

The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill)

'Judgment' of the Polish Constitutional Tribunal of
22 October 2020, K1/20

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INTRODUCTION: A 'MOLOTOV COCKTAIL' LOBBED AT POLAND

October of 2020 was just another month of rising concerns over the ever worsening Covid-19 statistics in Poland. Otherwise the times were unremarkable: Poland's ruling powers ploughed on with demolishing the rule of law and persecuting courageous judges; they reshuffled their cabinet to appoint an openly homophobic minister; and continued to inundate Polish citizens with propaganda spewing from government-controlled television channels.¹ But on 22 October 2020, something happened that made political observers, civic activists, and the people on the streets in Poland rub their eyes in disbelief. The Constitutional Tribunal (hereafter: the Tribunal), firmly controlled by the

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¹For one of the latest accounts on the demolition of the rule of law in Poland, see M. Tatała et al., *Rule of Law in Poland 2020: A Diagnosis of the Deterioration of the Rule of Law From a Comparative Perspective*, Civil Development Forum, (<http://for.org.pl/pl/publikacje/raporty-for/raport-for-stan-praworzadnosci-w-polsce-w-2020-r>), visited 10 March 2021. A comprehensive scholarly analysis of the process of the rule of law and constitutional backsliding in Poland has been provided in W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019).

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Law and Justice party and chaired by Mrs Julia Przyłębska, who was unlawfully appointed to the position of the President of the Tribunal (though properly elected, earlier, as a judge of the Tribunal), as part of a panel partly comprised of persons not legally appointed judges of the Tribunal, announced that provisions of the law allowing pregnancies to be terminated when there is a high probability of a severe or irreversible foetal impairment or when the foetus is diagnosed with an incurable and life-threatening disease – are unconstitutional.² Hours later, the streets of cities and towns, large and small, all over Poland, teemed with tens of thousands and later hundreds of thousands of protesters loudly proclaiming their opposition – frequently using expletives so far unheard of in public spaces – to this assault on fundamental human rights paraded as a legitimate judicial act as part of the Tribunal's constitutional review of legislation.³ The protest, initially aimed at the Tribunal's pronouncement, quickly turned into a global protest against the Law and Justice party's rule over Poland in general, at first triggering incredulity in government circles and then prompting a series of nervous reactions from them.

Immediately after the Tribunal headed by Mrs Przyłębska announced its 'judgment'⁴ –lawyers began to come forward to discredit it both on the merits and on procedural grounds, something we will also be doing in this case note. There is also a no less important and puzzling question to be considered – why Jarosław Kaczyński, the *de facto* ruler of Poland (and hence also the ultimate controller of what the Tribunal is doing, with all current judges with a single exception of Judge Kieres having been political nominees of Kaczyński), chose this particular moment to lob this kind of Molotov cocktail at the nation after refraining from using legislation to incite ideological wars. This is, of course, par excellence a *political* rather than legal issue, so we will deal with it here quickly. Some commentators suggested that this move was designed to distract the public from the authorities' mishandling of the Covid-19 pandemic; others saw it as a concession towards the Catholic electorate or to voters in rural areas infuriated by the animal protection bill floated recently by the government which would spell financial losses for the agricultural sector.⁵ The only certainty is that the kind of

²'Judgment' of Constitutional Court of 22 October 2020, K 1/20.

³M. Gessen, 'The Abortion Protests in Poland Are Starting to Feel Like a Revolution', *The New Yorker*, 17 November 2020, (www.newyorker.com/news/our-columnists/the-abortion-protests-in-poland-are-starting-to-feel-like-a-revolution), visited 10 March 2021.

⁴For the sake of simplicity we shall grudgingly use the term 'judgment' to describe the decision of 22 October 2020 but, for reasons given below under the heading 'Formal defects', it is not a legal, valid judgment. Rather, it is a 'judgment *non existens*' or a decision masquerading as a judgment, taken by a group of persons, some of whom are not lawful judges, a fact which fatally taints the decision with invalidity.

⁵For consideration of some of the theories surrounding Kaczyński's decision, see K. Wigura and J. Kuisz, 'Poland's abortion ban is a cynical attempt to exploit religion by a failing leader',

schizophrenia permeating Poland ruled by Kaczyński becomes very apparent when we realise that it is only Kaczyński himself who can say which of these hypotheses is in fact correct and explain *why* he decided to incite social turmoil. What is already clear by now, however, is that this particular decision may well turn out to be the most portentous one Kaczyński has ever made.

THE RIGHT TO ABORTION IN POLAND PRIOR TO 22 OCTOBER 2020

One of the themes standing out in discussions among street protesters and lawyers alike is that the Tribunal's judgment of 22 October 2020 will likely result in the demise of the so-called 'abortion compromise'.⁶ This rather enigmatic expression has been used since at least 1997 (the year of the adoption of current Constitution) to describe the situation in Poland prior to 22 October 2020. The 'compromise' consisted of a generalised ban on abortion save in three situations: (i) when pregnancy posed a threat to the woman's life or health (regardless of the stage of development of the foetus); (ii) when pre-natal tests or other medical procedures indicated a high probability of a severe and irreversible foetal impairment or when the foetus is found to be afflicted with an incurable and life-threatening disease (prior to the foetus becoming viable outside the body of the pregnant woman); and (iii) when there are legitimate reasons to suspect that the pregnancy is a result of a prohibited act, such as rape or incest (in which case abortion was allowed in the first 12 weeks of pregnancy).⁷

So what exactly is this 'abortion compromise' in Poland today? Perhaps it is best to begin by defining 'compromise' itself. The most common understanding of 'compromise' is an agreement between parties with different views or demands, where all sides of a conflict situation settle to reach a mutual concession.

The Guardian, 28 October 2020, (www.theguardian.com/commentisfree/2020/oct/28/poland-abortion-ban-kaczynski-catholic-church-protests), visited 10 March 2021.

⁶On the significance of 'rights-talk' in shaping abortion legislation in a comparative legal perspective, see N. Rimalt, 'When Rights Don't Talk: Abortion Law and the Politics of Compromise', 28 *Yale Journal of Law & Feminism* (2017) p. 327.

⁷The Act of 7 January 1993 on Family Planning, Protection of the Human Embryo and Conditions for the Admissibility of Abortion (Journal of Laws of 1993, No. 17, item 78). This law must be read in conjunction with the relevant provisions of the Criminal Code (Journal of Laws of 1997, No. 88, item 553). Art. 152 of the latter reads: '§ 1. Whoever, with consent of the woman, terminates her pregnancy in violation of the law shall be subject to the penalty of deprivation of liberty for up to three years. § 2. The same punishment shall be imposed on anyone who renders assistance to a pregnant woman in terminating her pregnancy in violation of the law or persuades her to do so. § 3. whoever commits the act referred to in § 1 or § 2 above after the foetus becomes viable outside the pregnant woman's body shall be subject to the penalty of deprivation of liberty for a term of between six months and eight years'. The pregnant woman terminating her pregnancy is not subject to criminal liability.

