

WOJCIECH LIS*

The Right to Life of the Conceived Child in the Provisions of the Constitution of the Republic of Poland

- **ABSTRACT:** *Human life is a fundamental value that conditions the existence of a human being, along with the entire range of freedoms and rights. These rights are secondary to life, without which they lose their meaning. However, the problem is to determine the beginning of human life, on which its legal protection depends. This is of great importance in a world where the essence of natural law is being undermined and values are being relativised. This leads to the danger of objectifying human beings, especially those who are at the earliest period of their lives. The issue, therefore, is to answer the question of when human life begins and, consequently, to determine the moment at which the status of a human being is obtained. In the background, another equally important question emerges regarding the limits of human legislation that aspires to replace the universal laws of nature.*
- **KEYWORDS:** human dignity, conceived child, protection of life, permissibility of abortion, windows of life

1. Introduction

The right to life is a fundamental principle that conditions the existence of a human being, together with his or her inherent freedoms. Human life is the greatest value and asset protected by law. However, a clear distinction must be made between the right to life, which has a natural law basis, and its protection, which must be ensured by the state.

At the normative level, problems exist in determining the point in time when one acquires the attributes of a human being, and consequently, the status of a subject of freedoms and rights. In the context of the right to the protection

* Associate Professor, The John Paul II Catholic University of Lublin, Faculty of Law, wlis@kul.lublin.pl, ORCID ID: 0000-0002-9014-0749.



of life, it is difficult to determine the point in time from which this protection is due. The attribute of humanity is undoubtedly possessed by a human being in the postnatal (post-birth) period. However, there is no consensus on recognising the humanity of a child conceived in the prenatal (pre-birth) period of life, which generates serious consequences, including the possibility of the child's death. Therefore, the problem lies in answering the question of when one can speak of a child – whether from the moment of conception or only from the moment of birth. In other words, is a human being only human in the postnatal period, or also in the prenatal period of life? Consequently, the moment from which human life should be protected must be determined.

The controversy over determining the moment when human life should first be protected is a subject of fierce polemics, particularly in the political arena. The public debate on the right to life of conceived children emphasises two opposing views: one advocating for full protection from the moment of conception (without any exceptions) and a total ban on abortion (without any exceptions), and the other supporting unrestricted freedom to kill them, justifying it in various ways. There is a clear dissonance in the protection of the right to life, particularly in the case of children. On one hand, there is a need to empower children by increasing the protection of their rights. On the other hand, there is the possibility of depriving conceived children of their lives, which automatically deprives them of those rights. Expensive research is being carried out on ways of protecting the lives of children conceived through the development of prenatal medicine, and various forms of support for pregnant women and single mothers are being constructed. At the same time, “programmes for solving demographic problems” are being created through abortion and the promotion of early abortifacients. Therefore, it is rightly noted that a consequence of the hypocrisy of postmodern science is the thesis of the permissibility of killing people in the context of promoting human rights, especially so-called reproductive rights.¹ Moreover, the law permitting the killing of conceived children has become a criterion for states that consider themselves democratic, guaranteeing an uncritical homage to procreative freedom, which includes the possibility of abortion.

When considering the right to the protection of the life of conceived children, attention should be drawn to the Convention on the Rights of the Child

1 ‘The basis of reproductive rights is the recognition of the fundamental right of all couples and individuals to decide freely and responsibly the number, spacing and timing of bringing children into the world, the right to information, access to the means to do so, and the right to maintain the highest standard of sexual and reproductive health. These rights also imply the right of all to make decisions concerning their reproduction free from discrimination, coercion and violence’, Programme of action of the International Conference on Population and Development, Cairo, 1994, New York: United Nations 1995, paragraphs 7.2-7.3.

(CRC),² whose preamble states that its purpose is to protect the rights of the child both before and after birth. At the normative level, it is rare to find such an explicit definition of a human being in the prenatal period. The terms “foetus” or “pregnancy” do not appear; instead, the term “child” is used, which clearly refers to a human being beyond any doubt. This is remarkable, given the United Nations’ stance of promoting abortion by treating the killing of children as an instrument for birth control.³ Therefore, since the child before birth – the conceived child – is a human being, it is entitled to the protection due to a human being. In Poland, the basic principles concerning the protection of the conceived child first stem from the Constitution of the Republic of Poland, adopted on 2 April 1997.⁴ The aim of this study is to present Polish legal regulations on protecting the life of the conceived child, which conditions the possibility of having and exercising civil rights.

2. Constitutional guarantees for the protection of life

The Polish Constitution is the supreme law of the Republic of Poland, as confirmed by the catalogue of sources of law (Article 87 of the Polish Constitution). In view of the primacy of the Constitution in the Polish legal system, any consideration of the right to life and its protection should begin with an analysis of its provisions.

The starting point is the categorical declaration in Article 2 of the Polish Constitution, which states that ‘the Republic of Poland is a democratic state governed by the rule of law, implementing the principles of social justice’. Under the rule of law, a democratic state places human beings and the goods most precious to them as its supreme value. One such good is life, which must be protected at every stage of its development within a democratic state under the rule of law.⁵ Life is an essential attribute of the human being. Deprivation of life annihilates him or her as a subject of freedoms and rights. The extent to which the right to life is protected is the yardstick for democracy, the value of which is determined, *inter alia*, by the criterion of protecting the freedoms and rights of the most vulnerable – namely, the conceived child.

This conviction is confirmed by the principle of protecting human dignity, which constitutes the axiological foundation of the constitutional order and the entire legal system. It also constitutes a link between the order based on natural law and that stemming from positive law. Article 30 of Poland’s Constitution expresses the principle of the protection of human dignity, stating that ‘The inherent and

2 Convention on the Rights of the Child adopted by the United Nations General Assembly on 20 November 1989, Dz. U. 1991, No. 120, item 526, hereinafter: CRC.

3 Andrzejewski, 2017, p. 16.

4 Constitution of the Republic of Poland of 2 April 1997, Dz. U. 1997, No. 78, item 483 as amended.

5 Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

inalienable dignity of the human being constitutes a source of human and civil freedoms and rights. It is inviolable and its respect and protection is the duty of public authorities'. Dignity is granted to a human being by the mere fact of being human and is independent of any other circumstances. Since it is a constitutive element being human, it follows that it belongs to everyone equally, without differentiation. Therefore, every human being has the same value, making it inadmissible to say that, because of the stage of life, one human is worth less than another. Human development and his or her personality formation are gradual processes that extends from before to after birth. Therefore, dignity, which is inherent and inalienable, and the corresponding legal protection of life, cannot be arbitrarily restricted to fully formed persons or specific prenatal stages. Respect for and protection of human dignity applies to every living human being; regardless of the period of life or the stage of development.⁶

The protection of dignity requires that the designator of the constitutional concept "human being" be defined as broadly as possible, without any exclusions, in a complete manner. Indeed, the interpretation of the concept of "human being" by public authorities may not lead to the exclusion from the category of subjects of human rights of any human being, regardless of his or her stage of development, developmental defects, state of health and any other features secondarily defining it. Human dignity, by its very nature, does not allow for any exclusions, and this means linking it to membership of the human species (the full scope of the category "human being" without any specific feature). Acknowledging the possibility of applying subjective exclusions would deprive the principle of the protection of dignity of its meta-legal character, we would make it contradictory, the principle would lose its axiological justification, its normative value, it would become a perversion of itself. It would turn out that legal subjectivity and the protection of human freedoms and rights would derive - contrary to the purpose of this principle - not from "humanity" in the species, biological sense, but from the arbitrary decision of an authority as to who should be considered a human being ("normative humanity").⁷

The principle of protecting human dignity must be viewed as the obligation to ensure the protection of human life. Human dignity cannot be protected if sufficient guarantees for the protection of life are not provided for every human being,

6 Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, OTK 2021, item 1.

