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Foetal endangerment through alcohol intoxication under Polish law: Can a mother be held criminally responsible?

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Contextualising the controversy

As the press have recently stated, a 29-year-old woman delivered a baby in a hospital in Gdańsk born with serious alcohol intoxication. The blood alcohol concentration of the new-born girl was 1.6‰. During labour the mother was also drunk herself with a BAC of 0.6‰. She admitted to consuming alcohol while being pregnant. Due to prenatal alcohol exposure, the baby was born with visible birth defects and had fully developed Foetal Alcohol Syndrome. The girl was reported to have been taken to foster parents and the state prosecutor initiated legal proceedings to terminate the mother's parental rights. According to the opinion of an expert forensic witness, the high level of alcohol concentration could even have been lethal for the child. Thus the state prosecutor accused her of exposing a human to an immediate danger of loss of life or danger of sustaining grievous bodily harm.

The spokesperson for the state prosecutor underlined that the same situation had happened recently in Pruszcz Gdański. A 34-year-old woman had been partying and drinking soon before childbirth. When the first signs of labour occurred her friends called an ambulance. The baby

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was born with a BAC of 1.2‰. The prosecutor is awaiting the forensic opinion as to whether this state of intoxication could be endangering for the life of the child[1].

Soon after the press reported this incident, a similar, yet more tragic situation happened in Skierniewice. A highly intoxicated woman with a BAC of 4.9‰ was brought to hospital and the body of her baby was found quartered at her home. The circumstances of the case are being clarified. However, it is beyond doubt that the woman is an alcoholic and had drunk during pregnancy. Both parents of the child were arrested and charged with murder and infanticide[2].

After pregnant women or women giving birth were found drunk in Koszalin, Sosnowiec, Łódź, Ostrowiec Świętokrzyski, Ząbkowice Śląskie, Bytom and Żory, doctors started to speak about "a plague"[3]. Their reports received much attention, aroused grave criticism and wide public outcry. It provoked responses from the police and prosecutor declaring that such situations will be duly prosecuted.

The above-mentioned declarations should be regarded as public populism. In this paper it is argued that under current Polish criminal law any foetal endangerment is not criminalized as long as it is caused by the mother of a child. This includes also maternal consumption of alcohol in pregnancy.

Normative qualification of foetal endangerment by a mother

Setting aside all these cases, in which a committed crime should be considered abuse, an assault or a homicide on an already born child as

[1] G. Szaro, 'Coraz więcej pijanych noworodków. Dziecko Weroniki P. miało po porodzie 1,6 promila', *Gazeta Wyborcza Trójmiasto*, 8 October 2014.

[2] J. Kosmatka, R. Bednarek, 'Pijana ciężarna w Skierniewicach. Dziecko nie żyje', *Dziennik Łódzki*, 24 October 2014.

[3] M. Stańczyk, 'Tragedia w Skierniewicach. Lekarze mówią o pladze pijanych ciężarnych kobiet', Onet, 27 October 2014, http://kobieta.onet.pl/dziecko/ciaza-i-porod/tragedia-w-skierniewicach-lekarze-mowia-o-pladze-pijanych-ciezarnych-kobiet/kn31f, access: 12.12.2014; M. Stańczyk, 'Ciężarne na rauszu', Onet, 19 March 2013, http://kobieta.onet.pl/zdrowie/zycie-i-zdrowie/ciezarne-na-rauszu/5275d (access: 12.12.2014).

a victim of a crime[4] and concentrating upon the problem of alcohol consumption during pregnancy, it should be said that qualifying such acts as an offence of endangerment is incorrect per se. The public prosecutor invoked Article 160 of the Criminal Code of 1997[5], which provides that whoever exposes a human to an immediate danger of loss of life or a danger of sustaining a grievous bodily harm, is subject to the penalty of deprivation of liberty for up to 3 years. The limits of penalties are aggravated, if the perpetrator has a duty to take care of the person exposed to danger. When a mother endangers her child, she can be subject to the penalty of deprivation of liberty for between 3 months and 5 years.

