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PUBLIC REASON IN PRACTICE—THE MORAL LEGITIMACY OF THE CONSTITUIONAL COMPLAINT LODGED BY POLISH MPs CHALLENGING THE CONSTITUTIONALITY OF THE ABORTION LAW*

I. INTRODUCTION

On 27 October 2017, a group of over one hundred Members of Polish Parliament (MPs) lodged a constitutional complaint before the Constitutional Tribunal which challenged the constitutionality of the provisions permitting abortion in the event of grave and irreversible foetal defects or an incurable illness that threatens the life of the foetus (hereinafter referred to as: the complaint or the constitutional complaint).[1] When speaking on behalf of this group, Bartłomiej Wróblewski, a Member of Prawo i Sprawiedliwość (the Law and Justice party), claimed in a statement to Katolicka Agencja Informacyjna (the Catholic Information Agency) that their complaint 'is strictly legal in nature, it is not influenced by ideological, moral or political considerations.' At first glance, it may seem surprising that in a conversation with a Catholic agency, a conservative MP would pride himself on the fact that a document on abortion that he had been instrumental in preparing did not contain any ideological content, or—therefore—religious content. Wróblewski's statement suggests that, in his opinion, the strength of the complaint lodged by the group of MPs is that it is based on arguments of a certain type, as well as the fact that certain types of argument do not appear there at all. Consciously or unconsciously, he thereby indicates circumstances which, in the view of contemporary political philosophy, are considered decisive for evaluating the legitimacy of political actions.

It is worth mentioning that this constitutional complaint is a contribution to the ongoing dispute in Poland, which began in the early 1990s, concerning

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[1] Constitutional complaint challenging the compliance of a normative act with the Constitution, in the case K13/17 [*Wniosek o stwierdzenie niezgodności aktu normatywnego z Konstytucją w sprawie K13/17*], <http://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K%2013/17>.

the legality of abortion. The current 'abortion compromise' only permits abortion in three situations (when the mother's life or health is at risk, in the case of a defect or foetal illness, or when the pregnancy arose as a result of a criminal act),[2] but since its entry into force, the law has been widely criticised by proponents of both the pro-life and pro-choice positions. None of the social campaigns, legislative initiatives or parliamentary discussions of the last twenty years has led to a change in the legal status. However, the complaint of 27 October 2017, appears to be a breakthrough in the ongoing discussion, for at least two reasons. Firstly, it has submitted this controversial issue for consideration by the Constitutional Tribunal. It is worth noting that the last change in the legal status of abortion in Poland was made when the Constitutional Tribunal repealed the provision which permitted abortion for social reasons.[3] Secondly, the arguments of the MPs presented in the complaint refer to a special case of the admissibility of abortion, namely abortion for so-called eugenic reasons, which allows abortion when there is a high probability of irreversible defect or incurable illness that threatens the life of the foetus. It seems that for the first time in the history of this dispute we are dealing with a situation where abortion for eugenic reasons is at the centre of public discussion.

In this article, I will analyse the argumentation contained in the constitutional complaint lodged by the MPs. I will not, however, enter into legal divagations and consider what resolution the Constitutional Tribunal should issue in the pending case. Instead, I will focus on the issue of the moral legitimacy of the actions taken by the MPs; I thus seek to the answer the question of whether their initiative is defensible in terms of the principles of public morality. The evaluation is conducted in accordance with the principles of the most important contemporary theory of political legitimacy, namely John Rawls' idea of public reason. Therefore, before addressing the key points of the discussion, I will first discuss the most important elements of Rawls' idea.

II. PUBLIC REASON

In the scholarly literature, Rawls is primarily known for two famous works in the field of political philosophy—*A Theory of Justice* and *Political Liberalism*. It is said that while the former focuses on the issue of social justice, the latter addresses the problem of the moral legitimacy of political activities. Although this is a considerable simplification, it accurately reflects the importance of the issue of legitimacy in Rawls' theory.

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[2] The Act of 7 January 1993 on Family Planning, the Protection of the Human Foetus and the Conditions for Terminating Pregnancy [Ustawa z 7 stycznia 1993 r. o planowaniu rodziny, ochronie płodu ludzkiego i warunkach dopuszczalności przerywania ciąży] (JL RP 1993, no. 17, item 78).

[3] The judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, OTK ZU 1997, no. 2, item 19.