The key distinguishing element of compromise is a jointly reached agreement on a way out of a difficult situation satisfactory – or at least acceptable – to the parties concerned. However, as Poland was transitioning from communism to democracy, the country's free and democratic society was not the site of any social dialogue concerning abortion rights. What happened instead was that the Catholic Church in Poland was in a sense 'rewarded' for its undeniable contribution to the overthrow of the previous regime in the country. As a result, from day one, legislation in Poland has been shaped without regard to the prevailing standards for women's rights and the protection of reproductive rights. The extent to which pregnant Polish women were free to decide their fate was curbed in line with the position held by the Vatican and Poland's clergy.⁸

Ever since the new legislation came into effect,⁹ efforts have been mounted to amend it, with several twists and turns occurring in the resultant battle. The first move to amend the law was made in 1996 when the then ruling left-wing coalition voted to allow pregnancies to be terminated by women finding themselves in difficult living conditions or dramatic personal circumstances.¹⁰ On 28 May 1997, however, the full panel of 12 judges of the Tribunal ruled – with three dissenting opinions – the latter amendment unconstitutional.¹¹ The Tribunal argued that the so-called 'social premise' for abortion, 'serves to legalise the termination of pregnancies without sufficiently demonstrating the need to safeguard some other constitutional value, right or liberty, while also relying on vague legalisation criteria, thereby undermining the constitutional guarantees serving to protect human life'.¹² Importantly, this judgment 'injected', as it were, the protection of conceived life into the new Constitution of 2 April 1997 ahead of its adoption, by suggesting that the new Constitution provides for the legal protection of human life from the moment of conception. This is despite the relevant Article 38 of the Constitution speaking (intentionally) of the life of human beings, without being specific as to when this life begins and ends.¹³ What the Tribunal was in fact ruling on at the time was compliance with the

⁸On the influence of the Catholic Church on abortion legislation in Poland, see A. Kulczycki, 'Abortion Policy in Postcommunist Europe: The Conflict in Poland', 21(3) *Population and Development Review* (1995) p. 471.

⁹*Supra* n. 7 [the Act of 1993].

¹⁰The Act of 30 August 1996 on Family Planning, Protection of the Human Embryo and Conditions for the Admissibility of Abortion (Journal of Laws of 1996, No. 139, item 646).

¹¹The judgment of the Polish Constitutional Tribunal of 28 May 1997, K 26/96, <sis.lex.pl/orzeczenia-i-pisma-urzedowe/orzeczenia-sadow/k-26-96-orzeczenie-trybunalu-konstytucyjnego-520122839>; for English translation of large parts of the judgment, see <www.law.utoronto.ca/utfl_file/count/documents/reprohealth/poland_1997_decision_english.pdf>, visited 10 March 2021.

¹²*Ibid.*, para 3 of the 'Sentence' section of the judgment.

¹³The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483). Art. 38 stipulates: 'The Republic of Poland shall ensure the legal protection of the life of

Constitutional Act of 1992 known as the Small Constitution.¹⁴ (We shall return to the analysis of the Constitution and the Judgment of 28 May 1997 later in this case note, under the heading ‘A critical analysis of the “judgment” of 22 October 2020’).

In 2006, just nine years after the Tribunal’s judgment, the first attempt was made to explicitly provide for the *constitutional* protection of human life from the moment of conception. But the initiative failed in Parliament.¹⁵ It would appear that the spirit of compromise prevailed among the right-wing and conservative forces in power at the time. Now, in 2020, it turns out that such fundamental issues are being decided by the ruling power based on gains to be had and losses to be suffered. There were further legislative forays into the abortion battleground between 2016 and 2018. Most of these were centred around the ‘Stop Abortion’ initiative, under which organisers delivered 500,000 signatures of citizens to Parliament in support of tougher anti-abortion laws seen as extending the legal protection of human life.¹⁶ The proposed Bill called for prison sentences for both doctors performing illegal abortions and women undergoing them. This action prompted the creation of the ‘Save Women’ Legislative Initiative Committee which collected 215,000 signatures for a Bill making it legal to freely terminate a pregnancy within the first 12 weeks from conception.¹⁷ At that time, the Polish Parliament rejected both Bills, with the Bill calling for harsher restrictions on abortion being shelved largely because of the powerful social protests it triggered. The two Bills were again put before Parliament in 2018, but it was only the Tribunal’s pronouncement of 22 October 2020 that added a new – and dramatic – impetus to the situation.

The unavoidable conclusion to be drawn from comparing the abortion laws in effect in Poland prior to 22 October 2020 (and of the various attempts to relax and tighten them) with the legal situation in the other member states of the European Union, is that access to legal abortion in Poland is restricted to an extreme degree. Looking at the official statistics of legal abortions performed in Poland, it is also clear that Polish women are terminating pregnancies ‘outside

every human being’. Official English translation available at (www.sejm.gov.pl/prawo/konst/angielski/kon1.htm), visited 10 March 2021.

¹⁴Constitutional Act of 17 October 1992 on mutual relations between the legislative and executive authorities of the Republic of Poland and on local self-government (Journal of Laws of 1992, No. 84, item 426).

¹⁵Proposal of 5 September 2006 for a draft law changing the Constitution of the Republic of Poland, Document No. 993.

¹⁶Citizens’ initiative proposal of the act amending the act of 7 January 1993 on family planning, protection of the human fetus and conditions for the admissibility of termination of pregnancy and the act of 6 June 1997 – Penal Code, Official Document No. 784, (www.sejm.gov.pl/Sejm8.nsf/PrzebiegProc.xsp?nr=784), visited 10 March 2021.

¹⁷Civic bill proposal on women’s rights and conscious parenting, Official Document No. 2060.

the system', in many cases outside Poland.¹⁸ At the same time, it must be said that efforts to liberalise the existing abortion laws never sparked social protests powerful enough to bring about real change, so it may seem that the 'abortion compromise' has somehow embedded itself in the social consciousness in Poland as a matter of fact. It is only now, when the right to legal abortion was effectively eliminated in the wake of the Tribunal's 'judgment' of 22 October 2020 that citizens reacted violently and on a massive scale. To cite a succinct observation by Jarosław Makowski and Kazimierz Bem: 'After a protracted agony, the infamous "abortion compromise" is finally dead. The truth is, this was never a compromise but rather a slavish tribute offered by Catholic politicians to Pope Wojtyła – a sacrifice of female bodies made by males to a fellow male fixated on banning abortion.'¹⁹

A CRITICAL ANALYSIS OF THE 'JUDGMENT' OF 22 OCTOBER 2020

Formal defects

The 'judgment' of 22 October has fatal formal and procedural defects that render it invalid *ab initio*. It cannot be considered a proper judgment of the Tribunal for two disqualifying reasons: first, it was handed down by a panel (presenting itself as a full court) composed inter alia of three 'judges' improperly appointed and thus unauthorised to take part in any judicial proceedings before the Tribunal; and second, the panel was presided over by a Judge improperly elected to the position of the President (Chief Justice) of the Tribunal. In addition, the judgment has been published with inexcusable delay, contrary to a clear constitutional requirement. These three procedural defects will be now described briefly, in turn.

Three out of the 13 persons sitting on the panel and signing off the judgment (without dissenting) had joined the Tribunal as a result of faulty elections to seats

¹⁸According to estimates by the Federation for Women and Family Planning, Polish women perform more than 100,000 abortions every year – and this number may be short by some tens of thousands. Federation representatives stress that the actual number of abortions performed is hard to determine, but it is believed that 15% of the procedures are performed abroad. A 2013 poll showed that as many as one in three Polish women (and not fewer than one in four) underwent at least one abortion in their life. For detailed analysis and statistics, see Report by The Federation for Women and Family Planning, *Twenty Years of Anti-abortion Law in Poland*, (en.federa.org.pl/wp-content/uploads/2018/05/report_federa_20_years_polands_abortion_law.pdf), visited 10 March 2021.