In should be argued, however, that Article 160 is inapplicable in all cases when a woman consumes alcohol while being pregnant. It cannot be applied even if this behaviour of a mother caused a bad postnatal condition of a child or ill-effects to its future development. The exact wording the article refers to endangering "a human". It cannot be interpreted, the least without infringing a nullum crimen sine lege principle, that a lawmaker meant that foetuses are to be under protection of this legal provision as well[6].

Protection of "a human" and "a conceived child" under Polish constitutional law

When a life of a human begins is a complex ethical, moral, philosophical, biological, and social issue[7] that cannot be addressed in the framework of this paper. The only perspective that is relevant at this point is the question of what meaning these notions have in the law provisions being currently in force.

It should be strongly accentuated that the life of a human being is under protection of Polish law, including constitutional and criminal law

[4] This might have been the case in Skierniewice, according to press reports.

[5] *Ustawa z dnia 6 czerwca 1997 r. — Kodeks karny* (Journal of Laws 1997 No. 88, item 553 as amended).

[6] B. Michalski [in:] *Kodeks karny. Część szczególna, Komentarz do artykułów 117–221*, vol. 1, ed. A. Wąsek, Warszawa 2004, p. 321.

[7] A. Breczko, *Podmiotowość prawna człowieka w warunkach postępu biotechnomedycznego*, Białystok 2011, pp. 119ff.

provisions, both in the prenatal and postnatal phase. That being said, however, it does not mean that this protection is equally intensive, regardless whether it applies to a foetus or a human[8]. Therefore it is essential to draw a distinction line between these two notions. Article 38 of the Constitution reads as follows: "The Republic of Poland shall ensure the legal protection of the life of every human". The literal wording of this constitutional provision does not entail the protection of every "human being". Therefore in constitutional and criminal law doctrine there has been a legal debate as to whether foetuses are protected by this constitutional norm as well and if so, under what conditions[9].

This controversy was resolved by the Polish Constitutional Tribunal in the highly controversial[10] judgment of 28 May 1997[11]. In that judgment the court concluded that the provision legalising abortion on the grounds of material or personal hardship (so-called social reasons) as it stood at that time was incompatible with the Constitution. The court held that the value of human life as a constitutionally protected good may not be subject to differentiation and it should include a prenatal and postnatal phase. Poland is a democratic state governed by the rule of law and thus regards a human being as a principal value. Therefore the value of life is protected by the Constitution at any stage of its development, from the very moment of its creation. In the opinion of the Tribunal,

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[8] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, Warszawa 2007, p. 105; L.K. Paprzycki, 'Istota ludzka — zagadnienia graniczne ochrony w prawie karnym', *Medyczna Wokanda* 2000, No. 1, p. 9.

[9] B. Banaszak, *Konstytucja Rzeczpospolitej Polskiej. Komentarz*, Warszawa 2009, p. 214; L. Bosek, 'Prawo podstawowe do godności ludzkiej w Konstytucji RP', [in:] *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, vol. I, ed. P. Kardas, T. Sroka, W. Wróbel, Warszawa 2012, pp. 115–117; K. Wiak, *Ochrona dziecka poczętego w polskim prawie karnym*, Lublin 2001, pp. 125–126; idem, 'Pojęcie "człowiek" w polskim prawie karnym', [in:] *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla*, vol. II, ed. P. Kardas, T. Sroka, W. Wróbel, Warszawa 2012, pp. 1339–1341.

[10] L. Bosek, 'Status of a Conceived Child', [in:] Z. Banaszyk et al., *Medical Law. Cases and Commentaries*, Warszawa 2012, pp. 39–48.

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

there are no sufficiently accurate, reasonable and non-arbitrary criteria that would make the differentiation of a level of protection possible.

The axionormative views of the Constitutional Tribunal on foetal rights can be observed in the very notion of a "conceived child" that the court has used, giving reasons for the judgment. The court stated clearly that the prohibition on violation of a conceived child's life results from constitutional norms.