At the outset, it is worth clarifying that Rawls was interested in the issue of legitimacy, or, in other words, moral acceptability, as it concerns a very specific category of political decision-makers' actions, that is, actions that are performed within the framework of a democratic system.[4] Therefore, crucial to his theory are the limitations imposed on various political decisions, initiatives or proposals that are carried out under democratic conditions. Thus, when formulating his theory, Rawls gives voice to several fundamental and widely held convictions concerning democracy. Firstly, he points out that in any political system power is based on the use of coercion and on limiting the freedom of the individual. Secondly, Rawls emphasises that citizens in a democratic state have a special political status—they are free and equal to each other. Thirdly, the consequence of granting this special status to citizens is that democratic societies are characterised by far-reaching ideological pluralism. Rawls observes that under the conditions of freedom human reason is able to develop many well-founded solutions to the same problem. This diversity of views to which citizens adhere (or their 'doctrinal diversity') is therefore a natural consequence of using reason in circumstances characterised by freedom.

Rawlsian political theory recognises that these basic principles of democratic systems remain in tension with each other and, consequently, pose a challenge to the theory of the legitimacy of political actions. Let us recall that, on the one hand, the essence of exercising political power is coercion, while, on the other hand, democracy is characterised by respect for the freedom and equality of citizens, and the reasonable pluralism associated with these values. Thus, the problem of political legitimacy can be reduced to the question of what conditions must be met in order for us to recognise that the exercise of authority takes place with respect for the special status of individuals and for the phenomenon of pluralism. In *Justice as Fairness: A Restatement*, Rawls proposes the following solution to this difficulty: '[...] the exercise of coercive political power, the power of free and equal citizens as a collective body, is to be justifiable to all in terms of their free public reason'.[5] We can interpret this excerpt as arguing that the moral acceptability of political actions depends on the way they are justified. Therefore, only those regulations, decisions, initiatives or proposals that are duly justified are legitimised. At the same time, the criterion for evaluating the 'adequacy' of this justification is, according to the quotation, 'free public reason'.

The notion of public reason is an extremely complex component of Rawls' theory. I argue that its content can be grasped by distinguishing two elements of this idea, namely its substantive and procedural aspects.[6] Each of these elements is a source of the criteria for the legitimacy of political actions.

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[4] J. Rawls, *Political Liberalism*, New York 1996: 212.

[5] Idem, *Justice as Fairness: A Restatement*, Cambridge, MA, 2001: 141.

[6] Rawls himself did not employ the distinction between the substantive and procedural aspect of the idea of public reason—this is my own interpretation of this concept. I broaden this interpretation in a book I am currently working on which is devoted to the idea of public reason.

The substantial aspect of public reason encompasses various kinds of values, principles, ways of reasoning and justifying that provide political decision-makers with legitimate reasons for action. Rawls defines such reasons as being acceptable to all free and equal citizens who respect the democratic system (public reasons). Let us clarify that, according to Rawls, the individual is simultaneously a democratic citizen and an adherent of a comprehensive doctrine or worldview (religious or non-religious). There are specific values associated with each of these two domains. The proper legitimacy of political activities is provided only by those values and ways of reasoning that can be linked to the ideal of democratic citizenship. The catalogue of such public reasons includes fundamental democratic ideals (such as freedom, equality and tolerance), universally recognised principles for implementing policies (such as efficiency or proportionality) and the rules of logical thinking. Public reasons are distinguished by the fact that they can be accepted by citizens regardless of the comprehensive doctrine they adhere to. They do not presuppose any particular theory associated with a controversial moral, religious or philosophical idea. The essence of the substantive aspect of public reason therefore expresses the principle of the acceptability of the reasons for political action.

The principle of acceptability: Political actions are legitimised only by reasons that are acceptable to a reasonable democratic citizen (public reasons).

The procedural aspect of public reason refers to the way public decision-makers appeal to public reasons. For the sake of later considerations in this article, it is worth bearing in mind two postulates of this kind.[7] The first is the principle of publicity (transparency), which requires that the justifications of the actions taken by public authorities should be public (like the actions themselves), that is, they should be accessible to citizens. Everyone should have a real opportunity to become acquainted with the content of these justifications and to evaluate whether the reasons that are presented as supporting a particular action are accurate and convincing, and, furthermore, whether they are legitimate.