7 Cieply, 2014, p. 79.

without exception. This means that it is impermissible to differentiate the value of human life according to social standing, age, or any other characteristics.⁸

The protection of life is the protection of the biological existence of a human being, which the Republic of Poland ensures for every human (Article 38 of the Polish Constitution). The protection of the purely biological aspect of human existence is expressed in a provision of the same degree of detail as is inherent in all provisions on civil liberties and rights in Chapter II, 'Freedoms, rights and duties of man and citizen', of the Polish Constitution. As the first article in the section on personal freedoms and rights, it provides for the protection of values that enable the individual to be the subject of further freedoms and rights. It also allows for a fairly precise identification of this subjective right. It is not so much the right to life, which is a philosophical or theological category, but the right to the legal protection of life. Its counterparts should be the state's various positive actions, carried out in specific legal forms, that create both legal and factual institutions to reduce or eliminate threats to human life.⁹

The solution adopted resulted from the majority's attitude in the Constitutional Committee of the National Assembly, which adopted a minimalist approach to legislation. This stance cannot be assessed unequivocally. On one hand, it seems rational, as it allows for the creation of constitutionally ideologically neutral provisions that allow for changes in the legal system without the need to revise the Constitution. The adopted construction of the provision, which eliminates the necessity of addressing extra-legal issues, may contribute to the fact that Poland's Constitution will be a long-lived act, not subject to revisions as the political system evolves. Conversely, the current formulation of Article 38 of the Constitution is characterised by exceptional brevity, which deprives it of clear axiological colouring, thus creating a convenient position for the legislator who, by remaining silent on sensitive issues, has avoided taking an unambiguous position.¹⁰

Article 38 of the Constitution has been broadly constructed with an open formula, meaning it does not specify the moment from which life is subject to protection nor the moment in which this protection ends. Such a construction of a provision placed in a normative act, which is the supreme law of the Republic of Poland, creates uncertainty regarding the actual guarantees of the protection of life. It is not known when this protection begins or when it ends, allowing the legislator a relatively high degree of discretion in this respect, which undermines legal certainty, harms legal security, and, consequently, the right to a secure existence.¹¹ It follows from the literal wording of Article 38 of the Constitution that the beneficiary of the norm guaranteeing the protection of life is, therefore, every

8 Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK-A 2004, No. 1, item 1.

9 Sarnecki, 2016, point 4.

10 Grabowski, 2005, pp. 101–102.

11 Lis, 2022, p. 195.

human being residing in Poland, irrespective of race, nationality, sex, age, state of health, expected duration of his or her life, or any other criterion. The norm resulting from Article 38 does not contain any prerequisites regarding the recognition or non-recognition of certain entities as human beings or certain biological situations as human life. This means that the guarantees of the legal protection of life apply to human beings from the very beginning of their existence, that is, from the moment of their conception until the moment of their death.

In the absence of a normative definition of the moment from which human life begins – and, consequently, when the right to its protection is actualised – a colloquial understanding linking the beginning of life to fertilisation must be adopted. It is therefore the moment when the ovum and the sperm fuse into a single cell that constitutes the embryo of a new organism.¹² Fertilisation of the ovum is the first step in human development during prenatal and postnatal life. As a result of fertilisation, the chromosomes from the mother and father fuse, containing all the genetic information that determines the specific characteristics and individual qualities of the new organism – such as the sex of the child, the colour of its skin, eyes, and hair, its facial features, body shape, and character traits. It follows that humanity is not something acquired at a certain point in personal development, nor is it contained somewhere between fertilisation and birth, understood merely as the moment of leaving the mother's body.¹³ Human life is a continuum, characterised by a certain process that begins at conception and progresses through successive stages of development up to birth, and is then linked to the stages of infancy, childhood, youth, adulthood, and old age until death. The subject's identity is preserved; he is the same person throughout, with only a shift in the phase of the life cycle due to the passage of time. Each phase is necessary in order to move on to the next. Given this, it is impossible to assume that a human being, according to Article 38, is only considered a human being from the moment of birth. Birth is only a change in the environment during a specific phase of the life cycle, not the beginning of life itself.¹⁴ Indeed, humans are subject to biological processes related to personal development, which includes two basic periods. The first stage, pre-birth (prenatal), begins at the moment of conception (fertilisation) and encompasses the development that occurs in the mother's organism up to the moment of birth. The second stage, post-birth (postnatal) lasts from the moment of birth until death. Therefore, since human life appears at the moment of conception, from that moment one is a human being, although only at the initial stage of ontogenesis. From this moment, therefore, begins the legal protection of his life guaranteed under Article 38 of Poland's Constitution.¹⁵ This implies that a conceived child, although unborn, is a human

12 Fertilisation (Zapłodnienie).

13 Lis, 2022, pp. 196–197.

14 Żelichowski, 1997, p. 111.

15 Kowalski, 2009, p. 45.

being albeit at the earliest stage of its ontogenesis. The legislator could, in theory, postpone the moment at which a conceived child acquires its status. However, assuming minimal rationality, it would be an abuse to claim that, by using the term “conceived child”, the legislator tacitly referred to an undefined criterion of “personification” or “individualisation” of the human embryo. No such criterion was defined, leaving it up to the interpreter to decide, which contradicts the linguistic interpretation of “conception”. The dictionary definition of this concept, derived from the colloquial understanding, does not point to any later stage of human life beyond fertilisation.¹⁶ This clarity, rooted in natural law, frees one from the arbitrariness of deciding whether or not to grant the status of human being, and makes one independent of accepted worldview concepts, which shift with the change of those in power.

Therefore, the concept of humanity encompasses all human beings, irrespective of their stage of development, whether brought into existence naturally or through medically assisted procreation. It is important to emphasise that the essence of humanity is determined by possessing certain morphological characteristics of the human organism and the structure and shape of the organism proper to the human species, but in the possession of the human genotype, which determines that a given living being is a human being.¹⁷ On normative grounds, various terms are used to describe a prenatal human being: embryo, zygote, foetus, conceived child, and unborn child.¹⁸ These are merely technical terms used to describe the stages of human development. However, they all describe a human being. The use of different terminology to describe the human at different development stages does not disprove his humanity, deprive him of his dignity, or make him less human. Therefore, the conceived child is not an indefinable product of the human organism but a human being in the prenatal period of life who deserves protection, like any other human.

It is also worth noting that the autonomy to use any reproductive method reflects the desire of expectant parents to have a child. However, subordinating these methods to this goal leads to the objectification of the child. The *in vitro* procedure is particularly controversial, involving the creation of more embryos than are ultimately intended for transfer into the woman’s body. Embryos deemed unsuitable for normal development are destroyed. This means that the legal protection of life does not apply to all embryos. The assessment of an embryo’s potential for normal development is made by a doctor solely based on medical criteria. Embryos deemed incapable of normal development are treated as medical waste under the Waste Act of 14 December 2012. This means that the human embryo, the

16 Gałązka, 2007, p. 29.

17 Żelichowski, 1997, pp. 108–109.

18 For a broader discussion, see Cieplý, 2015, pp. 79 et seq. For the purposes of this study, the term embryo has been adopted, synonymous with embryio; both are used here to describe the earliest form of human existence.

earliest stage of human development, is not only deprived of the legal protection of life but also treated in a way that affronts human dignity by being equated with medical waste, subject to disposal.¹⁹ This implies that not all embryos created through medically assisted procreation procedures are entitled to the legal protection of life. The remaining viable embryos are subject to preservation and storage procedures. The legal principles expressed, *inter alia*, in Poland's Constitution guarantee the embryo's right to life and prohibit its subjective treatment. The *in vitro* procedure must not involve embryo destruction, thawing several embryos, selection, or re-freezing unused embryos.²⁰ Current legislation on the legal status of embryos resulting from IVF does not provide an adequate level of protection for surplus embryos that have not been transferred into the female body.

