Constitutional Court of Croatia

[Decision of February 21, 2017 regarding abortion]

Rješenje Ustavnog Suda Republike Hrvatske, broj: U-I-60/1991 i dr. od 21.veljace 2017.

Unofficial abridged translation into English

The entire decision is online in Croatian. This unofficial and abridged translation was sponsored by the International Reproductive and Sexual Health Law Program, Faculty of Law, University of Toronto, Canada, and kindly abridged by Dr. Ivana Radačić in consultation with Prof. Rebecca Cook. We are very grateful to Her Excellency Marica Matković, Ambassador the Republic of Croatia in Canada, and to Ms. Ksenija Podgornik, M.Sci, and the Office of the President of the Constitutional Court of Croatia, for facilitating English translation of the official press release. For the translation itself, we gratefully acknowledge international courts and organizations that have placed English versions of cited records and documents in the public domain. Finally, we are most grateful to Jana Rađa Kolombo and Mark Davies who faithfully translated and edited the rest of this abridged translation, under the auspices of DAVIES d.o.o.

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Official Gazette 25/2017 (20/03/2017), Ruling of the Constitutional Court of the Republic of Croatia no. U-I-60/1991 et al. of 21 February 2017, and the dissenting opinion

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA

The Constitutional Court of the Republic of Croatia, composed of Miroslav Šeparović, President of the Court, and Judges Andrej Abramović, Ingrid Antičević-Marinović, Mato Arlović, Snježana Bagić, Branko Brkić, Mario Jelušić, Lovorka Kušan, Josip Leko, Davorin Mlakar, Rajko Mlinarić, Antun Palarić and Miroslav Šumanović, in its deliberation on proposals for the institution of proceedings to review the conformity of a law with the Constitution of the Republic of Croatia (Official Gazette 56/90, 135/97, 113/00, 28/01, 76/10 and 5/14), at its session held on 21 February 2017, rendered the following

RULING

I. Proposals for the institution of proceedings to review the conformity with the Constitution of the Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth (Official Gazette 18/78, 31/86, 47/89 and 88/09) are not granted.

II. The Croatian Parliament is hereby instructed to enact a new act in accordance with the findings of the Constitutional Court in points 49 and 50 of the statement of reasons of this ruling within two (2) years.

III. This ruling shall be published in the Official Gazette.

Statement of Reasons

I. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

1. The Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth was enacted by the competent council of the Parliament of the Socialist Republic of Croatia (hereinafter: SRC) on 21 April 1978 and was published in the Official Gazette No. 18 of 4 May 1978.

The Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth has been amended three times, …

At the moment of issuing this ruling, the Act on Health Measures on the Exercise of the Right to the Freedom of Decision-Making on Giving Birth with its amendments (Official Gazette 18/78, 31/86, 47/89 and 88/09; hereinafter: Act) is in force.

1.1. The proposals for the institution of proceedings to review the conformity with the Constitution of the Act were submitted by the following:

- Nike Karabaić from Rijeka and Antun Lisec from Vetovo … - Croatian Movement for Life and Family of Zagreb, … - Croatian Catholic Association “WE” of Zagreb, … - Stjepan Herceg, attorney-at-law in Zagreb … - the Association “In the Name of the Family” of Zagreb, (- Saša Čajić from Zagreb – Daniel Majer from Požega.

2. During the proceedings, the Constitutional Court requested and received the following expert and scientific opinions: …

- the Chair of Family Law, Faculty of Law, University of Zagreb, 14 March 2008;

- the Chair of Family Law, Faculty of Law, University of Split, 14 March 2008;

- the Chair of Family Law, Faculty of Law, University of Rijeka, 12 May 2008;

- the Catholic Faculty of Theology, University of Zagreb, Regional Study of Theology in Rijeka, 21 April 2008;

- the Catholic Faculty of Theology, University of Zagreb, 25 April 2008;

- Professor Biljana Kostadinov, PhD, Chair of Constitutional Law, Faculty of Law, University of Zagreb, 29 November 2016.

On 24 January 2008, an expert opinion was also requested from the Chair of Family Law, Faculty of Law, University J.J. Strossmayer of Osijek, but was not received.

2.1. Pursuant to Article 49.2 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette 99/99, 29/02 and 42/02 – revised text; hereinafter: Constitutional Act), an advisory panel with doctors and experts in the field of medical ethics was held on 19 February 2009, after which Professor Niko Zurak, PhD, from the School of Medicine of the University of Zagreb, as the coordinator of the Commission for drawing up an expert opinion in medical ethics, on 25 August 2009 submitted a joint expert opinion. Individual expert opinions were also submitted by <a number of professors from the schools of medicine in Rijeka and Split> …:

- On 18 September 2009, Željko Reiner, Fellow of the Academy, submitted an expert opinion drawn up by the select leadership of the Department of Gynaecology and Obstetrics.

2.2. On 29 December 2015, the Croatian Women's Network, … filed a submission that included the Concluding Observations of the United Nations (hereinafter: UN) Committee that monitors the Convention on the Elimination of All Forms of Discrimination against Women from the fourth and fifth periodic report for the Republic of Croatia of 24 July 2015.

2.3. On 3 November 2016, Arsen Bauk, Member of the Croatian Parliament, submitted a copy of segments from the minutes of the sixth session of the Commission for Constitutional Matters of the Parliament of the Republic of Croatia, held on 3 December 1990, with a report on the results of a public discussion on the Draft Constitution of the Republic of Croatia.

2.4. On 14 November 2016, the Centre for Education, Counselling and Research of Zagreb filed a submission with expert opinions by Ivana Radačić, PhD, and Karolina Wieckiewicz on the standards for protecting reproductive rights.

2.5. The Centre for Reproductive Rights filed an expert opinion on 5 January 2017 on the constitutionality of the impugned Act, with a short review of “European legislative standards

concerning abortion" and concerning Europe's constitutional approach to the right to life and termination of pregnancy, along with a list of international public health guidelines.

...

II. TEXT OF THE IMPUGNED ACT

3. The impugned Act was enacted pursuant to Article 272 of the SRC Constitution (Official Gazette 8/74, 31/81, 5/86, 28/89 and 33/89 - corrigendum), reading:

"Article 272

It is the right of man to make free decisions concerning the birth of children.

This right may be restricted only to protect health."

3.1. The proponents contest the Act in its totality. …

"I. GENERAL PROVISIONS

Article 1

In order to ensure the realisation of the right of man to make free decisions concerning the birth of children, this Act regulates the rights and duties of citizens relating to the prevention of unwanted conception, the termination of unwanted pregnancies, and medical assistance for those persons who are not able to have children due to health factors.

Article 2

The right of man to make free decisions about the birth of children may be restricted only to protect health, under the conditions and in the manner set out in this Act.

Article 3

In order to realise the right of citizens to be informed about the methods and advantages of family planning, counselling and other forms of assistance to citizens regarding family planning are organised within the activity of healthcare, child care and education, social protection, and other activities.

Article 4

Workers and other working people in organisations of associated labour and other self-management organisations and communities of labour ensure conditions for the realisation of the right of man to make free decisions about the birth of children on the basis of the principles of solidarity and reciprocity, within the framework of their material means. …

Health organisations of associated labour that perform sterilisation procedures shall report such procedures within 30 days to the body competent for maintaining health statistics. …

III. TERMINATION OF PREGNANCY

Article 15

Termination of pregnancy is a medical procedure.

Termination of pregnancy may be performed only within 10 weeks of conception.

After 10 weeks of conception, termination of pregnancy may be performed only further to the approval of a commission under the conditions and according to the procedure set out in this Act.

Article 16

Termination of pregnancy may not be performed if it is established that it might have serious consequences on the woman's health.

Article 17

Termination of pregnancy may be performed in hospitals that have an organised unit for gynaecology and obstetrics, as well as in other health organisations of associated labour with special authorisation of the republican body of administration competent for health care.

Article 18

Termination of pregnancy is performed at the request of a pregnant woman.

If the request for termination of pregnancy is made by a minor under 16 years of age, she will need the approval of her parents or guardian with the consent of the guardianship authority.

Article 19

A pregnant woman submits her request for termination of pregnancy to a health organisation of associated labour of her choice that performs such termination of pregnancy.

If all requirements for termination of pregnancy are fulfilled, the pregnant woman shall be referred to a doctor to perform the procedure of termination of pregnancy.

Article 20

If it is established that more than 10 weeks have passed from conception or that the procedure of termination of pregnancy might have serious consequences on the woman's health, the pregnant woman shall be referred with a request to a first-instance commission.

If, in the event referred to in paragraph 1 hereof, the pregnant woman is a minor under 16 years of age, who is not married, the minor's parents or guardian shall be notified about the referral of the minor to the first-instance commission.

Article 21

In the event referred to in Article 19.2 hereof, termination of pregnancy may be performed immediately after the pregnant woman contacts the doctor who is to perform the procedure of termination of pregnancy, and in the event referred to in Article 20.1 hereof, termination of

pregnancy shall be performed immediately following the approval of the first-instance commission, but at the latest within seven days of the date on which approval is obtained.

Article 22

After 10 weeks from conception, the first-instance commission may approve termination of pregnancy subject to an approval or request of the pregnant women in the following cases:

- where it is established on the basis of medical indications that the life of the woman could not be saved or a deterioration in health prevented during pregnancy, delivery, or post-partum;

- where it can be expected on the basis of medical indications and knowledge of medical science that the child will be born with serious congenital physical or mental defects;

- where conception was the result of the criminal offence of rape, intercourse with a helpless person, intercourse by abuse of position, intercourse with a child, or incest.

Article 23

The procedure further to a request for termination of pregnancy is an urgent one.

The first-instance commission shall issue a decision on the request for termination of pregnancy within eight days of the date on which it receives the request.

Article 24

A pregnant woman who is dissatisfied with the decision of the first-instance commission may file an objection to the second-instance commission within three days.

The second-instance commission shall issue a decision on the objection against the decision of the first-instance commission within eight days of the date it receives the objection.

The decision of the second-instance commission on the request for termination of pregnancy is final.

Article 25

Regardless of the conditions and procedure set out in this Act, termination of pregnancy shall be performed or completed:

- in the case of immediate danger to the life or health of the pregnant woman;

- where the procedure for termination of pregnancy has already been put in motion.

The termination of pregnancy referred to in paragraph 1 of this Article shall be performed in a health organisation of associated labour performing the procedure of termination of pregnancy and, exceptionally, the procedure may be performed in some other health organisation of associated labour.

Article 26

The health organisation of associated labour shall notify the authority competent for maintaining

health statistics about the termination of pregnancy within 30 days of the date on which the procedure of termination of pregnancy is performed.

Article 27

Where, in completing the procedure of termination of pregnancy which has already been put in motion, it is suspected that termination of pregnancy was put in motion contrary to the provisions of this Act, the responsible person in the health organisation of associated labour in which the termination of pregnancy is completed shall submit a report to that effect to the competent law-enforcement authority immediately.

Article 28

The health organisation of associated labour in which termination of pregnancy is performed shall ensure that the procedure of termination of pregnancy is performed using the latest medical methods.

The health organisation of associated labour referred to in paragraph 1 of this Article shall enable, whenever necessary, that the stay of the woman in the health organisation of associated labour following the procedure of termination of pregnancy is extended.

V. THE ESTABLISHMENT AND WORK OF COMMISSIONS

Article 35

The first-instance commission that issues the decision on a request for sterilisation or a request for termination of pregnancy consists of two doctors, where one must be a gynaecologist and the other a social worker or a nurse working for the health organisation of associated labour performing the sterilisation or termination of pregnancy.

The first-instance commission is established by the health organisation of associated labour performing the sterilisation or termination of pregnancy.

Article 36

The second-instance commission which, within the meaning of Articles 13 and 24 of this Act, issues a decision on an objection against the decision of the first-instance commission consists of two gynaecologists, a doctor specialised in the relevant branch of medicine in view of the medical indications for which approval for sterilisation or approval to perform termination of pregnancy is discussed, a social worker, and a judge designated, at the request of the authorised health organisation of associated labour, by the president of the municipal court in the area where the health organisation is located.

The commission referred to in paragraph 1 of this Article is established by the health organisation of associated labour authorised specifically by the republican administrative authority competent for healthcare.

Article 37

The commissions referred to in Articles 35 and 36 of this Act work in sessions, and decisions are made by a majority vote.

In order to supplement medical findings and opinions, the commission may refer the applicant to the relevant health organisation of associated labour to establish facts required for issuing a decision on the request.

VI. PRICES AND COSTS

Article 38

The price of health services for medical procedures set out in this Act shall be established further to the common foundations and benchmarks agreed within the Association of Health Insurance Communities and Healthcare of Croatia by and between self-management interest groups in health insurance and healthcare.

Article 41

The costs of the termination of pregnancy are borne by the pregnant woman, unless provided otherwise in a self-management general act of the self-management interest group of health insurance and healthcare.

If termination of pregnancy is performed as a result of any of the reasons set out in Article 22 of this Act, and in the case of the unwanted pregnancy of a woman using intrauterine contraception methods, the costs of termination of pregnancy shall be borne by the self-management interest group of health insurance and healthcare.

The costs of the termination of pregnancy of a pregnant woman who requires social protection are borne by the self-management interest group of social protection in the municipality in which the pregnant woman has permanent residence, under the conditions and in the manner set out in the general self-management act.

IV. PENAL PROVISIONS

Article 42

The health organisation of associated labour shall be fined for a misdemeanour in an amount from 2,000 dinars to 10,000 dinars if:

1. it performs sterilisation, termination of pregnancy or artificial insemination without authorisation (Articles 14, 17 and 31);

2. it performs sterilisation or termination of pregnancy without having obtained a decision of the commission where such a decision is required (Articles 13, 20 and 22).

A health worker performing the procedure of sterilisation, termination of pregnancy or artificial insemination shall be fined for a misdemeanour referred to in paragraph 1 of this Article by a fine in an amount from 500 dinars to 3,000 dinars.

Article 43

The health organisation of associated labour shall be fined for a misdemeanour in an amount from 1,000 dinars to 5,000 dinars if it fails to submit a report on the sterilisation performed or to issue a notification on the performed termination of pregnancy within 30 days (Article 14.2 and Article 26).

The responsible person in the health organisation of associated labour shall be fined for a misdemeanour referred to in paragraph 1 of this Article by a fine in an amount from 500 dinars to 2,000 dinars.

Article 44

The responsible person in the health organisation of associated labour that completes the procedure of termination of pregnancy that has already been put into motion shall be fined for a misdemeanour by a fine in an amount from 1,000 dinars to 3,000 dinars if, in the event of suspicion that such termination was put into motion contrary to the provisions of this Act, he or she fails to submit a report immediately to the competent law-enforcement authority (Article 27).
…

III. THE OBJECTIONS OF THE PROPONENTS

1) The proponents Nike Karabaić and Antun Lisec

4. The proponents Nike Karabaić from Rijeka and Antun Lisec from Vetovo proposed that the Act is unconstitutional because the SRC Constitution, and consequently Article 272 of the SRC Constitution, on the basis of which the impugned Act was adopted, ceased to have effect following the promulgation of the 1990 Constitution of the Republic of Croatia. They particularly pointed out that the Act was contrary to Article 21 of the Constitution.

2) The proponent Croatian Movement for Life and Family

4.1. The Croatian Movement for Life and Family of Zagreb points out that the impugned Act, which permits “artificial, violent termination of life of unborn children”, is not in accordance with Article 21.1 of the Constitution. The proponent holds that the impugned Act is also not in accordance with Article 3 of the United Nations Universal Declaration of Human Rights, which states that everyone has the right to life, or with the Declaration of the Rights of the Child. They point out that it is unnecessary to present special evidence that an unborn child is indeed a human being and that it has the right to life as a fundamental and the most important human right that is above and before all other human rights. …

The proponent submits that from the medical standpoint the Act is unacceptable because it permits or approves that a doctor and supporting medical staff terminate the life of a foetus contrary to the principles of medical ethics, and that the provisions on sterilisation, artificial contraception and artificial insemination are also unacceptable.

The proponent emphasises that the impugned Act has a great many defects.

In the extensive explanation of its positions concerning the term “human being” referred to in Article 21.1 of the Constitution, the case law of international courts, and referring to Article 14.2 of the Constitution, the proponent states that “in terms of its characteristics, the performance of abortion cannot be treated as a right, but as the negation of a right”.

4.1.2. The proponent claims that the impugned Act is not in accordance with Article 2 of the Agreement between the Holy See and the Republic of Croatia on Legal Questions (and the proponent also refers to the non-conformity of the Act with Article 141 of the Constitution), since “most citizens of the Republic of Croatia belong to the Catholic Church, so that, accordingly, the above Act is contrary to the teachings of the Catholic Church, whose statehood is represented by the Holy See”. …

4.1.3. In the second supplement to its proposal of 20 December 2016, the proponent submitted the expert opinions of the Christian Legal Centre of Great Britain “Right to Life in International Law” (by Roger Kisk and Paul Diamond) and Ordo Iuris — Instytut na Rzecz Kultury Prawnej of the Republic of Poland — “International Standards on the Right to Life” (by Aleksander Stepkowski et al.).

3) The proponent Croatian Catholic Association “WE”

4.2. The Croatian Catholic Association “WE” of Zagreb submits that in view of the termination of the validity of the 1974 SRC Constitution, the impugned Act is unconstitutional, i.e., not in conformity with Article 21 of the Constitution. It is further stated that the implementation of that Act under the conditions of the depopulation of the Republic of Croatia is deleterious at multiple levels and that the Act should be repealed as one of the “fundamental preconditions for demographic and spiritual revival and for the implementation of a pro-natality population policy of the Republic of Croatia”.

4) The proponent Stjepan Herceg

4.3. The proponent Stjepan Herceg holds that the impugned Act is a *contradictio in adiecto* because it promulgates a non-existent right to make free decisions on giving birth, “which is realised by murdering unborn children under the conditions set out in the Act”.