The principle of publicity (transparency): The justification for political action should be accessible to all citizens.

The second postulate related to the procedural aspect of public reason concerns the sincerity of the action of political decision-makers. The idea of public reason imposes the requirement that there be consistency between the reasons to which decision-makers officially refer and the reasons why they actually take action. As theoreticians of public reason emphasise, the postulate of the sincerity of political actions refers not only to the subjective sphere of a decision-maker's actions, but it is also verifiable from the perspective of an external observer. Contemporary followers of Rawls argue that the key to fulfilling this requirement in a particular case is the

[7] In the book I am preparing, I argue that the procedural aspect of public reason also includes the principle of reciprocity, along with the principles of publicity and sincerity. I omit discussion of the principle of reciprocity here due its limited significance for the subsequent discussion.

impression that the analysed action makes on the people who observe it, and therefore whether they can recognise the reasons presented by decision-makers as credible justifications of their actions. In other words, when assessing a political decision, we should be able to rationally come to the conclusion that the considerations that have been officially indicated as its justification (and not some other reasons) are the best explanation for making that decision.

One of the thinkers who continued Rawls' thought, Eric MacGilvray, recommends two methods for evaluating political actions in terms of the principle of sincerity—thus understood.[8] The first is testing the compatibility between publicly offered reasons for a political decision and the consequences that normally lead to a decision of this kind being made. For example, if the decision-maker proposes introducing unrestricted access to firearms, justifying this with reference to the need to increase public safety, and yet all the available empirical research proves that unrestricted access to weapons reduces the level of safety, then on the basis of the idea of public reason we can conclude that the action of this decision-maker is disingenuous. The second method which MacGilvray mentions is to identify discrepancies between the actual political action taken and the action which one would to expect to follow as a consequence of the reasons officially presented as justifications. According to this approach, recognising an action as contrary to the principle of sincerity is possible when the justification presented by the decision-maker legitimises other political actions that the decision-maker does not take or refuses to take. Such a situation would suggest that the decision-maker's action was motivated by other considerations than those which were officially mentioned.

The principle of sincerity: The justification of a political action presented to the public by a decision-maker should be identifiable as a factor which leads the decision-maker to take the action in question.

III. THE COMPLAINT SUBMITTED TO THE CONSTITUTIONAL TRIBUNAL CONCERNING THE CONSTITUTIONALITY OF ABORTION FOR EUGENIC REASONS

Let us now turn to a discussion of the most important elements of the constitutional complaint lodged by the group of MPs asserting the unconstitutionality of abortion eugenic reasons. Above all, it should be noted that the MPs' lodging of this type of complaint was an act of exercising political power (political action) in the sense intended by Rawls, and is thus subject to evaluation in accordance with the principles of political legitimacy outlined above. As I pointed out in the introductory section, this proposal concerns the repeal of one of the three exceptions to the prohibition on

[8] E. MacGilvray, *Reconstructing Public Reason*, Cambridge, MA, 2004: 194–198.

abortion provided for in the law on family planning. This is a situation where 'Prenatal examinations or other medical conditions indicate that there is a high probability of a severe and irreversible fetal defect or incurable illness that threatens the fetus's life'.[9]

In the previous section, I emphasised that the idea of public reason combines the legitimacy of political actions with their justification. In view of the above, in order to determine whether the action of the MPs in question is morally acceptable on the basis of Rawls' idea, we should look at the arguments which the complainants presented to support their claim.

At the outset, I must point out that reading the constitutional complaint is no easy task, because it was drawn up very carelessly. Reconstruction of the reasoning presented there is hindered by, in particular, grammatical and lexical errors and frequent repetition of identical statements (for example the substance of the argumentation contained on page 9 of the complaint is repeated word for word on page 17, the same applies to fragments on page 16 and pages 22–23, where the same words were first cited in italics to indicate a quote from the judgment of the Constitutional Tribunal, and then without italics as a reconstruction of the Tribunal's position). It is also worth noting that the complaint very superficially addresses the main arguments put forward in favour of the admissibility of abortion for eugenic reasons. When analysing the legitimacy of this position, the applicants limited themselves to criticising views which nobody actually expresses when participating in the contemporary ethical debate. Among the values cited as supporting eugenic abortion are mentioned 'care for the quality of genetic data transmitted' (as illustrated by the example of the practices employed in Nazi Germany),[10] and the 'woman's mental comfort', which is also referred to as 'protection against negative emotional states'.[11] In particular, the reliability of the analysis carried out in this respect undermines the very laconic discussion of the argument which appeals to the interest of the future child, as well as the lack of any reference to the replaceability argument, which is widely discussed in the literature.[12]

