committed a prohibited act on the territory of the Republic of Poland, as well as on a Polish water-borne or airborne vessel, unless an international agreement to which the Republic of Poland is a party provides otherwise. There is therefore no doubt that every foreign national is obliged to comply with Polish law and any termination of pregnancy in Poland in violation of the statutory provisions may result in criminal liability, regardless of the citizenship of the perpetrator and the citizenship of the pregnant woman. The legal situation concerning abortions performed in the Czech Republic is somewhat more complicated under Polish

80 DUDOVÁ, Radka. op.cit., pp. 945–975

81 PODGÓRSKA, Joanna. Tourism of Polish Women – to Slovakia for an abortion, the author of the article in the magazine writes: "According to the estimates of the Federation for Women and Family Planning, even tens of thousands of Polish women perform abortions abroad annually. Abortion is legal in the neighboring countries. In the Czech Republic, technically, foreigners with permanent residence rights or with Czech insurance have the right to undergo abortion, but in practice this principle is not strictly adhered to. In Germany, Polish helplines are launched in particular in clinics located in border areas. Only one clinic in Prenzlau declares that it receives 20–30 phone calls from Poland per day. Companies involved in transport, care and translation are set up. Polish women also go to Sweden, the Netherlands and Austria. In the United Kingdom, according to unofficial data, they account for up to one-third of patients at abortion clinics," *Polityka*, 5 September 2011, https://www.polityka.pl/tygodnikpolityka/spoleczenstwo/1518782,1,turystyka-polek--na-slowacje-po-aborcje.read

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criminal law.[82] It should be noted at the outset that there is no unanimity as to the legal assessment of such an event in both doctrine and jurisprudence. In essence, two different situations are most often cited: 1) a Czech doctor performs an abortion on a Polish citizen in the Czech Republic and, 2) a Polish citizen being on the territory of Poland provides a pregnant woman with contact to a Czech doctor who can perform an abortion in the Czech Republic.

It is hard to disagree with the view of K. Kmąk that criminal prosecution against a person who satisfies the constituent elements of Art. 152 § 2 of the Criminal Code abroad cannot *a priori* be excluded – on the basis of the personality principle (in the case of a Polish citizen: Art. 109 of the Criminal Code)[83] or the principle of substitute liability (in the case of a foreign national: Art. 110 § 2 of the Criminal Code).[84] Notably, it is necessary then to fulfil the requirements of the dual punishability principle – such an act must also constitute an offense abroad (Art. 111 § 1[85] of the Criminal Code).[86] This concept recognizes that in the abovementioned situations, a Polish or Czech physician cannot in essence be held liable under the Polish Criminal Code for an abortion performed in the Czech Republic (regardless of the citizenship of the pregnant woman).

In contrast, the perpetrator who incites a pregnant woman to undergo abortion or assists in carrying it out, committing that act in Poland while the abortion is to be carried out in the Czech Republic, shall be held liable on a slightly different basis. Two strikingly different views are put forward in that respect. One of them holds that the legal basis for criminal liability of accessories or instigators acting in Poland with respect to abortion committed in the Czech Republic will

82 The issue of liability under Czech law should be left on the margin, pursuant to § 10 Zákon České národní rady o umělém přerušení těhotenství („Umělé přerušení těhotenství podle § 4 se neprovede cizinkám, které se v České socialistické republice zdržují pouze přechodně").
Cf. Czechy zapewnią aborcję cudzoziemkom?. Rzeczpospolita, 5 May 2011, http://www.rynekzdrowia.pl/Prawo/Czechy-zapewnia-aborcje-cudzoziemkom,108709,2.html

83 Art. 109 of the Criminal Code – A Polish criminal statute shall apply to a Polish citizen who has committed a crime abroad.

84 Art. 110 of the Criminal Code.
§ 1. A Polish criminal statute shall apply to an alien who has committed abroad a prohibited act against the interests of the Republic of Poland, a Polish citizen, a Polish legal person or Polish organizational entity without legal personality, and also to an alien who has committed a crime of a terrorist nature abroad.
§ 2. A Polish criminal statute shall apply to an alien who has committed abroad a prohibited act other than provided for in § 1 if the prohibited act is subject to a penalty of deprivation of liberty exceeding 2 years in a Polish criminal statute, and the perpetrator is present on the territory of the Republic of Poland and no extradition order has been issued.

85 Art. 111 § 1 of the Criminal Code – Liability for an act committed abroad is applicable only if that act is also recognized as a crime by the statute effective in the place of commission of that act.

86 KMĄK, Krzysztof. Nakłanianie lub udzielanie pomocy do przerwania ciąży z naruszeniem przepisów ustawy, *Prokuratura i Prawo,* 2018, no. 2, p. 76.