5) The proponent “In the Name of the Family”

4.4. The Association “In the Name of the Family” holds that the Act is not in conformity with Articles 14, 16, 21.1, 23.1, 59 and 65.1 of the Constitution. The proponent emphasises that the right to life is “beyond any doubt a fundamental human right, above and before all other human rights”. It holds that the term “human being” in Article 21.1 of the Constitution “includes both an unborn and a born human being…”. The proponent also refers to the Judgment of the Court of Justice of the European Union (hereinafter: CJEU) in Case C-34/10 *Oliver Brüstle v Greenpeace eV* EU:C:2011:669 (Grand Chamber, 18 October 2011) and holds that in this judgment “contemporary case law has taken an expressly stated position that human life begins at conception …”. The proponent also refers to the preamble of the 1980 Convention on the Rights of the Child and the 1955 International Covenant on Civil and Political Rights (the correct year is 1966, note by the Constitutional Court), and the case law of the Federal Constitutional Court of

Germany (*Bundesverfassungsgericht, BVerfG*) in 1974 and 1992, as well as the case law of the ECtHR, concluding that the "ECtHR has never denied the qualification 'person' in terms of an unborn child" and that it has "recognised that a child conceived has human dignity and the right to protection in the name of human dignity".

In a special part of its proposal, the proponent examines the question "whether there is such a thing as the right to free decision-making on giving birth" and expresses its position that the only correct stance towards this question is to correlate the right to life of the mother with the right to life of the unborn child. The proponent holds that "only where the right to life and health of the mother is jeopardised is it justified to correlate the right of the mother with the right to life of her unborn child". …

The proponent analyses in particular the prohibition of discrimination on the grounds of age and holds that "the argument that the embryo is not a human being is discriminatory on the grounds of age". The proponent refers to several international conventions on the protection of embryos and genetic engineering. …

The proponent emphasises, in conclusion, that the Republic of Croatia should extend more robust protection to unborn children than that provided at present. …

6) The proponent Saša Čajić

4.5. The proponent Saša Čajić refers to the 1959 United Nations Declaration on the Rights of the Child (correctly the Convention on the Rights of the Child of 1989, a note by the Constitutional Court) … He also refers to Article 63 of the Constitution that especially protects maternity and mentions that the impugned Act provides that only the mother can make a decision on the fate of the embryo and that the child has no role. … He also mentions numerous citations from the Bible.

7) The proponent Daniel Majer

4.6. The proponent Daniel Majer challenges Article 18.1 of the Act and points out that "the wife alone should not have the right to an abortion without the consent of the husband". He holds that a married woman should not be able to request termination of pregnancy in view of the presumption of paternity during marriage, because the "intention of the legislator on the equality of parents is evident".

4.7. All proponents propose that a procedure for a review of conformity with the Constitution should be instituted and that the impugned Act should be repealed in its totality. The proponent Saša Čajić, by referring to Article 45 of the Constitutional Act, proposes a temporary suspension of all individual acts and actions taken pursuant to the impugned Act.

IV. EXPERT OPINIONS

5. In the Constitutional Court proceedings, expert opinions were obtained in the fields of theology (Professor Josip Brbac, PhD, and Professor Matija Berljak, PhD), family law (the chairs of family law at the faculties of law in Rijeka, Split, and Zagreb), medicine and medical ethics (Professor Zvonko Rumboldt, PhD, Professor Mirna Sarga-Babić, PhD, Professor Miljenko

Kapović, PhD, Professor Anđelka Radojčić Badovinac, PhD, and Professor Niko Zurko, PhD, as coordinator of the Commission for drawing up an expert opinion in medical ethics), and constitutional law (Chair of Constitutional Law at the Faculty of Law in Zagreb).

The opinions are not stated in the order in which they were received, but are grouped, for easier comprehension, by the scientific and professional fields to which they relate.

1) Chair of Constitutional Law at the Faculty of Law in Zagreb

5.1. Professor Biljana Kostadinov, PhD, of the Chair of Constitutional Law at the Faculty of Law in Zagreb, presented her opinion on the relationship between the new and old constitutional order, the right to life, and the constitutionality of the right to free decision-making on giving birth.

In her opinion, she states that any new constitution is regularly "a follow-up to the previous legal system and that constitutions rarely include a provision stipulating express abrogation of non-conforming previous legislation". In relation to the act of determining the commencement of the right to life, she writes in the opinion that the constitutional procedure on termination of pregnancy may involve two or three participants: the woman and the state (USA), the woman and the foetus (France, Italy), or the woman, the foetus, and the state (FR Germany, Spain). It is the aim of the proceedings before the Constitutional Court to mediate and to channel the political conflict that arose in the 1970s regarding the woman's role in the family and women's issues, the requirement for the substantive equality of women, and gender equality. There is no doubt in terms of constitutional law that women's interests have been taken into consideration and that they can be regarded as legally protected further to the general principle of freedom. Without entering into a debate whether an unborn child can be the holder of constitutional rights, Constitutional Court judges provide for direct protection of the unborn child's interests, so the state acts as a direct protector of the foetus. According to a recent decision of the Constitutional Court of Portugal (no. 75/2010), an unborn child is not expressly regarded as a right-holder, but only as the embodiment of a constitutional value, which is a fundamental difference that affects the type of protection granted to the unborn child under the constitution.

The opinion also examines the decision of the Constitutional Court of France no. 201-466 DC of 27 June 2001 and the decision of the Constitutional Court of Spain no. CTD 53/1985, with a conclusion that "we hold that the Constitutional Court of the Republic of Croatia should also leave the decision as to when life begins to the Croatian Parliament pursuant to the principle of the separation of powers and the constitutionally enshrined separation of competences. The Croatian Parliament, and only and solely the Croatian Parliament, should say when the right to life begins". It is further stated:

[…]

"New legislation in France, Portugal, and Spain is based on a periodic model that permits abortion further to a woman's request only during a specific period of pregnancy, just like the Croatian Act on Health Measures. The indication-based model that prohibits abortion, other than in the case of indications ascertained by a third person, is dismissed, and the German model of

"open-ended" counselling that discourages abortion, but that permits the woman to make a final decision after counselling, which is aimed to protect her unborn child, is abandoned.

We emphasise that the Federal Republic of Germany changed the method of counselling in 2012 and 2014. Although it is expected that the woman should inform the counsellor about her reasons for considering abortion, counselling excludes the possibility of forcing a pregnant woman to discuss her situation or to cooperate with the counsellor. It is also provided that, on request, the woman may remain anonymous to the person in charge of counselling (Act on Assistance to Avoid and Cope with Conflicts in Pregnancy, Part II, Sections 5, 6).

Predominantly Catholic states, whose abortion legislation was inspired by the German model in the past century (Portugal, Spain), dismissed at the turn of the century the model of counselling dissuasive of abortion for women before they made their decision on abortion, crossing over from the judicial foetus-saving discourse to discourse on the respect of life and of the woman.

[. . . The text goes on to explain the legislative models of Portugal, Spain and France.]

Our Act on Health Measures permits that over a period of ten weeks following conception a woman is guaranteed the right to make a decision on the termination of pregnancy without interference from a third party and without the introduction of a time limit for considering her decision, which is in accordance with the prevalent legal trends in European states in the 21st century…

After ten weeks, subject to the generally accepted medical indications for the termination of pregnancy (to save the life of a mother or if the child is born with serious congenital defects) which European legislation accepts even after the 22nd week of pregnancy (foetal viability), the first-instance commission may make decisions concerning requests for abortion if conception is the result of the criminal offence of rape, intercourse with a helpless person, intercourse by abuse of position, intercourse with a child or incest (Article 22.3). …

[…]

(…)

In the Constitution of the Republic of Croatia, the constitutional value of freedom clearly protects individual self-determination, set against the danger of paternalism, i.e., the imposition of control under the pretext of protecting the individual. Dignity ensures the fundamental right to be recognised as who you are and does not permit anyone to impose on you their version of what would be good for you. Equality ensures that human freedom may be enjoyed by everyone, under the same conditions and with complete diversity. Constitutional principles have their special functions. Taken together, they enable a profound analysis of the problem we face in the case at hand. … Human rights and fundamental freedoms are interpreted by the constitutional courts of developed democracies based on the triangle of the following constitutional values — dignity, freedom, equality. …

… Those challenging the Act on Health Measures in the case at hand refer to part of this Article as grounds for repealing the Act on Health Measures and do not interpret the Constitution of the Republic of Croatia as a value in conformity with contemporary constitutionalism.

Abortion at the request of a woman according to the pregnancy periodic model (e.g., 14 weeks in Spain, 12 in France, 10 in Portugal) is the result of modern legislation in European constitutional democracies in the 21st century, or, to be more precise, in the past ten years.

It is worth recalling, without venturing into the wider field of international treaties, that the Republic of Croatia has ratified the Convention on the Rights of Persons with Disabilities and its Optional Protocol to the Convention (2007), which includes the obligation of the state to provide persons with disabilities with the right to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education, and the means necessary to enable them to exercise these rights (Article 23.1.b, Respect for home and family).

The Parliamentary Assembly of the Council of Europe, in its Resolution 1607 of 16 April 2008, affirmed the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. The Parliamentary Assembly held that, in this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, and invited the member states to decriminalise abortion within reasonable gestational limits."

2) Chair of Family Law at the Faculty of Law in Zagreb

5.2. The Chair of Family Law at the Faculty of Law in Zagreb points out in its opinion that the main problem in implementing the impugned Act is the question of whether the unborn child has the right to life or whether the mother is the master of (unborn) life. … It is indisputable that a live-born child is a human being, but it is seemingly disputable whether an unborn child should also be assigned the attribute of a human being, and it is pointed out that no one has succeeded in denying the status of human being to the embryo. From the position of biomedical sciences, it is increasingly certain that all human beings begin to exist at the moment of conception, i.e., at the moment of the creation of a new, unique, and unrepeatable biological organism. Therefore, it is concluded in the opinion that if the framer of the constitution had wanted to exclude unborn children from the right to life, it should have been stated that the right to life is guaranteed (only) to a live-born child. …

The impugned Act was promulgated at a time of different social and political regulation, as reflected in the different constitutional law provisions (e.g., the legal protection of the right to personality did not exist and it was not guaranteed), and it is held that it is a contradiction *contra constitutionem*. …

… In the Chair's opinion, the impugned Act is contrary to Article 21.1 of the Constitution *rebus sic stantibus*, but the legislator should balance the opposing interests of the right to life and the right of the mother. Namely, termination of pregnancy, just like murder in extreme necessity, sometimes has its legal justifications (e.g., in the case of a malformed child, rape) and requires

detailed, deliberate and responsible regulation. The current law no longer suits human rights requirements in the third millennium and it is substantially different from contemporary European solutions, but the opinion cautions, in conclusion, that the legal prohibition of the termination of pregnancy would not be fruitful.

3) Chair of Family Law at the Faculty of Law in Split

5.3. The Chair of Family Law at the Faculty of Law in Split states that the impugned Act is contrary to the Convention on the Rights of the Child, which expressly states: “States Parties recognize that every child has the inherent right to life” (Article 6.1 of the Convention) and “States Parties shall ensure to the maximum extent possible the survival and development of the child” (Article 6.2 of the Convention).

An embryo is something new in the real world. A unique being, non-existent until that time, begins to exist. …

The postulate of modernism is that everyone, in their essence, is equal. The only affiliation/membership that provides equal dignity to all is the common denominator which says that everyone belongs to a single, human, species. If, therefore, the embryo is a human being, the embryo is also a subject with full rights, equal in dignity to other subjects. Therefore, the embryo’s right to life must be recognised and it must be proclaimed a “person”. …. The mother has no rights to the embryo, because she has already used a large number of her human rights (such as the right to decide whether, when, with whom, and in what circumstances to conceive a child). If the mother does not want or is not able to provide and care for the child properly, there is always a solution available that excludes the act of murder, and that is adoption.

4) Chair of Family Law at the Faculty of Law in Rijeka

5.4. In its opinion, the Chair of Family Law at the Faculty of Law in Rijeka begins by stating that the Convention on Human Rights and Biomedicine prohibits the creation of human embryos for research purposes, but at the same time does not define the content and scope of the term “embryo”. The resolution of this delicate preliminary issue is left in the hands of the legal systems of the member states of the Council of Europe. However, there is no definition of the term in the legal system, so that the ECtHR has, so far, refrained from providing its interpretation and an express definition. … The Convention on the Rights of the Child defines a child as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Therefore, there is no anticipated understanding of the legal subjectivity of an unborn child.

In the case of conflicting interests between the parent (mother) and an unborn child, it is held that it would be contrary to the best interests of the child to act against the mother, and such an intervention would also mean unlawful interference with the privacy and physical integrity of the mother. …

…

It is emphasised that there is still no generally accepted legal standard for the protection of the right of an unborn child and that the foetus is an emerging legal subject which should be afforded full human dignity from the moment of conception. … Most member states of the Council of Europe have laws that enable the performance of termination of pregnancy under certain conditions. It is believed that an absolute prohibition is not possible, because there are cases where it is necessary to save the life of the woman, or also cases of rape or incest where termination of pregnancy is permitted.

5) Theological experts

5.5. Theological experts are unanimous in their support of the proposals to repeal the impugned Act in its entirety because "there are no scientific data that would bring into question the existence of a human being from the moment of conception".

6) Experts in medical ethics

5.6. Experts in medical ethics state in their joint opinion of 25 August 2009 that the medical profession takes an active part in the planning of pregnancy through counselling and education on the methods of contraception. Supported by advancements in the medical sciences and in the profession, doctors are active in various procedures to treat reduced fertility and in medically assisted conception treatments. In relation to the termination of pregnancy, the medical profession, i.e., gynaecologists, perform procedures to complete a miscarriage and, in conformity with the laws of individual states, perform the procedures of termination of pregnancy according to the legislation in force. ...

From the perspective of medical ethics, the commencement of human life is considered directly and indirectly in the Declaration of Geneva (Physician's Pledge) of 1948, amended in 1968 and 1983, which states: "I will maintain the utmost respect for human life from its beginning", and in the Oslo World Medical Association Statement on Medically-Indicated Termination of Pregnancy. They state that a circumstance where the vital interests of the mother are set against the vital interests of the unborn child lead to a dilemma and a question whether pregnancy may be terminated deliberately; however, diverse responses to resolve this dilemma reflect the diverse positions towards the life of an unborn child. It is not the job of the medical profession to specify positions and regulations concerning that issue in individual states and communities, but it is the duty of health practitioners to do their best to protect their patients and the rights of doctors in society.

… Save for one dissenting opinion (Professor Anđelka Radojčić Badovinac, PhD, which is mentioned separately), the medical commission was of the opinion that it is an indisputable scientific fact that in pregnancy the phases of the embryo and of the foetus involve a human being. It is ethically justified to terminate pregnancy if strictly medically indicated, if the pregnancy jeopardises the life of the pregnant women (e.g., ectopic pregnancy) or if the life of the pregnant woman is dependent on essential treatments that have serious deleterious effects on the foetus in terms of malformations (e.g., cancer treatment with radiation and chemotherapy). … From the medical position, regarding ethical and expert aspects, there is no justification to

terminate pregnancy at the request of a healthy woman if the foetus is healthy as regulated in Article 15 of the impugned Act. They conclude as follows:

“The medical profession is defined through its professional tasks, such as prevention, diagnostics, and treatment. These qualifications do not exist in the case of the abortion of a healthy foetus in a healthy pregnant woman, so that this problem is wholly within the sphere of the legislature.”

The dissenting opinion

5.6.1. Professor Anđelka Radojčić Badovinac, PhD, states in her dissenting opinion that “fertilisation is a precondition, but that the zygote (fertilised ovum) certainly does not represent a unique human being, because it still functions on its mother’s genome. … The commencement of life in human beings cannot be defined by either birth or conception. … In my personal opinion, every foetus that can survive outside the uterus , even if with medical assistance, represents human life and, consequently, abortion would result in the ‘murder’ of a child after a certain developmental age. … It is my opinion that abortion as a matter of personal choice of the pregnant woman should be allowed between 10 and 12 weeks, while medically-indicated abortions even later (up to 18–20 weeks)”.

5.7. In the opinion of the select leadership of the Department of Gynaecology and Obstetrics (see point 2.1 of the statement of reasons of this ruling), it is stated that they have made a unanimous decision that life begins at the moment the male and female germ cells unite.

V. THE RELEVANT PROVISIONS OF THE CONSTITUTION

6. The Constitutional Court holds that the following provisions of the Constitution are relevant for the examination of the grounds of the proponents' assertions:

Article 3
Freedom, equal rights, . . . gender equality, . . . respect for human rights, . . . are the highest values of the constitutional order of the Republic of Croatia.

Article 14 All persons in the Republic of Croatia shall enjoy rights and freedoms, regardless of race, colour, gender, language, religion, political or other conviction, national or social origin, property, birth, education, social status or other characteristics.
All persons shall be equal before the law.

Article 16
Freedoms and rights may only be curtailed by law in order to protect the freedoms and rights of others, the legal order, and public morals and health.
(…)

Article 21
Each human being has the right to life.
There shall be no capital punishment in the Republic of Croatia.

Article 35
Respect for and legal protection of each person’s private and family life, dignity, reputation shall be guaranteed.

Article 38
Freedom of thought and expression shall be guaranteed.

VI. INTERNATIONAL DOCUMENTS
In considering the merits of the proposal to institute proceedings for reviewing the compatibility of the contested Act with the Constitution, the Constitutional Court acknowledged the fact that the issue of the right of termination of pregnancy or the right to life deals with numerous international documents adopted under the aegis of the UN and the Council of Europe. Considering the compliance of the provisions of the disputed Act with the Constitution, the Constitutional Court considered it useful to state their relevant parts. The first is a description of the relevant parts of the UN documents and then the documents of the Council of Europe.

A. UNITED NATIONS DOCUMENTS

1) Universal Declaration of Human Rights of the United Nations

7. The following provisions of the Universal Declaration of Human Rights of the United Nations are relevant:

Article 1.
All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 3.
Everyone has the right to life, liberty and security of person.

2) International Covenant on Civil and Political Rights

8. The following provisions of the International Covenant on Civil and Political Rights are relevant:

Article 6.
Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

(…)

Article 7
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

3) Convention on the Elimination of All Forms of Discrimiination against Women (CEDAW)

9. The following provisions of the Convention on the Elimination of All Forms of Discrimination against Women are considered relevant:

Article 11.
1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular:

(…)

(f) The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction.

(…)

3. Protective legislation relating to matters covered in this article shall be reviewed periodically in the light of scientific and technological knowledge and shall be revised, repealed or extended as necessary.

Article 12

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

(…)

Article 16

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(…)

(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

(…)

4) Convention on the Rights of the Child (CRC)

10. The following provisions of the Convention on the Rights of the Child apply:

Article 6
1. States Parties recognize that every child has the inherent right to life.
2. States Parties shall ensure
to the maximum extent possible the survival and development of the child.