¹⁹J. Makowski and K. Bem, 'Umarł kompromis aborcyjny, niech żyje świecka Polska!' ['The abortion compromise is dead, long live secular Poland!'], *OKOpress*, 21 November 2020, (oko.press/umarl-kompromis-aborcyjny-niech-zyje-swiecka-polska-makowski-i-bem/), visited 10 March 2021.

already occupied by other, properly elected judges. To be more precise, one had been elected to an already occupied seat (Mr Mariusz Muszyński), and two others were elected to succeed deceased judges who had been elected to occupied seats: Mr Jarosław Wyrembak, who succeeded Mr Henryk Cioch (who had taken up a seat already occupied), and Mr Justyn Piskorski (who succeeded Mr Lech Morawski who had taken up a seat already occupied) and who – to add insult to injury – was the judge-rapporteur in the decision of 22 October 2020. From a procedural point of view, these two types of failure are fully equivalent.

The method of court-packing administered by the new political majority at the end of 2015 was in fact quite simple: the election of three new judges by the parliament in the last weeks of its former term was invalidated, and three new ‘judges’ of the majority’s own choice were quickly installed in their place (despite the legality of the former election). This is the story in a nutshell; but the story in fact was slightly more complex.²⁰ At the end of the 7th term of the Polish Sejm, the lower chamber of parliament (which has the exclusive power to elect Tribunal’s judges by a simple majority), dominated by the centre-right majority of liberal and peasant parties, elected five new judges to the Tribunal in anticipation of retirements on the Court. Out of the five, two were elected irregularly (because they concerned seats that would only become vacant in the next term of the Sejm). But the other three were elected regularly. Nevertheless, President Duda (who by that time was in office after the mid-year presidential elections as candidate for the right-wing Law and Justice party) refused to take the oath of office from the three properly elected judges and instead awaited the parliamentary elections. At the beginning of 8th term, the Sejm’s new majority passed a resolution declaring the election of all five new judges null and void. The resolution of 25 November 2015 was unlawful: no constitutional rules allow the Sejm to change its earlier lawful resolution about the election of constitutional judges in any way. The only legal ploy that made such a resolution possible was the failure by the President to take the oath of office from the new judges elected in October 2015. But this failure was unconstitutional in itself: taking an oath of office from duly elected judges is the President’s duty rather than a prerogative and is of a ceremonial rather than constitutive character. So the President in tandem with a new parliamentary majority established a legal space (ironically created by two independently unlawful actions) in which the ‘election’ of three judges supported by the Law and Justice party on 2 December 2015 was possible – factually, even if not legally.²¹

²⁰For a more detailed account, see Sadurski, *supra* n. 1, p. 61-68.

²¹For the Venice Commission’s findings on improprieties in the composition of Constitutional Tribunal, see Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by The European Commission for Democracy Through Law, 11 March 2016, Opinion No. 833/2015 CDL-AD(2016)001, paras. 107-133; for the European Commission’s assessment, see, inter alia, Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland, paras. 3-12.

The three new 'judges', who should rather be called 'quasi-judges', were hastily invited (in the middle of the night of 2/3 December 2015) to the presidential palace to pledge the oath of office. By the following morning, the quasi-judges were installed (literally 'installed', with the help of security officers) in the Tribunal. The three quasi-judges (Henryk Cioch, Lech Morawski and Mariusz Muszyński) were not admitted to judging during the entire year of 2016, until the President (Judge Andrzej Rzepliński) and Vice-President (Judge Stanisław Biernat) of the Tribunal stepped down, in accordance with the regular schedule of terms of office. As a result, the majority of judges shifted to pro-Law and Justice party judges. Despite the fact that there has been a formal Tribunal judgment which deemed the legal grounds on which the 'quasi-judges' were elected to be unconstitutional²² – thus tainting their 'election' as ineffective – the three quasi-judges and their successors (Mr Jarosław Wyrembak and Mr Piskorski, respectively, for Mr Cioch and Mr Morawski, both having died before their 'term of office' expired) continued to appear on the bench of the Tribunal, to participate in proceedings, and to author various judgments. However, all the 'judgments' in the handing down of which any of these three persons participate, are invalid *ex lege*, because they are issued by persons not competent to be considered judges. This reasoning applies to the 'judgment' of 22 October 2020, in which Messrs Muszyński, Wyrembak, and Piskorski took part, the last of them even as judge-rapporteur.

Although a matter of arguably lesser legal consequence, one should nevertheless raise the issue of the President of the Tribunal, Ms Julia Przyłębska. Even though her legal status *as a judge* of the Tribunal cannot be questioned, she presided over the proceedings culminating with the judgment of 22 October *qua* President of the Tribunal, so her mandate is relevant. Her election to this position on 21 December 2016 was tainted with numerous irregularities. Under Polish law, the Tribunal elects (at a General Assembly meeting of all judges) two candidates for the presidency of the Tribunal. Then the President of the Republic appoints one of those candidates in a discretionary manner. But the meeting of the General Assembly was convoked and chaired by . . . Ms Julia Przyłębska who had earlier been appointed by the President of the Republic to the position (unknown to the Constitution) of Acting President of the Tribunal. That is the first item on the list of irregularities. Second, the meeting of the Assembly included three improperly elected 'judges' (whom we call, in this case note, quasi-judges): Messrs Cioch, Morawski, and Muszyński, as just described. Third, Ms Przyłębska ran the meeting in the absence of one of the 'old' judges (i.e., who was appointed prior to the take-over of the Tribunal in 2015-16) who was not given sufficient time to return to Warsaw from a short

²²Judgment of the Polish Constitutional Tribunal of 9 December 2015, K35/15.

period of leave. Fourth, even though a secret vote was admittedly taken (with Ms Przyłębska easily winning a majority from those present at the meeting), no formal resolution of the Assembly was taken for the presentation of the two candidates to the President of Poland. In lieu of such a resolution, Ms Przyłębska simply sent a letter to the President, signed only by herself, listing the two candidates, prompting the President to quickly appoint her to the top office in the Tribunal.

As we have just mentioned, the defects of the appointment of the President of Tribunal are of lesser importance than the fully irregular election of the three quasi-judges. Nevertheless, the fact that the proceedings leading to the judgment of 22 October 2020 were formally presided over by Ms Przyłębska in her capacity as the President of the Tribunal, rather than a Judge *simpliciter*, casts a big dark shadow upon the formal and procedural correctness of the ‘judgment’ under discussion here.