'The right to the legal protection of life imposes an obligation on the state to take measures to reduce or eliminate threats to human life. This implies a commitment towards protection rather than neutrality of the law'.²¹ It should be emphasised that the law is not and cannot be axiologically neutral, since every system of law presupposes, expresses, and implements a certain set of moral values. This opens up the perspective of such analyses, which, by their very nature, must refer to a fundamental worldview—such as ethical, moral, religious.

The Constitution of the Republic of Poland, in the totality of its provisions, gives expression to a certain objective system of values (...). For the definition of this system of values, the provisions on the rights and freedoms of the individual play a central role (...). Among these provisions, the principle of the inherent and inalienable dignity of the human being takes a central place.²²

One cannot overlook the fact that the solemn introduction of the Constitution of the Republic of Poland refers first and foremost to God, who is the source of truth, justice, goodness and beauty, and to the Christian heritage of the nation, from where the imperative of respect for the life of another human being, including the conceived child, to whom everything precious from over a thousand years of the Polish State's heritage will be handed down. It follows that the nature and objectives of the law are determined by its axiology. It encompasses the fundamental values on which the law is built, which determine the sense of its existence, constitutes moral standards for its evaluation, and should be considered.²³

Both the content of Article 38 of Poland's Constitution and the nature of the Constitution as the highest law in the Polish legal system indicate that

19 Lis, 2022, p. 219.

20 Order of the Constitutional Tribunal of 18 April 2018, S 2/18, OTK-A 2018, item 20.

21 Grabowski, 2006, p. 179.

22 Judgment of the Constitutional Tribunal of 23 March 1999, K 2/98, OTK 1999, No. 3, item 38.

23 Michalik, 2005, p. 386.

subconstitutional norms, issued to implement its provisions, should create situations that ensure the “protection of life”, which, according to the disposition of this provision, is to be ensured by the state. The creation of a situation where life is unprotected must remain a drastic exception, as it concerns the first of human rights – the most important one – which naturally conditions the existence of all further freedoms and rights.²⁴

The legal protection of life is a duty of the state that should be implemented by all possible means. Negative and positive aspects of this duty can be identified. In the negative aspect, this obligation implies a prohibition of depriving a person of life, which is referred to as the defensive content of the right to life. The addressees of this prohibition are both public authorities and private actors. The negative aspect of the legal obligation to protect life limits the legislator’s freedom to legislate, as it excludes the possibility of authorising public authorities to

deliberately and intentionally deprive a person of life - especially if there is no such necessity from the point of view of the protection of other freedoms and rights, or if it concerns a person who by his action has not caused the necessity of such a reaction.²⁵

The right to the legal protection of life is not absolute; it can be abrogated by the legalisation of a state of superior necessity, of necessary defence, or the use of force by security and law enforcement officers. In its positive aspect, the duty of legal protection of life includes the injunction to eliminate or minimise emerging threats to human life and react when these threats materialise. This includes threats originating from other persons, as well as those resulting from factors beyond human control, such as flooding or earthquakes. The protection of human life in its positive aspect should encompass preventive measures (within the limits of the foreseeability of the occurrence of a given threat) and repressive measures (aimed at enforcing responsibility for acts constituting unlawful attacks on human life). At the same time, the state’s protective duties are not limited to securing life in terms of biological existence but should also include measures to promote all-round human development.²⁶

Among the provisions guaranteeing the legal protection of life, indicating the essence of the state, is Article 5 of Poland’s Constitution, according to which ‘the Republic of Poland shall safeguard the independence and inviolability of its territory, ensure the freedoms and rights of man and citizen and the security of its citizens, protect the national heritage and ensure the protection of the

24 Sarnecki, 2016, point 8.

25 Judgment of the Constitutional Tribunal of 30 September 2008, K 44/07, OTK-A 2008, No. 7, item 126.

26 Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

environment, guided by the principle of sustainable development'. Article 5 does not contain any premise suggestion to make an ideological argument that the human rights it guarantees refer only to a certain category of people, excluding the unborn.²⁷

The protection of the life of the conceived child is emphasised by Article 18 of Poland's Constitution, according to which 'Marriage as a union between a man and a woman, family, maternity and parenthood are under the protection and guardianship of the Republic of Poland'. Here, the legislator has expressed the desired sequence of events provoked by marriage, which forms the basis for the establishment of a family, maternity, and parenthood. The concept of maternity expresses the necessary relationship between mother and child, which occurs on many levels: biological, emotional, social, and legal. The function of this relationship is the proper development of human life in its initial period, in which special care is required.²⁸ Highlighting motherhood emphasises the woman's special role in procreation and child-rearing, and the ties that bind her to the child during pregnancy and immediately after childbirth. It should be added that the legislator, by extending protection and care to motherhood, automatically extends it to the child at every stage of its life. Maternity points to the mother, and since there is a mother, there must also be an object of reference, namely the child, because maternity is relational in nature, presupposing the existence of two separate entities: the mother and the child. Indeed, motherhood refers to both the period before and after the birth of the child and begins at the moment of conception. Therefore, the extension of maternity to protection and care means extending protection and care to the conceived child, without whom maternity would lose its meaning. This is confirmed by Article 68(3) of Poland's Constitution, which imposes an obligation on public authorities to provide special healthcare to, *inter alia*, children and pregnant women. Furthermore Article 71(2) of the Constitution grants the mother before and after the birth of her child the right to special assistance from public authorities, the scope of which is determined by law. It should be added that special healthcare goes beyond the sphere of ordinary, general healthcare and should therefore be more intensive or specialised, that is, tailored to the specific needs of a given group.²⁹

The protection of the right to life of conceived children is supported by the principle of equality and non-discrimination, guaranteed by Article 32 of Poland's Constitution, according to which '1. All are equal before the law. Everyone has the right to equal treatment by public authorities. 2 No one shall be discriminated against in political, social or economic life for any reason'. The subjective scope of the principle of equality and non-discrimination has been defined by

27 Mazurkiewicz, 2017, p. 22.

28 Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

29 Judgment of the Constitutional Tribunal of 22 July 2008, K 24/07, OTK-A 2008, No. 6, item 110.

the terms “everyone” and “no one”. Thus, the legislator has defined the scope of subjects to whom the principle of equality applies. It follows that this scope has been extended to every human being, regardless of their legal situation.³⁰ The principle of equality and non-discrimination is rooted in primary equality – that all humans belong to the same species, share the characteristics of humanity, and consequently possess equal dignity. Therefore, considering only post-natal humans as human beings and denying the humanity of a prenatal human being constitutes unlawful discrimination.

Ensuring the legal protection of life also guarantees the protection of health³¹. Both values are closely interlinked, mutually conditioning each other with the proviso that health protection, although an intrinsic value, has a servile character in relation to life, which is the most important value. Health protection would be meaningless if it did not preserve or improve the quality of life. It should be emphasised that the protection of life is a value to which every human being is equally entitled. Indeed, the legislator does not differentiate between the protection of life – and consequently health – and the phase of human life. It follows that human life should be protected from its inception, that is, from the moment of conception.³²

The Republic of Poland shall ensure the protection of the rights of the child. Everyone has the right to demand from public authorities the protection of the child against violence, cruelty, exploitation, and demoralisation.³³

A specialised body, the Ombudsman for Children’s Rights, is the guardian of children’s rights³⁴. Given this, the constitutional status highlights the need to protect children’s rights.