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be the above-mentioned Art. 5 of the Criminal Code. The Supreme Court took the same view stating in its judgment of 20 November 2014 that "in the light of Art. 6 § 2 of the Criminal Code, the place of committing a crime under Art. 152 § 2 of the Criminal Code is the place where the perpetrator acts. In the present case, it is clear from the unquestionable factual findings that the accused engaged in the behavior corresponding to all the statutory constituent elements of the offense under Art. 152 § 2 of the Criminal Code in Poland. Given the above, it is immaterial for the existence of perpetration of the offense under Art. 152 § 2 of the Criminal Code that the abortion was to be carried out outside Poland, where that procedure is considered legal."[87]

It should be emphasized that the above judgment of the Supreme Court was given upon hearing a cassation filed against the judgment of the Court of Appeals in Cracow, which presented a different legal assessment of the behavior of the instigator and accessory acting in Poland (concerning an abortion performed in the Czech Republic). The Court of Appeals stated that "the designation << of termination of pregnancy in violation of the statutory provisions >> under Art. 152 § 2 of the Criminal Code can only be such a << termination of pregnancy >> that is governed by the provisions of Polish law. This term does not include abortions that are carried out outside Poland, since Polish law does not regulate the rules of termination of pregnancy abroad, thus the law cannot be violated there. The same applies accordingly to assistance in and incitement to abortion perpetrated in Poland when the procedure itself is or is to be carried out outside Poland. It would be unjust to punish for assistance in or incitement to lawful behavior."[88] It is our belief that the interpretation made by the Court of Appeals in Cracow – within the scope of the phrase "in violation of the statutory provisions" – was carried out correctly. It should be added that the main issue is not so much injustice as the prohibition of *contra legem* interpretation. This means that pursuant to the provision of Art. 152 § 1 and 2 of the Polish Criminal Code, the performance of a legal abortion in another country may not be punished under the Polish Criminal Code. The same applies accordingly to providing assistance to a pregnant woman in terminating her pregnancy in violation of the statutory provisions, or inciting her to do so. To take the contrary view would in effect be tantamount to a violation of the principle of harmonization of law according to which behavior undertaken within the framework of one's powers excludes criminal liability due to the assumption that there is no conflict of law.[89] The rational legislator should surely strive for systemic coherence,[90] for it is unacceptable to apply criminal regulations

87 http://www.sn.pl/sites/orzecznictwo/Orzeczenia3/IV%20KK%20257-14.pdf

88 Judgement of the Court of Appeals in Cracow of 22 April 2014, II AKa 37/14, KZS 5/2014. Cf. also the commentary: POSTULSKI Jacek. [in:] WARYLEWSKI Jarosław. (ed.), op. cit., pp. 199–203.

89 Decision of the Supreme Court of 29 August 2007, I KZP 18/07, OSNKW 2007, no. 9, pos. 64.

90 Cf. WRÓBEL, Włodzimierz. *Czy powrót do racjonalizmu? Projekty nowelizacji Kodeksu karnego w perspektywie zmian dokonanych w prawie karnym w latach 2005–2007*, [in:] *Populizm penalny i jego przejawy w Polsce*, (eds.) SIENKIEWICZ, Zofia. KOKOT, Reinhard. Wrocław 2009, p. 104.

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to behavior permitted by other legal regulations.[91] Consequently, it would not be rational to impose a penalty on a Polish doctor for informing a patient in Poland about the possibility of a legal termination of pregnancy in the Czech Republic in the situation where the performance of abortion by the same doctor on that woman in the Czech Republic would not give rise to criminal liability there.

6 Conclusions

Finally, it should be mentioned that the amendments to the Polish criminal law aimed at strengthening abortion law being currently drafted can only exacerbate the "international" issues. By way of illustration, the latest draft put forward by the Citizens' Legislative Initiative "Stop Abortion" is by far the most radical proposal of punishability of abortion in Polish public space. The adequate provisions would then have the following wording:

> *"Art. 152. § 1. Whoever causes the death of a conceived child shall be subject to a penalty of deprivation of liberty for between 3 months to 5 years.*
>
> *§ 2. If the perpetrator of the act specified in § 1 acts unintentionally, he shall be subject to a penalty of deprivation of liberty for up to 3 years.*
>
> *§ 3. Whoever provides assistance in committing the act specified in § 1 or incites to its commission shall be liable within the statutory limits prescribed for the perpetration of that act.*
>
> *§ 4. A doctor does not commit the offense specified in § 1 and § 2 if the death of a conceived child is a consequence of therapeutic measures necessary to avert the immediate danger to the life of the mother of the conceived child.*
>
> *§ 5. If the mother of the conceived child is the perpetrator of the act specified in § 1, the court may apply an extraordinary mitigation of the penalty to her or even waive its imposition.*
>
> *§ 6. A mother who commits the act specified in § 2 shall not be subject to a penalty."*[92]

In short, account should be given to a new principle of holding a pregnant woman (mother of a conceived child) liable for intentional abortion in relation to whom the court may apply only an extraordinary mitigation of penalty or waive its imposition (following attribution of the crime to her), as well as the punishability of causing the death of a conceived child unintentionally. According to the proposed draft, the two legalizing prerequisites existing today – the child's disease and a prohibited act as a cause of pregnancy – shall no longer be in force, whereas the medical indications shall be limited only to the situation of

91 See: ŻÓŁTEK, Sławomir. *Prawo karne gospodarcze w aspekcie zasady subsydiarności*, Warsaw 2009, p. 168.

92 https://www.stopaborcji.pl/wp-content/uploads/2016/03/projekt_2016.pdf, viewed 30 December 2019.

taking therapeutic actions necessary to avert immediate danger to the life of the mother of the conceived child. It remains to be seen whether and to what extent that draft becomes applicable law. Notably, strong support is currently being sought for the repeal of the eugenic premise legalizing abortion, i.e. the right to terminate pregnancy when prenatal examinations or other medical indications point to a high probability of severe and irreversible impairment of the fetus or an incurable disease threatening its life. If such legislative amendments will be pass into law, resolving criminal cases will be highly controversial, especially in view of the recent changes in the Polish justice system[93]. As a consequence, this may lead to an increase in abortion tourism, including to the Czech Republic.

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