In addition, as already mentioned, the judgment was published and entered into force with inexcusable delay. Under Polish law, a judgment of the Constitutional Tribunal acquires legal force at the time of its publication (Article 190(3)), and the judgment must be published ‘immediately’ (Article 190(2)). The government has no discretion to delay or suspend publication. In particular, there are no legal grounds for the government (which, in this instance, merely plays the role of a printing press) to delay the publication of the judgment until the written reasons are completed – and yet this is exactly what the Government and the Constitutional Tribunal acting in tandem did. The judgment, let us recall, was announced orally on 22 October 2020 but published officially – and thus entered into force – on 27 January 2021, three months after its announcement. In public media both the representatives of the government (which is responsible for printing of the official gazette) and Judge Przyłębska explained that the delays was caused by the need to wait for the last dissenting opinions which had been foreshadowed but which some judges submitted quite late. But this is totally unpersuasive: both as a matter of law (Article 190(2) of the Constitution) and as a matter of established practice, publication of the sentence is separate from, and precedes, publication of written reasons, not to mention the separate opinion. While this aspect does not, *per se*, signify the invalidity of the judgment (in the way that the first factor described above does), it adds to an overall picture of disdain for legal rules displayed by the Tribunal and by the Government in relation to the judgment.

The substance

The ‘judgment’ of 22 October 2020 declared that a provision of the law of 7 January 1993 as subsequently amended, to the effect that a serious defect of

the fetus (i.e. Article 4(a)(1.2)), is inconsistent with Article 38 of the Polish Constitution (legal protection of life of every person), in connection with Article 30 (inviolable human dignity as a source of all liberties and rights) and in connection with Article 31(3) (a list of legitimate grounds of statutory restrictions on constitutional rights). The reasons provided for the judgment appealed to (1) the constitutional text, and (2) Constitutional Tribunal case law, in particular the landmark judgment of 1997, as already mentioned above. Our critical analysis of the judgment's justification will proceed in these two stages.

The reasons provided for the judgment K 1/20 explicitly refer to the constitutional text. The 'judge-rapporteur' quoted and cited the Constitution several times. He made it clear that his task was not to deliberate on 'ethical-philosophical aspects', but rather that the role of a constitutional court is to rule authoritatively on matters concerning the compatibility or otherwise of the positive law with the Constitution (Judgment part III.1.2, p. 16).²³ And yet, even a cursory reading of the reasons leads to the immediate thought that nothing in the constitutional text mandates a conclusion that the Constitution prohibits the termination of abortion save in the two narrow cases of threat to the mother's life/health and pregnancy originating from a crime. Rather, this conclusion was a sheer act of judicial activism, going well beyond what the Constitution explicitly *says*. Whether it was what the Constitution-makers *intended to say* will be discussed below.

First however, textual interpretation needs to be considered. The key provision on which the judgment is based is Article 38.²⁴ In the words of Mr Piskorski:

Article 38 has a special significance [in this case] and raises certain implications applying to an ordinary legislature . . . What is beyond any doubt is that it concerns the protection of life understood as the protection of a biological existence of a human. Furthermore, it is a law which is primary vis-à-vis the state which means that a state cannot confer it upon human beings, but only can emphasise its existence and significance by subjecting it to special protection. (Judgment Part III.3.2 p. 23)

But, strangely enough, and embarrassingly for the reasons provided for the judgment of 22 October 2020, Article 38 does not even declare a right to life. What the article provides for is the 'legal protection of life' for everyone. Why the Constitution drafters chose this articulation rather than a more straightforward 'right to life' is beside the point for a purely textual analysis (which is all that is required at this stage of our case note). But for a textualist 'a right to X' is

²³All references to the Judgment K 1/20 are in brackets, in the main text of this case note.

²⁴Art. 38 reads: 'The Republic of Poland shall ensure the legal protection of the life of every human being'. All translations of Polish constitutional provisions are taken from an official English translation, *supra* n. 13.

not exactly the same as 'legal protection of X'. A 'rights'-based articulation sounds more categorical, absolute, or trump-like than a 'legal protection' articulation, which sounds as though it would lend itself to weighing and balancing, be subject to proportionality, and trade-offs with other values for which individuals may claim 'legal protection'.

This is confirmed by the text of the Constitution of Poland. 'Rights to . . .' articulations are clearly distinguishable in the Polish Constitution from those of 'legal protection' even though both types of wording are included in the constitutional chapter on rights and liberties. For instance, in the constitutional text, everybody has a 'right' to a fair and public hearing of his or her case by an independent court (Article 46), to privacy and the protection of family life and reputation and good name (Article 47), to bring up, as a parent, her or his children in accordance with one's convictions (Article 48), access to the public service (Article 60), access to public information (Article 61), to participate in elections and referenda (Article 62), and to lodge petitions and complaints (Article 63). Statistically, the language of 'rights' easily prevails in the Polish constitutional bill of rights (Chapter II of the Constitution) over the language of 'legal protection'. The latter, in addition to Article 38, is used for 'human liberty' (Article 31), equal protection of property and property rights (Article 64), protection of consumer and tenants (Article 76), as well as in connection with privacy and the protection of family life (Article 47). As one can see, 'legal protection to X', in contrast to a 'right to X' or 'right to legal protection to X' is the exception rather than the norm in the Polish Constitution. And we must assume that the Constitution-makers used that language advisedly rather than randomly. So while we would not go so far as to say that the Constitution in any way sidelines the value of life, there are no constitutional-textual grounds for a claim that a 'right to life' is elevated to a quasi-absolute rank: it is not.

This textual observation is confirmed by analysing the other two central provisions which, along with Article 38, served the Tribunal as a basis for its judgment of 22 October 2020. Article 30 (human dignity) was described by Mr Piskorski in his oral reasons for the judgment as:

a kind of link, a connection between the order of natural law and positive law, while it is at the same time an axiological foundation of an entire constitutional order. . . . The prohibition of any violation of human dignity has an absolute character and applies to everyone, while a duty to respect and protect dignity is conferred upon public authorities of the state.²⁵

²⁵Ibid., 16:20-17:12.

But, again, a purely textual analysis of Article 30²⁶ challenges Mr Piskorski's conclusion for two reasons. For one thing, 'dignity' is defined not as a right per se, but rather as a *source* of rights. As such, at least under a purely textual analysis (which is, let us repeat, all that we are doing at this stage), it cannot serve as an independent ground for the legal determination of a right, but only as an interpretive tool for rights analysis. Second, an inherent and inalienable dignity is expressly described as a source of *all* rights and freedoms (the point additionally emphasised by the location of Article 30 at the top of the constitutional chapter on rights) and hence, not only of a right to life (assuming, *arguendo*, that such a right is established), but also liberty (Article 31), equality before the law and non-discrimination (Article 32), bodily inviolability (Article 41), privacy (Article 47), etc.

All these (and many other) constitutional rights compete with the legal protection of life, and all are under the control of the ultimate source of all rights, i.e. the principle of dignity. Each of these rights is visible to dignity, and the principle of dignity must affect the competition between these rights when a conflict arises. Competition is regulated by the third of the textual grounds cited by judgment K 1/20, namely Article 31(3).²⁷ The Tribunal said:

the Tribunal, based on the written motion initiating the current procedure, has reconstructed the main challenge as claiming that the legal provisions under challenge are inconsistent with Article 38 of the Constitution, in connection with Article 30 and in connection with Article 31(3) of the Constitution. (Part III.1.2, p. 16)

On its face, Article 31(3) contains four rules dealing with restrictions on rights: (1) such restrictions must be statutory, not based on other sources of law; (2) the necessity requirement; (3) a list of derogatory grounds (legitimate grounds for statutory limits upon constitutional rights); and (4) the requirement that the essence of a right not be infringed. None of these requirements apply to the provision deemed unconstitutional by the Tribunal on 22 October 2020. For example, in relation to (1): access to abortion in the case of fetal defect was statutory. In relation to (2): it could be held to be necessary for at least

²⁶Art. 30 reads: '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'.