3. Consequences of recognising the protection of the life of the unborn child

The constitutional guarantees for the protection of life lead to statutory provisions that safeguard the life of the conceived child. The Ombudsman for Children, whose competences and method of appointment are specified in the Act of 6 January

³⁰ Cieply, 2014, p. 75.

³¹ Article 68(1) of Poland’s Constitution.

³² Lis, 2021, pp. 39-40.

³³ Article 72(1) of the Constitution of the Republic of Poland.

³⁴ Article 72(4) of the Polish Constitution.

2000 on the Ombudsman for Children, is particularly suited for this role.³⁵ Under the Act, a child is defined as any human being from conception to adulthood³⁶. It should be emphasised that this is the only provision in the Polish legal system that recognises the subjectivity of the child from the moment of conception. The Ombudsman for Children takes measures to ensure the full and harmonious development of the child, respecting his or her dignity and subjectivity. In particular, the Ombudsman protects the rights to life and health, family upbringing, decent social conditions, and education³⁷. In exercising its powers, Ombudsman for Children is guided by the best interests of the child and considers that the family is the natural environment for the child's development. The protection of children's rights is also ensured by the Ombudsman, who upholds the freedoms and rights of human beings and citizens set out in Poland's Constitution and other normative acts, including the implementation of the principle of equal treatment. In matters related to children, he or she is obliged to cooperate with the Children's Rights Ombudsman.³⁸

It should be emphasised that the conceived child, as *nasciturus*, was already endowed with legal capacity under Roman law. This was a recognition of its humanity and allowed for its integration into society even before birth. Such a child had legal capacity, provided that it was born alive, which was of great importance for both family and property relations. The principle *nasciturus pro iam nato habetur, quotiens de commodis eius agitur* (a child conceived is considered to be already born whenever its benefit is at stake) is reflected in the provisions of the Civil Code Act of 23 April 1964.³⁹

Under Article 927 § 2 of the Civil Code, a child conceived at the time of the opening of an inheritance may be an heir if it is born alive. Inheritance is acquired at the time of opening and the child becomes an heir as if he were alive at the time of the testator's death. An analogous solution concerning the establishment of a bequest for the benefit of a conceived child is provided in Article 972 of the Civil Code. Additionally, Article 994 § 2 of the Civil Code stipulates that descendants entitled to a legacy are protected already at the prenatal stage of life. By analogy with Article 927 § 2 of the Civil Code, case law holds that a child is entitled to the benefits of an insurance contract in the event of the father's death if the death occurred before the child was born, and that he has the possibility of being the beneficiary of a donation made during his foetal life. Therefore, a conceived child can be named as a beneficiary under a life insurance policy and, if properly

35 Act of 6 January 2000 on the Ombudsman for Children, consolidated text Dz. U. 2023, item 292, hereinafter: uRPD.

36 Article 2(1) of the Ombudsman for Children Act.

37 Article 3(1-2) of the uRPD.

38 Article 1(2-2a) of the Act of 15 July 1987 on the Ombudsman; consolidated text Dz. U. 2023, item 1058.

39 Act of 23 April 1964 Civil Code, consolidated text Dz. U. 2022, item 1360 as amended, hereinafter: the Civil Code.

represented, be a party to a donation contract, although the legal effects of the insurance or donation will only take effect after the child is born.

A consequence of recognising the legal subjectivity of the conceived child is the child's right to claim compensation for damage caused before birth, commonly referred to as prenatal damage, in order to safeguard its future interests. Prenatal damage refers to harm caused to the conceived child either directly to his or her organism or to the organism of his or her mother, resulting in a violation of the organism's integrity. Pursuant to Article 4461 of the Civil Code, 'From the moment of birth, the child may claim compensation for damage suffered before birth'. Thus, the legislator recognised that a human being can suffer damage during prenatal life while also prejudging that he or she can claim damages after birth. A tort committed against a pregnant woman, resulting in harm to the conceived child that alters its normal development process and causes subsequent disability, is considered a tort against the child if the child is born alive. Indeed, such a child cannot be in a worse situation than one who has suffered harm during or immediately after birth.⁴⁰ At the same time, such a child has the right to claim for prenatal damages not only from the mother but also from third parties. The claim for prenatal harm is an independent claim made by the child, independent of the claims of the mother or others.

In all these cases, the conceived child becomes the subject of certain rights (and obligations) despite the lack of legal capacity, which it acquires only at birth⁴¹.

The protection of the health of the conceived child is guaranteed by the Act of 5 December 1996 on the Profession of Physician and Dentist,⁴² which prescribes that participation in a therapeutic experiment⁴³ by pregnant women must be subjected to a particularly thorough assessment due to the associated risks for the mother and the conceived child⁴⁴. The Act categorically prohibits conducting a research experiment⁴⁵ on the conceived child⁴⁶. Any actions taken to benefit to the health of the pregnant woman must always be assessed for the risk of danger

40 Judgment of the Supreme Court of 3 May 1967, II PR 120/67, OSNC 1967, No. 10, item 189.

41 Article 8(1) of the Civil Code.

42 Act of 5 December 1996 on the profession of physician and dentist, consolidated text Dz. U. 2022, item 1731 as amended, hereinafter: *uzl*.

43 A therapeutic experiment is the introduction of new or only partially tried diagnostic, therapeutic or prophylactic methods with the aim of achieving a direct benefit for the health of the sick person. It may be carried out if the methods used hitherto are not effective or if their effectiveness is insufficient (article 21(2) of the *uzl*).

44 Article 21(2).

45 A research experiment primarily aims to expand medical knowledge. It may be carried out on both a sick and a healthy person. The conduct of a research experiment is permissible when participation in it is not associated with risk, or the risk is minimal and is not disproportionate to the possible positive results of such an experiment (article 21(3) of the *uzl*).

46 Article 23a(1), point 1.

to the health and life of the conceived child. Thus, the legislator has chosen to limit the possibility measures aimed at curing the pregnant woman by requiring consideration of the need to protect the health and life of the conceived child.⁴⁷ However, based on the current legislation, the decision to undertake diagnostics and treatment for the conceived child depends exclusively on the woman, which raises justified doubts in the context of constitutional guarantees of equality between women and men.

The protection of the child during the prenatal period of life is also addressed in the Act of 25 February 1964, the Family and Guardianship Code.⁴⁸ The legislator allows for the possibility of acknowledging paternity before the conceived child is born⁴⁹. This provision applies to a man who is not the husband of the mother of the conceived child. As a result of the acknowledgement of the conceived child and the confirmation of the acknowledgement of the child by the mother (the pregnant woman), a familial legal relationship is created even before the child is born. A child conceived within marriage enjoys a presumption of descent from its mother's husband⁵⁰. However, the acknowledgement of paternity before the birth of the child becomes effective only when the child is born, at which point parental rights also take effect. The purpose of this provision is to safeguard the rights of the child, even before birth, by eliminating doubts about the child's origin. Article 751 § 1 CRiO allows the acknowledgement of paternity even before the birth of a child conceived through medically assisted reproduction using reproductive cells from an anonymous donor, an embryo created from reproductive cells, or through embryo donation. A man who has acknowledged paternity may bring an action to annul the acknowledgment within one year of learning that the child is not his. However, if paternity is acknowledged before the birth of a conceived child, the time limit does not begin until the child is born⁵¹.