In terms of evaluating the action of the group of MPs, the most important argument concerns the justification for the prohibition of abortion for eugenic reasons. Thus we now turn to a discussion of this aspect of the complaint. The justification of the standpoint presented by the complainants can be reduced to two arguments. The first of them claims that all people are entitled to the dignity of the human person, including people in the prenatal stage of development, and that the life of all such people should be protected. This argument can therefore be classed as being based on the principle of the right to life. On the other hand, the second argument states that differentiating the scope of people's entitlement to the protection of life due to

[9] Article 4a(2) of the Act of 7 January 1993 on Family Planning.

[10] *Constitutional complaint*...: 8 and 14.

[11] Ibidem: 9–10 and 26.

[12] Cf. W. Galewicz, Etyczne dyskusje wokół prokreacji, in: idem (ed.), *Antologia bioetyki*, Cracow 2010: 9–43.

health considerations constitutes unacceptable discrimination. This line of reasoning can be described as the argument from differential treatment.[13]

The argument from the right to life is based on two premises: the assertion which in the complaint was characterised as a 'broad understanding of the concept of a person',[14] and a specific interpretation of the right to life. The first of these premises determines the scope of subjects who are entitled to dignity and, consequently, the possibility of granting them basic rights.[15] The complainants adopt the position that every human being is a person, while what falls under the category of 'human' is determined by the biological criterion. According to this criterion, this category encompasses any individual with the appropriate genetic constitution (human genotype). The application states that: 'The constitutional concept of "man" [...] covers every creature with a human genome, regardless of the stage of development [...]. The essence of being human is not exhausted in the body having certain morphological and characteristic features of the human body, the structure and shape of this organism, but in the body's possession of a human genotype, which determines that the living being is a human being'.[16]

The fact of the entity fitting within the designated scope is thus the basis for acknowledging that this is a person vested with the right to life. This right, in the opinion of the complainants, is impossible to reconcile with eugenic reasons having legal validity. According to the constitutional complaint, the right to life is inalienable (meaning that no one can decide to remove it), and it is not subject to gradation (each person is entitled to the right to the full extent). In this perspective, the right to life is the basis for asserting that life should not be deprived—its essence expresses 'the prohibition of intentional and deliberate deprivation of a person's life'.[17] The complainants assert that because every act of abortion is a kind of intentional and deliberate deprivation of life, it thereby constitutes a violation of the right to life.

The argument from unequal treatment shares the first premise with the argument from the right to life—it is based on the assumption that dignity, and consequently fundamental rights, are also vested in foetuses in the prenatal period. The second premise of the argument from unequal treatment is the principle of non-discrimination. The complainants assume that the differentiation of the legal position of persons, in particular differentiating the scope of protection of rights, through the use of criteria

[13] I have distinguished these two elements of the justification in my reconstruction of the argument presented in the complaint. Due to the specific nature of legal argumentation, the applicants give separate consideration to the violation of the principle of dignity, the right to life, the principle of non-discrimination and the principle of proportionality. However, the substance of each individual argument in is very similar, which justifies the decision to construct two main arguments on their basis.

[14] *Constitutional complaint*...: 20.

[15] Ibidem: 12.

[16] Ibidem: 19.

[17] Ibidem: 22.

such as race, sex or health, is a form of unacceptable discrimination. In their opinion, with a violation of this principle we are dealing with an example of eugenic reasons. The complainants focus on the provision that makes the situation of foetuses dependent on the prognoses regarding their state of health. The termination of a pregnancy, which is in principle prohibited by law, can be carried out if there is a high probability of severe foetal defect or an incurable disease threatening the life of a foetus. According to the complainants, due to the fact that it is impossible to provide any good justification for such a selection of human beings, the provision should be regarded as providing the basis for unjustified discrimination. The complaint expresses the view that making such distinctions between of the scope of legal protection afforded to healthy and unhealthy foetuses is an expression of an unequal 'distribution of respect'. It is argued that the provision in question assigns a lower value to the lives of foetuses affected by illness or defects.[18]