²⁷Art. 31(3) reads: 'Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights'.

one of the derogatory grounds. In relation to (3): the derogatory grounds applicable here include the 'rights of others' (i.e. persons other than a fetus) to human liberty (Article 31 (1)), the equal rights of women and men (Article 33), the prohibition on cruel and inhuman treatment (Article 40), bodily integrity (Article 41(1)), the privacy and protection of family life (Article 47), and the protection of health (Article 68), etc. Finally, in relation to (4): while the availability of abortion in case of fetal defect *may* be seen to infringe the right to life of a fetus (a point we are making here only *arguendo*), the principle (4) of not infringing the essence of a right applies to all rights at stake, hence also to all these rights listed under item (3) in this paragraph of our case note. And if it can be shown (as it clearly can) that the non-availability of legal abortion in the case of a fetal defect affects the essence of at least one such right, then the competition between different rights is simply replicated at the stage of the 'essence analysis', and no right is presumptively privileged by the constitutional text in this competition.

So much for the textual interpretation; we now turn to an interpretation based on the constitution-makers' intentions. Over the course of its existence so far, the Constitutional Tribunal has not worked out an elaborate theory of constitutional interpretation, usually oscillating between textualist and teleological approaches. In particular, it has not established a theory of the 'original intentions' of the constitution-makers as a legitimate source for discerning the 'true' meaning of a constitutional text. Occasionally, the Tribunal has referred to constitutional convention debates,²⁸ but this approach has never been elevated to the level of a privileged method of constitutional interpretation. Jurisprudential debates, which are frequent in US constitutional adjudication (and legal systems which take the US as a model) on matters such as the pros and cons of the 'original intentions', the 'original meaning', or the 'living tree' theory of Constitutional interpretation,²⁹ have been largely absent from the Polish constitutional arena. In this, Poland is not alone in European-continental architecture. But further explication of this striking feature is well beyond the ambit of this case note.

²⁸See Judgment K20/02 of 23 September 2003 which expressly appealed (in Part 4.1 of the Reasons for judgment) to deliberations in the Constitutional Commission of the National Assembly, concerning the constitutionalisation of the principle of the civil liability of the state for state actions towards citizens, as instantiated in Art. 77(1) of the Constitution which in this case was the constitutional basis for the scrutiny of provisions of the Code of Administrative Procedure (culminating with invalidation of some of the latter provisions). Judgment K 40/07 of 16 April 2008 the Tribunal, in Part 1 of its reasons for judgment, also referred to the views expressed in the Constitutional Commission of the National Assembly deliberations in order to construe the meaning of Art. 186 of the Constitution concerning certain powers of the National Council of Judiciary.

²⁹See A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press 1998).

Despite the absence of an official recognition of the 'original intentions' theory as an ultimate guideline for discerning constitutional meanings, it does not necessarily follow that one should ignore such intentions altogether. Indeed, one can claim that where a Constitution is a relatively new construct (and the Polish Constitution is less than a quarter of century old), the two main obstacles usually cited as the main arguments against using the original intentions method do not apply. The first such objection is that this method constitutes rule by the 'dead hand of the past' – that today's polity should not be governed by the will of generations long departed, where the constitution-makers were totally non-representative of today's concerns or of today's societal makeup.³⁰ However, with new constitutions, subjecting the law to the constitution-makers' will does not imply their rule from the grave, as many of these parties are still very much alive and active. The second objection is that appealing to 'original intentions' is impracticable because we often lack sufficient knowledge about the constitution-makers' actual intentions, and second-guessing such intentions leads to the concocting of such intentions by an interpreter.³¹ But with new constitutions, this objection need not apply, as we may have good access to reliable knowledge about these intentions (known in Polish legal theory as 'authentic interpretation').

This is certainly the case for Article 38 of Polish Constitution, and of the constitution-makers' intentions regarding the place of abortion in the system of constitutional rights. This was actually one of the major issues in Poland's pre-constitutional debates, and one of the main stumbling blocks on the road to a new Constitution. It was definitely not the case that Poland's constitution-makers omitted this issue out of disregard for its importance. The proposal to constitutionally prohibit abortion by declaring the right to life 'from the moment of conception' *was* on the table right up to the final stages of constitutional drafting. Some leading actors in Constitution debates used this issue as blackmail, saying they would oppose the Constitution if a clear anti-abortion provision was not inserted. However, in the end, all of the main actors 'decided not to decide', using a strategy well-described in a famous article by Ginsburg and Dixon. This was a clear case of 'constitutional deferral' under which a given subject (here, a right to life) was deemed constitutional, but then 'almost all substantive decision-making on the subject [was deferred] to future decision-makers'.³² Article 38 was deliberately and consciously left open and ambiguous as to the beginning and, for that matter, the ending of 'natural life'. The imprecision in

³⁰See J. Hart Ely, *Democracy and Distrust* (Harvard University Press 1980) p. 11.

³¹For an in-depth discussion of this claim, see R. Kay, 'Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses', 82 *Northwestern University Law Review* (1988) p. 226 at p. 236-259.

³²R. Dixon and T. Ginsburg, 'Deciding not to Decide: Deferral in Constitutional Design', 9 *International Journal of Constitutional Law* (2011) p. 636 at p. 637.

the final drafting of Article 38 was a conscious and (in our view) wise strategy rendering the Constitution possible. It was well-described by an acute observer of the constitution-making process in Poland:

The deliberately vague wording in Article 38 reflects a compromise, with *the result that the responsibility for the regulation of abortion is passed effectively to the Sejm*. As written, the provision would arguably seem to permit a restrictive law on abortion as well as a liberal law. In this regard, it should be noted that proposals to protect human life explicitly from the moment of conception were not accepted.³³

The italicised words indicate the clear intention of constitution-makers who could not reach a substantive compromise in the debates but did not want this failure to prevent the adoption of the Constitution as a whole. The matter was simply transferred to the sphere of legislative discretion, to be exercised through statutes (of course subject to eventual constitutional scrutiny by the Tribunal but only *after* and on the basis of statutory regulation). It is consistent with Ginsburg and Dixon's observation that sometimes 'passions' of the parties to constitutional negotiations can make the 'decision costs' of reaching agreement on constitutional issues disproportionately high.³⁴ Finding consensus was a task delegated to the sub-constitutional agenda. It was not assigned to a future constitution-maker or amender (indeed, attempts to amend the constitution to prohibit abortion were later made and rejected),³⁵ and was certainly not assigned to a future constitutional court. It is therefore inconsistent with all the record of deliberations on the 1997 Constitution to claim, as the judge rapporteur in the present case asserted: 'The Tribunal has determined that the intention of the constitution-maker – in the light of the absence of explicit constitutional limits of temporality of human life and its legal protection or of the preclusion of the Tribunal's jurisdiction in this field – was to leave it to a determination by the Tribunal what is the binding meaning of the notion "a human" in the meaning of Article 38 of the Constitution' (Judgment Part III.3.3.1 p. 28). The judgment of 22 October 2020 directly breached this jurisdictional understanding and intruded upon the legislative powers of the parliament so defined in the constitutional settlement of 1997.