Nonetheless, the Constitutional Tribunal argued that the intensity of legal protection of a human being in a prenatal and postnatal phase of life can differ, although in all phases must be adequate and proportionate. The protection should be provided by both civil and criminal law norms. The Constitutional Tribunal rendered that the unborn child should be protected also from the acts of its mother to its detriment. Therefore it declared as unconstitutional depriving a child of the possibility of asserting tort claims against its mother related to damage incurred prior to birth as a result of a wilful act of the mother. The court held as well that derogation of a norm that stipulated penal liability for bodily harm or bodily disorder of a conceived child was also a violation of the Constitution. However, Article 156a of the Criminal Code that the Constitutional Court referred to, provided that the mother of a child who causes its injury is not to be punished and therefore is exempt from criminal liability.

Differentiating the notions of a foetus and a human under Polish criminal law

The constitutional provisions are interpreted in a way that does not exclude foetuses from the notion of a "human". This does not mean ipso facto that the term "human" has the same meaning when used in the Criminal Code. To accept that view would mean that a homicide (Article 148 of the Criminal Code) could be applied to a person terminating pregnancy and criminal law provisions that relate to the abortion or feticide would be superfluous. There would be no need to introduce provisions explicitly using a term "unborn child". Interpreting criminal law

provisions systematically, according to the ejudem generis principle, one must conclude that the notion of a human used in the Criminal Code has not got the same designates as the notion of a human used in the Constitution. The Criminal Code creates a distinction between the separate phases of prenatal and postnatal development of a human being and provides for a different level of protection. This is not unconstitutional, because the referents in constitutions and in statutes can and often have in fact different, autonomous meaning[12].

In that context the criminal law doctrine has developed several criteria that would help to distinguish between a human and a foetus[13]. According to the obstetric approach, any human being can be regarded as a human from the beginning of childbirth defined either by the onset of uterine contractions or labour pain. The physiological approach requires a child to undertake any physiological activity, including movement, heartbeat or respiration[14]. Physical (or spatial?) approach concentrates upon partial[15] or full[16] separation of a child from a mother. The foetus viability criterion accepts as a moment of differentiation, the ability of a foetus to survive outside the uterus[17]. The genetic approach considers the beginning of a human from the creation of any being with a human genotype[18]. Very often mixed criteria are also used[19].

[12] In the judgment of 28 May 1997, the Constitutional Tribunal accepted such an interpretation.

[13] A. Marek, *Prawo karne*, Warszawa 2006, p. 423; T. Sroka, *Odpowiedzialność karna za niewłaściwe leczenie. Problematyka obiektywnego przypisania skutku*, Warszawa 2013, pp. 49–86; W. Gutekunst, 'Przestępstwa przeciwko życiu i zdrowiu', [in:] *Prawo karne. Część szczególna*, ed. W. Świda, Warszawa-Wrocław 1967, pp. 99–100.

[14] W. Makowski, *Kodeks karny. Komentarz*, Warszawa 1937, p. 636.

[15] J. Śliwowski, *Prawo karne*, Warszawa 1979, pp. 351–352.

[16] H. Wolińska, 'Jeszcze na temat dzieciobójstwa. Polemika', PiP 1967, No. 12, p. 1025.

[17] M. Cieślak [in:] *System prawa karnego. O przestępstwach w szczególności*, vol. IV, part 2, ed. I. Andrejew, Wrocław-Łódź 1989, p. 298; E. Plebanek, 'Prawnokarna ochrona dziecka poczętego zdolnego do samodzielnego życia poza organizmem kobiety ciężarnej — wybrane zagadnienia sporne', [in:] *Profesor Marian Cieślak — osoba, dzieło, kontynuacje*, ed. W. Cieślak, S. Steinborn, Warszawa 2013, pp. 412–433.

[18] This criterion is not used in practice of the jurisprudence.

[19] M. Siewierski [in:] J. Bafia, K. Mioduski, M. Siewierski, *Kodeks karny. Komentarz*, Warszawa 1971, p. 359.

The usage of a legal criterion to determine when we might speak of a human is all-important. The debates on some forms of late-term abortions like the American discussion on intact dilation and extraction (IDX) resulting in adopting the Partial-Birth Abortion Ban Act in 2003[20] can serve here as a perfect example.