5) Convention on the Rights of Persons with Disabilities

11. The following provisions of the Convention on the Rights of Persons with Disabilities are relevant:

Article 23 – Respect for home and the family

1. States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that:

a) The right of all persons with disabilities who are of marriageable age to marry and to found a family on the basis of free and full consent of the intending spouses is recognized;

b) The rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights are provided;

6) UN TREATY MONITORING BODIES

11.1. The application of these international documents in the member states is overseen by some UN committees, and the topic of termination of pregnancy is particularly addressed by the United Nations Human Rights Committee, the official abbreviation of the UNHRC and the Committee on the Elimination of All Forms of Discrimination against Women of Discrimination against Women; official abbreviation: CEDAW).

For example, CEDAW in 2010 expressed its concern in the Final Remarks in relation to the fourth periodic report for Malta (CEDAW / C / MLT / CO / 4), inter alia, due to a complete ban on the termination of pregnancy due to insufficient access by women to reproductive health care services , and because sexual education is not covered by an educational curriculum.
[…]

B. COUNCIL OF EUROPE DOCUMENTS

1) Convention for the Protection of Human Rights and Fundamental Freedoms

12. The following provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms are relevant:

Article 2 – Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Article 8 – Right to respect for private and family life

1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion,

2) Convention for the Protection of Human Rights and Dignity of a Human Being with regard to the Application of Biology and Medicine: the Convention on Human Rights and Biomedicine]

13. The following provisions of the Convention for the Protection of Human Rights and the Dignity of the Human Being with regard to the Application of Biology and Medicine: The Convention on Human Rights and Biomedicine: […]

Article 1 – Purpose and object

Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine.

(…)

Article 2 – Primacy of the human being

The interests and welfare of the human being shall prevail over the sole interest of society or science.

Article 12 – Predictive genetic tests

Tests which are predictive of genetic diseases or which serve either to identify the subject as a carrier of a gene responsible for a disease or to detect a genetic predisposition or susceptibility to a disease may be performed only for health purposes or for scientific research linked to health purposes, and subject to appropriate genetic counselling.

Article 14 – Non-selection of sex

The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided.

Article 18 – Research on embryos *in vitro*

1. Where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo.

(…)

3) Resolution of the Parliamentary Assembly of the Council of Europe 1607 (2008) of 16 April 2008 - »Access to Safe and Legal Abortion in Europe

14. The following Conclusions of Resolution 1607 (2008) are relevant: 9 [9] (Resolution of the Parliamentary Assembly of the Council of Europe 1607 (2008) of 16 April 2008 - "Access to safe and legal abortion in Europe" (Resolution 1607 (2008) - Access to safe and legal abortion in Europe was adopted on the basis of the Report of the Committee on Equal Opportunities for Women and Men, Doc. 11537 rev. 11 March 2008, and the opinion of the Committee on Social Welfare , Health and Family Affairs Committee No: 11576 of 15 April 2008.

“1. The Parliamentary Assembly reaffirms that abortion can in no circumstances be regarded as a family planning method. Abortion must, as far as possible, be avoided. All possible means compatible with women’s rights must be used to reduce the number of both unwanted pregnancies and abortions.

2. In most of the Council of Europe member states the law permits abortion in order to save the expectant mother’s life. Abortion is permitted in the majority of European countries for a number of reasons, mainly to preserve the mother’s physical and mental health, but also in cases of rape or incest, of foetal impairment or for economic and social reasons and, in some countries, on request. The Assembly is nonetheless concerned that, in many of these states, numerous conditions are imposed and restrict the effective access to safe, affordable, acceptable and appropriate abortion services. These restrictions have discriminatory effects, since women who are well informed and possess adequate financial means can often obtain legal and safe abortions more easily.
3. The Assembly also notes that, in member states where abortion is permitted for a number of reasons, conditions are not always such as to guarantee women effective access to this right: the lack of local health care facilities, the lack of doctors willing to carry out abortions, the repeated medical consultations required, the time allowed for changing one’s mind and the waiting time for the abortion all have the potential to make access to safe, affordable, acceptable and appropriate abortion services more difficult, or even impossible in practice.
4. The Assembly takes the view that abortion should not be banned within reasonable gestational limits. A ban on abortions does not result in fewer abortions but mainly leads to clandestine

abortions, which are more traumatic and increase maternal mortality and/or lead to abortion "tourism" which is costly, and delays the timing of an abortion and results in social inequities. The lawfulness of abortion does not have an effect on a woman's need for an abortion, but only on her access to a safe abortion.

5. At the same time, evidence shows that appropriate sexual and reproductive health and rights strategies and policies, including compulsory age-appropriate, gender-sensitive sex and relationships education for young people, result in less recourse to abortion. This type of education should include teaching on self-esteem, healthy relationships, the freedom to delay sexual activity, avoiding peer pressure, contraceptive advice, and considering consequences and responsibilities.

6. The Assembly affirms the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way.

7. The Assembly invites the member states of the Council of Europe to:

7.1. decriminalise abortion within reasonable gestational limits, if they have not already done so;

7.2. guarantee women's effective exercise of their right of access to a safe and legal abortion;

7.3. allow women freedom of choice and offer the conditions for a free and enlightened choice without specifically promoting abortion;

7.4. lift restrictions which hinder, de jure or de facto, access to safe abortion, and, in particular, take the necessary steps to create the appropriate conditions for health, medical and psychological care and offer suitable financial cover;

7.5. adopt evidence-based appropriate sexual and reproductive health and rights strategies and policies, ensuring continued improvements and expansion of non-judgmental sex and relationships information and education, as well as contraceptive services, through increased investments from the national budgets into improving health systems, reproductive health supplies and information;

7.6. ensure that women and men have access to contraception and advice on contraception at a reasonable cost, of a suitable nature for them and chosen by them;

7.7. introduce compulsory age-appropriate, gender-sensitive sex and relationships education for young people (inter alia, in schools) to avoid unwanted pregnancies (and therefore abortions);

7.8. promote a more pro-family attitude in public information campaigns and provide counselling and practical support to help women where the reason for wanting an abortion is family or financial pressure.

VII. PRACTICE OF EUROPEAN COURTS

Based on the international documents mentioned in points 7 to 11 of the explanation of this decision and the procedures carried out by referring to the principles contained in these documents, a relatively rich case-law has been created.

A. PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS]

15. The European Court of Human Rights considered the status of embryos and/or fetuses, or the unborn child, in the widest sense in the concept of "life" in Article 2, paragraph 1 of the Convention, and also within the term "private and family life" in Article 8 of the Convention, and the notion of "freedom of expression" in Article 10 of the Convention. In 1995, the first judgment on the violation of the right to life under Article 2 of the ECtHR Convention was given in McCann et al. v. the United Kingdom (Judgment, Grand Chamber, 27 September 1995, application No. 18984/91). The practice of the ECtHR on this issue has been significantly developed only in the last fifteen years, and to date the most extensive examination of the right to life of an unborn child has been carried out by the ECtHR in the *Vo v. France* case (decision, Grand Chamber, 8 July 2004, request No. 53924 / 00) in which he recapitulated his previous practice.10

1) Vo v. France

15.1. In the decision of Vo v. France ECtHR has united its current practice in relation to the right to life and the termination of pregnancy.

The decision states:

[…]

85. Having regard to the foregoing, the Court is convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention ("*personne*" in the French text). As to the instant case, it considers it unnecessary to examine whether the abrupt end to the applicant's pregnancy falls within the scope of Article 2, seeing that, even assuming that that provision was applicable, there was no failure on the part of the respondent State to comply with the requirements relating to the preservation of life in the public-health sphere.

[…]

86. In that connection, it observes that the unborn child's lack of a clear legal status does not necessarily deprive it of all protection under French law.

[…]

87. In *Boso*, cited above, the Court said that even supposing that the foetus might be considered to have rights protected by Article 2 of the Convention (see paragraph 79 above), Italian law on the voluntary termination of pregnancy struck a fair balance between the woman's interests and the need to ensure protection of the unborn child.

[…]

After the decision Vo v. France, the ECtHR has issued two more important judgments. The relevant parts of these judgments are set out below in the explanation of this decision.

2) P and S v. Poland

In the judgment P. and S. v. Poland (judgment of 30 October 2012, application number 57375/08) ECtHR stated:

[§ 96] While the Court has held that Article 8 cannot be interpreted as conferring a right to abortion, it has found that the prohibition of abortion when sought for reasons of health and/or well-being falls within the scope of the right to respect for one's private life and accordingly of Article 8 (see *A, B and C v. Ireland* [GC], no. 25579/05, § 245, 16 December 2010, § 214). In particular, the Court held in this context that the State's obligations include both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights, and the implementation, where appropriate, of specific measures (*Tysiąc v. Poland*, cited above, § 110; *A, B and C v. Ireland* [GC], cited above, § 245; and *R.R. v. Poland*, cited above, § 184).

[…]
§99 . . The Court has already found in the context of similar cases against Poland that once the State, acting within its limits of appreciation, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain an abortion. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion (*Tysiąc v. Poland*, cited above, § 116-124, *R.R. v. Poland*, cited above, § 200). The legal framework devised for the purposes of the determination of the conditions for lawful abortion should be "shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention" (*A, B and C v. Ireland* [GC], cited above, § 249). Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by that provision that the relevant decision-making process is fair and such as to afford due respect for the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case, and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, *mutatis mutandis*, *W. v. the United Kingdom*, 8 July 1987, §§ 62 and 64, Series A no. 121). The Court has already held that in the context of access to abortion the relevant procedure should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered. The competent body or person should also issue written grounds for its decision (see *Tysiąc v. Poland*, cited above, § 117).

(b) Application of the principles to the circumstances of the present case

100. The Court first notes that the 1993 Act provides for the possibility of lawful abortion in certain narrowly defined situations. In its judgments referred to above the Court has already highlighted the importance of procedural safeguards in the context of the implementation of the 1993 Act when it comes to determining whether the conditions for lawful abortion provided for by that Act obtain. It held that Polish law did not contain any effective procedural mechanisms capable of determining whether these conditions were fulfilled in an individual case, either in the

context of a dispute between a pregnant woman and doctors as to whether the conditions for lawful abortion on grounds of a threat to the woman's health were met (see *Tysiąc v. Poland*, cited above, §§ 119–124), or in the context of possible foetal malformation confirmed by an initial diagnosis (see *R.R. v. Poland*, cited above, § 200 and 207).

The present case differs from those two cases in that it concerns an unwanted pregnancy resulting from rape. Under Article 4 (a) 1 (5) of the 1993 Act abortion can lawfully be carried out where there are strong grounds for believing that the pregnancy was the result of a criminal act, certified by a prosecutor.

[…]

(…)

108. On the whole, the Court finds that the staff involved in the applicants' case did not consider themselves obliged to carry out the abortion expressly requested by the applicants on the strength of the certificate issued by the prosecutor. The events surrounding the determination of the first applicant's access to legal abortion were marred by procrastination and confusion. The applicants were given misleading and contradictory information. They did not receive appropriate and objective medical counselling which would have due regard to their own views and wishes. No set procedure was available to them under which they could have their views heard and properly taken into consideration with a modicum of procedural fairness.

(…)

111. The Court is of the view that effective access to reliable information on the conditions for the availability of lawful abortion, and the relevant procedures to be followed, is directly relevant for the exercise of personal autonomy. It reiterates that the notion of private life within the meaning of Article 8 applies both to decisions to become and not to become a parent (*Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-I*; R.R. v. Poland*, cited above, § 180). The nature of the issues involved in a woman's decision to terminate a pregnancy or not is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are taken in good time. The uncertainty which arose in the present case despite a background of circumstances in which under Article 4 (a) 1.5 of the 1993 Family Planning Act there was a right to lawful abortion resulted in a striking discordance between the theoretical right to such an abortion on the grounds referred to in that provision and the reality of its practical implementation (*Christine Goodwin v. the United Kingdom* [GC], cited above, §§ 77-78; *S.H. and Others v. Austria*, cited above, § 74, *mutatis mutandis*; and *A, B and C v. Ireland* [GC], cited above).

112. Having regard to the circumstances of the case, the Court concludes that the authorities failed to comply with their positive obligation to secure to the applicants effective respect for their private life. There has therefore been a breach of Article 8 of the Convention.

3) *A, B, and C v Ireland*

15.3. In *A., B., and C. v. Ireland* (judgment of 16 December 2010, application No. 25579/05) ECtHR stated:

214. While Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8.
(…)

[…]

1. In the present case, and contrary to the Government's submission, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. In particular, the Court notes that the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States. Only 3 States have more restrictive access to abortion services than in Ireland namely, a prohibition on abortion regardless of the risk to the woman's life. Certain States have in recent years extended the grounds on which abortion can be obtained … Ireland is the only State which allows abortion solely where there is a risk to the life (including self-destruction) of the expectant mother. Given this consensus amongst a substantial majority of the Contracting States, it is not necessary to look further to international trends and views which the first two applicants and certain of the third parties argued also leant in favour of broader access to abortion.

2. However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.

3. Of central importance is the finding in the above-cited *Vo* case, referred to above, that the question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected (see the review of the Convention case law at paragraphs 75-80 in the above-cited *Vo v. France* [GC] judgment), the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention ...

4. It is indeed the case that this margin of appreciation is not unlimited. The prohibition impugned by the first and second applicants must be compatible with a State's Convention obligations and, given the Court's responsibility under Article 19 of the Convention, the Court must supervise whether the interference constitutes a proportionate balancing of the competing interests involved (*Open Door*, § 68). A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature. Nor is the regulation of abortion rights solely a matter for the Contracting States, as the Government maintained relying on certain international declarations. …However, and as explained above, the Court must decide on the compatibility with Article 8 of the Convention of the Irish State's prohibition of abortion on health and well-being grounds on the basis of the above-described fair balance test to which a broad margin of appreciation is applicable.

5. From the lengthy, complex and sensitive debate in Ireland … as regards the content of its abortion laws, a choice has emerged. Irish law prohibits abortion in Ireland for health and well-being reasons but allows women, in the first and second applicants' position who wish to have an abortion for those reasons, … the option of lawfully travelling to another State to do so.

(…)

6. Accordingly, having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life (paragraphs 222-227 above) and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn.

A. PRACTICE OF THE EUROPEAN UNION COURT

16. The judgment of the EU Court in *Oliver Brüstle v Greenpeace* is also relevant. (Grand Chamber, Judgment of 18 October 2011, C-34/10, EU: C: 2011: 669) in the following section:

»35. Accordingly, any human ovum must, as soon as fertilised, be regarded as a 'human embryo' within the meaning and for the purposes of the application of Article 6(2)(c) of the Directive, since that fertilisation is such as to commence the process of development of a human being.

(...)

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 6(2)(c) of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions must be interpreted as meaning that:

– any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted, and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a 'human embryo';

2. The exclusion from patentability concerning the use of human embryos for industrial or commercial purposes set out in Article 6(2)(c) of Directive 98/44 also covers the use of human embryos for purposes of scientific research, only use for therapeutic or diagnostic purposes which is applied to the human embryo and is useful to it being patentable.

3. Article 6(2)(c) of Directive 98/44 excludes an invention from patentability where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos.

C. PRACTICE OF CONSTITUTIONAL COURTS

[…]

1} CONSTITUTIONAL COURT OF THE SLOVAK REPUBLIC

17. The Constitutional Court of the Slovak Republic in its decision number: I. ÚS 12/01 of 4 December 2007 states:

1. The right to life represents the archway and the pillar of the whole system of the protection of fundamental rights and freedoms. The legal system of the Slovak Republic protects human life as a key value of the state governed by
the rule of law.
2. From the wording of Article 15 sec. 1 of the Constitution of the Slovak Republic ("the Constitution") it follows that the constitution-maker differentiates between every person's right to life (first sentence) and the protection of an
unborn human life (second sentence). This differentiation indicates the difference
between the right to life as a personal, subjective entitlement and the protection of an unborn human life as an objective value.
3. To interpret the second sentence of Article 15 sec. 1 of the Constitution as a proclamation is in principal contradiction to the current concept of the Constitution being not a document containing normatively irrelevant proclamations, the significance of which is determined by further activity of the law-maker, but it is a real complex of directly applicable norms, principles and values which have their own specific normative impact.

4. Even if it is not possible to speak about the normative irrelevance of Article 15 sec. 1 second sentence of the Constitution, the normative importance of this provision, however, with reference

to its formulation itself and the constitutional context, does not reach such intensity that it could be possible to talk about it as about a fundamental right being limitable on the basis of strict balancing and proportionality against another fundamental right in the sense of Article 15 sec. 4 of the Constitution.

5. The creation of various categories of the right to life, of which not every right would have the same weight, or alternatively, even the creation of new subjects of law through the judicature (next to the classical dichotomy: natural vs. legal persons) would be in contradiction to the constitutional postulate of equality of people in their rights. At the same time, such forming of the Constitution would have prospectively incalculable consequences of creating various categories of fundamental rights, the content of which would be specified in dependence on the bearers (holders) of those rights.

6. Unlike the standard legal norms (code of conduct), the state cannot create objective values according to the conclusions of current legal science, but only recognize them and respect them or start out from them or possibly to emphasize the importance of specific values to the detriment or in relation to other values. By expressing explicitly a special objective value in the Constitution, this gains the character of a constitutional value which enjoys constitutional protection.

7. The Constitutional Court of the Slovak Republic ("the Constitutional Court") holds the opinion that an unborn human life has the character of an objective value.

8. The Constitution does not exclude the balancing of fundamental rights and freedoms with constitutional values, but this balancing has different quality from the balancing of particular fundamental rights and freedoms.

9. According to the Constitution, the nasciturus is not a subject of law to whom the fundamental right to life pursuant to Article 15 sec. 1 of the first sentence of the Constitution belongs. The nasciturus may, however, become a subject of law ex tunc, and thus ex tunc also the bearer of fundamental rights, but under the condition that s/he will be born alive.

10. Article 15 sec. 1 of the second sentence of the Constitution conceives the protection of the unborn human life as a constitutional value, whereby it acknowledges normative status to the need for protecting this value at the level of the constitutional imperative.

11. While it is applicable to a fundamental right that "where there is a law there is also legal protection", provided therefore also by the judicial power; as far as the value guaranteed under the constitution is concerned, this legal protection is weaker and this also in regard to the possibility of reconsideration with which the law-maker also commands in connection with constitutional diction.

13. The right to privacy and to the protection of private life in connection with the principle of freedom in its basic limitation, leaning also on the fundamental right to human dignity, guarantees to an individual the possibility of autonomous self-determination. Within this scope, and protected by the Constitution as well, there is also the possibility of a woman deciding on her own spiritual and physical integrity and its various layers, inter alia, also on the fact whether she will conceive a child and how her pregnancy will develop. By becoming pregnant (either in a planned or unplanned or voluntarily way or as aconsequence of violence), a woman does not waive her right to self-determination.