Finally, we turn to the use of case law in the judgment under discussion. The case of the Constitutional Tribunal of 1997 occupies the most prominent role in the reasons provided by Mr Piskorski for the judgment of 22 October

³³R. Cholewiński, 'The Protection of Human Rights in the New Polish Constitution', 22 *Fordham International Law Journal* (1998) p. 235, p. 261-62, emphasis added.

³⁴Dixon and Ginsburg, *supra* n. 32, p. 638.

³⁵An amendment proposal was lodged in the Sejm on 5 September 2006 and failed to obtain the necessary two-thirds majority of votes on 13 April 2007.

2020, as mentioned earlier in this case note. (We should add that while case law is not officially considered a source of law in Polish constitutionalism, it is nevertheless often referred to by the Tribunal as an auxiliary argumentative device, and certainly figures prominently in the 22 October 2020 judgment.) This case is not the only judgment by the Tribunal on abortion, but is by far the most momentous, and its predecessors (dating back to 1991) have been conveniently ignored in the judgment under discussion.³⁶ This is not the case with judgment K26/96 of 28 May 1997. Indeed, in the oral reasons for the present judgment, its prominence overshadows that of the constitutional text itself. At the outset of his oral reasons, Mr Piskorski announces: 'The Tribunal, while interpreting [the provision of the abortion law concerning permissibility of abortion in the case of defects of fetus] reaches a conclusion analogous to that of the verdict of 28 May 1997 in case number K26/96'. Mr Piskorski returns to the 1997 case again and again, always approvingly and deferentially, and all his argument and rhetoric is oriented towards creating an impression that the present decision is the natural, obvious and necessary extension of the 1997 decision.

But it is *not*, for several reasons which we shall spell out in a moment. As a caveat we should say that, in our opinion, the 1997 decision was wrong and unconstitutionally hurtful to Polish women. One of us has repeatedly offered a strong critique of that judgment, and alleged that the judgment was legally wrong and poorly argued.³⁷ This is not a place to rehash those criticisms. We simply take it for granted that the 1997 judgment – which, let us repeat, found the permissibility of abortion to be constitutionally correct only in three cases: where there is a threat to the mother's life and health; where the pregnancy originates from a crime; and where the fetus has significant defects – has become part of the settled case law on abortion in Poland, or of the so-called 'abortion compromise', and, as we have just argued, any change to the legal status quo requires intervention by the legislature or constitution-maker. We find the status quo to be regrettable – in the sense of being unduly burdensome to pregnant women – but it is even more objectionable to push this legal situation in an even more restrictive direction while pretending to rely on the force of the 1997 judgment. And this is exactly what the Tribunal purported to do on 22 October 2020. There are three main reasons why relying on the judgment of July 1997 is not appropriate as an alleged support for the judgment of October 2020. We will list them in increasing order of importance.

First, the judgment of 1997 was not based on the same Constitution as the judgment of 2020. In July 1997, the new Constitution had been adopted but was

³⁶For account of pre-1997 case history on abortion in Poland, see W. Sadurski, *Rights Before Courts*, 2nd edn. (Springer 2005) p. 178-79.

³⁷See Sadurski, *supra* n. 1, p. 59.

not yet in force. It only entered into force on 17 October 1997. And it was only in the very last sentence of the majority opinion that reference was made, obiter, to the new Constitution: ‘Constitutional grounds on which the Tribunal based the present judgment found its confirmation and clear articulation in the [new] Constitution of the Republic of Poland’.³⁸ It does not follow, of course, that judgments handed down under the old constitution lose force following its replacement by the new constitution. Nevertheless, certain constitutional resources available to constitutional judges under the old constitution were no longer available under the new one, and vice versa. In the present case, the all-important proportionality analysis provided by Article 31(3) was not available to the 1997 Tribunal. The constitutional structure of rights under the old Constitution (which was a patchwork of the heavily-amended old Constitution of 1952, the Round Table Agreements of 1989 which had a *de facto* though not a *de iure* constitutional status, and the so-called Small Constitution of 1992) was completely different to that crafted by the new Constitution of 1997. If anything, it was extremely meager (there was no express bill of rights, no provisions for weighing and balancing different rights through proportionality analysis, etc.), thus giving judges almost *carte blanche* for judicial adjudication on rights. Suffice to say that the judgment of 1997 derived conclusions about the permissibility of abortion from ... the principle of a democratic state based on law (Article 1 of the old Constitution as amended).³⁹ But the new Constitution changed all that: it contains a very elaborate Charter of Rights, including three well-articulated provisions relevant to the 2020 case (Articles 30, 31(3) and 38) which had no equivalents in the constitutional structure controlling the judgment of 1997. For this reason, these two constitutional states of affairs yield different constitutional interpretations.

Second, even putting to one side, *arguendo*, the first objection, the *outcome* of 1997 judgment was very different from that in 2020. The earlier judgment drew a line between legally permissible and non-permissible abortion at the point dividing on the one hand, the three permissible instances (threat to life and health, pregnancy originating from a crime, fetal defects) and on the other, abortion on social and psychological grounds. The judgment of 2020 inexplicably moved the wall separating permissible from impermissible abortion in a way which put abortion for fetal defects on the impermissible side. This is a fundamental change, especially if one considers that over 96% of legally performed abortions in Poland in recent years belong to this category.⁴⁰ Now, the main thrust of the 1997

³⁸Judgment K 26/96, Part. 4.9.

³⁹*Ibid.*, Part 3.

⁴⁰According to the official report by the Polish Ministry of Health, in 2019 out of 1,116 cases of legal abortion, 1,074 were performed because of the likelihood of severe and irreversible fetal

judgment was a critique of the permissibility of abortion on the fourth ground: socio-psychological reasons ('difficult life conditions', as the statute of 1996 put it, as scrutinised and partly invalidated by the 1997 judgment). This was the burden of the argument in that judgment, while the first three grounds were treated more or less as belonging to the same class, with no relevant distinctions being drawn *within* these three cases. In other words, the judgment of 1997 more or less took it for granted that abortion sought on the grounds of fetal defects was as substantially warranted, from a constitutional point of view, as the other two cases. Hence removing one of these three cases and lumping it with the other impermissible categories is inconsistent with the outcome and logic of the 1997 case.

The third reason for their incompatibility is the most serious and has to do with the central argument about the constitutional value of life, as articulated in the 1997 judgment. In that judgment, a distinction was carefully drawn by the author of the majority opinion, President of the Tribunal judge Andrzej Zoll, between the constitutional *value* of human life, which remains constant at the different stages of human life (starting from the moment of conception) and the possibility of changed levels of constitutional *protection* for human life. The former (constancy of constitutional value) was emphasised in this passage:

The constitutionally protected value of the legal good that is human life, including life developing in the pre-natal stage, may not be differentiated. The reason for this is that no sufficiently precise and justifiable criteria exist for making such a differentiation depending on the stage of development a human life is in. Human life therefore becomes a constitutionally protected value from the moment of its coming into existence. This is also true of the pre-natal stage.⁴¹

But in the operative passage of the judgment, President Zoll wrote for the majority about differentiated *protection*:

From the acceptance that human life, including at its prenatal stage, is of constitutional value, it does not follow that in some exceptional situations, protection of this value must not be limited or even excluded due to the necessity of protecting or giving effect to other constitutional values, rights and liberties.⁴²

impairment or incurable disease. Among them, 271 cases concerned the presence of Down syndrome without additional defects, in 174 cases, trisomy 21 was accompanied by coexisting defects. In another 200 cases, the cause of termination of pregnancy was multiple multiorgan defects. The remaining cases concerned syndromes of birth defects caused by chromosomal abnormalities, such as Patau, Turner or Edwards' syndromes *see* (wiadomosci.onet.pl/kraj/aborcje-ministerstwo-zdrowia-podaje-liczbe-wykonanych-zabiegow-w-2019-r/z2wc0vz), visited 10 March 2021).