'For a child conceived but not yet born, a guardianship shall be established if it is necessary to guard the future rights of the child. The guardianship shall cease when the child is born'⁵². It should be emphasised that during the prenatal period of a child's life, its parents are not legal representatives; the parents of a conceived child will only acquire parental authority when the child is born. The *curator ventris* represents the conceived child in matters relating to rights that already exist, the subject of which is, *inter alia*, life or health, and the rights that the child will only acquire from birth.⁵³ It should be emphasised that one of the main objectives of the establishment of the *curator ventris* is to prevent possible

47 Sakowski, 2002, p. 44.

48 Act of 25 February 1964 Family and Guardianship Code, consolidated text Dz. U. 2020, item 1359, as amended, hereinafter: CRiO.

49 Article 75(1) of the Family and Guardianship Code.

50 Article 62(1) of the CRiO.

51 Article 78(1) of the CRiO.

52 Article 182 of the CRiO.

53 Jędrejek, 2017, Commentary on Art. 182, point 3.

unauthorised termination of pregnancy and to prevent damage to the unborn child and other factors that may lead to a disorderly state of health.

The protection of the rights of children conceived but not yet born is affirmed by the guarantees obliging the father of a child, who is not the mother's husband, to contribute to the expenses of pregnancy and childbirth⁵⁴. Expenses related to pregnancy and childbirth are considered expenses that arise as a result of pregnancy or childbirth, which the child's mother would not have incurred if she had not been pregnant or given birth. However, the mother can only assert these claims once the paternity of the man in question, who is not her husband, is established; that is, when the child is acknowledged or paternity is judicially established. She may assert these claims simultaneously with the establishment of paternity⁵⁵. Similarly, Article 142 of the CRiO, stipulates that

[I]f the paternity of a man who is not the mother's husband has been established, the mother may request that this man, even before the child is born, pay an appropriate sum of money for the mother's maintenance costs for three months during the period of childbirth and for the child's maintenance costs for the first three months after birth. The time and manner of payment of this sum shall be determined by the court.

The possibility to make such a claim is limited in time, and the mother can make such a claim up to the date of the child's birth. However, after the child is born, the mother may claim maintenance from the father of that child. The purpose of this provision is to safeguard the pregnant woman's situation and protect the interests of the conceived child. It is clear that the quality of life of a pregnant woman who is unable to meet her basic needs during pregnancy has a direct impact on the health of the conceived child and, subsequently, the child's potential for development after birth.

4. Criminal law protection of the life of the unborn child

The constitutional protection of human life is reflected in a law that criminalises the killing of a human being, including a conceived child. Due to its restrictive nature, criminal law is subsidiary to other forms of legal goods protection. Viewing criminal law as a last resort measure implies that legislators should intervene in the sphere of socially unacceptable human behaviour only when milder forms of accountability are insufficient to produce the desired results. Criminal punishment

⁵⁴ Article 141(1) of the CRiO.

⁵⁵ Article 143 of the CRiO.

is undoubtedly the most severe form of state response, but is nevertheless necessary to ensure adequate legal protection against goods of particular value, such as life, health, or human dignity. The use of non-criminal legal responses in such cases would disproportionately affect these assets. Attacks on these fundamental values, which are simultaneously expressions of the greatest contempt for the essence of humanity, arouse not only social disapproval but also a justified need to stigmatise the perpetrator. Criminal repression is the most appropriate response, as alternative means of protecting these goods lack retributive elements.⁵⁶

Given the need to protect human life, the principle of subsidiarity and consequent treatment of criminal law as *ultima ratio* lose their significance. This means that, in fundamental cases such as the protection of human life, including in the prenatal period, the *ultima ratio principle* should be replaced by the *sola ratio* or *unica ratio principle*. In such cases, a criminal law response, appropriate to the gravity of the act, seems to play a primary role.⁵⁷ The protection of life as a fundamental value prompts the adoption of an interpretative directive, assuming that any doubts regarding the protection of life should be resolved in favour of this protection - *in dubio pro vita humana*.

Despite recognising the special value of human life, its protection under criminal law varies in intensity. Human life is protected differently during the prenatal period compared to after birth. This differentiation is reflected in the provisions of the Act of 6 June 1997 of the Criminal Code (CC).⁵⁸ Pursuant to Article 157a § 1, 'Whoever causes bodily harm to the conceived child or a health disorder endangering its life, shall be subject to a fine, the penalty of restriction of liberty or deprivation of liberty for up to 2 years', while 'Whoever exposes a human being to direct danger of loss of life or a serious injury to health shall be subject to the penalty of deprivation of liberty for up to 3 years' (Article 160 § 1). The moment of delivery is the key differentiator for protection, as full protection of life and health is only afforded to the conceived child from one of the following moments: 1) the onset of natural childbirth, 2) the first medical action directly aimed at performing a caesarean section to terminate the pregnancy at the request of the pregnant woman, or 3) the occurrence medical conditions warranting a caesarean section or another necessary procedure for pregnancy termination due to medical necessity.⁵⁹ Thus, the perpetrator's conduct will lead to different legal consequences depending on whether the object of the attack was a conceived child or a human being. In criminal law, the precise moment a conceived child becomes a human being is crucial for determining criminal responsibility. It should be emphasised that, since human life has equal value and originates from the inherent dignity of

⁵⁶ Gardocki, 1989, p. 65.

⁵⁷ Ibid.

⁵⁸ Act of 6 June 1997 Criminal Code, consolidated text Dz. U. 2022, item 1138 as amended, hereinafter: CC.

⁵⁹ Order of the Supreme Court of 30 October 2008, I KZP 13/08, OSNKW 2008, No. 11, item 90.

all, the differentiation in the intensity of its protection depending on the stage of life – under the provisions of the CC – raises doubts about its compliance with the constitutional standard for the protection of life.

Such doubts are also raised by Article 157(3) of the CC, which excludes the criminalisation of the mother of a conceived child who causes bodily harm or a health disorder threatening the life of the conceived child. The automatic exclusion of criminal responsibility for a pregnant woman who *de facto* performs an abortion means that the legislator gives consent to such behaviour. This leads to the conclusion that the conceived child is deprived of legal protection. In Europe, no country with a standard of protection of life similar to or higher than that in Poland provides for the automatic exclusion of the criminalisation of pregnant women who cause the death of the conceived child. The provisions excluding the criminalisation of pregnant women for killing a conceived child are a continuation of legal solutions characteristic of the former Soviet bloc countries. The decriminalisation of abortion performed by a pregnant woman was initiated by the Presidium of the Supreme Soviet of the USSR on 5 August 1954, which abolished the criminal liability of pregnant women for undergoing an abortion. Following the USSR, Poland was one of the first countries in the world to remove the criminal liability for pregnant women for killing a conceived child. This exclusion was introduced into Polish law under the Act of 27 April 1956 on the conditions for the permissibility of pregnancy termination. In almost all countries of the former Soviet bloc, laws did not provide for the criminalisation of a woman who terminates a pregnancy herself or allows another person to perform an abortion. Only the life and health of the pregnant woman were the objects of protection, with these being considered of higher value than the right to life of the conceived child. Legislators exempted the pregnant woman from criminal liability on the basis of the “humanitarian and progressive principle” that the decision about motherhood can only be decided by the woman herself. The automatic impunity of the pregnant woman for the killing of the conceived child was presented as an ‘achievement of socialist legal teaching’, created in opposition to the legislation of imperialist states and the teachings of the Catholic Church.⁶⁰ Attempts on the life of the conceived child must be criminalised, although it is possible to waive the punishment of the mother if she commits such an act under pressure from others or in special circumstances. However, this should occur through the administration of justice and not by automatically excluding the criminalisation of the mother who aborts her unborn child.