14. Any limitation whatsoever on the decision-making of a woman on the issue of whether she inclines to tolerate the obstacles in autonomous selfrealisation, and thus whether she wants to remain pregnant until its natural completion, represents interference with the constitutional right of a woman to privacy.

15. Interference with the right to privacy is admissible only when it is in compliance with a law. This law has to fulfil a special material quality - it has to envisage some particular legitimate aims and at the same time it has to be indispensable to the interests of protecting such aims in democratic society. Encroachment on privacy has to reflect the urgent social need for the protection of one or more legitimate aims and it has to be an appropriate means of such protection in relation to these aims.

16. On the one side, the law-maker must not ignore the imperative contained in the wording of Article 15 sec. 1 second sentence of the Constitution – the duty to provide protection to an unborn human life, and on the other side it has to respect the fact that everybody, including the pregnant woman, has the right to decide on her(his) private life and to protect the realisation of her(his) own idea thereof against unauthorised encroachment. The possibility for a pregnant woman to ask the relevant authority for an abortion is one of the alternatives through which it is possible to make use of the constitutional right to privacy and to self-realisation in connection with the principle of freedom.

17. It was the task of the Constitutional Court to seek a starting-point from the collision between the value protected by the Constitution (unborn human life) and the limitable human – fundamental right (right of a woman to privacy). When limiting fundamental rights, their essence and meaning should be taken into account (Article 13 sec. 4 of the Constitution). The constitutional value of unborn human life could therefore be protected only to such an extent that this protection would not cause interference with the essence of the freedom of a woman and her right to privacy.

18. The law-maker may - and in the interests of protecting the constitutional value of unborn human life must - lay down the procedure and the time limits for cases in which a pregnant woman decides for abortion, whereby this procedure may not be arbitrary; it has to enable a pregnant woman to make a real decision on abortion, and also maintain respect for the constitutional value of unborn human life.

19. By the Act of the Slovak National Council No. 73/1986 Coll. On abortion as amended by Act No. 419/1991 Coll., the law-maker tries, on the one side, to grapple with the constitutional imperative contained in Article 15 sec. 1 second sentence of the Constitution, and on the other with the fundamental right of a pregnant woman to decide for herself, which stems from the fundamental right pursuant to Article 16 sec. 1 of the Constitution and also from Article 19 sec. 1 and 2 of the Constitution. If from this balancing the conclusion is drawn by the law-maker that a pregnant woman has the right, without manifest restriction from the side of the state, to ask for abortion within a certain stage of the pregnancy, whereby in subsequent weeks, except for some strict exceptions, the integrity of the foetus will be strictly protected against the mother herself (but through the means of criminal law), this conclusion itself is not constitutionally impugnable as a breach of the constitutional imperative set in Article 15 sec. 1 second sentence of the Constitution, but only under the condition that the lawmaker does not cause inadmissible excess.

20. The unconstitutionality of the Act of the Slovak National Council No. 73/1986 Coll. on abortion as amended by Act No. 419/1991 Coll. does not arise moreover in connection with the fact that the legal regime of an unborn human life differs depending on the stage of the pregnancy. The constitutional imperative constituting the lawmaker's duty of the protection of human life before birth does not require the conclusion that legal protection of a foetus against its mother has to be identical in each particular stage of prenatal development.

21. The choice of twelve weeks as a limit for carrying out an abortion upon the request of a mother cannot be considered, according to the opinion of the Constitutional Court, as an arbitrary one. This period derives from the time of creation of sensibility in the foetus, and is in accordance with prevailing European practice of relevant legislation of the states permitting abortion upon request.

22. The law-maker is an authority entitled to determine the relevant maximum period for carrying out abortions, whereby the Constitutional Court reviews (and it cannot review anything other than through the optic of the constitutional imperative expressing the constitutional value) only potential excess in the course of considering this situation by the lawmaker; it does not review whether the period concerned is in optimum compliance with the current state of knowledge of medical science.

23. The argument concerning the intentions of the historical constitutionmakers (method of historical interpretation) holds only subsidiary place when interpreting the Constitution. It is not essential to know what particular members of the constitution-making body intended with a specific constitutional provision, but the fact of the kind of text they accepted after their discussions.

24. From the fundamental constitutional principles and also from the specific provisions of the Constitution containing the references to legal regulation it is possible to deduce that all fundamental social relations which are not directly regulated in the Constitution have to be regulated by law. This results particularly from the democratic character of law-making and from the understanding of the principle of division of powers between the legislative power and executive power in the Slovak Republic. At the same time every individual is protected against the arbitrariness of public power. This scope includes, above all, issues considered by the law-maker as inessential from the point of view of legal regulation, and which are therefore not regulated directly, although their legal regulation, even through the secondary norm of a delegated authority, is nevertheless necessary or at least appropriate or advisable. Last but not least, these are issues which are unforeseeable in the moment when a law is adopted, meaning issues which can undergo changes for example in details of mainly technical or highly expert character.

25. The period for carrying out an abortion represents, in the opinion of the Constitutional Court, such an essential issue of legal regulation that it has to be regulated solely by state law, and therefore any regulation by lesser laws is excluded.

2) CONSTITUTIONAL COURT OF HUNGARY

18. The Constitutional Court of Hungary, in its decision no. 64/1991 of 17 December 1991, states:

“It is unconstitutional to regulate the termination of pregnancy in non-statutory regulations. […]

The authority competent to make a decision whether the foetus is a person or not is the Parliament.

Summary: The first group of proponents claimed that the regulations were not in accordance with the Constitution because they permitted, or rather insufficiently restricted, the availability of termination of pregnancy. […]

The second group of proponents held that any external regulatory interference was unconstitutional, since termination of pregnancy was a matter of the conscience of the woman concerned. […]

[…] In the case at hand, the regulation of termination of pregnancy related to the right of the foetus to life, and because this involved the question of its legal status, the regulation was indubitably connected with the right of the foetus to legal capacity. This right is a precondition for the right of the foetus to life and human dignity as a legal subject. Therefore, the decision whether the foetus is a legal subject will determine whether the foetus is a human being in the legal sense. […]

In order to determine whether rights were affected by the regulation of termination of pregnancy to the extent requiring legislative intervention, the weighing test had to be implemented. It was necessary to weigh the right of the woman to self-determination (dignity) and the question whether the duty of the state to protect life also extends to the right of the foetus to life. Only where the foetus does not have the right to be legally recognised and therefore does not have legal subjectivity could it be considered that termination of pregnancy is in conformity with the right to life referred to in Article 54 of the Constitution. On the other hand, if the foetus has the right to life and human dignity, then there may be no difference between that right and the right of other persons, and the right of the unborn, in the case of a conflict with the right of the mother, must be weighed in the same way as the rights of live-borns. In such a case, the right of the foetus to dignity would in itself prohibit termination of pregnancy. Therefore, termination of pregnancy must always be regulated by law because any decision on that issue includes decisions on the legal status of the foetus. Further to the foregoing, the regulations of the executive authority concerned are unconstitutional because by regulating termination of pregnancy they also regulated that issue, which, in accordance with Articles 8.2, 54 and 56 of the Constitution, may be regulated only by law.

Articles 29.4 and 87.2 of the 1972 Health Act violate also Article 8.2 of the Constitution. The articles permitted the regulation of termination of pregnancy by measures that did not have the full effect of law. […]

…

Depending on the decision of the Parliament whether the foetus is a legal subject there will be constitutional limits that will restrict the possibility of termination of pregnancy. If the legislator decides that the foetus is not a person in legal terms, a legal subject with the right to life and dignity, termination of pregnancy will be permitted only in cases where law tolerates a choice between two lives and, therefore, does not punish termination of human life. If the legislator decides otherwise, the state will have to weigh its duty to protect life and the right of the woman to self-determination. An outright prohibition would be unconstitutional because it wholly negates the right of the pregnant woman to self-determination, as would the rules that would give priority exclusively to that right. The state must protect life from the very beginning and, therefore, the right to self-determination may not be dispositive even in the earliest stage of pregnancy. That duty means that the state may not permit unfounded termination of pregnancy by law. Conditions that the legislator considers essential must be incorporated in the new act on termination of pregnancy as conditions to be fulfilled. Finally, the Parliament must decide where to draw the line between the two constitutional extremes, from full prohibition of termination of pregnancy to its unrestricted accessibility."

3) CONSTITUTIONAL COURT OF GERMANY

19. The Federal Constitutional Court of Germany states in its decisions:

a) BVerfGE 39, 1c (Schwangerschaftsabbruch I)

[…] Judgment of the First Senate of 25 February 1975 on the oral hearing of 18/19. November 1974 - 1 BvF 1, 2, 3, 4, 5, 6/74

b) BVerfGE 88, 203 (Schwangerschaftsabbruch II)[i]

Judgment of the Second Senate of 28 May 1993 - 2 BvF 2/90 i 4, 5/92 - D. – I:

1) The Basic Law requires the state to protect human life. Human life includes the life of the unborn. It too is entitled to the protection of the state. The Basic Law does more than just prohibit direct interference by the state in the life of the unborn, it enjoins it to protect and support such life, i.e. above all to guard it against illegal interference by third parties (cf. BVerfGE 39, 1 <42>). The obligation to protect is based on Article 1, Paragraph 1 of the Basic Law, which expressly requires the state to respect and protect human dignity; its object, and following from that, its extent are more precisely defined in Article 2, Paragraph 2 of the Basic Law.

a) Unborn human life - and not just human life after birth or an established personality - is accorded human dignity

b) The duty to protect unborn life relates to an individual life not to human life generally. Its fulfillment is a prerequisite for orderly living together in a state. It is subject to the authority of the state (Article 1, Paragraph 1, Sentence 2 of the Basic Law). That means it is subject to the state in all its functions, including especially the state's legislative authority. The duty to protect relates to dangers which stem from other persons. It encompasses protective measures, whose

aim is to avoid emergencies resulting from a pregnancy or to overcome them, and legal standards of conduct. The two complement each other.

2. The standards of conduct for the protection of unborn life are set by the state when it enacts legislation containing regulations and prohibitions as well as duties to act or desist from acting. This also applies to the protection of the unborn vis-à-vis its mother, notwithstanding the bond which exists between the two and which leads to a relationship of "joined twosomeness" between mother and child. Protection of this kind for the unborn vis-à-vis its mother is only possible if the legislature fundamentally forbids her to terminate her pregnancy thereby imposing on her a fundamental duty to carry the child to term. The fundamental prohibition on termination of pregnancy and the fundamental duty to carry a child to term are two inseparably bound elements of the constitutionally required protection.

Moreover, protection is necessary against influences which are exerted by third persons - even by the woman's family and wider social circle. Such influences could be aimed directly at the unborn or even take an indirect form if the pregnant woman were refused needed help, if things were made difficult for her because of the pregnancy, or if she were pressured into terminating the pregnancy.

a) Such rules of conduct cannot be left voluntary, but must take legal form. They must be binding and make provision for legal consequences in accordance with the nature of the law as a system of rules concerned with practical application. Nevertheless, a threat of criminal punishment is not the only conceivable sanction in such a case. It can, however, strongly influence a person to respect and heed legal rules.

Legal rules of conduct should provide two kinds of protection. First, they should have a preventative and repressive effect in an individual case if injury to the protected legal value is threatened or has already occurred. Second, they should strengthen and support values and opinions on what is right and wrong among the public and promote legal awareness (cf. BVerfGE 45, 187 <254, 256>), so that from the start, due to such legal orientation, the injury of a legal value is not even contemplated.

b) The obligation to protect life is not so absolute that it even takes priority, without exception, over every other legal value. This is evidenced by Article 2, Paragraph 2, Sentence 3 of the Basic Law. However, the obligation to protect is not fulfilled simply by applying any kind of protective measure. The extent of the obligation to protect must be determined by viewing, on the one hand, the importance and need for protection of the legal value to be protected by law (in this case unborn human life), and on the other hand, by viewing competing legal values (cf. G. Hermes, Das Grundrecht auf Schutz von Leben und Gesundheit, 1987, p. 253 et seq.). Listed among the legal values which are affected by the right to life of the unborn are - proceeding from the right of the pregnant woman to protection and respect for her human dignity (Article 1, Paragraph 1 of the Basic Law) - above all her right to life and physical inviolability (Article 2, Paragraph 2 of the Basic Law) and her right to free development of her personality (Article 2, Paragraph 1 of the Basic Law).

It is the legislature's task to determine the nature and extent of protection. The Basic Law identifies protection as a goal, but does not define the form it should take in detail. Nevertheless, the legislature must take into account the prohibition on too little protection (regarding the

meaning of this term see Isensee in: Handbuch des Staatsrechts, Volume V, 1992, § 111 marginal note No. 165 et seq.) so that, to this extent, it is subject to constitutional control. What is necessary - taking into account conflicting legal values - is appropriate protection, but what is essential is that such protection is effective. The measures taken by the legislature must be sufficient to ensure appropriate and effective protection and be based on a careful analysis of facts and tenable assessments (see I. 4. *infra*). The amount of protection required by the Basic Law does not depend on what stage the pregnancy has reached. The unborn's right to life and its protection under the Basic Law are not graded according to the expiration of certain deadlines or the development of the pregnancy. Thus the legal system also has to provide the same degree of protection in the early phase of a pregnancy as it does later on.

c) If the prohibition on too little protection is not to be infringed, the form of protection by the legal order must meet minimum standards.

aa) In line with the above, a termination must be regarded for the duration of the pregnancy as fundamentally wrong and thus forbidden by law (cf. BVerfGE 39, 1 <44>) . If there were no such prohibition, control over the unborn's right to life - be it only for a limited time - would be handed over to the free, legally unbound decision of a third party, who might even be the mother herself, and the legal protection of the life within the meaning of the abovementioned standards of conduct would not be guaranteed. Even reference to a woman's human dignity and her ability to make responsible decisions herself does not demand that unborn life be abandoned in such a way. Legal protection presupposes that the law lays down conditions governing to what extent and how far one person can interfere with another and does not leave it to the will of one of the parties concerned.

A woman's constitutional rights do not take precedence over the fundamental prohibition on termination of pregnancy. Although such rights also exist vis-à-vis the unborn and must accordingly be protected, they do not extend so far as to allow the constitutional duty to carry the child to term to be suspended even for a limited time. Nevertheless, in certain exceptional circumstances the woman's constitutional rights make it possible for the legal duty not to be applied and, in some cases, it is in fact even necessary for the duty not to be applied.

bb) It is the task of the legislature to determine which exceptional situations will go to make up exceptional circumstances. However, so as not to breach the prohibition on too little protection, it must take into account that conflicting legal values cannot be proportionately balanced because what is being weighed up on the side of the unborn life is not just a matter of a greater or fewer number of rights nor the acceptance of disadvantages or restrictions, but life itself. A balance which guarantees both the protection of the unborn's life and, at the same time, grants the pregnant woman a right to terminate is not possible because the termination of a pregnancy is always the killing of an unborn life (cf. BVerfGE 39, 1 <43>). A balance cannot be achieved (although alleged that it can be - cf. Nelles in "Zur Sache, Themen parlamentarischer Beratung", published by the German Parliament, Vol. 1/92, p. 250) whereby for a certain time in the pregnancy the woman's right to free development of her personality takes precedence and thereafter the unborn is given precedence. If that were the case, then the unborn's right to life could only have effect if the mother had not decided in favor of killing during the first phase of the pregnancy.

Nevertheless, this does not mean that the existence of an exceptional situation, which under the constitution permits the duty to carry a child to term to be dispensed with, can only be considered where there is a grave danger to the woman's life or a serious impairment to her health. Other exceptional situations, in addition to the ones just mentioned, are imaginable. The criterion used to recognize them is, as determined by the Federal Constitutional Court, that of exactability (cf. BVerfGE 39, 1 <48 et seq.>). This criterion - irrespective of the fact that the woman's involvement in a pregnancy termination is not to be regarded under the criminal law as an omission - is justified because the prohibition on pregnancy termination, due to the unique relationship between mother and child, is not limited to a woman's duty not to injure another person's rights. Instead, the prohibition contains a duty of an intensive nature, affecting the woman's very existence, a duty to carry and bear the child as well as a further duty to act on behalf of, look after and be responsible for the child such latter duty being an ongoing duty lasting years after the birth . . .

Looking ahead at the burdens associated with those duties, it can be seen that in individual cases, severe, and under some circumstances, also life threatening conflict situations can arise in the particular psychological state in which expectant mothers often find themselves during the early phase of a pregnancy. In these conflict situations protection of the woman becomes so essential that the legal order - irrespective of any other duties based on moral or religious views - cannot demand that the woman must under all circumstances allow the right to life of the unborn precedence (cf. BVerfGE 39, 1 <50>).

However, non-exactability cannot arise from circumstances which are within the bounds of a normal pregnancy. What is required are rather burdens which force the woman to sacrifice her own existential values to a degree beyond that which can be expected of her.

It follows from the above that in respect of a woman's duty to carry a child to term, in addition to the usual medical and the criminological indications, an embryopathic one - provided that it has been adequately defined in advance - can also be constitutionally valid as an exceptional circumstance. In the case of other emergencies, this will only occur if the severity of the social, psychological or personal conflict is so clearly recognizable that, viewed from the point of view of exactability, congruence with the other indications is retained (cf. too BVerfGE 39, 1 <50>).

cc) To the extent that non-exactability limits the woman's duty to bear the child, it does not relieve the state of its obligation of protection vis-à-vis every unborn human life. The state is compelled by its obligation of protection to support the woman with help and advice thereby convincing her, where possible, to decide in favor of carrying the child to term. This is also assumed by the provision in § 218a, Section 3 of the Penal Code (new version).

dd) If the task of protecting human life from killing is one of the state's elementary protective tasks, then the prohibition on too little protection forbids it from relinquishing its use of the criminal law and the protective measures afforded by the criminal law.

It has been from the beginning and still is the criminal law's task today to protect the elementary values of community life. This includes respect for human life and the inviolability of human life. Accordingly, killing of other human beings is widely punishable.

The criminal law is not the primary means of legal protection because of its sharpness. Its application is subject to requirements of proportionality (BVerfGE 6, 389 <433 et seq.>; 39, 1 <47>; 57, 250 <270>; 73, 206 <253>). It is, however, applied as the ultimate measure of protection where certain conduct is not just forbidden, but considered so socially damaging and unbearable for orderly communal living that it must be prevented at any cost.