The Polish Supreme Court in its jurisprudence accepted the first criterion and held that under the provision of Article 160 of the Criminal Code life and health of a human is protected from the physiological commencement of labour and in the case of a delivery through a caesarean section, from the start of this surgical procedure, alternatively from the moment when medical reasons for the operation occurred, even if it was not performed[21].

Accepting this interpretation, it is clear that any activities carried out by an expectant mother that are harmful to her unborn child can be classified as exposing a human to immediate danger of loss of life or a danger of sustaining grievous bodily harm under Article 160 of the Criminal Code only if they were undertaken after the childbirth began[22]. This also includes the consumption of alcohol, drug abuse, behaving in a risky manner etc. It should be noted that there is no exempting a mother from criminal liability for hurting her child in course of the delivery[23]. Nonetheless, what regards the behaviour of a woman before labour commenced, cannot fall under this criminal law provision.

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[20] The Partial-Birth Abortion Ban Act enacted on November 5, 2003 (18 U.S.C. § 1531).

[21] Decision of the Supreme Court of 30 October 2008, I KZP 13/08 (OSNKW 2008/11/90). Judgement of the Supreme Court of 27 September 2010, V KK 34/10. (OSNKW 2010/12/105, *Prok. i Pr.* — wkł. 2011/2/7, Biul. PK 2010/6/16-17, Biul. SN 2010/12/22-23). Ruling of the Supreme Court of 26 October 2006, I KZP 18/06 (OSNKW 2006/11/97, *Prok. i Pr.* — wkł. 2007/1/6, Biul. SN 2006/10/19).

[22] L.K. Paprzycki, 'Granice prawnokarnej ochrony życia i zdrowia człowieka na tle uchwały Sądu Najwyższego z 26 października 2006 r. (I KZP 18/06)', *Medyczna Wokanda* 2010, No. 2, p. 8.

[23] K. Daszkiewicz, 'Przerwanie ciąży a dzieciobójstwo', PiP 1968, No. 3, p. 497.

Crime of causing a bodily injury to a foetus

In the current criminal regulation, a woman would be held criminally responsible for drinking in pregnancy only if it was punishable under Article 157a of the Criminal Code.

According to this provision, whoever causes a bodily injury or a life-threatening health disorder to a conceived child, is subject to a fine, the penalty of limitation of liberty or the penalty of deprivation of liberty for up to 2 years. The lawgiver provided two normative exemptions. A doctor does not commit a crime if the bodily injury or the health disorder suffered by the conceived child is a consequence of treatment necessary to avert the danger to life or health of the pregnant woman or the conceived child. The mother of the conceived child who commits the act of injuring or endangering a foetus is not subject to a penalty.

The wording of the provision makes it visible that the lawgiver considers inflicting bodily harm or bodily disorder upon a foetus by a mother as illicit. A mother, contrary to a doctor in the above-mentioned situation, fulfils statutory provisions of a prescribed crime. Accordingly, she commits an unlawful act. However, the lawgiver has generally resigned from punishing her. Therefore the mother consuming alcohol in pregnancy should be immune from criminal prosecution.

It should be noted that the provision in question penalises only intentional acts[24]. The lawgiver did not provide the criminal liability for unintentional acts resulting in detriment of foetal health. Nonetheless, if the woman knows of her state of pregnancy and is aware of the fact that maternal consumption of alcohol endangers a foetus, it should be generally concluded that she acts intentionally, not recklessly. If she foresees that harm might be caused but goes on to take the risk, regardless of the consequences, she acts with mens rea in form of dolus eventualis. Therefore, whereas unintentional acts harming a foetus are not criminalised in genere, in case of pregnant women also intentional acts are not punishable.

[24] R. Krajewski, 'Przestępstwo uszkodzenia ciała lub rozstroju zdrowia dziecka poczętego', *Prokuratura i Prawo* 2007, No. 6, p. 16.