Currently, criminal law protecting the life of the conceived child is strengthened by anti-abortion provisions. Pursuant to Article 152 of the CC:

60 More widely: Bogunia, 1980, p. 54.

§ 1. Whoever, with the consent of the woman, terminates her pregnancy in violation of the provisions of this Act, shall be subject to the penalty of imprisonment for up to 3 years. § 2. Whoever assists or induces a pregnant woman to terminate her pregnancy in violation of the provisions of this Act shall be subject to the same penalty. § 3. Whoever commits the act specified in § 1 or 2 when the conceived child has achieved the capacity to live independently outside the organism of the pregnant woman shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years.

In accordance with Article 153 of the CC:

§ 1. Whoever, by using violence against a pregnant woman or in any other manner without her consent, terminates a pregnancy or by using violence, an unlawful threat or deception leads a pregnant woman to terminate a pregnancy, shall be subject to the penalty of deprivation of liberty for a term of between 6 months and 8 years. § 2. Whoever commits the act specified in § 1 when the conceived child has reached the capacity for independent life outside the organism of the pregnant woman, shall be subject to the penalty of deprivation of liberty for a term of between 1 and 10 years.

Article 152 of the CC refers to the termination of pregnancy with the pregnant woman's consent but contrary to the provisions of the law, while Article 153 of the CC refers to the termination of pregnancy without the pregnant woman's consent. It should be noted that Articles 152 and 153 of the CC refer to the protection of a conceived child already developing in the woman's organism, but they do not cover a child conceived through medically assisted procreation, that is, an *in vitro* fertilised cell remaining outside the woman's organism. Such a situation is regulated by the provisions of the Act of 25 June 2015 on the treatment of infertility,⁶¹ primarily Article 83, which states: 'Whoever destroys an embryo capable of normal development created in a medically assisted procreation procedure shall be punished with imprisonment from 6 months to 5 years', and Article 85, which states: 'Whoever creates an embryo for a purpose other than a medically assisted procreation procedure shall be punished with imprisonment from 6 months to 5 years'. In relation to the *in vitro*-fertilised cell, the legislator does not use the term "child conceived", but instead refers only to the embryo. Consequently, the criminal act in this context is not causing of death but the destruction of the embryo created through a medically assisted procreation procedure. The destruction of an embryo

61 Act of 25 June 2015 on infertility treatment, consolidated text Dz. U. 2020, item 442, hereinafter: uln.

created through a medical procedure, capable of normal development, does not constitute the causal act of pregnancy termination. The adopted solution leads to the dehumanisation of the human being in the prenatal period, thereby weakening the legal protection of life. By defining the final moment of the embryo's development in Article 2(1) point 28 of the Act as 'the moment of implantation in the mucous membrane of the uterus', the law removes the protection granted to such a developed being under the provisions of the Act on infertility treatment. Further, this definition determines the moment at which the conceived child is granted protection under the provisions of the CC.

Criminal law guarantees for the protection of life aim to realise constitutional standards through the tools inherent in criminal law. Nevertheless, the regulation of criminal liability for offences against human life and health, based on the stage of life and the comparison of statutory penalties, indicates unequal treatment between the prenatal and postnatal periods. The varying definitions of the object of the attack within criminal provisions dedicated to protecting life and health – such as a human being, a child, a conceived child capable of independent life outside the organism of the mother, and a conceived child – raise not only constitutional but also systemic doubts. Given this, it should be emphasised that Polish criminal law upholds principle of continuity in the protection of goods, considering the axiological foundations of the entire legal system. Consistency in protection requires extending criminalisation to behaviours that violate or endanger a legal good to a degree comparable to those already criminalised.⁶² It also requires imposing similar penalties for offenses of a similar nature against comparable goods.

5. Permissibility of abortion

The existing model of life protection in Poland cannot be analysed separately from the provisions legalising abortion. Under the Act of 7 January 1993 on family planning, protection of the human foetus and the conditions for the permissibility of pregnancy termination,⁶³ the legislator determined that pregnancy termination may only be performed by a physician in two cases: when the pregnancy threatens the life or health of the pregnant woman, or when there is a justified suspicion that the pregnancy has resulted from a prohibited act (Article 4a, § 1, points 1 and 3). Termination of pregnancy for any other reason is considered a criminal offence. In the first case, termination is not subject to a time limit; in the second case, termination is possible only if no more than 12 weeks have elapsed since

⁶² Kulesza, 2014, pp. 103-104.

⁶³ Act of 7 January 1993 on family planning, protection of the human foetus and conditions of permissibility of abortion, consolidated text Dz. U. 2022, item 1575, hereinafter: upr.

the beginning of the pregnancy. This means that an advanced pregnancy may be terminated if it endangers the life or health of the pregnant woman. Nevertheless, in cases where the conceived child has already acquired the capacity to live independently outside the mother's body, any procedure to save the life or health of the pregnant woman should also aim to save the life of the child.

The permissibility of abortion attempts to resolve the conflict of values between the welfare of the mother and that of the child. Legal doctrine emphasises that the imprecision and lack of clarity in Article 4a(1), point 1 of the Act – especially regarding to the elements of ‘danger to the life and health of the pregnant woman’ – and the wide margin of interpretation of abortion laws, may lead to uncertainty and unpredictability in determining the prerequisites for abortion's permissibility.⁶⁴ Under the current legislation, one may reach the unacceptable conclusion that an unwanted or unplanned pregnancy may constitute a threat to the broader health of the pregnant woman, including both physical and psychological aspects. This reasoning is supported by the World Health Organization's definition of health, which encompasses not only the complete absence of disease or infirmity but also a state of complete physical, mental, and social well-being.⁶⁵

In the context of the permissibility of abortion, it should be emphasised that, pursuant to Article 39 of the Act, a doctor may refrain from performing health services that are against his or her conscience; that is, they may refuse to perform an abortion (the conscience clause). Thanks to this clause, the doctor will not participate in the procedure aimed at terminating the conceived child. When invoking the conscience clause, he or she must record this in their medical records and inform the pregnant woman the possibility of obtaining an abortion from another doctor or treatment facility. Nevertheless, he is obliged to provide the pregnant woman with medical assistance in cases where a delay could cause loss of life, grievous bodily harm, or serious health disorders.

The permissibility of abortion is proof that the legislator, through the provisions of the law, differentiates the value of human life depending on its stage of development, which raises doubts about its compliance with the provisions of Poland's Constitution, which guarantees legal protection for the life of every human being. Moreover, limiting the protection of the life of the conceived child can be considered acceptable only in situations of absolute necessity, specifically to protect the life of the pregnant woman as a good of equal importance. Given this, the premise that abortion is permissible because pregnancy poses a threat

64 Pluta, 2021, p. 13.

65 Constitution of the World Health Organization as adopted by the International Health Conference, New York 19 June - 22 July 1946, Official Records of the World Health Organization No. 2, June 1948, https://apps.who.int/iris/bitstream/handle/10665/85573/Official_record2_eng.pdf;jsessionid=AECA261C63ED78CA2E6F302B6EAF4B?sequence=1 (Accessed: 6 August 2023), p. 100.

to the health of the pregnant woman cannot justify the procedure, as these are unequal goods and, as such, are not comparable. Within the context of the constitutional standard for the protection of human life, it is impossible to limit the legal protection of life to protect the health of a pregnant woman, as health is considered a lower-value good. This implies that the condition for limiting the legal protection of life arises in situations where it is beyond doubt that the life of one human being is incompatible with that of another. This premise can be broadly defined as the requirement for symmetry between the goods sacrificed and those saved. Furthermore, any limitation on the legal protection of life must be absolutely necessary and treated as a measure of *ultima ratio*.⁶⁶ According to Poland's Constitution, the interpretative directive *in dubio pro vita humana*, any doubts about the protection of human life should be resolved in favour of this protection. Human dignity cannot truly be protected if sufficient grounds for the protection of life are not established.⁶⁷