It follows that the criminal law is usually the place to anchor the fundamental prohibition on pregnancy termination and the woman's ensuing fundamental legal duty to carry the child to term. If, however, there are other constitutionally adequate protective measures it is possible, in a limited number of cases, not to punish unjustified pregnancy terminations. In these cases, the legal system's prohibition can be clearly expressed in other ways which are in keeping with the constitution (...).

3. The state does not satisfy its obligation to protect unborn human life simply by hindering life-threatening attacks by third parties. It must also confront the dangers attached to the existing and foreseeable living conditions of the woman and family which could destroy the woman's willingness to carry the child to term. … Viewing motherhood and childcare as work, which lies in the interests of the community and is deserving of its recognition, meets this requirement.

a) The care owed to the mother by the community includes an obligation on the part of the state to ensure that a pregnancy is not terminated because of existing material hardship or material hardship expected to occur after the birth. Similarly, if at all possible, disadvantages for the woman in her vocational training or work resulting from a pregnancy ought to be removed. ...

b) The obligations to protect unborn life, marriage and the family (Article 6 of the Basic Law) and to ensure equal rights for men and women in the workplace (cf. Article 3, Paragraph 2 of the Basic Law as well as Articles 3 and 7 of the International Agreement on Economic, Social and Cultural Rights dated December, 1966 <Federal Law Gazette 1973 II, p. 1570>) compel the state and especially the legislature to lay the right foundations so that family life and work can be made compatible and so that childraising does not lead to disadvantages in the workplace. To achieve this it is necessary for the legislature to invoke legal and practical measures which allow both parents to combine childraising and work as well as to return to work and progress at work after taking a break from work for childraising purposes.

d) Finally, the mandate to protect also obliges the state to maintain and raise in the public's general awareness the unborn life's legal right to protection. Thus the state organs at both the federal and state levels must show that they uphold the protection of life. This relates in particular to school curricula. Public institutions whose job it is to provide health information, family counseling or sex education must strengthen the will to protect unborn life.,,, Public and private broadcasters are obliged to respect human dignity when taking advantage of their freedom to broadcast (Article 5, Paragraph 1 of the Basic Law). (Regarding private broadcasting see Article 1, Paragraph 23, Section 1, Sentences 1 and 2 of the Treaty on Broadcasting in Unified Germany dated 31 August, 1991). Therefore, their programs also play a part in protecting unborn life.

4. In accordance with what has been stated in points 2. and 3. *supra* , in order to fulfill its duty to protect unborn life, the state must adopt sufficient legal and practical measures, while at the same

time considering the conflicting legal values so as to ensure that appropriate, and as such effective, protection is achieved. For this to be done, it is necessary to create a clear protection concept which combines preventative and repressive elements. It is up to the legislature to develop and transform into law such a protection concept. In doing so, it is not free under the existing constitution to treat termination of pregnancy - other than in exceptionable situations which are constitutionally unobjectionable - as not illegal i.e. allowed. Nevertheless, according to standards still to be more precisely defined, the legislature can decide how it will put into effect the fundamental prohibition on termination of pregnancy in other areas of the law. All in all, the protection concept must be defined in such a way as to make it suitable for providing the required protection without its becoming or appearing like limited permission for pregnancy terminations.

The protection concept chosen by the legislature and the form it takes must be sufficient to protect unborn life as is demanded by the constitutional prohibition on too little protection. To the extent that the legislature's choice amounts to a prognosis about actual developments, especially the effects of its rules, it must be reliable. The Federal Constitutional Court will examine whether the prognoses are warranted when measured by the following criteria.

a) The legislature has scope to assess, weigh up and create even where, as is here the case, the constitution binds it to undertake effective and adequate measures to protect a legal value. How its scope is limited depends on various types of factors, in particular, on the characteristics of the relevant area, on the possibility of accurately predicting future developments - such as the effects a rule will have - and on the significance of the legal values at stake (cf. BVerfGE 50, 290 <332 - 333>; 76, 1 <51 - 52>; 77, 170 <214 - 215>). There is no need to decide whether or not three distinguishable standards of control for a constitutional examination can be derived from the above (cf. BVerfGE 50, 290 <333>). Constitutional examination extends in any case to checking whether the legislature has sufficiently taken the named factors into account and used its scope for assessment in a "justifiable manner".

   (...)

II.

According to the above arguments, constitutional law does not, as a matter of principle, bar the legislature from adopting a concept of protection for the protection of unborn life which emphasizes counseling of the pregnant woman during the early phase of pregnancy so as to encourage her to carry her child to term. At the same time, in view of the openness necessary for counseling to be effective, the law dispenses with a threat of criminal punishment based on indications and the ascertainment of grounds supporting indications by third parties.

(…)

3.5 Thus constitutional law does not object to the legislature's choice of a protection concept which is based on the assumption - at least in the early phase of pregnancy - that effective protection of unborn human life is only possible with the support of the mother. Only she and those initiated by her know at this stage of the pregnancy about the new life which still belongs to her alone and which is fully dependent on her. The secrecy pertaining to the unborn, its

helplessness and dependence and its unique link to its mother would appear to justify the view that the state's chances of protecting it are better if it works together with the mother.

(...)

5. If the legislature gives women who receive counseling final responsibility for deciding to undergo a termination and makes it possible for them, where necessary, to have the termination performed by a physician, then it can reasonably expect pregnant women in conflict situations to accept counseling and disclose details of their situation to the counselor. (...)

III.

If the legislature adopts a counseling concept in order to fulfill its duty to protect, the protective effect for unborn life is then supposed to be achieved through preventative means - i.e. by the woman who is contemplating a termination being positively influenced during counseling. The counseling concept is directed towards strengthening the woman's sense of responsibility. Irrespective of the responsibilities borne by her family or the persons belonging to her wider social circle or her physician (see V. and VI. *infra*), it is she who must ultimately decide in favor of the termination and take responsibility for it (final responsibility). All this requires the creation of a framework with the prerequisites necessary for making a woman want to act in favor of the unborn life. Only when such framework exists, can it be assumed, even without the ascertainment of grounds supporting an indication, that the counseling concept protects unborn life (1.). However, it is not permissible to declare a non-indicated pregnancy termination justified (not illegal) if demanded by a woman following counseling during the first twelve weeks (2.). Furthermore, the legislature is not bound in all respects to accept the consequences arising from the fundamental prohibition on pregnancy termination, if the counseling concept demands that exceptions be made in order for it to be effective (3.).

1. a) The first and foremost condition of a counseling concept is that counseling be made obligatory for the woman and that it be directed to encouraging her to carry her child to term. The content of the counseling, its conduct and organization must all be suitable for providing the woman with the insight and information which she needs to make a responsible decision about the continuation or termination of the pregnancy (see for details IV. *infra*).

b) Furthermore, those persons who are able to exert an influence over the woman - be it negative or positive - should be included in the protective concept. This applies in particular to the physician whom the pregnant woman consults to perform the termination. (...) Family members and persons in the pregnant woman's wider social circle must also be included in the protective concept. (...)

c) For the reasons given under D. II. 5. a) and b) *supra* , the counseling regulation must refrain from allowing a general emergency indication as a justification ground. A justification would run counter to the concept. In order to retain the woman's openness towards counseling and so as to achieve effective protection, the counseling regulation does not require a woman to prove the existence of a justifiable emergency nor itself test such existence. (...)

2. The counseling regulation's goal of not punishing terminations carried out by a physician during the first twelve weeks of pregnancy at the pregnant woman's demand after counseling, without the existence of an indication having been ascertained, can only be achieved if the

legislature deletes such pregnancy terminations from the statutory definition of crime found in § 218 of the Penal Code. They may not be declared justified (not illegal) .

(...)

IV.

If the legislature decides in favor of a counseling concept, its duty to protect unborn human life imposes on it restrictions in relation to the rules for the counseling procedure (see III. 1. a) *supra*). This is of central importance for the protection of life because the emphasis of the guarantee of protection is shifted to preventative protection using counseling. Therefore, the legislature must take into account the prohibition on too little protection and make rules regarding the content of counseling (1.), rules on how the counseling regulation is to be implemented (2.), and rules on how counseling is to be organized - including the choice of people to be involved. These rules must be effective and adequate to persuade a woman, who is considering termination, to carry the child to term. Only then is the legislature's conclusion that effective protection of life can be achieved through counseling justified. (...)

V.

The concept of protection underlying counseling sees in the physician another party who owes the woman help and advice - albeit from a medical viewpoint. A physician may not simply perform a demanded termination without considering his behavior as a medical practitioner. He has a duty to guard health and life, and thus may not be indiscriminately involved in a termination.

The state's duty of protection requires that the physician's involvement on behalf of the woman provide at the same time protection for the unborn life.

(...)

6. The state's duty to protect unborn life does not demand that contracts be regarded as legally invalid if made with physicians and hospitals regarding terminations not punishable under the counseling concept. On the contrary, the concept requires that the services provided by a physician to a woman be granted legal status . . . Bad performance of the duties to advise and inform must therefore, as a matter of principle, give rise to contractual and tortious remedies.

However, from a constitutional viewpoint a distinction must be made here. Civil sanctions are necessary, as a matter of principle, for defective performance of a contract and for a tortious interference with a woman's bodily integrity. This not only applies to an obligation to repay a fee paid futilely, but also to compensation for damage including - within the provisions of §§ 823 and 847 of the German Civil Code - fair compensation for a woman for intangible suffering associated with a failed pregnancy termination or the birth of a handicapped child. The constitution (Article 1, Paragraph 1 of the Basic Law) does not permit the existence of a child to be characterized legally as an injury. The obligation on all state powers to respect each person's existence for its own sake (cf. I. 1. a) *supra*) prohibits treating the duty to support a child as an injury (...)

E.

If the challenged provisions of the Pregnancy and Family Assistance Act are examined against the background of these standards, then it would appear that in respect of the shift to a counseling concept during the first twelve weeks of pregnancy, which in itself is permissible, the Act does not fulfill its duty to effectively protect unborn life arising from Article 1, Paragraph 1 read together with Article 2, Paragraph 2, Sentence 1 of the Basic Law. ...

b) Where the legality of a termination cannot be determined, the constitutional duty to protect life forbids interpreting 24b of the Fifth Volume of the Code of Social Security Law as allowing social insurance benefits to be paid in the same way as for a termination which is not illegal. A state governed by the rule of law can only finance an act of killing if it is legal and the state has assured itself of this legality. (...)

If it is not possible to tell whether a termination undergone in the early phase of pregnancy under the counseling regulation can be viewed as permissible because of the existence of a general emergency indication, the state is not allowed, as a matter of principle, to be directly involved financially or through third parties such as the community of insured persons. If it were to be involved, the state would accept co-responsibility for acts which, on the one hand, the constitution does not allow it to regard as legal, and which, on the other hand, it is prevented from treating as legal under the protection concept.
(...)

(2) The welfare state principle (Article 20, Paragraph 1 of the Basic Law) does not permit the state to treat terminations not subject to the threat of criminal punishment under the counseling regulation as allowed because there is no assessment of legality in individual cases. It is only possible to build a welfare state on the foundations of the Basic Law, if the tools of a state based on the rule of law are employed. The principle of maintaining the rule of law would not just be minimally affected, but rather violated in its substance, if without making distinctions taking into account the goals of a welfare state, the state were to assume (co-) responsibility directly or indirectly for occurrences whose legality it cannot be certain of.

(...)

b) In those cases where the protection concept makes it necessary, the legislature has to lay down the conditions under which the state will assume the costs for a woman who cannot afford a termination. . . By allowing these social benefits, the state is not acting contrary to the requirements of its duty of protection. In doing so, it is simply avoiding from the outset women having to turn to illegal means and thereby not only causing damage to their own health, but depriving the unborn of any chance of rescue which might be available through counseling from a physician.

(...)

4. In view of the labor law origins of the law concerning the continued payment of wages and in view of the requirements of the protection concept, and in conformity with the principles laid out (D. III. 3.) *supra*), it does not appear necessary to exclude terminations which do not fall within the definition of an offence under § 218 of the Penal Code (new version) from the obligation to pay benefits.

4) CONSTITUTIONAL COURT OF SPAIN

20. The Constitutional Court of Spain in itsjudgment no. 53/1985 of 11 April 1985 states:

7. In short, the arguments put forward by the appellants cannot be accepted in support of the thesis that the unborn child is also entitled to the right to life, however, in any case, and this is decisive for the issue which is the object of this appeal, we must state that the life of the unborn child, in accordance with the arguments in the foregoing points of law in this judgment is a legal right constitutionally protected by art. 15 of our fundamental regulation.

On the basis of the considerations made in point of law 4, this protection which the Constitution dispenses to the unborn child implies two obligations for the State in general terms: that of refraining from interrupting or hindering the natural gestation process, and that of establishing a legal system for the defence of life which presupposes an effective protection thereof and which, given the fundamental nature of life, also includes as a final guarantee, criminal regulations. This does not mean that said protection needs to be absolute; in fact, as occurs with all constitutionally recognised rights, in specific cases it may and even should be subject to restrictions, as we shall see below.

8. Together with the value of human life and substantially relating to the moral dimension thereof, our Constitution has also raised personal dignity to the status of fundamental legal value, which without prejudice to the rights inherent in it, is inextricably linked to the free development of personality (art. 10) and the rights to physical and moral integrity (art. 15) to freedom of ideas and beliefs (art. 16) to honour, to personal and family privacy and to one's own image (art. 18.1). From the meaning of these precepts it may be assumed that dignity is a spiritual and moral value inherent to the person, which is singularly manifested in conscious and responsible self determination of one’s own life and which is accompanied by a claim for the respect of others. Dignity is recognised for all persons in general, however, when interpreting the constitution and attempting to specify this principle, the obvious fact of the feminine condition cannot be ignored and the specification of the aforementioned rights in the framework of maternity, rights which the State should respect and to the effectiveness of which it is required to contribute, within the limits imposed by the existence of other rights, also recognised by the Constitution.

9. In the light of the previous considerations we are able to undertake an analysis of the Proposal which is the subject of this appeal in order to judge the alleged unconstitutionality of the cases of declaration of non punishable grounds for abortion contained therein, as alleged by the appellants.

Legislature is based on a pre-constitutional set of rules which uses the penal system as a means of protecting the life of the unborn child (arts. 411 to 417 of the Penal Code) regulations which do not revise in general but which are restricted to declaring that abortion is not punishable in specific cases namely on therapeutic, ethical and eugenic grounds (point of law 2). The question raised is that of examining whether legislation is able to exclude specific cases of the life of the unborn child from criminal protection.

(…)

These conflicts are extremely serious and of a particularly singular nature and they cannot be considered simply from the perspective of women's rights or from that of protection of the life of the unborn child. Even this cannot prevail unconditionally over those, nor may women's rights prevail absolutely over the life of the foetus, given that that prevalence presupposes loss, in any case of a right which is not only constitutionally protected, but which embodies a central value of the constitutional system. Therefore, insofar as the absolute nature of any of these may be confirmed, the constitutional interpreter is required to consider the rights on the basis of the question raised, attempting to harmonise them, if possible or conversely, specifying the conditions and requirements in which the prevalence of one over the others may be admitted.

(…)

[11.] …In respect of this and from a constitutional perspective, it is necessary to mention the connection existing between the terms of art. 49 of the Constitution –including in Chapter III "Governing principles of social and economic policy", from Title I "Fundamental rights and duties" –and protection of the life of the unborn child included in art. 15 of the Constitution. In effect, insofar as progress is made in enforcing preventive policy and in the generalisation and intensity of the assistance in a social State (along the lines initiated in the Law of 7 April 1982 on the disabled, which includes severely disabled and complementary provisions) this will decisively contribute to preventing the situation on which decriminalisation is based.

12. From a constitutional perspective, the bill, since it declares that abortion is not punishable in certain cases, defines the scope of criminal protection of the unborn child, which is excluded in such cases based on protection of constitutional rights of women and the circumstances arising in specific situations. Therefore, having established the constitutionality of such cases it is necessary to analyse whether the regulation contained in art. 417 bis of the Penal Code, in the wording given to it in the Draft Bill sufficiently ensure the result of weighting of the rights in conflict made by legislature in such a way that failure to protect the foetus does not occur outside the situations established, and that neither are the rights to life and the physical integrity of the woman unprotected, avoiding the fact that sacrifice of the unborn child, if appropriate, would unnecessarily entail the sacrifice of other constitutionally protected rights. This is because, as we have mentioned in points of law nos. 4 and 7 of this Judgment, the State is required to guarantee life, including that of the unborn child (art. 15 of the Constitution), by means of a legal system which presupposes an effective protection thereof, which requires, as far as possible, that the necessary guarantees are established so that the efficacy of said system would not be diminished beyond that required by the purpose of the new precept.

Legislature is aware of this concern, as the bill indicates in a general manner, that abortion should be carried out by a doctor with the woman's consent, as well as the fact that in the case of rape a complaint should be lodged, and that in the third case an unfavourable prognosis should be accompanied by the opinion of two different medical specialists from the doctor performing the operation. Legislature has therefore established specific measures designed to ensure that the cases based on partial decriminalisation of abortion are checked; as the State Attorney states, it is

a question of measures of guarantee and certainty of the factual prerequisite of the precept in line with what occurs in the positive regulation of our neighbouring countries.

It is therefore essential to examine whether those measures of guarantee are sufficient to consider that the regulation contained in the Draft bill complies with the aforementioned constitutional requirements deriving from art. 15 of the Constitution.

In the first case, that is, therapeutic abortion, this Court considers that the requisite intervention of a doctor to interrupt the pregnancy without any previous medical opinion is insufficient. Protection of the unborn child requires firstly, that, as in the case of eugenic abortion, an appropriately specialised doctor should ascertain the existence of any foundation for the case and should issue an opinion on the circumstances of each case.

Furthermore, in the case of therapeutic and eugenic abortion, this verification, given the nature of the premise, is essential prior to carrying out the abortion, as if it takes place the result would be irreversible, and therefore the State cannot be disinterested in this verification.

Similarly it cannot be disinterested in the actual performance of the abortion, taking into account the rights involved overall --the protection of the life of the unborn child and the right to life and health of the mother, which furthermore, is the basis of decriminalisation in the first case--so that the intervention may be made in appropriate medical conditions, thus reducing risk to the mother.

Therefore, legislature should ensure that verification of the premise in cases of therapeutic or eugenic abortion, as well as performing the abortion itself, take place in public or private health centres, authorised to that effect, or any other solution deemed appropriate should be adopted within the constitutional framework.