Let us focus on the relation between these two lines of argument. The complainants explicitly state that their claim is primarily based on the argument from the right to life, while the argument from unequal treatment is of a subsidiary nature. In the constitutional complaint, we can read that 'the allegation that the prohibition on discrimination has been violated with regard to the right to life should be raised as a possible allegation', that is in the event that the argument referring to the right to life is not taken into account.[19] However, these two lines of argumentation are very similar to each other. Firstly, each assumes that the biological criterion of a human being is adequate, and that this criterion is sufficient for granting rights and freedoms. The essential difference between these arguments is that the former is non-comparative, since it claims that denying the full protection of life to any person constitutes a violation of the person's rights; whereas the other is comparative, since it requires a comparison between the level of protection of life granted to one specific group with that granted to another. However, both arguments hold that foetuses with unfavourable medical prognoses are the victims of eugenic reasons.

It is worth noting that with regard to the interdependence of these arguments, they can be modified in order to make them more independent of each other. Such an opportunity is provided primarily by the argument of unequal treatment, and the claimants' remarks on assigning value to the lives of individuals based on the content of legal regulations (which I described above as the 'distribution of respect'). We can accept—following some representatives of the disability studies—that the admissibility of abortion for eugenic reasons discriminates not so much against foetuses as against disabled people who currently live in society.[20] The literature puts

[18] Ibidem: 20.

[19] Ibidem: 23.

[20] Cf. T. Shakespeare, Choices and rights: eugenics, genetics and disability equality, *Disability and Society* 13(5), 1998: 665–681; L. Gillam, Prenatal diagnosis and discrimination against the disabled, *Journal of Medical Ethics* 25, 1999: 163–171.

forward two arguments in support of this thesis. The first is consequentialist, stating that there is a causal link between the availability of eugenic abortion and the level of discrimination against people with disabilities. The claim here is that the legal admissibility of abortion for eugenic reasons leads to a greater number of such procedures, and, consequently, to a reduction in the number of disabled people in society. Furthermore, as advocates of this argument argue, since discrimination against people with disabilities is a direct result of the fact that they constitute a social minority, the fact that there are even fewer of them aggravates their unfair treatment.[21] On the other hand, according to the second argument, which is non-consequentialist, it is not the results associated with the admissibility of eugenic abortion that constitute a form of discrimination against disabled people, but rather the fact that such a regulation is in force. The possibility of terminating a pregnancy for eugenic reasons expresses (sends a 'message') that the life of a disabled person is worth less than the life of a healthy person. On the basis of this argument, the content of legal regulations is treated as one of the factors shaping the 'social basis of self-respect', namely circumstances on the basis of which the individual creates their self-esteem.[22] Proponents of this view argue that the legal validity of eugenic reasons is contrary to the sound distribution of the social foundations of respect.

IV. THE ARGUMENTATION ON EUGENIC REASONS AND THE QUESTION OF POLITICAL LEGITIMACY

Before proceeding to an analysis of the MPs' constitutional complaint in the light of the principles of public reason outlined above, I would like to mention that the problem of the admissibility of abortion is considered to be a serious challenge for Rawls' idea of public reason. Rawls' critics expressed doubts as to whether this issue could be reasonably considered in the categories provided by the theory of public reason.[23] One of the sources of these doubts was the somewhat hasty remarks that Rawls himself made on this matter. When addressing the issue in *Political Liberalism*, in the famous 'footnote on abortion', he stated that public reason identifies three public reasons as important for the dispute on the admissibility of abortion (these being: respect for human life, equality of women, and the need to guarantee the reproduction of political society), and argued that the balancing of these values necessarily results in recognising a woman's duly qualified right to terminate her pregnancy in the first trimester.[24] However, in his last

[21] For example, in terms of infrastructure, a small number of people in need of special therapy or adaptation entails that such therapies or adjustments are no longer treated as a priority.

[22] Cf. J. Rawls, *A Theory of Justice*, Cambridge, MA, 1999.

[23] Cf. M. Sandel, Odpowiedź na liberalizm polityczny, in: *Liberalizm a granice sprawiedliwości*, Warsaw 2009: 275–316; P. Campos, Secular fundamentalism, *Columbia Law Review* 94(6), 1994: 1814–1827.