Criminal liability of a woman for termination of pregnancy

It should be argued that penalising infliction of any injuries on a foetus by a pregnant woman would have been illogical and improper, taking into consideration the regulations on termination of pregnancy being currently in force. Abortion is a highly controversial issue both from a social and legal perspective[25]. The voices of polemics over forms of induced ending of pregnancy cannot be examined within the scope of this brief analysis. However, what is crucial for the study is whether the norms proscribing abortion can render women criminally liable for self-induced abortion.

A woman who performed abortion herself or allowed a third person to terminate her pregnancy was punishable under Article 231 of the Polish Criminal Code of 1932. Abortion was, however, legal for maternal life, health, a pregnancy being a result of a rape, incest, sexual intercourse with minors or by abuse of authority. The Law of 27 April 1956 generally allowed medically performed abortions also for socio-economic factors and decriminalized all acts performed by women resulting in self-abortion, as well as facilitating, inciting or assisting the termination of the pregnancy.

The Polish Criminal Code of 1997 currently in force criminalizes abortion. However, because of the special wording of a provision, women cannot commit this prohibited act. Article 152 provides that whoever, with the 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 3 years. 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. Feticide, defined as causing death

[25] E. Zielińska, 'Z problematyki wykładni przepisów karnych dotyczących ochrony płodu ludzkiego', PiP 1995, No. 2, p. 21; eadem, 'Dopuszczalność przerywania ciąży w orzecznictwie sądów konstytucyjnych', PiP 1988, No. 3, p. 83; eadem, 'Przestępstwo przerywania ciąży', [in:] *System prawa karnego. O przestępstwach w szczególności*, vol. 4, part 1, ed. I. Andrejew, Wrocław-Łódź 1989, p. 390. More detailed studies: J. Majewski, W. Wróbel, 'Prawnokarna ochrona dziecka poczętego', PiP 1993, No. 5; E. Zielińska, *Przerywanie ciąży. Warunki legalności w Polsce i na świecie*, Warszawa 1990; eadem, *Oceny prawnokarne przerywania ciąży. Studium porównawcze*, Warszawa 1986; L. Bogunia, *Przerwanie ciąży. Problemy prawno karne i kryminologiczne*, Wrocław 1980; K. Daszkiewicz, *Przestępstwa przeciwko życiu i zdrowiu*, Warszawa 2000, pp. 259ff.

of a foetus without a woman's consent, is also recognized as a crime of violence. Whoever, through the use of force against a pregnant woman or by other means, without her consent, terminates the pregnancy or induces her by force, an illegal threat, or deceit to terminate the pregnancy shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years. More severe penalties for abortion of feticide are provided for committing these acts after the foetus has become capable of living outside the pregnant woman's body.

The detailed regulation on family planning and legal abortion is stated in the Law on protection of the human foetus and conditions permitting pregnancy termination that was passed by Parliament in 1993. It provides that an abortion can be carried out by a physician in three situations only: where pregnancy endangers the mother's life or health; when prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease (until such time as the foetus is capable of surviving outside the mother's body); and when there are strong grounds for believing that the pregnancy is a result of a criminal act (until the end of the twelfth week of pregnancy).

Termination of pregnancy in breach of the conditions enlisted above is a criminal offence. Nonetheless, the pregnant woman herself does not incur criminal liability for an abortion performed in contravention of the 1993 Act. Therefore it should be said that for over a half of century women have not been held criminally liable for inducing ending of pregnancies under Polish criminal law. In this situation one might argue that engaging in certain behaviour by women that could pose risk to the health or development of a foetus or that indeed caused some ill-effects to its body must be also rendered unpunishable.

The regulation on termination of pregnancy might be interpreted using an argument a fortiori in the form a maiori ad minus. According to this rule of reasoning, if one is allowed more, then one is allowed less as well. By that way of interpretation, Article 157a of the Criminal Code would be superfluous. This argumentation is defensible only under the condition that we accept that the value protected by the regulation of abortion is a foetus itself, which is not the dominant standpoint in present

Polish jurisprudence. This interpretation, however, is especially appealing in case of analysing criminal liability of a mother for undertaking a failed abortion attempt and causing bodily injury of a newborn baby by the abortion procedure.

