



Warsaw, November 10th 2021

**Memorandum on the judgment of the Polish Constitutional Tribunal on eugenic abortion
and motion for a resolution “on the first anniversary of the de facto abortion ban in Poland”
(2021/2925(RSP))**

On the 11th November 2021 the European Parliament will vote on two draft resolutions “on the first anniversary of the de facto abortion ban in Poland” (2021/2925 (RSP))¹. One of these projects condemns Poland and uses numerous false information, while the other one essentially refers to the legal situation in Poland and international obligations.

For this reason, the Ordo Iuris Institute would like to emphasize some of the most important issues related to the judgment of the Polish Constitutional Tribunal, which on October 22, 2020 ruled that eugenic abortion is inconsistent with the Polish Constitution and present a number of general remarks on the ground of abortion law and protecting of life on Polish and international law level.

Legal context of abortion

1. Abortion is not a human right and the issue of access to abortion is the exclusive competence of individual states. **The European Union has no competence to intervene in the health policies of the Member States.** According to Art. 6 and art. 168 of the Treaty on the Functioning of the European Union, the issue of sexual and reproductive health falls within the scope of health policy of states, for which the EU has only supporting competences and cannot seek to harmonize this law in the Member States. It is debatable whether the EU is competent even to speak out or formulate positions on these issues. It should be recalled and strongly emphasized that **legal regulations concerning the matters related to killing**

¹ The first anniversary of the de facto abortion ban in Poland (2021/2925 (RSP)), [https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2021/2925\(RSP\)](https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2021/2925(RSP)), (access: 09.11.2021).

an unborn child fall within the sole competences of the Member States of the EU, which has been on numerous occasions confirmed by the European Commission².

2. For this reason, the creation of any form of pressure by the EU institutions on the Member States with regard to the protection of life and abortion should be considered as unauthorized. It is inconsistent with the EU treaty law and the indicated provisions of international law (e.g., art. 6 and Preamble of the Convention on the Rights of the Child).
3. The resolutions of the International Conference on Population and Development held in Cairo in 1994 (ICPD) clearly state that abortion may not be promoted as a method of family planning and the states should take actions to limit the number of abortions (point 8.25 ICPD PoA). Furthermore, **the concept of “the right to abortion” does not exist in the international law** and the states have repeatedly expressed their objection against attempts to create such law. It should be remembered that abortion violates fundamental human rights, especially including the right to live³ and the right to be free of tortures and inhuman treatment⁴. Abortion is also one of the cruelest forms of discrimination due to sex, color of skin, disability or just the fact of “being unwanted”. At the level of Member State legislation, Polish legislation also does not know the concept of a “right to abortion”⁵. It is worth noting that recently several dozen countries (including some belonging to the EU) have directly opposed attempts to perceive abortion as a human right by signing the Geneva Consensus Declaration, that clearly reminds that the right to life is a fundamental right and that abortion cannot be considered a human right⁶.

The judgment of the Polish Constitutional Tribunal (file number K 1/20)

4. The judgment of the Polish Constitutional Tribunal (file number K 1/20) was issued on the basis of the provisions of the Polish Constitution which explicitly state that:
 - “The Republic of Poland shall ensure the legal protection of the life of every human being” (art. 38);
 - “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” (art. 30);
 - “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

² More: [Joint answer given by Mr Andriukaitis on behalf of the Commission, Written questions :E-006285/14 , E-007476/14](https://www.europarl.europa.eu/doceo/document/E-8-2014-006285-ASW_EN.html), 28 November 2014, https://www.europarl.europa.eu/doceo/document/E-8-2014-006285-ASW_EN.html (access: 09.11.2021).

³ See: Universal Declaration of Human Rights (art. 3), Convention for the Protection of Human Rights and Fundamental Freedoms (art. 2), International Convention of Civil and Political Rights (art. 6).