[24] J. Rawls, *Political Liberalism*...: 243–244.

published work, Rawls approached the same problem in a radically different way:

> If we accept the idea of public reason we should try to identify political values that may indicate how this question can be settled, or a settlement approached. I have in mind such values as the following: that public law show an appropriate respect for human life, that it properly regulate the institutions through which society reproduces itself over time, that it secure the full equality of women, and finally, that it conform to the requirements of public reason itself […].[25]

In contrast to the position expressed earlier, Rawls does not claim here that only three public reasons are relevant for political actions related to abortion—the four circumstances mentioned in the quotation above are just examples of legitimate arguments. Importantly, he does not argue that public reason indicates that any specific resolution should be adopted to resolve the abortion dispute. The scope of solutions that are acceptable on the basis of public reason is broad. What public reason excludes as illegitimate is not a particular stance on the admissibility of abortion, but rather some ways of supporting these positions. Jonathan Quong, one of the most important Rawls' followers, takes a very similar position on the issue of abortion:

> Even if both pro-choice and pro-life citizens agree on a core set of political values (liberty, the sanctity of human life, the equality of men and women) there is little reason to suppose that the content of public reason can be complete if each citizen is permitted to weigh or rank these values differently. The pro-life citizen might place an infinite amount of weight on the sanctity of human life, whereas the pro-choice citizen might rank the values of liberty or the equality of men and women first and foremost. Our two citizens thus arrive at diametrically opposed conclusions despite the fact that they were apparently reasoning from the same premises.[26]

Let us recall that according to the idea of public reason presented in this article, in order for a given political action associated with abortion to be considered legitimate, it is necessary to fulfil the conditions stipulated by the three principles of public reason. In the following section I will assess the actions of the complainants in the light of each of these principles.

The principle of acceptability: Political actions are legitimised only by reasons that are acceptable to a reasonable democratic citizen (public reasons).

The principle of publicity (transparency): The justification for political action should be accessible to all citizens.

The principle of sincerity: The justification of a political action presented to the public by a decision-maker should be identifiable as a factor which leads the decision-maker to take the action in question.

[25] J. Rawls, *Justice…*: 17.

[26] J. Quong, *Liberalism without Perfection*, Oxford 2011: 282.

1. The principle of acceptability

Let us first consider the action of the complainants in terms of the first of these conditions. We are therefore interested in whether the two arguments put forward in the complaint for repealing the eugenic reasons have the status of public reasons, and therefore whether they should be acceptable to a reasonable democratic citizen. In my opinion, the arguments of the applicants fulfil this condition. A reasonable citizen could share the views expressed through these arguments regardless of which comprehensive doctrine he/she espoused.

Let us note that when presenting their arguments, the complainants do not refer to religious dogma or God's will; neither do they refer to sacred texts. Furthermore, it does not seem that their arguments need to be supplemented with some unexpressed ideological assumptions. The individual premises of the arguments are comprehensible and open to debate, without the need to adopt any doctrinal perspective. The justification of the complaint is not based on other non-public reasons, such as the benefit of a particular political party, or a populist appeal to the will of the majority of society or national interest. Both of the arguments put forward by the complainants are grounded in publicly acceptable values and ways of reasoning, that is in the right to life and, the principle of equality (non-discrimination). The above remark also applies to the key premise of both these arguments, namely the biological criterion for identifying human beings. Again, it is worth noting that by insisting on a 'broad understanding of the concept of a human being', the complainants do not refer, for example, to Catholic teachings on the immortal soul, but rather to claims that can be accepted independently of religious beliefs.

In passing, it is worth drawing attention to two features of the discussed justification, which, although they may indicate its weakness, do not undermine its political legitimacy. Firstly, the arguments put forward by the complainants can be regarded as incorrect or unconvincing. Indeed, it seems that closer analysis of the justification reveals significant shortcomings. It is not clear whether the biological criterion for defining a human being which the complainants insist on is better justified than the alternative criteria of moral status (for example the criterion referring to the ability to feel).[27] It is also debatable whether considering the problem of abortion through the concept of subjective rights is the best way of presenting the issue. However, it should be clearly stated that for the theory of public reason, the accuracy of argumentation in favour of a given demand is one thing, while its legitimacy is another matter entirely. In considerations of legitimacy, the status of arguments is crucial, rather than their accuracy.