Proposals de lege ferenda and comparative remarks

Consuming alcoholic beverages during pregnancy is behaviour posing serious risk of bearing a child with mental and physical deficiencies and the scale of the problem in the modern world is alarming. Alcohol drunk by an expectant mother easily crosses the placental barrier, therefore a foetus drinks alcohol drunk by its mother. The foetus cannot process alcohol effectively until the liver is fully developed and the high levels of alcohol can affect the development of organs and the brain. Harmful consequences for the developing foetus last a lifetime[26]. The typical characteristics of Foetal Alcohol Syndrome include organ dysfunction, distinctive facial stigmata, developmental delay, growth deficiency, intellectual disability, poor socialization and learning skills and behavioural problems[27]. Nothing in this paper should be interpreted in favour of the maternal consumption of alcohol. All social actions, programmes, campaigns and strategies aimed at health promotion and undertaken to encourage pregnant women to abstain from drinking alcohol shall be strongly supported[28].

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[26] R.G. LaChausse, 'The Effectiveness of a Multimedia Program to Prevent Fetal Alcohol Syndrome', *Health Promotion Practice*, 9(3), July 2008, p. 289; K.A. Kerns et al., 'Cognitive Deficits in Nonretarded Adults with Fetal Alcohol Syndrome', *Journal of Learning Disabilities*, 30(6), November/December 1997, pp. 685–693.

[27] J.R. West, C.A. Blake, 'Fetal Alcohol Syndrome: An Assessment of the Field', *Experimental Biology and Medicine*, 230(6), June 2005, pp. 354–356; K.L. Jones, D.W. Smith, 'Recognition of the Fetal Alcohol Syndrome in Early Infancy', *Lancet*, 2(999–1001), 1973; K.L. Jones et al., 'Pattern of Malformation in Offspring of Chronic Alcoholic Mothers', *Lancet*, 1(1267–1271), 1973; T. Jirikowic et al., 'Children with Fetal Alcohol Spectrum Disorders: A Descriptive Profile of Adaptive Function', *Canadian Journal of Occupational Therapy*, 75(4), October 2008, pp. 238–248.

[28] The efficacy of the campaigns should be constantly monitored. D. Gilk et al., 'Fetal Alcohol Syndrome Prevention Using Community-Based Narrowcasting Campaigns', *Health Promotion Practice*, 9(1), January 2008, p. 93.

For the time being drinking in pregnancy resulting in a bodily injury or dysfunction of a foetus is a prohibited act, for which a pregnant woman is explicitly unpunishable. Similarly a woman cannot be punished for all other situations when she intentionally harms her foetus, including use of tobacco, medicines, perilous sport activities, non-compliance with a doctor's order of bedrest, dietary restrictions[29] or caesarean section[30]. It is not justified to interpret a regulation on endangerment of a human stipulated in Article 160 of the Criminal Code so that a mother could be held criminally liable for such behaviour after her child is born.

Such an approach was also adopted by British courts. The Court of Appeal has recently ruled that a girl born with Foetal Alcohol Syndrome is not legally entitled to compensation after her mother drank excessively while pregnant. Legal representatives of the child argued that the mother had poisoned her foetus by consuming eight cans of strong lager and half a bottle of vodka a day, but appeal judges ruled that the Offences against the Person Act of 1861 is inapplicable in this case and that the mother had not committed a criminal offence. Lord Justice Treacy said an "essential ingredient" for a crime to be committed "is the infliction of grievous bodily harm on a person — grievous bodily harm on a foetus will not suffice"[31]. It should be noted that courts in the UK have traditionally not been willing to extend wardship jurisdiction, while the foetus is in utero, as it has been held that the real purpose of such an extension would be to control the actions of the mother[32].

In the United States a more punitive approach has been chosen. In many American states attempts were made to criminalize engaging by pregnant women in activities potentially dangerous to foetal health and it

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[29] M. Warin et al., 'Mothers as Smoking Guns: Fetal Overnutrition and the Reproduction of Obesity', *Feminism Psychology*, 22, August 2012, No. 3, pp. 360–375.