⁴ See: Convention for the Protection of Human Rights and Fundamental Freedoms (art. 3), International Convention of Civil and Political Rights (art. 7).

⁵ See: W. Borysiak, Glosa do wyroku Sądu Najwyższego z dnia 13 października 2005 roku, IV CK 161/05, „Państwo i Prawo” 7 (2006), p. 118. Also: M. Chajda, Nasciturus i jego ochrona..., p. 61.

⁶ See: <https://www.hhs.gov/sites/default/files/geneva-consensus-declaration-english.pdf> (access: 09.11.2021).

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" (art. 31 p.3).

1. The consequence of this judgment of the Constitutional Tribunal is only the extension of the legal protection of life to children who are conceived and yet unborn, who are sick and disabled, on the basis of equality with healthy children, to which the legislator is obliged both by constitutional provisions and numerous acts of international law (including in particular, Article 10 of the Convention on the Rights of Persons with Disabilities).
2. It should be emphasized that the judgment does not interfere with the admissibility of revoking the protection of the life of a conceived child in the remaining "abortion exceptions" provided for by law. Abortion is still permissible when the pregnancy poses a threat to the life or physical (not mental) health of the mother (in a situation where life or health is at risk, the pregnant woman has the right to medical interventions saving these goods - also when the inevitable consequence of such actions may be the death of the child). Polish law still allows abortion when the pregnancy is a result of a prohibited act (e.g. rape).
3. The judgment in case K 1/20 is in line with the long-established jurisprudence of the Constitutional Tribunal, initiated by the ruling of May 28, 1997 (file number K 26/96), in which the Tribunal decided that the obligation of the state to respect human life prenatal treatment results from the principle of a democratic state ruled by law. It should be emphasized that before 2015, no political or other allegations were made regarding the functioning of the Constitutional Tribunal and adjudicating judges.
4. According to the undisputed jurisprudence of the Constitutional Tribunal, all doubts regarding the protection of human life should be resolved in favor of this protection, in accordance with the principle *in dubio pro vita humana* (judgment of the Constitutional Tribunal of 27 January 2004, file ref. K 14/03). Also, the judgment of September 30, 2008, file ref. K 44/07, the Tribunal stated that in the Polish legal system, situations of restriction of "(...) legal protection of human life in order to protect goods located lower in the constitutional hierarchy, e.g., property and other property rights, public morality, environmental protection, are unacceptable or even the health of other people. "

Motion for a resolution in version B9-0544/2021⁷

1. The draft denies in a concise form the false information that abortion is a human right, reminds of the sovereign competences of the Member States in the field of health policy and the need to protect life, which results from binding international law. The authors also declare their support for the Polish authorities in finding a solution that respects the lives of each of us, and supports mothers and their families through medicine and other help necessary for children with disabilities.

⁷ B9-0544/2021, https://www.europarl.europa.eu/doceo/document/B-9-2021-0544_EN.html, (access: 09.11.2021).