⁴¹Ibid., para. 3 of the 'Legal Reasoning' part of the judgment.

⁴²Ibid., Part 4.3 of the judgment.

This differentiated protection, the Tribunal added, is warranted by a collision between constitutional rights, values and interests. And the removal of the possibility of legal abortion based on the difficult life conditions of the mother was argued by the author of the majority opinion on the basis that such a collision was never properly realised and articulated by lawmakers who enacted the 1996 statute. According to Zoll, a collision occurring in the case of difficult life conditions is significantly different than in the other three conditions which warrant the permissibility of abortion.

None of this is absorbed by Mr Piskorski in his reasons for the 2020 judgment. While one can, of course, question the plausibility of Zoll's distinction between the equal value of human life and unequal protection of life, it is *there* in the 1997 judgment, and it is the critical part of the argument underpinning that earlier judgment. The 2020 judgment removes this crucial ingredient and remains within the confines of the equality of human life at all stages of its development, while disregarding the point about warrants for unequal protection due to collision with other values. As the judge rapporteur declares: 'The Constitution introduces the highest standard of protection of human life because, in the light of the Constitution, devitalization (*sic*) of human dignity as a function of the stage of the development of a person is irrational since Deprivation of life, regardless of its stage, annihilates at the same time the subject who is holder of that dignity' (Judgment, Part III.3.3, p. 26). Hence, the judgment fundamentally changes the justification, and pretensions to continuity with the 1997 judgment are disingenuous.

The true nature of Mr Piskorski's oral opinion comes through when he analogises an abortion conducted because the fetus has defects to eugenics, which (at least in Polish) has clearly negative connotations, as actually recognised by the judge rapporteur himself who observes frankly: 'The connotation of the term "eugenic" is universally perceived in a manner unambiguously negative' (Judgment, Part III.2.3, p. 20). Despite this negative connotation, acknowledged by the Tribunal, the judgment several times characterises the legal provision on abortion scrutinised in the judgment, as 'eugenic' (e.g. by saying that Article 4a, 1, 1 of the law under scrutiny 'has, in the opinion of the Tribunal, a eugenic character, in the sense of liberal eugenic whereby it is not the state which promotes only healthy and fit citizens . . . but leaves the choice to parents who may decide whether to keep the life of, and continue their care over children which may not be healthy . . .') (Judgment, Part III.2.3, p. 21). This highly evaluative characterisation of the abortion in question as 'eugenic' was picked by one of the dissenters, Judge Pszczółkowski, who deems such a characterisation 'false', 'untrue, simplified and often unfair' (Judgment, pp. 70-71). By drawing an extraordinary analogy between the termination of a pregnancy with 'eugenics' – a term denoting a deeply discredited practice and ideology with reprehensible connotations – and

(implicitly) connecting it with the parents' unwillingness to undertake special care for their child displays the fundamentalist ideology behind the judgment. It has nothing to do with judicial deference to the constitutional text and the settled case law. It is a novel judgment, unmoored in the Tribunal's case law, and, as we have seen, in the constitutional text and the constitution-makers' original intentions. It must therefore be called what it is: a usurpation of legislative power by a Tribunal (improperly composed), in a radically activist way.

Separate opinions

Written reasoning of the five separate opinions to the judgment covers 117 pages (Judgment, pp. 37-154). They were submitted by judges representing both the 'old guard' as well as new Law and Justice party nominees, some appointed in violation of the law. Each of them, however, regardless of the specific point and tenor of their criticism, point to the substantive weaknesses, procedural failures, and the ideological burdens of the content of the judgment passed in October 2020. Two separate opinions (that of Judge Kieres⁴³ and Judge Pszczółkowski⁴⁴) had already been signalled during the oral announcement of the judgment. The three subsequent ones (by Judge Jędrzejewski, Mr Muszyński and Mr Wyrembak) concern only the written justification for the judgment, not the merits of the judgment itself.

Most of the charges and polemics against the judgment were expressed in the two dissents of Judge Kieres and Judge Pszczółkowski. Their doubts and open opposition towards the conclusions of the Tribunal are extensive, in-depth, and touch on the very foundations of the analysed constitutional matter. One of their key arguments suggests that the Tribunal, in an unacceptable way, had taken over the role of a legislator. Judge Kieres argued that the proceedings before the Tribunal should be discontinued in its entirety due to ongoing efforts in the Polish Parliament on a citizens' proposal to change abortion laws (Dissent

⁴³Judge Kieres belongs to the so-called old composition of the Tribunal, elected in accordance with all procedures. His dissenting opinion is accompanied by a personal declaration made as a member of the Catholic Church, which has an even more significant and poignant overtone. It is worth quoting it at length: '(...) The Constitution obliges me to protect the rights of people who do not share my views. (...) I believe that pregnant women and their families who are told that their child is likely to have a severe and irreversible disability or a serious life-threatening illness should be respected, compassionate and supported. The state should provide them with the necessary help, and not force them to heroism. I express this view not only as Leon Kieres a private person, but also Leon Kieres, a citizen and Leon Kieres, a judge of the Constitutional Tribunal'.

⁴⁴Judge Pszczółkowski was appointed by Law and Justice party as one of the party's closest allies and their former member of Parliament. However, his judicial activity in the Tribunal allows me to state that he adjudicates independently of the will of those who appointed him.

of Judge Kieres, Part 1.3, p. 38). Judge Pszczółkowski stated straightforwardly: the fundamental change in law was forced by ignoring the difficult parliamentary ways of prompting changes to Article 38 of the Constitution (Dissent of Judge Pszczółkowski, Part 3.2.2 p. 86). Judge Kieres also raised the question of the impartiality of two members of the bench (the previous involvement of Judges Pawłowicz and Piotrowicz as members of Parliament as discussed above) and doubts as to whether the Tribunal had examined all the relevant circumstances in order to comprehensively clarify the case, as required by the Act on the organization of the Constitutional Tribunal (Dissent of Judge Kieres, Part 1.3, p. 38). Throughout their argumentation, they also depicted the selective, one-sided quoting of literature and jurisprudence by the Tribunal.

As for the very essence of the judgment, it is worth quoting the part of Judge Pszczółkowski's dissent (which is also representative of views expressed by Judge Kieres), that points out that the Tribunal has acknowledged only one side of a dramatic conflict, accepting only 'the prospect of preserving life in the prenatal phase. At the same time, it ignored the perspective of women whose dignity, life and health are undoubtedly values under constitutional protection. In the name of protecting life in the prenatal phase – not otherwise absolute – the Constitutional Tribunal imposed on them the obligation of a heroic attitude, i.e. the obligation to assume responsibility in all circumstances for (...) sacrifices and hardships far exceeding the usual measure of limitations related to pregnancy, childbirth and raising a child' (Dissent of Judge Pszczółkowski, introductory section, p. 70).