Secondly, one can wonder whether the legitimacy of the MPs' action is not undermined by the fact that it is based on a controversial interpretation of the public reasons invoked. Certainly, the right to life and the principle of

[27] Cf. W. Galewicz, *Status ludzkiego zarodka a etyka badań biomedycznych*, Cracow 2013: 80–116.

equality are values which should be accepted by every reasonable citizen, but at the same time they are values that are open to different interpretations. Thus, while it can be said that at some general level the reasons referred to are shared by reasonable citizens, it is more difficult to agree that reasonable citizens would interpret these values in a similar vein to the premises of the complainants' arguments. It is worth clarifying that the principle of acceptability does not require that a specific interpretation of a given value be consented to, but only that consent be given to these values having the status of public reasons. It is therefore a kind of threshold or minimum requirement that public arguments must meet. By imposing such a minimum requirement, the Rawlsian theory makes it possible for the content, application and implications of individual public values and principles to be debated from the perspectives of different legitimate positions.

2. The principle of publicity

This action of the complainants also fulfils the postulate of transparency—it is a public action and its justification is publicly available. The constitutional complaint of the group of MPs, consisting of the challenge and its justification, was made available on the website of the Constitutional Tribunal. It seems that given the widespread use of the internet in contemporary society, this means there is a real opportunity for everyone interested to familiarise themselves with the complaint and participate in debate.

3. The principle of sincerity

However, the biggest challenge for the complaint under discussion is the principle of sincerity. In my opinion, in this case we are dealing with a violation of this requirement of political legitimacy. In the second section of the article, following MacGilvray, I mentioned two methods for testing the compliance of political actions with the principle of sincerity. I think that the second method can be applied to this case. We can find discrepancies between the actions taken by the complainants with regard to the reasons indicated by them and the actions they would be obliged to take if they were to sincerely honour these reasons. I will draw attention to two cases of such discrepancy, which in my opinion effectively undermine the credibility of the justification under consideration and entail that the principle of sincerity has been violated.

Firstly, the public reasons indicated in the complaint seem to justify a much wider scope for changes to the Polish abortion law than the change specified in the complainants' demand. In other words, the legitimacy of the presented justification would require that the MPs take certain actions which they have yet to take (for unknown reasons). We can note that the MPs' appeal to the right to life undermines the possibility of abortion not only when there is a high probability of defect or foetal illness, but also in

cases when there is a health risk to the mother (abortion for medical reasons) and pregnancy resulting from a criminal act (abortion for legal reasons). If the right to life vested in all human beings prohibits killing, and every instance of abortion is a case of killing a human being, then why would only abortion for eugenic reasons amount to a violation of this right? The complainants argue that legal protection of life is absolute, but in their reasoning they do not indicate any argument that would lead to the conclusion that the right to life can be suspended even if the foetus originates from a criminal act.[28]

A similar doubt arises when considering the argument of unequal treatment. If, as the complainants assert, differentiating the scope of the protection of life according to medical prognoses constitutes an example of unacceptable discrimination, it would seem that differentiating this scope according to the way the foetus was conceived is at least equally reprehensible. I do not think we can imagine any acceptable argument for using the criterion of the method of conception in order to distinguish between people's legal situations. It seems, therefore, that the application of the complainants' reasoning to abortion for legal reasons leads to the conclusion that it discriminates against foetuses conceived as a result of a criminal act in favour of foetuses that were not conceived in this way.

Secondly, since neither of these arguments meets the necessary requirements to pass the test of sincerity, at least in form in which they are presented by the complainants, the next step is to consider whether these requirements could be met by a modified version of the argument from unequal treatment, which I mentioned in the previous section. Let us recall that the modified version of the argument states that the group discriminated against by the eugenic reasons currently in force is not actually foetuses with unfavourable medical prognoses, but rather disabled citizens who are currently living in society. The compliance of such reasoning with the principle of sincerity might seem a little more difficult to assess. I think, however, that we can agree that in order for an argument claiming discrimination against people with disabilities to be perceived as sincere by an objective observer, it would be necessary for the argument to be consistent with a broader political strategy of caring for people with disabilities. If the argument focused on the unequal treatment of disabled people is used only in a very specific context, namely a discussion on the legality of abortion, yet omits other areas of social life in which the problem of discrimination against disabled people occurs, the use of this argument must raise doubts as to the sincerity of the policy makers. In this regard, it is not insignificant that the complainants are, above all, MPs representing the Sejm majority that backs the governing party.