2. The Ordo Iuris Institute recommends voting **for the project** in version B9-0544/2021.

Motion for a resolution in version B9-0543/2021⁸

3. In view of the more and more frequent attempts by the European Union institutions to introduce the term "reproductive and sexual rights" (SRHR) and to define it, inter alia, through access to abortion, it should be emphatically stated that such a term, let alone the definition, has never been accepted by the international community. The term "sexual and reproductive health and rights" does not appear in any binding treaty and for the last years numerous states have consequently raised objections towards it while it has not been clearly defined yet. It can be observed that "sexual and reproductive health and rights", in unauthorized manner, introduce demands including i.a. common acceptance for prenatal murders, vulgar sexual education or promotion of the "gender" theory. The term used in non-binding final documents of conferences in Cairo (1994) and Beijing (1995) and Sustainable Development Goals (2015) does not include any reference to the separate category of "sexual rights". There is also no binding international legal act which would in any way refer not only to "sexual and reproductive rights" but even to sexual and reproductive health and rights.
4. The right to have conscientious objections is an integral and essential part of the freedom of conscience that is guaranteed both in the Polish Constitution and in international agreements. Questioning the right to conscientious objection is an unacceptable attack on the fundamental human right to act according to one's own conscience.
5. In the doctrine of international law, no group of 'rights of LGBTI+ persons' exists. Persons identifying with the LGBT ideology have the same rights as all citizens in Poland. Alleged "LGBT-free zones" have never been established in Poland, and the Local Government Charter of the Rights of the Family adopted by some local government units is mainly a sign of support of the rights of parents set forth in the Polish Constitution (e.g., the right to raise children according to one's view) that is not discriminatory in any way.
6. Research shows that Poles perform, in the worst (highest) scenario, around 14,500 illegal abortions per year. This figure correlates with data made available by organisations that specialise in "helping" to perform illegal abortions (the product of data on abortions and the number of organisations), at the same time highly differing from the caricatured numbers of illegal abortions stated in the last year resolution of the EP and in the current draft resolution.
7. According to numerous polls, support for abortion in Poland is decreasing, and there are increasingly more persons supporting the protection of life. In a poll conducted in 2017, as many as 71.6% of respondents gave a positive answer to the question "Do you support the full protection of human life from the moment of conception?", with 40.7% choosing the

⁸ B9-0543/2021, https://www.europarl.europa.eu/doceo/document/B-9-2021-0543_EN.html, (access: 09.11.2021).

answer “definitely yes”. The support for Women’s Strike alone cannot be identified with support for access to abortion. At the same time, it should be noted that, contrary to what was written in the draft, in the demonstrations planned on the occasion of the "anniversary of the sentence", **the interest in participating in the protests was marginal**⁹.

8. In view of the allegations and false statements contained in letter W of the draft resolution with regard to the Ordo Iuris Institute, it must be stressed that the subject-matter of the Foundation’s statutory activity for the Ordo Iuris Foundation for Legal Culture is activity for the affirmation of human dignity, which was constitutionally attested as a supra-positive source of inherent, inalienable, and inviolable freedoms and human rights (Article 30 of the Constitution of the Republic of Poland). In its activities, the Institute observes and upholds all rights and freedoms guaranteed by the Basic Law, including the right to life. **The notion that a European entity active in the field of human rights, fulfilling its statutory goals, and acting according to the law undermines human rights is a violation of its good name and reputation and, therefore, a violation of personal rights.** Similarly, the false statement about the support for ‘the creation of LGBTI-free zones’ by the Ordo Iuris Institute is a lie that infringes personal rights and the reputation of the Institute.
9. For many years, in contrast to a large number of Western and Scandinavian states, Poland has implemented an effective model of sex education, which is reflected by such rates as the number of sex offences (in 2017, the rate per 100,000 inhabitants was approximately 8 in Poland, 42 in Germany, 83 in Denmark and 189 in Sweden).
10. The need for protection against violence is a problem too serious to be used for imposing radical ideology upon society. Therefore, Poland announced that it would start working on a new document as an alternative towards the Istanbul Convention that would propose effective anti-violence solutions in a non-ideological and research-based manner.
11. The resolution adopted by the European Parliament on November 26th, 2020 is an example of an attempt to enforce social and legal changes based on ideological assumptions that contradict not only Polish tradition and culture, but also applicable national and international law. **Motion for a resolution in version B9-0543 / 2021 is a continuation of these violations.**
12. The Ordo Iuris Institute recommends voting **against** the project in version B9-0543 / 2021.

⁹ PolskieRadio24, *Mija rok od wyroku TK w sprawie aborcji* [A year has passed since the Constitutional Tribunal's abortion judgment.], <https://www.polskieradio24.pl/5/1222/Artykul/2832052,Mija-rok-od-wyroku-TK-ws-aborcji-Frekwencja-Strajku-Kobiet-w-Warszawie-nie-dopisala> (access: 09.11.2021).