The equivalence of legally protected goods was the basis for the repeal of Article 4a(1), point 2 of the UPR, which allowed for the termination of a pregnancy when prenatal tests or other medical indications suggested a high probability of severe and irreversible disability in the conceived child or an incurable disease threatening its life. Termination of pregnancy under this provision (eugenic abortion) was possible until the conceived child acquired the capacity to live independently outside the pregnant woman's organism. This provision made the legal protection of the life of the conceived child dependent on its state of health, which constituted direct discrimination and legalisation of abortion without sufficient justification based on the need to protect another constitutional value, right, or freedom. Additionally, the use of unspecified criteria for the legalisation of abortion violated the constitutional guarantees of human life. The Constitutional Court held that the fact of a child's handicap or incurable disease in the prenatal period of life – linked to eugenic considerations and the possible discomfort of the child's life – could not independently prejudge the admissibility of the termination of pregnancy and, thus, the killing of the conceived child. It was impermissible by law to assume that such a child was unworthy of life. Given this, in its verdict of 22 October 2020 (case K 1/20), the Constitutional Tribunal stated that Article 4a(1) point 2 of the Act was incompatible with Article 38 (which guarantees legal protection of life for every human being), Article 30 (which emphasises the importance of human dignity as the source of human freedoms and rights, and obliges public authorities to respect and protect it), and Article 31(3) (which defines the grounds for limiting freedoms and rights) of Poland's Constitution.⁶⁸ Thus, the Court upheld

66 Judgment of the Constitutional Tribunal of 30 September 2008, K 44/07, OTK-A 2008, No. 7, item 126.

67 Judgment of the Constitutional Tribunal of 7 January 2004, K 14/03, OTK-A 2004, No. 1, item 1.

68 Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, OTK 2021, item 1.

its position expressed in the ruling of 28 May 1997, in case K 26/96, which unequivocally stated that human life is a value at every stage of development and is therefore subject to protection. The value of a constitutionally protected legal good – human life, including life development at the prenatal stage – cannot be distinguished. Indeed, there are no sufficiently precise and justified criteria that allow such differentiation, depending on the developmental stage of human life. Human life is constitutionally protected from the moment of creation. This process also occurs during the prenatal phase. The yet-to-be-born child, as a human being endowed with inherent and inalienable dignity, is a subject with the right to life. The legal system must guarantee due protection of this central good, without which this subjectivity would be negated. However, this position is weakened by the assertion that, while human life at every stage of development constitutes a constitutional value to be protected, the intensity of this protection may not be the same at every stage of life or under all circumstances. The intensity and type of legal protection are not simple consequences of the value of the protected good. The intensity and type of legal protection, in addition to the value of the protected good, are influenced by a wide range of diverse factors, which ordinary legislators must consider when deciding on the choice of legal protection and its intensity. However, from the perspective of the protected good, this protection should always be sufficient.⁶⁹ Consequently, the intensity of the protection of human life varies because of the application of different criminal sanctions for causing the death of a human being before and after birth.

With this in mind, the Act on Family Planning, Protection of the Human Foetus, and Conditions for the Permissibility of Abortion seems to balance the firm commitment to protecting life with the prudence determined by the realities of life. Tightening the provisions of the Act will not automatically change social reality. There is no evidence to suggest that banning abortions will reduce their frequency or improve the protection of the lives of conceived children. It is necessary to educate and support pregnant women, as well as society as a whole, to build awareness of the nature of abortion as the murder of a human being. These actions should have primacy over administrative bans and criminal penalties. The simultaneous effects of persuasive and punitive legislation on the protection of life are mutually exclusive due to the inherent contradiction in declaring the protection of the conceived children's lives while simultaneously threatening their mothers with imprisonment. This attitude alienates pregnant women from social institutions (including religious institutions) that want to protect them and the lives of their children, as they may perceive these institutions as aligned with the ideological forces responsible for imposing criminal sanctions on abortion.⁷⁰

69 Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK 1997, No. 2, item 19.

70 Andrzejewski, 2017, p. 21.

6. The idea of “windows of life” as a way of protecting the life of the child

The idea of “life windows”, developed in Poland, is an alternative to killing or abandoning a child in random locations, thus condemning it to death. Leaving a child in a “window of life” is not considered abandonment, as abandonment involves leaving a child without providing it with care or ensuring care by other persons. Given this, a mother who leaves her child in a “window of life” cannot be held criminally responsible, as the assumption of this system is that the child will receive immediate care.⁷¹ The premise of “life windows” is to create a safe place both for mothers in difficult life situations and for their newborn children, whom they cannot or do not wish to care for. “Windows of life” are typically created and run at religious houses, children’s homes, or single mother’s shelters (i.e. places where someone is present at all times). In these facilities, mothers have the opportunity to leave their child completely anonymously, without harming them or facing legal consequences. This opportunity gives them the sense that they have done nothing wrong and have chosen the “lesser of two evils” for their child’s well-being. Thanks to “windows of life”, the children left in these facilities have the chance to survive and, once they have gone through the adoption procedure, to gain a family that will provide them with home, warmth, a sense of security, and optimal conditions for functioning and development. The main purpose of “windows of life” is to save the lives of children in emergency situations, which their mothers perceive as situations of no return. In this sense, “windows of life” serve both mothers and their newborn children.

“Windows of life” open from the outside; when they are opened, an alarm sounds to indicate that a child has been left inside. The child remains in the “window of life” for no more than a few minutes, as it is the responsibility of the entity running the facility to respond quickly, provide ongoing care to the child, and notify the relevant authorities immediately. The child left in the “window of life” is immediately transferred to a hospital, where tests are carried out to determine its state of health. The guardians of the “window of life” inform the police⁷² and the adoption centre when a child is left, which immediately notifies the family court. The court is then requested to issue guardianship orders concerning the

71 Pawlik and Glanc, 2018. Pursuant to article 210 of the Criminal Code, ‘§ 1. Whoever, contrary to the obligation to care for a minor under 15 years of age or a person incapacitated by reason of his mental or physical condition, abandons such a person, shall be subject to the penalty of deprivation of liberty for a term of between 3 months and 5 years. § 2. If the consequence of the act is the death of the person specified in § 1, the perpetrator shall be subject to the penalty of deprivation of liberty for a term of between 2 and 15 years.’

72 The police are obliged to identify the child and establish whether the child’s abandonment is related to a crime; whether the child has been kidnapped or whether the person leaving the child has acted under duress.

child and assign the child a name. This is because when a child is left in a “window of life” it loses its previous identity, becoming an NN person (Non-Named person). The family court gives the child a name and surname and establishes its date of birth. The child is then given a PESEL (Universal Electronic System for Population Registration) and a birth certificate is drawn up, which enables the adoption procedure to be initiated. This procedure is quite smooth because many families awaiting adoption are specifically looking for young children. Consequently, finding an adoptive family for such a child is not difficult, and the child can be placed with his or her future parents almost immediately.

The creation of “life windows” in Poland was inspired by the ideas preached by Pope John Paul II and aimed to continue his efforts from the 1970s to save the lives of conceived children. The first “window of life” in Poland was created on 19 March 2006 in Krakow, at the Single Mother’s Home on 39 Przybyszewskiego Street. This initiative was led by Caritas of the Krakow Archdiocese and Cardinal Stanislaw Dziwisz. Currently there are more than 60 “windows of life” across Poland, in which more than 160 children have been saved.⁷³

It should be noted that “windows of life” remain an unregulated initiative, meaning that, in theory, anyone can establish one. Each “window of life” has its own procedures, depending on the institution managing it. However, despite the lack of legal regulations, they function efficiently and exemplify how social and legal relations can develop on their basis without being encumbered by a series of legal regulations. The activities of the “windows of life” show that the goodwill of individuals, social groups, and society as a whole can generate spontaneous action for the common good. Their functioning also confirms that wise and responsible human behaviour can achieve more in protecting the fundamental human right to than legal regulations alone.⁷⁴

“Windows of life” serve as a means of protecting the right to life by ensuring the welfare of children. Despite this, the UN Committee on the Rights of the Child in 2015 urged Polish authorities to close these “windows of life.” The Committee argued that the concept violates Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms,⁷⁵ which includes the right to know the identity of one’s parents as an integral element of an individual’s right to respect for his or her private and family life. Additionally, the Committee cited Article 8 of the CRC, which guarantees children the right to preserve their identity, including their biological identity. State parties are obliged to take measures to respect a child’s right to preserve his or her identity, including nationality, name, lawful family relationships, and protection from unlawful interference.