[30] In the famous case of "Baby R" a pregnant mother's foetus was apprehended by British Columbia welfare authorities, because the mother did not agree with the attending obstetrician on the caesarean section. The case described in: K.E. Maier, 'Pregnant Women: Fetal Containers or People with Rights?', *Affilia*, 4, July 1989, No. 2, pp. 8–20.

[31] BBC News, *Foetal alcohol case dismissed by Court of Appeal*, 4 December 2014, http://www.bbc.com/news/uk-30327893, access: 12.12.2014.

[32] E.J. Stein, C.W.G. Redman, 'Maternal-Fetal Conflict: A Definition', *Medico-Legal Journal*, 58, No. 4, p. 233.

must be said that these attempts generally failed[33]. This was high on the agenda in the context of prenatal crack exposure and the problem of so-called "crack babies" that received much public attention in the 1980s[34]. From 1985 to 1993, 240 women in 35 states were arrested and charged for their actions during pregnancy[35]. State legislatures have drafted new statutes pertaining to conduct categorized as foetal endangerment or foetal abuse. The most widespread trend to deal with prenatal substance use has involved amending or interpreting existing child abuse and dependent child legislation to infants who had been exposed to drugs or alcohol in utero[36]. Women exposing their foetuses to harmful substances were charged with delivering drugs to a minor (Johnson case),[37] criminal child neglect (State v. Withner)[38], and even homicide by child abuse (State v. McKnight, 2003)[39]. Intoxicated pregnant women also faced charges of possession of a controlled substance, contributing to the delinquency of a minor, child abuse and neglect, cruelty to children, reckless endangerment, manslaughter, and assault with a deadly weapon[40].

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[33] V. Toscano, 'Misguided Retribution: Criminalization of Pregnant Women Who Take Drugs', *Social Legal Studies*, 14, September 2005, No. 3, p. 364; J.M. Pollock-Byrne, A.V. Merlo, 'Against Compulsory Treatment: No Quick Fix For Pregnant Substance Abusers', *Criminal Justice Policy Review*, 5, June 1991, No. 2, p. 80.

[34] M. Meyers, 'Crack Mothers in the News: A Narrative of Paternalistic Racism', *Journal of Communication Inquiry*, 28, July 2004, No. 3, p. 200.

[35] J. Flavin, 'A Glass Half Full? Harm Reduction among Pregnant Women Who Use Cocaine', *Journal of Drug Issues*, 32, July 2002, No. 3, pp. 973–974; C.S. Carter, 'Prenatal Care for Women Who Are Addicted: Implications for Gender-Sensitive Practice', *Affilia*, 17, Fall 2002, No. 3, p. 340.

[36] J.M. Pollock-Byrne, A.V. Merlo, op. cit., pp. 83–84; J. Losco, 'Fetal Abuse: An Exploration of Emerging Philosophical, Legal and Policy Issues', *Political Research Quarterly*, 42, June 1989, No. 2, p. 266.

[37] Johnson v. State, 578 So.2d 419, 420, Johnson v. Florida, 602 So. 2d 1288. K.J. Maschke, 'Prosecutors as Crime Creators: The Case of Prenatal Drug Use', *Criminal Justice Review Spring*, 20, 1995, No. 1, p. 23.

[38] State v Whitner, No. 92-GS-39–670 (1992) S. C. Ct. Gen. Sess. Pickens County Apr. 20, Whitner v State, No. 93-CP-39–347 (1993) S. C. Ct. C. P. Pickens County Nov. 22, Whitner v South Carolina (1997) 492 S. E. 2d 777.

[39] State v McKnight (2003) 576 S.E.2d 168.

[40] R. Roth, *Making Women Pay: The Hidden Costs of Fetal Rights*, New York 2000, p. 146.

The quest for realization of foetal rights might have unexpected results. In December 2010 Ben Shuai was pregnant and in despair. She attempted to commit suicide by self-poisoning, but she survived. Her 8-month-old foetus, delivered by caesarean section, did not. After she was charged with murder and spent more than a year in jail, she pleaded guilty to criminal recklessness[41].