The constitutional requirements would not be unfulfilled if legislature were to decide to exclude the pregnant woman from among the criminally responsible subjects in the event of noncompliance with the requirements mentioned in the previous paragraph, given that its ultimate aim is to make effective the duty of the State to ensure that in carrying out the abortion, the limits established under legislation will be observed and in medical conditions sufficient to safeguard the right to life and health of the woman.

With respect to verification in the question of ethical abortion, judicial verification of the offence of rape prior to the interruption of the pregnancy presents serious objective difficulties, since the time which could possibly be taken up by a court hearing would conflict with the maximum term within which the abortion could be carried out.

Therefore this Court considers that lodging a prior complaint required by the bill in the aforementioned case, is sufficient to assume the constitutional requirement of verification of the premise to assume its fulfilment.

Finally, as is clear, legislature may adopt any solution within the framework of the constitution, as it is not the concern of the Court to act in place of legislature, however it is, in accordance

with art. 79.4 b) of the OLCC, its task to indicate the amendments, which in its view --and without excluding other possible opinions -- would permit the bill to be formalised by the appropriate body.

13. The appellants consider that consent in the cases established in numbers 1 and 3 of art. 417 bis of the Penal Code, in the wording of the bill should not correspond to the mother only, and they refer especially to the father's participation considering that this exclusion infringes art. 39.3 of the Constitution.

The Court considers that the solution put forward by legislature is not unconstitutional, given the special nature of the relationship between the mother and the unborn child which means that the decision will have a considerable effect on her life.

14. Finally, the appellants allege that the bill contains no provision on the consequences caused by the criminal regulation in other legal sectors, referring specifically to conscientious objection, in respect of the procedure through which consent of an underage female is given, or one subject to guardianship, and the inclusion of abortion in the Social Security system.

The Court is well aware of the special relevance of these questions and also all those deriving from the right of women to be provided with the necessary information, not only medical, which constitutes a requirement for valid consent - but also of a social kind in respect to the decision to be adopted.

However, such questions, although their regulation may be of particular interest, are unrelated to the judgment of constitutionality of the bill, which should be confined to the contested criminal regulation pursuant to the terms of art. 79 of the Constitution.Nevertheless, it is pertinent to mention, in terms of the right to conscientious objection that such a right exists and may be exercised, irrespective of whether or not such a regulation has been issued.

Conscientious objection is part of the content of the fundamental right to ideological and religious freedom acknowledged in art. 16.1 of the Constitution and, as this Court has indicated on several occasions, the Constitution is directly applicable, especially in matters of fundamental rights.

And with regard to the manner in which the underage or incapacitated female provides her consent, the regulation established by positive law could be applied, without prejudice to the fact that legislature may assess whether the existing regulations are appropriate, from the perspective of the penal regulation in question.

RULING

In the light of the foregoing, the Constitutional Court WITH THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION has ruled:

that the draft Bill for the Organic Law introducing art. 417 bis of the Penal Code does not conform to the Constitution, not as a result of the cases in which abortion is declared

nonpunishable, but for failing to fulfil in its regulation constitutional requirements deriving from art. 15 of the Constitution, which is therefore violated, and in the terms and to the extent expressed in point of law no. 12 of this Judgment.

VIII. ASSESSMENT OF THE CONSTITUTIONAL COURT

A. INTRODUCTION

21. Termination of pregnancy is a complex and controversial question that cannot and may not be addressed unilaterally. It is a deeply moral, comprehensively conceived, ethical, philosophical, medical, scientific, religious, and legal issue, regarding which even experts in the relevant fields cannot reach a consensus. Consequently, it is more difficult to coordinate positions adopted in individual fields, which inevitably overlap and must be observed in an interdisciplinary manner in order to provide answers to doubts arising from the problem (i.e., its impermissibility or permissibility).

In terms of constitutional law and legislation, termination of pregnancy has become a topical issue, especially in the last decades of the past century, and it continues to be one in this century as well. However, at the national and global level, consensus on when life begins, in any field, including constitutional law and legislation, has still not been reached.

In the meantime, numerous international documents have been passed and case law established by international courts that have set certain standards and rules. Despite this, it is not possible to talk about general consensus. What is more, international courts themselves emphasise that some progress has been made, but that it is still not possible to speak of the existence of generally accepted positions that would bind all states as a common heritage (see points 7 through 16 of the statement of reasons of this ruling, with the relevant parts of international documents and case law).

1) The moral aspect

22. The “core of the problem”, especially if observed primarily from the legislative aspect, is that the idea is to “break down” an issue that is primally moral and based on one’s worldview by regulating it via a (coercive) legal norm. However, moral positions (especially if connected with one’s religious convictions) can be in mutual conflict, and can even exclude one another. It is a question of morals, ethics, and faith, the way it is understood and embraced by each individual, in line with his or her right to self-determination. It is, therefore, illusory to expect that its legal regulation will resolve all dilemmas and divisions that the question provokes in society. The complexity and sensitivity of the relationship between law and morals reflect and burden the resolution of the issue of termination of pregnancy.

It is often overlooked that moral positions cannot always be turned into legal norms, and they do not have to be, and that moral duties, even when they are regulated by law, exceed the limits of law. Moral duties, therefore, cannot be the exclusive basis for the legal regulation of a particular issue. Termination of pregnancy is, first and foremost, a moral issue that concerns not only the conscientiousness, rights and dignity of a woman (who wants to or intends to terminate

pregnancy), but is also reflected in the position of a particular social community about the ethical acceptability or unacceptability of the act (public morals), philosophical and ethical positions on the right to protection, and the right to dignity of a human being even before birth, etc.

Therefore, it is not surprising that the issue of termination of pregnancy provokes deep schisms and debates in all societies. It can still be concluded, though, that at the national and global level there are two morally opposed "camps" (groups): those opposing the "right to abortion", who refer to themselves as being "pro-life", and its advocates, who refer to themselves as "pro-choice", and who are, as such, even accepted in certain international documents. The moral arguments of the two groups can be succinctly stated as described below.

22.1. Advocates of the "pro-life" position hold that life begins at conception, that the embryo is a human being entitled to all human rights, including the right to life. The mother's body is "only a place where the unborn being grows and feeds", so the woman has no right to (self-)determination concerning the life of her unborn child. They also emphasise the rights of the father, i.e., the necessity to enable the child's father to participate in the process of making the decision. Termination of pregnancy, for them, is murder, a (violent) termination of human life. It seems that the moral position of this group is conditioned by the religious beliefs of its advocates, since the positions embraced by most religions are complementary and, to a great extent, match those of "pro-life" advocates.

22.2. Advocates of the "pro-choice" position hold that the woman's right to safe termination of pregnancy is a fundamental human right that arises from her right to life, self-determination, dignity, and health. Restrictive laws prohibiting termination of pregnancy only expose women to greater health risks and result in discrimination. They do not signify that termination of pregnancy will not be performed or that the number of procedures will drop, but merely restrict access to the safe termination of pregnancy. The prohibition of termination of pregnancy, therefore, forces women to use alternative solutions and to seek illegal termination of pregnancy, thus endangering their life and health. Considering that the woman's right to reproductive self-determination is a fundamental human right, advocates of the "pro-choice" position hold this prohibition to be impermissible. Only the woman herself can make decisions about her body, life, health and dignity, while unwanted pregnancy can be a great burden for the woman's physical and emotional wellbeing.

2) The legislative aspect — a comparative overview of the European legislation

23. Starting with the foregoing, (just with) the moral controversy and the deep-rooted division in the public, it is evident that the normative regulation of the permission or prohibition of termination of pregnancy is a great challenge for any legislator. Any reasonable legislator should strive not to deepen the divide with its legislative solutions, but to make the social divisions less pronounced and to harmonise the values and positions represented by certain social groups. Legislative solutions in various states are different, considering that every state, at the time of adopting the relevant legislation, starts with its moral, cultural, religious, social and other heritage and then amends it or supplements it in accordance with social changes and the system

of social values. It is, therefore, difficult to make a reliable comparative analysis, let alone to speak of a common denominator.

23.1 Still, a comparative overview shows that termination of pregnancy, in the case of the member states of the Council of Europe and the European Union, is permitted, with greater or lesser restrictions, in almost all states. Most European states permit termination of pregnancy on request and/or on widely set medical and socioeconomic grounds.

The Republic of Ireland permits termination of pregnancy only and exclusively if the woman's life is endangered, while Northern Ireland also permits it if the woman's health is in danger. It is permitted in Poland only on restrictively stipulated legal grounds, i.e., where the threat to the life and health of the woman is serious or if the foetus is malformed. Malta and Andorra do not permit it for any reason (therefore, they absolutely prohibit termination of pregnancy). The restrictive laws and practices in those states that jeopardise, even under extraordinary circumstances, the life and health of the woman are subject to criticism (judgement) by various international bodies. In relation to some of them, the ECtHR found that rights protected by the Convention have been violated (Article 3 and/or Article 8, and Article 10 of the Convention — see, for example, *Tysiac v. Poland* (judgment, 20 March 2003, application no. 5410/03), *R. R. v. Poland* (judgment, 28 November 2011, application no. 27617/04), *P. and S. v. Poland, A. B. and C. v. Ireland* — see, for more detail, points 15.1, 15.2 and 15.3 of the statement of reasons of this ruling).

Termination of pregnancy on request and/or on socioeconomic grounds

24. European states that permit termination of pregnancy on request make such a termination conditional on an earlier stage of pregnancy (usually up to 10, 12 or 14 weeks of conception). For example, a woman can request termination of pregnancy for a period up to 10 weeks from conception in Portugal, up to 14 weeks in Spain, and up to 12 weeks from conception in France. In Slovakia, the time limit is 10 weeks, in Sweden 18 weeks, etc. States that permit termination of pregnancy on request, but that have certain widely set medical and socioeconomic grounds for such termination, also bind it to a certain stage of pregnancy. For example, Norway and the United Kingdom allow termination of pregnancy up to 24 weeks from conception, while in Italy the time limit is up to 12 weeks.

Laws in those states that permit termination of pregnancy stipulate that after the expiration of the period in which it can be legally performed on request, with or without socioeconomic grounds, health practitioners may perform termination of pregnancy in later stages of pregnancy if there is danger to the woman's life, her physical and mental health, and in the case of serious or fatal malformations of the foetus.

24.1. In European states that permit termination of pregnancy, the period required to make a decision ("period of deliberation") and counselling (compulsory or non-compulsory) is required by the legislation of certain states in western Europe (e.g., Spain), while in the states of north-eastern Europe, this is not required.

Termination of pregnancy in the case of minors is usually permitted with the consent of their parents or their guardian, except in Belgium where it is permitted even without their consent. The costs of termination of pregnancy differ from state to state and depend on the age of the woman and her social status.

25. In conclusion, one can say that a comparative overview, with full acknowledgement of all the dangers entailed in generalisation, especially bearing in mind the number and diversity of legislative solutions, shows that termination of pregnancy is permitted in most European states, including those (rare) legal systems where the right to life is recognised for an unborn being (foetus). This state is Germany, in which the Federal Constitutional Court, in its decision 39 BVerfGE1, 1975 (see point 19 of the statement of reasons of this ruling, which includes citations from the relevant parts of this decision), found that everyone has the right to life, i.e., all human individuals, regardless of the phase of their development, and that life within the meaning of the historical existence of a human individual begins, on the basis of verified biological-physiological knowledge, as of 14 days from conception.

3) International documents

26. The absence of consensus at the European and global level is probably one of the reasons why no international act that regulates human rights and freedoms, including those that primarily deal with the protection of the rights of women and children, provides a definition or interpretation of who is meant under the term “everyone”, and whose rights and freedoms are protected by the act. Does the term “everyone” mean both born and unborn beings and is an unborn being (embryo and/or foetus) considered to be a human being with full legal capacity, and, if so, as of when, at which stage of development, does an unborn being acquire this status?

In other words, such international acts do not provide and do not attempt to provide an answer to the question when life begins. It is notoriously generally accepted that any human being is entitled to life, but who is to be considered a human being in the sense of a person that enjoys full legal protection? The terms used in international documents are general formulations and principles that do not provide an unambiguous answer to this controversy (which is also true of the laws in most European states) and open an area for different interpretations, sometimes mutually opposing ones (citations from some of the documents are included in points 7 through 11 of the statement of reasons of this ruling).

26.1. For example, Article 1 of the Universal Declaration of Human Rights states that “[a]ll human beings are born free and equal in dignity and rights”, while Article 3 states that “[e]veryone has the right to life”.

Article 6 of the International Covenant states that “[n]o one shall be arbitrarily deprived of his life”.

The Convention on the Rights of the Child defines a child as “every human being below the age of eighteen years”, and Article 6 recognises that “every child has the inherent right to life”.

Article 1 of the Convention on Human Rights and Biomedicine states that its purpose and object is to “protect the dignity and identity of all human beings and guarantee everyone, without

discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine". Article 2.1 of the European Convention on Human Rights states: "Everyone's right to life shall be protected by law."

4) International standards

a) Practice of the UN and WHO

26.2 The committees and specialised agencies of the UN require that termination of pregnancy be made legal and available in situations where pregnancy jeopardises the mental or physical health of the pregnant woman, her life or the life of the foetus, and in situations involving rape, incest and other types of sexual violence, and that the indications be subject to wide interpretation. The committees continuously issue warnings about the connection between restrictive laws on termination of pregnancy and the maternal death rate. Restrictive laws are not only those that provide for a narrow set of indications, but also those that restrict access to termination of pregnancy by setting up procedural or other practical barriers. States must ensure the availability, accessibility, appropriateness and good quality of the service of termination of pregnancy. This involves the act of setting up a clear legal framework with guidelines on circumstances that make termination of pregnancy lawful, an appropriate regulation of the right to conscientious objection in a way that does not jeopardise the availability of termination of pregnancy, and the elimination of procedural barriers, such as compulsory counselling or compulsory waiting periods. When states prevent access to legal and safe termination of pregnancy, women choose to terminate their pregnancy despite the prohibition (so-called unsafe abortion), jeopardising their own health and life. The committees, therefore, encourage states to liberalise laws on termination of pregnancy and they consistently criticise states that have restrictive laws in place.

The WHO also recognises the connection between restrictive laws on the termination of pregnancy, unsafe abortion, and maternal death rate. Unsafe abortions are one of the four major causes of illness and mortality in women, which accounts for 13% of the causes of maternal mortality and 20% of the total mortality and disability rate resulting from pregnancy and delivery. In states where termination of pregnancy is lawful and available on request or subject to widely set restrictive grounds, the number of cases and the rate of mortality and illness resulting from termination of pregnancy decreases. Restricting legal access to termination of pregnancy does not diminish the need for termination of pregnancy, but only increases the number of women who choose to have illegal and unsafe abortions. In states that have restrictive laws on termination of pregnancy, women choose to have the procedure performed in neighbouring states where it is lawful, which results in costs (often significant ones), delays in service, and social inequality. Laws and rules that facilitate access to safe abortions do not result in an increase in the percentage or number of terminations, but only reduce the number of unlawful and unsafe procedures.

26.3 International court decisions issued in relation to the interpretation and application of international documents, i.e., the conformity of national legislation with the principles included

in those international documents, also do not resolve the “question of all questions”, i.e., when life begins.

b) Case law of the ECtHR [European Court of Human Rights]

27. In its case law to date, the ECtHR has also not interpreted the term “life” or set the relevant legal standards. Quite the contrary, one could say that the ECtHR has been very circumspect and careful, starting from the premise that there is no European legal or scientific consensus on this issue. In line with this position, in its proceedings to date relating to termination of pregnancy, in which the ECtHR was asked to define the term “life” and when “life” begins within the meaning of Article 2 of the Convention, the ECtHR has so far always chosen to restrict and “protect” itself by the circumstances of the case concerned, leaving states with broader discretion.

ba) In relation to Article 2 of the Convention

27.1. The right to life is regulated in Article 2 of the Convention, and its very place clearly shows that it occupies the first and most important position in the Convention. It is “one of the basic values of the democratic societies making up the Council of Europe”, which the ECtHR also found in its first judgment concerning the right to life (*McCann and Others v. the United Kingdom*). Article 2 of the Convention protects everyone’s right to life. However, although hierarchically it is the highest, most important right, because without the right to life all other rights and freedoms become meaningless, the right to life referred to in Article 2 of the Convention is not absolute in the sense that it protects life unconditionally. It relates to protection against unlawful and violent deprivation of life, because deprivation of life, in certain, strictly stipulated cases, may be justified.

In its interpretation and implementation of Article 2 of the Convention, the ECtHR starts from the position that it is not desirable (“the Court is convinced that it is neither desirable”, *Vo v. France*, § 85) nor possible to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention. Therefore, it is equally legitimate for a state to choose or not to choose to regard the “unborn” as a person with the aim of protecting life. Although it has accepted that the “unborn” begins to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation, it has opted to restrain itself to the statement that, at best, it may be regarded as common ground between states that the embryo/foetus belongs to the human race. The potentiality of this being and its capacity to become a person enjoying certain civil rights (for example, inheritance and gifts), require protection in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Article 2 of the Convention (*Vo v. France*, § 84).

27.2. Therefore, it could be said that the position on the reach of Article 2 of the Convention in relation to the unborn (being) arises from the fact that the Convention does not define the term “everyone” or the term “life”. Article 2 of the Convention includes two basic elements: the general obligation to protect life by law and the prohibition to inflict deprivation of life intentionally, other than in certain, strictly stipulated, cases. Even under the presumption that it can be regarded that the foetus has rights guaranteed in Article 2 of the Convention, the

evaluation of a potential violation of its rights depends on the personal circumstances of the case, i.e., on whether the national legislation on termination of pregnancy strikes a fair balance between the need to protect the foetus on the one hand and the rights and interests of the woman on the other. For example, in the case *Boso v. Italy* (decision, 5 September 2002, application no. 50490/99), the ECtHR found that the relevant Italian legislation that authorises termination of pregnancy within the first twelve weeks of pregnancy if there is a risk to the woman's physical or mental health (and beyond that point, termination of pregnancy may be carried out only where continuation of the pregnancy or childbirth would put the woman's life at risk, or where it has been established that the child would be born with a condition of such gravity as to endanger the woman's physical or mental health) is aimed to protect the woman's health. It found that the national legislation strikes a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman's interests.