Judge Jędrzejewski and Mr Muszyński put forward serious allegations that the Tribunal had incorrectly identified the 'real constitutional matter' and consequently had adopted an incorrect pattern of constitutional review, even though both agreed with the judgment's conclusion. In their opinion, the Tribunal should have based its decision regarding the unconstitutionality of the disputed provisions on Article 30 of the Constitution, and therefore on the concept of human dignity (Dissent of Judge Jędrzejewski, p. 109-112; dissent of Mr Muszyński, Part III 1, p. 116-118).

The most radical, however, was the dissent of Mr Wyrembak, who, although appointed in an unlawful procedure by Law and Justice party, remains in open personal conflict with Julia Przyłębska.⁴⁵ Mr Wyrembak considers the published reasoning of the judgment to be 'vague, complicated, juridically very doubtful, laconic, puzzling, inconsistent, incomprehensible' and rejects the manner in

⁴⁵E. Siedlecka, 'Sędzia dubler wzywa Przyłębską do dymisji. Konflikt w Trybunale Konstytucyjnym' ['The quasi-judge calls on Przyłębska to resign. Conflict in the Constitutional Tribunal'], *OKOpress* 19 October 2019, (oko.press/dubler-wzywa-przylebska-dymisji-konflikt-w-trybunale-konstytucyjnym/), visited 10 March 2021.

which the judgment had been drafted (Dissent of Mr Wyrembak, Part I A-C, p. 135). He claims that during the process of preparing the written reasons, the main motives of the judgment were changed without being discussed and voted on among the judges, which had so far been an indisputable practice when drafting the final version of each judgment. According to Mr Wyrembak, on 3 December 2020, he had simply received a document ready for signature (separate opinion of Mr Wyrembak, Part I, p. 134). As he claims, there was consequently a serious and blatant discrepancy between what had been announced by the Tribunal in October 2020 and what was published three months later. In this way, as Mr Wyrembak fears, the published reasoning may pave the way for the government to partially restore the possibility of terminating pregnancy due to fetal defects of the fetus, which he is a categorical opponent of (separate opinion of Mr Wyrembak, Part I E-G, p. 137-138). That is why his views, extreme in nature,⁴⁶ were also expressed in part of the dissent where he criticises the judgment on its merits. He also refers there to the concept of human dignity, which, in his opinion, starts when a human person begins to exist, i.e. not later than at the moment of conception. He also criticises the Tribunal's lack of reference to the concept of the Decalogue and Christianity (separate opinion of Mr Wyrembak, Part VI, p. 148). And as he refers to the Preamble of the Polish Constitution and God as the source of 'truth, justice, good and beauty', one cannot help thinking that for him that (Catholic) God should serve primarily as a source of binding law.

CONCLUSIONS: 'ANNUSHKA HAS ALREADY SPILLED THE OIL'

In Mikhail Bulgakov's brilliant novel *Master and Margarita*, Satan, calling himself Woland, visits Moscow where he meets two writers, Mikhail Berlioz and Ivan Bezdomny, at the Patriarch's Ponds. The two Russians try to persuade Satan that God does not exist. Woland derides their argumentation and warns Berlioz that 'Annushka has already bought the sunflower oil, and has not only bought it, but has already spilled it, and so the meeting will not take place'.⁴⁷

The expression '*Annushka has already spilled the oil*' has come to mean a momentous event, a gamechanger with unavoidable consequences. And this is precisely what befell Berlioz in Bulgakov's novel – he slipped on the oil spilled by Annushka on some tram tracks, had his head cut off by an oncoming tram, and the planned meeting did not in fact take place. The phrase 'Annushka has

⁴⁶The radical character of his views is visible even on a purely lexical level – he uses expressions such as 'taking away life from an unborn child', and the 'killing of the child' (Dissent of Mr Wyrembak, Part VII, p. 149).

⁴⁷M. Bulgakov, *The Master and Margarita*, 50th Anniversary Edition (Penguin 2016) p. 12.

already spilled the oil' could be seen on many of the placards recently brandished by protesters throughout Poland.

It appears that something of the kind took place in Poland in October and November 2020 – a social change which can no longer be reversed. Even though the power of protests is weakening, as is a normal trend in the dynamics of all street movements, one can no longer remain blind to the consequences of the destruction of the rule of law in Poland or of the incapacitation of independent and apolitical courts and tribunals in the country. With the judgment of the Tribunal, public opinion realised that there is a direct, inseparable link between the capturing of the rule of law and violation of rights and freedoms of millions of Polish women. The question remains, however, whether this social awakening will translate into more than just an outbreak of civic outrage.

Also of note is the fact that while drafting its judgment on one of the most fundamental issues concerning human rights, the Tribunal almost completely ignored, or rather tried to abuse the standards of international human rights protection systems concerning reproductive rights, which Poland's laws (and Poland's courts) must comply with. The question arises: how can the authority of judgments of the highest courts be preserved when they fly in the face of the real meaning of the human rights law and jurisprudence of international courts?⁴⁸ The Tribunal, struggling to prove that the view according to which the fetus should be recognised as the subject of the 'right to life', referred, *inter alia*, to the UN Convention on the Rights of the Child. The legal definition of the term 'child' contained therein does not, however, in any way determine from which moment in time a human being may be referred to by this term. Also, none of the other acts of international law indicated by the Tribunal (Article 6 of the International Covenant on Civil and Political Rights, Article 2 of the European Convention on Human Rights and Fundamental Freedoms) provide clear indications or obligations as to the direction of the interpretation of the Polish Constitution in matters relating to the shape of national abortion law. Moreover, the European Court of Human Rights has never prejudged the issue of the status of the fetus in its jurisprudence.⁴⁹ Thus, a fundamental judicial

⁴⁸Interestingly enough, Mr Muszyński, in his dissent, was the only one who referred in detail to the weaknesses of the Tribunal's arguments resulting from omitting the detailed analysis of international law. He did so, however, not to consider the emerging differences, but to instruct the Tribunal that, referring to international law in the reasoning would add arguments against those provisions and judgments based on international law that do not guarantee the absolute protection of prenatal life. He even used a vague term 'judicial imperialism' that needs to be stopped, in the context of Tribunal's role as a defender of the 'Polish constitutional identity' (Dissent of Mr Muszyński, Part V, p. 125-133).

⁴⁹See for example ECtHR 8 July 2004, No. 53924/00, *Vo v France*; ECtHR 10 April 2007, No. 6339/05, *Evans v United Kingdom*; ECtHR 26 May 2011, No. 27617/04, *R.R. v Poland*.

honesty would require dealing with all the arguments put forward in international human rights law in such a crucially important legal dilemma. Such honesty is, however, missing throughout this judgment.

Some commentators are predicting that the 'abortion compromise' will be replaced with laws allowing abortion to be performed in the first 12 weeks of pregnancy without any legal restrictions as soon as the ruling power in Poland changes. Some opposition members of Parliament are already struggling to launch the legislative process needed to achieve this. However, the outcome of this and other initiatives like it is anything but a foregone conclusion. It may be that the current situation is so firmly implanted in Poland's social (and legal) awareness that the standards prevailing in the vast majority of EU states will remain unattainable in Poland for a long time yet.