73 Nartowska and Rutke, 2023.

74 Czaplicki and KroczeK-Sawicka, 2017, p. 44.

75 Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2, Dz. U. 1993, No. 61, item 284.

Identity affirms an individual's uniqueness, which distinguishes him or her from others. Provisions ensuring the newborn child's right to identity are included in Article 7(1) of the CRC, which stipulates that immediately after birth, the child's birth certificate must be issued, and the child has the right to receive a name, obtain nationality, and, if possible, the right to know and be cared for by his or her parents. However, the right to identity should not be limited to providing a child with identification data such as a name or registration number. The broader concept of identity also includes the child's entitlement to know his or her origins, including the identities of his or her biological parents. Knowledge of one's genetic background influences physical and psychological well-being. It helps avoid behaviours that could negatively affect one's health or that of others, reduces uncertainty regarding the risk of contracting certain diseases, and facilitates timely actions to safeguard life and health when necessary.⁷⁶

It is worth emphasising that, due to the anonymity inherent in "windows of life", a child left there is deprived of knowledge about his or her biological identity. However, thanks to the new family, he or she has a chance to create a sense of belonging to a given social group. It is also crucial to note that Article 7(1) of the CRC explicitly stipulates that a child shall have the right from birth – "insofar as possible" – to know his or her parents and to remain with them. Situations in which the biological identity of the child will remain unknown are permissible in the name of the greater good or in emergency situations.⁷⁷ The most important point to consider is that the operation of "life windows" is part of the inalienable right to life, as outlined in Article 6 of the CRC. In this context, the operation of "life windows" can be seen as analogous to the concept of a state of public necessity in criminal law. According to this principle, to protect a greater good, one may need to sacrifice a lesser good. Referring to the "windows of life", it should be emphasised that in saving the life of a child one sacrifices its right to identity, but in the context of saving life it is difficult to compare these values. There is no doubt that life is a fundamental good, without which there is no point in talking about protecting any other rights, including the right to identity, without which it would never exist.

7. Summary

The standards of legal protection of life in Poland are high, despite the difficulties related to the normative definition of its beginning. The Polish legislator guarantees legal protection of life for everyone at the constitutional level; however, it legalises abortion at the statutory level. There is no consistent law in Europe protecting the

⁷⁶ Haberko, 2019, p. 61.

⁷⁷ Czaplicki and Kroczeck-Sawicka, 2017, p. 38.

lives of conceived children. Moreover, in terms of the quality of protection of the lives of conceived children, Poland is an enclave surrounded by countries with full access to inexpensive abortions. Despite this, there is significant social approval for theses derived from eugenics, including the creation of laws that allow for the selection of those who are allowed to live while condemning the weaker to death.⁷⁸ These trends are fostered by the automatic decriminalisation of acts by mothers who have aborted their pregnancies, contributing to the lowering of the constitutional standard for the protection of human life. The weakening of respect for life, supported by the liberalisation of abortion law at the supranational level, poses a serious threat of eradicating the legal protection of conceived children from the legal system. This is fostered by the lack of uniform regulation of the status of the conceived child, normalising – in an unambiguous and non-controversial manner – the moment surrounding the legal protection of its life. This causes discrepancies in the fundamental issue determining the biological existence of a human being. Consequently, the life of the conceived child becomes a relative value, with contested limits of protection. Attempts to dehumanise the conceived child, combined with the desire to decide on its humanity, constitute a dangerous trend. This opens the door to the arbitrariness of recognising someone as a human being or denying him or her this attribute, and, consequently, recognising or denying his or her right to life. The current state of the law fails to protect the life of the conceived child while also leaving the permissibility of abortion unresolved. This creates uncertainty. Therefore, it should be unequivocally established at the normative level that human life begins at conception, that is, with the fusion of male and female germ cells. This would put an end to all speculation and eliminate the state of uncertainty from which moment human life is protected.

Human life is a supreme, unique, and irreplaceable value and must therefore be protected from the very beginning of its existence. Since life is a process beginning from the moment of conception, to which every human being **is** entitled by virtue of his or her dignity, which is a non-deregotiable and non-gradable value, it follows that one is human to the same degree before and after birth. The child conceived, although not yet born, by virtue of its humanity and inherent dignity, which is not subject to gradation according to age, must be treated as a subject with all the consequences this entails, as it objectively exists as an independent being. Admittedly, the conceived child is connected to the mother's organism and biologically dependent on it, but is not identical to the person of the mother. It lives in her body but has a life of its own. In other words, a conceived child is not a potential entity – only the making of a human being – but a real entity – a concrete human being with the same rights as other people. Therefore, it should be treated on an equal footing with everyone else. *De lege ferenda*, public authorities must strive to make the constitutional guarantee of equality more realistic

78 Andrzejewski, 2017, p. 23.

and prohibit discrimination on any grounds, primarily based on the stage of life a person is at.

The protection of the life of conceived children is not a private matter for women, but a common one, guaranteeing the replacement of generations and the rebirth of society. It is a condition for the permanence of the state organisation, which is a common good. This was aptly put by John Paul II, who clearly emphasised that a nation that kills its own children becomes a nation without a future – as confirmed by the demographic crisis in European countries. The right to life is not just a matter of worldview; it is not a religious right but a human right.⁷⁹ This is confirmed by the wording of Article 38 of the Polish Constitution, which clearly states that the intention of the legislature was to exclude any attempt to deny anyone from the category of human being based on any criteria. In the moral order, on the other hand, it is expressed by the Fifth Commandment, ‘Thou shalt not kill’, which is the fundamental principle and norm in the universal code of morality, inscribed in the conscience of every human being. However, the problem of an ageing population must not be overlooked. Protecting children from abortion is one way of alleviating the demographic crisis that will bring about changes in the social structure and functioning of the state. Therefore, it is in the common interest to encourage childbearing, which will help increase the fertility rate and reduce the effects of an ageing population. The state should therefore pursue a family friendly policy that favours having children and develop a network of entities where children conceived but unwanted by their parents can find refuge and be given a chance at life.

The need to protect the life of the child has led to the development of the idea of establishing and operating “life windows” as an alternative to abandoning the child. The existence of “life windows” may also influence pregnant women’s decisions to terminate their pregnancies. Thanks to “life windows”, mothers who cannot or do not want to take care of their child do not have to harm it, but can leave it in a safe place after birth. Following the adoption process, the child has the chance to find a home with a new family. Therefore, it is necessary to strengthen the idea of “life windows” within the childcare system and to create new ones, with the hope that children will be placed in them as little as possible. However, the legal status of “life windows” and the rules for their establishment and operation must be regulated. There is a lack of legal standards regulating the circle of entities that can set up and manage these facilities. This means that there is no obstacle to this being undertaken by people who are not competent to do so, to the detriment of the development of the concept and, consequently, the proper protection of the right to life and other rights associated with it.

79 John Paul II, 1997, p. 35.

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