Therefore, considering that there is no consensus in terms of when life begins, in its evaluation of the national legal solutions implemented in individual cases, the ECtHR applies the test of proportionality and examines whether the state, within the framework of its broad discretion, has struck a fair balance between the protection of individual rights on the one hand and public interest on the other. Freedom of discretion narrows where there is consensus and in the event of issues relating to some basic aspects of one's private life (Article 8 of the Convention). In the case of morals or extensive national reforms, this is considerably wider. It follows that the question of consensus and free discretion is particularly complex in the case of termination of pregnancy.

27.3. The ECtHR further starts by stating that in most member states of the Council of Europe there is a tendency towards liberalising termination of pregnancy, and that most states in their legislation have resolved the opposing rights of the foetus and the rights of the woman (mother) in favour of easier access to termination of pregnancy.

bb) In relation to Article 8 of the Convention

28. In this context, Article 2 of the Convention is related to Article 8 of the Convention, since the legislation that regulates termination of pregnancy affects the field of private life; and when a woman is pregnant, her private life becomes intertwined with the developing foetus. Article 8 of the Convention is relevant from two aspects.

28.1. The first aspect is the protection of the woman's right to private life in relation to the making of an (independent) decision on the right to life, on the one hand, and the right of the potential father to make a decision, on the other. The ECtHR holds that any interpretation of the right of the potential father referred to in Article 8 of the Convention, provided that the mother intends to terminate her pregnancy, must take into account, first and foremost, the right of the pregnant woman, being the person primarily concerned in the pregnancy and its continuation or termination (*X. v. the United Kingdom* [decision of the Commission, 13 May 1980, application no. 8416/79, Decisions and Reports (DR) 19], *H. v. Norway* [decision, Commission, 11 July 1977, application no. 17004/90, Decisions and Reports (DR) 73], *Boso v. Italy*).

28.2. The second aspect concerns the positive obligations of the state within the meaning of Article 8 of the Convention. Namely, considering that the nature of the right to make a decision on termination of pregnancy is not absolute, states are obligated to set in place an effective legal framework that will provide for the enforceability and effectiveness of the rights guaranteed by law in practice. In other words, in conformity with its established case law, the ECtHR requires that the rights are not theoretical or illusory, but real.

28.3. To conclude, in relation to diverse national laws on termination of pregnancy that it has examined, the ECtHR consistently embraces the position that the unborn (child) is not regarded as a "person" that is directly protected by Article 2 of the Convention and that even if the unborn (child) might be considered to have the "right to life", it is implicitly limited by the mother's rights and interests (*Vo v. France*, §§ 79 and 87). Article 8.1 of the Convention and the position that it cannot be interpreted as meaning that pregnancy and its termination are, as a principle, solely a matter of the private life of the mother, does not exclude the possibility that under certain circumstances protection may extend to include the unborn child (*Vo v. France*, § 80). It is crucial to decide on this issue by weighing up various, and sometimes conflicting, rights and freedoms of the woman, the mother and the father in relation to one another or *vis-à-vis* an unborn child or *vis-à-vis* the interests of society (the social community), and, in weighing those rights and interests, states have broad discretion. Therefore, from a general perspective, it can be concluded that termination of pregnancy is based on the principles of freedom, i.e., on the rights of the woman (the pregnant woman) to privacy, to make independent decisions, and to choice, to make free decisions about her own body and way of life, to the protection of her health and life, but also on the right of the unborn (being) to certain protection, as well as on the public interest (the legitimate aim) of the social community to ensure that, by protecting the right to life, termination of pregnancy is (hierarchically) defined as an exception. If termination of pregnancy primarily enters the sphere of privacy (of the woman), then it should not be understood as a family planning measure or a means of contraception, which enters the sphere of public interest and communal wellbeing.

Starting with the broad discretion that states have on sensitive moral, comprehensively conceived, social and legal issues such as this, especially where there is no consensus, the ECtHR has put the ball back into the national terrain, i.e., to the area of national legislation that is subject to review before national (constitutional) courts.

c) Case law of the CJEU [Court of Justice of the European Union]

29. So far, the CJEU has dealt with this problem only in one case: *Oliver Brüstle v. Greenpeace eV*. It found that any human ovum is regarded as a "human embryo" after fertilisation within the meaning and for the purposes of implementing Article (2)(c) of Directive 98/44/EC of the European Parliament and of the Council because this is when the process of development of a human being begins.

The CJEU has dissociated itself by interpreting the definition of "human embryo" in a limited way, i.e., in order to determine the scope of implementation of the Directive. However, notwithstanding this, it seems that its definition of "human embryo" cannot be interpreted as if

the CJEU had either explicitly or implicitly defined the term “human being”, especially not within the meaning of equal protection extended to live-borns and unborn beings from the moment of conception.

5) Case law of constitutional courts

30. From the 1970s, constitutional courts in the member states of the Council of Europe / European Union have been asked to examine the constitutionality (conformity with their constitutions) of national laws that regulate the issue of the (im)permissibility of termination of pregnancy.

Proceedings before constitutional courts, as can be read in decisions issued by certain constitutional courts (see points from 17 to 20 of the statement of reasons of this ruling, which include citations from the relevant parts of decisions of certain European constitutional courts), attempt to act as an intermediary or to channel social conflict in relation to the role of the woman in the family and society that emerged in developed democracies in the 1970s, demanding (true) equality of women and gender equality. Constitutional courts justify the impugned constitutional values and rights by protecting social cohesion and, in their decisions, make an effort to strike a fair balance between conflicting rights and interests. Over the past decades, their decisions, aiming to achieve the mentioned objective, express a certain rhetorical inversion by setting up protection for the unborn (being) as a public interest to enable supervision over women’s decisions on termination of pregnancy or by asking for protection of women’s health to make access to termination of pregnancy more difficult.

It is basically an assessment of which constitutional values and rights or freedoms the constitutional court takes as relevant when making a decision on the woman’s right to request and have termination of pregnancy performed on her and on the obligation of the state to protect an unborn being, i.e., when weighing opposing rights and interests. A comparative overview of decisions of constitutional courts shows that they have examined the justifiability of the request (proposal) for a review of the constitutionality of a law on termination of pregnancy by juxtaposing (weighing) the rights and interests either of two parties: the woman and the unborn being (e.g., France and Italy), or three parties: the woman, the unborn being, and the state (e.g., Germany and Spain).

31. It also follows from that overview that almost no European constitution recognises, either explicitly or implicitly, the special right to life before birth. Ireland is the only state that has a provision in its constitution that expressly recognises the right to life of the unborn, while three other constitutions (Czech, Hungarian, and Slovak) include provisions relating to prenatal life (protection of life before birth) and stipulate that human life deserves protection before birth. However, the constitutional courts in those states found that the constitutional provisions concerned could not be interpreted as the establishment or recognition of the special right to life of an unborn being, but as a constitutional value that enjoys special protection of the state (see, for more detail, point 19 of the statement of reasons of this ruling). Although the Basic Law for the Federal Republic of Germany of 23 May 1949 [BGBl p. 1], as amended by Article 1 of the Act on Amendments to the Basic Law of 23 December 2014 [I, p. 2438], does not include

provisions on prenatal life, the Federal Constitutional Court of Germany interpreted the term "everyone" under Article 2.2 of that Law in such a way that it includes all human individuals, irrespective of the phase of their development.

The overview shows that the interests of the woman are legally protected by the general principles of the right to autonomy and free decisions as well as privacy, which are, with certain variations, a *sine qua non* of the constitutions of developed democratic states.

a) Constitutional Court of Spain

31.1. The Spanish law on termination of pregnancy that is now in force and that was challenged before the Constitutional Court rests on the so-called periodic model, which permits termination of pregnancy at the request of a woman only during a certain period of pregnancy, i.e., up to a certain period (for more information on the decision of the Spanish Constitutional Court, see point 20 of the statement of reasons of this ruling).

The Constitutional Court did not find it necessary for the purposes of the review of constitutionality to examine whether an unborn being can be the holder of constitutional rights, but it did protect prenatal life as a constitutional value. Therefore, even the life of an unborn being as a constitutional value enjoys Constitutional Court protection and the state has a positive obligation to protect the life of an unborn being as well.

The said obligation of the state was placed in a mutual relationship, starting with the fundamental human rights and freedoms protected by the Constitution, with the right of the woman to personal growth and development, life, physical and mental integrity, privacy, freedom of thought and freedom from discrimination.

Therefore, the constitutionality of the impugned act on termination of pregnancy was examined by weighing in order to strike a balance between the two opposing rights and interests.

31.1.1. The Constitutional Court pointed out clearly that the matter was exclusively within the domain of the legislator. The legislator is the authority competent to perform the weighing and, if necessary, to regulate the question of when life begins. The legislator is the body asked to extend protection to prenatal life (and to determine its reach), taking into consideration at all times that such a decision must acknowledge the fundamental rights of the (pregnant) woman. It is the role of the Constitutional Court to set limits for the legislator's free discretion, i.e., to set the principles for legislative solutions to balance those rights and interests.

b) Constitutional Court of Portugal

31.2. The periodic model of termination of pregnancy is a legislative solution embraced by the Portuguese legislature. The Portuguese Constitutional Court, when deciding on the constitutionality of that model, found that the impugned act on termination of pregnancy is in accordance with the constitutional values and rights protected by the Portuguese Constitution (decision of the Constitutional Court of Portugal no. 75/2010 of 23 February 2010). As opposed to the Spanish act, which recognises the woman's right to make a free decision on termination of pregnancy at the written request of the woman until the 14th week from conception, the

Portuguese 2007 act permits women to make free decisions on termination of pregnancy until the 10th week of pregnancy.

In sum, in this decision the court confirmed its earlier case law (decision of the Constitutional Court of Portugal no. 617/2006 of 15 November 2006) that intrauterine life is within the scope of protection of the right to life, but as an objective constitutional value. The unborn (being) is not expressly regarded as a right-holder, but as the embodiment of a constitutional value. Human life, although it does deserve some form of protection from the moment of conception, proceeds as a process of development with qualitatively different milestones along the way, which is why various degrees of protection that complement the process are allowed. This is why there is the duty of protection, but the Constitution does not set out any special form of protection Therefore, the scope and manner of its protection pertain to the legislator's area of free discretion. The decision, furthermore, recognises that the reproductive rights and interests of women are encompassed by the general constitutional provisions relating to the freedom of development of their personality and self-determination, so, therefore, the duty of the state to protect life cannot be regarded automatically as the obligation of the pregnant woman to become a mother.

31.2.1. The Portuguese Constitutional Court pointed out also that the question of protecting unborn life, its scope, and the way of protecting it are within the exclusive competence of the legislator, and that it is the task of the Constitutional Court to set out the guiding principles for the legislator and to examine whether they are respected in the selected legislative model. It is, therefore, up to the legislator to select a form of protection, respecting not only the prohibition of insufficiency (a guarantee of minimum protection), but also the prohibition of excess (that the measures do not affect other constitutionally protected goods). In the case concerned, the Constitutional Court found that the requirements were fulfilled and concluded that the impugned act on termination of pregnancy was in conformity with the Constitution.

c) Constitutional Court of the Slovak Republic

31.3. The Slovak Constitutional Court did not grant proposals for the review of constitutionality of the act on termination of pregnancy, which also permits termination of pregnancy at the request of a pregnant woman until the 12th week from conception.

The proponents claimed that the act is contrary to Article 15.1 of the Slovak Constitution that states that everyone has the right to life and that human life deserves protection, even before birth. Similar to the Portuguese Constitutional Court, the Slovak Constitutional Court also held that the woman's decision on termination of pregnancy on request within a defined period of time is based on the constitutional rights to privacy, dignity and (reproductive) autonomy. In connection with termination of pregnancy on request, the Constitutional Court assumed the position that the value of prenatal life may be protected only as long as such protection is not contrary to the very essence of the freedom of the woman and her right to privacy. It, therefore, started with the argument that if a woman in a certain developmental period of her pregnancy may not make free decisions whether to have the baby or to terminate her pregnancy, this would mean that she is obligated to reach full term, which has no foundation in the Constitution. This would also bring into question the essence of her right to privacy and her personal freedoms (the

relevant parts of the decision of the Slovak Constitutional Court are included as citations in point 17 of the statement of reasons of this ruling).

d) Constitutional Council of the French Republic

31.4. France is also one of the states that has selected the periodic legislative model of the right to termination of pregnancy, so that a woman may have an abortion performed on her until the 12th week of pregnancy. The Constitutional Council of France, by the decision on the constitutionality of the Act on Real Equality between Women and Men (*Loi n° 2014-873 du 4 août 2014 pour l'égalité réelle entre les femmes et les hommes*) of 2016, decided that the legislative solution concerned was in conformity with the Constitution.

31.4.1. The Constitutional Council had an opportunity to decide on the constitutionality of the legal provision that extended the right of woman to termination of pregnancy from the 10th week to the 12th of pregnancy even before the 2016 decision (decision of the Constitutional Court of the French Republic no. 2001-446 DC of 27 June 2001). In that case, the Constitutional Council was also asked to answer the question when life begins. The proponents for the review of constitutionality of that act claimed that the extension was an attack on the respect for a human being from the moment life begins and that during that period the embryo develops into a foetus, which is the threshold after which the emerging being becomes human. The Constitutional Council of France did not bring into question the evident existence of the constitutional right of man referred to in Article 2 of the Declaration of the Rights of Man and of the Citizen [*Déclaration des droits de l'homme et du citoyen . . .*].

The Declaration of the Rights of Man and of the Citizen sets out the principle according to which all men are born and remain free and equal in rights, where social distinctions may be founded only upon the general good (Article 1). The Declaration states that liberty consists of doing anything that does not injure anyone else. The exercise of the natural rights of each man has no limits except those which assure to the other members of society the enjoyment of the same rights and these limits can only be determined by law (Article 4). The Declaration guarantees freedom of thought and expression (Article 10). The Declaration guarantees dignity (Article 6) as a right before all other rights and a precondition for all other rights. However, it refused to answer whether and at which phase of its development the foetus is a human being, a person vested with the right to life. It based its position on the fact that the silence of the Constitution on this matter meant that the question concerns metaphysics and medicine, and not those assessing laws.

The Constitutional Council pointed out that it is exclusively up to the legislator to determine when in the process of development the foetus is (becomes) a human being. It is not up to the Constitutional Council, which does not have the general discretionary power to perform evaluations and make decisions as the parliament, to bring into question provisions adopted by the legislator on the basis of the current state of knowledge and technology. It concluded that the legal extension of the period from 10 to 12 weeks during which a (pregnant) woman may decide to terminate her pregnancy on request, considering the state of knowledge and technology at the time of adoption, did not disturb the balance that the Constitution requires in the protection of

human dignity against any form of encroachment on the freedom of the woman provided in Article 2 of the Declaration of the Rights of Man and of the Citizen.

31.5. Before these decisions, some other European constitutional courts were also asked to answer the question of the constitutional law status of an unborn being, or the constitutionality of the legislative provisions on the permissibility of termination of pregnancy. Although concerning this question they acted from somewhat different positions from the courts mentioned earlier, they also found that the appraisal of the permissibility of termination of pregnancy is conditioned on the right of the pregnant woman to terminate pregnancy, on the one hand, and the interest to protect an unborn being, on the other.

e) Constitutional Court of the Republic of Italy

31.5.1. The Italian Constitutional Court found in its decision issued in 1975 that it is impossible to grant absolute principle-based priority to the interests of the foetus and at the same time dismiss the protection of the health of a living person, because the woman is a person and the embryo or foetus is yet to become one. For this reason, there is no equality in terms of their rights, including the right to protection of health (decision of the Italian Constitutional Court no. 27/1975 of 18 January 1975). The Italian Constitutional Court confirmed that position in its later decisions nos. 26/1981 of 7 May 1981, 196/1987 of 25 May 1987, and 35/1997 of 30 January 1997.

f) Constitutional Court of Austria

31.5.2. The Austrian Constitutional Court, similarly to the Italian Constitutional Court, emphasised in its decision that the principle of equal treatment in the protection of the rights and freedoms of persons is not binding in a way to require the provision of a better legal position to the unborn. This conflict of interest should be resolved by giving more weight to the interests of the woman because, as opposed to the pregnant woman who is a human being, the foetus inside the womb is still not one in the full sense, since it is not able to survive on its own outside the woman's womb. Therefore, in certain developmental phases, the constitutional principle of equal treatment does not apply to the foetus (decision no. VfSlg 7400/1974, G 8/74 of 11 October 1974).

g) Federal Constitutional Court of Germany

31.5.3. Finally, the comparative overview of the case law of Europe's constitutional courts shows that only the German Federal Constitutional Court expressly recognises the prenatal right to life. In the first decision passed in 1975, in which it examined the constitutionality of the legislative model of termination of pregnancy, the German Federal Constitutional Court addressed the question whether the parliament is vested with the power to pass laws that can restrict or exclude the right to life stipulated in Article 2.2 of the Basic Law. It found that the right to life holds the first and central position in the hierarchical relationship of fundamental human rights and that everyone has the right to life, which means all human individuals regardless of the phase of their development (it based its opinion on the premise that human life

begins at 14 days following conception). The foetus is an independent value, separate from its mother and with the right to life.

The Federal Constitutional Court found that it is the duty of the state to protect unborn life because of the right to dignity of the foetus. The state is obligated to protect it even at the expense of the right of the mother to self-determination, since her right to self-determination is not absolute. Further to the clause of limitation in Article 2.1 of the Basic Law, the right may be limited to protect the rights of others, the constitutional order or moral law (*Sittengesetz*). As opposed to that right, the right to life as hierarchically the highest right may be limited, but only in extraordinary situations set out by law. On the basis of the foregoing, by applying the weighing test, the Federal Constitutional Court found that the right to life of the foetus, with all its special characteristics, prevails over the right of the mother to develop her personality freely, although in extraordinary situations the test is not applied. These situations would be those that are an excessive burden for the woman and where it would be unreasonable to require the woman to sacrifice her own values beyond reasonable expectations. Therefore, termination of pregnancy is permitted if the pregnancy jeopardises the life of the woman or is a serious threat to her health, in the event of foetal malformations or in the event of pregnancy that is the result of a criminal offence, and in the case of the so-called social indications on the side of the woman and her family that might result in conflict of such intensity that exceeds the reasonable limit of endurance, and because of which not even the threat of punishment would deter the woman from her decision to terminate pregnancy (this act stipulated that termination of pregnancy was a criminal offence, other than in the above-mentioned situations due to their particularly unfavourable and difficult nature for the pregnant woman). The legislative model of the test of unreasonable burden was also confirmed as acceptable from the position of constitutional law by a second decision of the Federal Constitutional Court issued in 1993.