It should be noted that the Unborn Victims of Violence Act of 2004[42], which recognizes a child in utero as a legal victim, does not prosecute any woman with respect to injuries caused to her "unborn child" (verba legis). However, some state legislation allows women to be detained, or let authorities intervene in their medical decisions, for the sake of foetal health. Seventeen states consider substance abuse during pregnancy to be child abuse, and three explicitly give authorities the power to confine pregnant women suspected of substance abuse because they are endangering their future child[43].

In Polish criminal law doctrine there are voices that these situations urge law amendments that would increase the protection of a foetus against the actions of its mother at least in the phase of the foetus viability[44]. There is a field to legal and axiological debate on the issue. From the purely normative viewpoint criminalization of causing foetal harm by a mother is possible.

Nonetheless, one must always bear in mind that criminal law protection should be one of last resort. Martha A. Field points out that the woman and the foetus ideally and normally are in a supportive relationship, not a competitive one, but attempts to regulate the mother to protect the foetus or to punish the mother for misconduct towards the foetus

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41 P. Thompson, 'Mother killed unborn baby by swallowing rat poison in last week of pregnancy', *MailOnline*, 16 March 2011.

42 Pub.L. 108–212.

43 R. Graham, 'For Pregnant Women. Two Sets of Rights in One Body', *The Boston Globe*, 16 February 2014, http://www.bostonglobe.com/ideas/2014/02/16/for-pregnant-women-two-sets-rights-one-body/5Pd6zntIViRBZ9QxhiQgFJ/story.html (access: 12.12.2014).

44 E. Siedlecka, 'Nie boję się odgrzania aborcyjnego sporu, Rozmowa z prof. Andrzejem Zollem, przewodniczącym komisji kodyfikacyjnej prawa karnego przy ministrze sprawiedliwości', *Gazeta Wyborcza*, 17 December 2013, L.K. Paprzycki, 'Istota…', pp. 15, 21.

tend to make them legal adversaries[45]. Vicki Toscano argues that if it were regulated and controlled by law, what a pregnant woman eats and drinks, how much she sleeps and exercises, it would mean losing by her the autonomy and freedom guaranteed in liberal society[46]. Moreover, the actual consequences of criminalizing endangerment of the foetus by its mother are positive neither for the well-being of the foetus nor its mother[47]. Therefore balancing rights of a woman and her foetus through the instrument of criminal law provisions might especially be incongruous, hazardous and improper.

Summary

After pregnant women and women giving birth had been found drunk in many Polish cities, the state prosecution accused women of committing an offence of exposing their new-born children to an immediate danger of the loss of life or a danger of sustaining grievous bodily harm. In the paper it is argued that under current Polish criminal law any foetal endangerment is not criminalized as long as it is caused by the mother of a child. This also includes maternal consumption of alcohol during pregnancy. The issue in question is analyzed from the constitutional and criminal law dimension with axiological and comparative remarks and proposals as to the law amendments.

Keywords: foetal endangerment, foetus rights, alcohol intoxication, bodily injury.

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[45] M.A. Field, 'Controlling the Woman to Protect the Foetus', *Law, Medicine and Health Care*, 117, 1989, pp. 124–125, as cited in: K.A. Farr, 'Fetal Abuse and the Criminalization of Behavior During Pregnancy', *Crime & Delinquency*, 41, April 1995, No. 2, p. 240.

[46] V. Toscano, op. cit., pp. 371, 373. Analysing an autonomy concern in maternal prenatal duty of care: T. Keren-Paz, 'On Mothers, Babies and Bathwater: Distributive Justice, Tort Law and Prenatal Duties', *Social and Legal Studies*, 14(2), 2005, pp. 182–183.

[47] J.M. Pollock-Byrne, A.V. Merlo, op. cit., p. 79; J. Gregory, '(M)Others in Altered States: Prenatal Drug-Use, Risk, Choice, and Responsible Self-Governance', *Social Legal Studies*, 19, March 2010, No. 1, p. 61.