Given the difficult situation of disabled people in Poland, and the small number of initiatives taken by the public authorities to make the treatment of this group of citizens more equal, it is difficult to view the MPs' proposal to ban abortion for eugenic reasons as being part of a wider political strategy

[28] *Constitutional complaint…*: 22.

that seeks to combat discrimination against disability. Examples of government actions and legislative omissions that have negatively affected the situation of disabled people could be enumerated. Suffice to say that complaints about discriminatory treatment of disabled people constitute the largest percentage of cases reported to the Polish Ombudsman ('Rzecznik Praw Obywatelskich' – the Commissioner for Human Rights). Despite numerous appeals from disabled people's organisations, the Polish public authorities have yet to ratify the Optional Protocol to the Convention on the Rights of Persons with Disabilities, which would give these people the right to submit complaints to the international body. Disabled people have criticised the current Parliament for failing to implement the judgment of the Constitutional Tribunal of 2014 which ruled that the benefits for guardians of adults with disabilities should be made equal to the benefits for guardians of children with disabilities.[29] Additionally, the current state of legal regulations and the judicial practice regarding the institution of incapacitation are widely criticised as being harmful to people with intellectual disabilities. The recent legislative acts in the sphere of public education also provide cause for concern (for example the removal of care for disabled children from the basic programme of pre-school education), as do proposed changes to electoral law (in response to strong social opposition, MPs withdrew from the announced liquidation of the institution of voting by post). It should also be noted that MPs who lodged the constitutional complaint regarding the abortion law did not find any other applicable provision than the challenged provisions of the 'abortion law' to be discriminatory. In my opinion, the above circumstances are a sufficient basis for concluding that the requirement of sincerity was not met in the present case.

V. CONCLUSIONS

In view of the above considerations, it is necessary to conclude that the constitutional complaint of the group of MPs which challenged the constitutionality of abortion for eugenic reasons is not a legitimate complaint. Although the analysed complaint complies with the principles of acceptability and the publicity, it does not meet the third postulate of the idea of public reason, namely the requirement that the action of political decision-makers should be sincere. The public reasons appealed to by the authors of the complaint are not a credible and genuine basis for the action taken by them.

Finally, it is worth considering what consequences the idea of public reason envisages for actions which do not follow the rules of political legitimacy. In the classic version of this idea, as expounded by Rawls, the postulate of the proper legitimacy of political actions only indicates that

[29] The judgment of the Constitutional Tribunal of 20 October 2014, K38/13, OTK ZU 2014, no. 9A, item. 104.

there is a moral duty. Thus an action that runs counter to this duty can be criticised as reprehensible, inappropriate, unjust, and even undemocratic, but no further sanctions are associated with it. However, it is worth noting that many of the followers of Rawls' thinking allow the possibility of treating the requirements of public reason as legally rules. Most often, individual postulates of political legitimacy are presented as components of the principle of doctrinal neutrality or the principle or the rule of law. If such an interpretation were adopted, a complaint's lack of legitimacy would have to be taken into account in the ruling of the Constitutional Tribunal. However, detailed consideration of this issue would require additional analyses that are beyond the scope of this article.

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PUBLIC REASON IN PRACTICE – THE MORAL LEGITIMACY OF THE CONSTITUTIONAL COMPLAINT LODGED BY POLISH MPs CHALLENGING THE CONSTITUTIONALITY OF THE ABORTION LAW

Summary

In the paper, I analyse the argumentation which supports the constitutional complaint lodged by a group of Polish MPs which challenged the constitutionality of the provision which allows abortion in the event of grave and irreversible fetal defects or an incurable illness that threatens the foetus life. My considerations do not concern the legality of this action. Instead, I am interested in the issue of the moral legitimacy of the MPs' action. I seek to establish whether their initiative is defensible in terms of public morality. The evaluation is conducted according to the principles of the most important contemporary concept of political legitimacy, which is John Rawls' idea of public reason. Therefore, firstly, I give an account of the Rawlsian theory of public reason. I focus mainly on the conditions that determine the criteria of the legitimacy of political actions. Then I summarise the arguments which support the demand of the MPs concerned. Finally, in the main part of the paper, I evaluate their action in the light of the theory of public reason.