The Federal Constitutional Court thus also confirmed its position on the permissibility of termination of pregnancy on request in early stages of pregnancy, but provided that the woman goes through compulsory counselling before termination and that the state adopts measures by which it ensures that society is adapted to the child (the relevant parts of those decisions are included as citations in point 19 of the statement of reasons of this ruling).

The German legislative solution and the decision of the Federal Constitutional Court issued in 1975 were challenged before the European Commission of Human Rights of the Council of Europe because of their restrictiveness. The Commission examined the application from the aspect of a possible violation of Article 8 of the Convention and found that the German legislation had not neglected the right to private life. Starting with the evolutive interpretation of the rights guaranteed in the Convention and its implementation in practice, the Commission justified its decision by the fact that at the time of the entry into force of the Convention, the legislation in most countries was just as restrictive (*Brüggemann and Scheuten v. Germany*, decision, 12 July 1977, application no. 6959/75; concerning that decision of the Commission, see also the presentation of the case law of the ECtHR in point 15.1 of the statement of reasons of this ruling).

6) Newer (liberalised) legislative solutions in some states

32. In the meantime, and especially in the course of the past decades, legislative solutions have become significantly liberalised, while constitutional courts, as is shown in the examples of Portugal, Slovakia, and France, have not brought into question their constitutionality. As mentioned already, legislative solutions in those states are based on the periodic model that permits termination of pregnancy at the request of the woman during a certain period of pregnancy (with or without previous counselling). The mentioned states, such as Portugal, for example, have abandoned the (German) model based on indications that prohibits termination of pregnancy, other than in the case of indications established by a third person and compulsory dissuasive counselling. Meanwhile, the Portuguese legislator has amended its legislation on termination of pregnancy (by amendments to the Act on Voluntary Termination of Pregnancy (*alterações à lei da Interrupção Voluntária da Gravidez / IVG, Lei No. 3/2016*) of 10 February 2016) and repealed compulsory counselling before the termination of pregnancy and payment in public health institutions, so that both the Spanish and Portuguese legislation includes provisions on counselling, which, however, are not expressly binding. In the meantime, Germany has amended the manner of counselling on several occasions (e.g., in 2012 and 2014). During counselling, the pregnant woman is encouraged to inform the counsellor about reasons why she intends to terminate her pregnancy, but she must not be forced to discuss her situation or to cooperate with the counsellor (*Gesetz zur Vermeidung und Bewältigung von Schwangerschaftskonflikten [Schwangerschaftskonfliktgesetz - SchKGG*]).

32.1. WHO holds that compulsory dissuasive counselling is contrary to international human rights standards and that counselling should be voluntary, confidential, and not forced upon the pregnant woman.

The UN committees have also expressed concern due to requests for compulsory and partial counselling before termination of pregnancy and they have asked states not to accept such requests.

“Legislative reserve”

33. It follows, in conclusion, that regardless of the different approaches chosen by constitutional courts in various states, which are by their very nature the result of different constitutional provisions and legislative solutions, but also cultural, social, traditional, and religious heritage, they are homogeneous and consistent in their position that the answer to the question when life begins (if the answer to that question is regarded as essential or purposeful for the permissibility or impermissibility of termination of pregnancy) is within the competence of the legislator (legislative reserve). In other words, the answer to that question is within the domain of the legislator, and not the constitutional court as the guardian of the constitution and of the values protected by the constitution. It is the duty of the constitutional court to examine whether, within the broad discretion of the legislator in regulating complex issues such as this one, it has respected the constitutional values and rights guaranteed by the constitution and whether the test of proportionality/weighing was conducted to strike a fair balance between the right of the woman and the interests of the unborn being.

B. SUMMARY OF THE PROPONENTS' OBJECTIONS

With respect to the case at hand, the Constitutional Court holds that it is necessary to present briefly the main content of the objections filed by all proponents, described in more detail in Title III of the statement of reasons of this ruling.

The Constitutional Court holds that the proponents' objections can be streamlined into two basic and interconnected objections. The first objection on which some proponents base the unconstitutionality of the impugned Act consists of the fact that, following the promulgation of the 1990 Constitution, the SRC Constitution, and consequently Article 272, on the basis of which the impugned Act was adopted, ceased to have effect. In other words, the impugned Act became unconstitutional in its entirety after the termination of validity of the constitutional basis on which it was passed.

The second objection was that the Act was not in conformity with the (current) Constitution, especially its Article 21, prescribing that each human being has the right to life. The proponents based their arguments on the fact that the right to life was beyond any doubt a fundamental human right that was above and before all other human rights and that the term "human being" in Article 21.1 of the Constitution included both an unborn and a born human being. It follows from the foregoing that the embryo is a human being equal in dignity with other human beings and that it enjoys the right to life guaranteed by the Constitution. In view of the indisputable fact that the unborn child is a legal subject, any indication of a threshold in pregnancy relating to permission for or prohibition of the termination of pregnancy is superfluous. The constitutional right to life may not be annulled by an imaginary right of the mother to terminate her pregnancy. There is no special right to termination of pregnancy, yet the desire of the woman to terminate pregnancy is transformed into a right, while the termination of pregnancy is detrimental to society in its totality and to the public order.

The proponents hold that the Republic of Croatia is obligated to provide stronger protection to unborn children than that extended at the moment, one that is based on education on freedom and responsibility, reproductive health and sexuality, responsible parenthood and family planning, and the improvement of the system of adoption as well as care and support for pregnant women and mothers who cannot or do not want to keep their children after birth.

C. THE CONSTITUTIONAL COURT'S ASSESSMENT OF THE OBJECTION OF THE UNCONSTITUTIONALITY OF THE IMPUGNED ACT ON THE GROUNDS OF THE TERMINATION OF THE EXISTENCE OF THE CONSTITUTIONAL BASIS ON WHICH THE IMPUGNED ACT WAS ADOPTED

[. . .]

D. THE CONSTITUTIONAL COURT'S ASSESSMENT OF THE OBJECTION CONCERNING THE NON-COMPLIANCE OF THE ACT WITH THE CONSTITUTION

40. Article 1 of the impugned Act, determining the Act's aim and purpose, *inter alia*, entitles each individual to the right to freely decide on the birth of children. The aforementioned right is not absolute and may be restricted by law with the purpose to protect (the) health (of a pregnant

woman — Article 2). Article 25 of the Act confirms that the protection of the life and health of a pregnant woman is of primary importance; it states that termination of pregnancy must be performed or completed regardless of the criteria and procedures laid down in the Act if there is an immediate threat to the life or health of a pregnant woman or if the termination of pregnancy has already been put in motion.

Article 15 of the Act defines termination of pregnancy as a medical procedure that may be performed before the end of the 10th week of the date of conception and, after that, only subject to the approval of a commission in accordance with the terms and procedures set out in law.

Termination of pregnancy is performed at the request of a pregnant woman if no more than 10 weeks have passed from the date of conception. In other cases, termination of pregnancy may be performed only if a commission issues its approval, in accordance with the terms and procedures laid down by law (Articles 15.2 and 15.3 of the Act).

Starting from the subject-matter of the Act that, *inter alia*, permits termination of pregnancy at the request of a woman if no more than 10 weeks have passed from the date of conception, the proponents hold that the Act is not in conformity, first and foremost, with Article 21 of the Constitution, "which guarantees that each human being has the right to life". They base their argument on the fact that the term "each human being" means both born and unborn beings and that their life begins with conception. Therefore, the constitutional protection of the life of man extends to the moment of conception.

41. It seems that the Constitutional Court has been put at the centre of a controversy on which no unified position exists in science, medicine and biomedicine, or in philosophy, religion, bioethics, law, even politics, as is evident from the background to the problem of the termination of pregnancy as elaborated above.

The Constitutional Court is expected to resolve the controversy and to determine when life begins, thus acting as an arbitrator between two parties: the one that holds that life begins at the moment of conception, so that an unborn being is protected under the scope of Article 21 of the Constitution from the moment of conception and denying the "right of the woman to termination of pregnancy", and the one that holds that life begins at birth, thus putting the unborn beyond the scope of protection of Article 21 of the Constitution, in which case the right of the woman would prevail.

41.1. The Constitutional Court starts from its position that the provisions of the Constitution must be interpreted in the spirit of the overall legal order formulated in the Constitution in such a way that the interpretation of the Constitution's provisions arises from the entirety of the relationships that are created by those provisions. For example, in ruling no. U-I-3789/2003 of 8 December 2010 (Official Gazette 142/10), it found:

"8.2. ... [T]he Constitution is a single whole. It cannot be approached by pulling one provision out from the entirety of the relations that it constitutes and then interpreting it separately and mechanically, independently of all the other values that are enshrined in the Constitution. The Constitution is endowed with intrinsic unity and the meaning of each individual part is bound to

all other provisions. If it is viewed as a unity, the Constitution reflects some all-encompassing principles and basic decisions in connection with which all its individual provisions must be interpreted. Thus, no constitutional provision may by pulled out of context and interpreted independently. In other words, each particular constitutional provision must always be interpreted in accordance with the highest values of the constitutional order which are the grounds for interpreting the Constitution itself. These are: freedom, equal rights, national equality and equality of the sexes, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and the democratic multiparty system (Article 3 of the Constitution)."

Accordingly, no constitutional provision may be interpreted in a way that produces unconstitutional consequences.

41.2. Furthermore, the Constitutional Court recalls that human dignity is absolutely protected, non-derogable and incomparable. In its Decision No. U-I-448/2009 et al. of 19 July 2012 (Official Gazette 91/12), the Constitutional Court found the following:

"Article 1 of the Charter of Fundamental Rights of the European Union (Official Journal of the European Union, C 83/389, 30/03/2010) reads: 'Human dignity is inviolable, it must be respected and protected.' In the European Union, human dignity is the first indivisible and universal value.

The Constitutional Court recalls that Protocol 13 to the Convention stipulates the 'inherent dignity of all human beings'. It also recalls the basic tenet used by the Court of Justice when interpreting human rights, contained in the case *Refah Partisi (The Welfare Party) and Others v. Turkey* (judgment, 31 July 2001, application nos. 41340/98, 41342/98, 41343/98 and 41344/98), which reads:

'43. ... Human rights form an integrated system for the protection of human dignity; in that connection, democracy and the rule of law have a key role to play.'

In the interpretation of constitutional values, the Constitutional Court also embraces the legal positions of the German Federal Constitutional Court that human dignity is the central point of departure in weighing all other constitutional values. This position is presented in the judgment *Lebach* (*BVerfGE 35, 202 /Lebach/ - Urteil des Ersten Senats vom 5. Juni 1973 auf die mündliche Verhandlung vom 2. und 3. Mai 1973 - 1 BvR 536/72*):

'Both constitutional values must be brought into balance in the case of conflict, to the greatest extent possible; if it is not possible to achieve such balance, by taking into consideration the typical characteristics and special circumstances of the case concerned, it must be decided which of the interests should stand back. Both constitutional values must be observed in their relationship to human dignity as the central point of the value-based organisation of the Constitution.'

The Constitutional Court establishes that human dignity is absolute, non-derogable and incomparable, and it is not possible to limit it or to weigh it. Obtaining evidence by violating human dignity renders such evidence unlawful. Deviation from the rule is not permitted, because no other individual right or liberty and no other general or public interest, not even the one aimed

at successful processing of the most serious criminal offences, may be compared or given priority over human dignity. The prohibition is included, *implicite*, in Articles 17.3, 23.1, 25.1 and 35 of the Constitution."

42. Article 21.1 of the Constitution stipulates that each human being has the right to life. Article 21 is the first article mentioned in Section 2 Personal and Political Liberties and Rights, Title III Protection of Human Rights and Fundamental Freedoms. The right to life is a precondition for all other rights since all other human rights and freedoms arise from it.

The Constitution guarantees the right to life "to every human being". However, it does not provide a definition of (does not elaborate) the notion of a human being in the sense whether or not it also includes, apart from already born individuals who undoubtedly has legal personality, unborn human beings.

43. The rights to liberty and personality are fundamental human rights. The Constitution includes the principle of the inviolability of liberty and personality (Article 22 of the Constitution), which may be restricted only under conditions set out in the Constitution.

44. In addition, the Constitution guarantees respect and legal protection of each person's personal and family life and dignity (Article 35 of the Constitution; hereinafter: the right to privacy).

44.1. The right to privacy guaranteed in Article 35 of the Constitution includes the right of each person to free decision-making and self-determination. Therefore, the right to privacy entails the right of a woman to her own mental and physical integrity, including the right to decide on conceiving a child and on the course of her pregnancy. By staying pregnant (either planned or unplanned, voluntarily or as a consequence of rape), a woman does not waive her right to self-determination. Any restriction of the woman's right to decide by autonomous self-determination, including whether she wishes or does not wish to bring pregnancy to term, represents interference in her constitutional right to privacy.

Interference with the right to privacy is permitted only if it is in conformity with law. Laws must follow a certain legitimate aim and must be necessary to protect those aims in a democratic society. Interference with someone's privacy must be the result of a crucial societal need to protect a legitimate aim, or more of them, and must be an appropriate means to protect the achievement of such aims.

45. In this respect, the Constitutional Court finds that an unborn being, as a value protected by the Constitution, enjoys constitutional protection under Article 21 of the Constitution only to the extent that such protection is not in conflict with the woman's right to privacy. The right to life of an unborn being within this meaning is not protected to have an advantage over or greater protection than a woman's right to privacy. Within this meaning, the legislator enjoys freedom of discretion in striking a fair balance between a woman's right to free decision-making and privacy, on the one hand, and the public interest in ensuring the protection of an unborn being, on the other. Accordingly, the Constitutional Court recalls that, according to the case law of the

ECtHR, although termination of pregnancy is included in the domain of the woman's privacy, it should not be understood as a family planning measure or as a means of contraception.

45.1. The Constitutional Court recalls that the question of "when life begins" is not within the jurisdiction of the Constitutional Court. The Constitutional Court should examine the legislation regulating the question of termination of pregnancy in order to establish whether it is in conformity with constitutional principles and values, i.e., whether it strikes a fair balance between the opposing rights and interests inevitable in complex cases such as this— a woman's right to decide whether to terminate her pregnancy and the interest of society to protect the life of an unborn being. In other words, the Constitutional Court must examine whether the legislator has struck a fair balance between their rights and interests within its broad discretion (see point 33 of the statement of reasons of this ruling).

46. In conclusion, on the basis of the said general positions, the Constitutional Court finds that it is up to the legislator to prescribe the procedure and period within which termination of pregnancy at the woman's request may be performed without any limitations.

The Constitutional Court finds that the legislative solution stating that termination of pregnancy may be performed at the woman's request before the end of the 10th week of pregnancy (and afterwards only subject to the approval of a competent authority if it is established, on the basis of medical indications, that life cannot be saved or the deterioration in the woman's health during pregnancy, birth or post-partum cannot be prevented, if it can be expected that the child will be born with serious physical or mental defects, if conception was connected with the commission of certain criminal acts [Article 22 of the Act] or in the event of immediate danger to the life or health of the pregnant woman and if termination of pregnancy has already been put in motion [Article 25 of the Act]) is in conformity with the Constitution.

Consequently, the Constitutional Court finds that the impugned legal regulation did not distort a fair balance between the woman's constitutional right to privacy (Article 35 of the Constitution) and to liberty and personality (Article 22 of the Constitution), on the one hand, and the public interest of protecting the life of unborn beings guaranteed by the Constitution as a constitutionally protected value (Article 21 of the Constitution), on the other.

47. Further to the foregoing, the Constitutional Court finds that the impugned Act is not in non-conformity with Articles 2, 3, 14, 16, 21, 22, 35 and 38 of the Constitution, or with the Constitution in its entirety.

48. Therefore, pursuant to Article 43.1 of the Constitutional Act, it was resolved as in point I of the operative part of this ruling.

E. WHY IT IS NECESSARY TO "MODERNISE" THE ACT

49. The Constitutional Court recalls that the impugned Act includes certain legal concepts or terms that no longer exist in the constitutional order of the Republic of Croatia (for example, organisations of associated labour, penal provisions in Dinars). Therefore, the impugned Act is formally not aligned with the Constitution.

49.1. Further, a completely new legal and institutional framework for health, social, and science and educational systems has been constructed since the adoption of the 1990 Constitution. The systems are based on other values and principles, and they are aligned with the Constitution and international standards as well as with advances in science and medicine, which are complemented with changes in the systems of health care, education, and social policy. In other words, taking into consideration the passage of time from the entry into force of this Act (almost forty years), it is clear that the impugned Act is “obsolete”, i.e., that it is essential to have it “modernised”.

50. It is up to the legislator to prescribe in the new act educational and preventive measures, in addition to the essential legislative changes required for the reasons mentioned above, so that termination of pregnancy is an exception.

Within its broad discretion, the legislator is free to issue measures that it considers purposeful for promoting sexually responsible behaviour and the responsibility of both man and woman in the prevention of unwanted pregnancies through educational and preventive programmes, for example the introduction of reproductive and sexual education. The legislator, in order to enable the woman to determine freely regarding pregnancy and maternity, may set an appropriate deliberation period before a decision on termination or continuation of pregnancy is made, during which she would receive all information on pregnancy and services available (for example, counselling centres and health protection during pregnancy and birth, the working rights of pregnant women and mothers, the availability of nurseries, centres that provide contraception and information on safe sex, and centres that provide counselling before and after pregnancy). It is up to the legislator to determine how the new act will regulate the question of costs resulting from the termination of pregnancy (whether and in which cases they will be borne by the woman or whether they will be settled at the expense of the state budget), the question of conscientious objection of doctors who do not want to perform terminations of pregnancy, etc.

Further to the foregoing, the Constitutional Court instructs the Croatian Parliament to enact a new act in accordance with the above findings within two (2) years of the date on which this ruling is issued.

51. The instruction in point II of the operative part of this ruling is based on Articles 31.4 and 31.5 of the Constitutional Act.

52. The ruling on publication in point III of the operative part is based on Article 29 of the Constitutional Act.

Number: U-I-60/1991

U-I-94/1991

U-I-173/1995

U-I-39/2008

U-I-5089/2016

U-I-5639/2016

U-I-5807/2016

Zagreb, 21 February 2017

President

Miroslav Šeparović, PhD, m.p.

Pursuant to Article 27.4 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (Official Gazette 99/99, 29/02 and 49/02 – revised text), I hereby give reasons in writing for my

DISSENTING OPINION

in case no. U-I-60/1991 et al.

I hereby give reasons for my dissenting opinion announced at the session of 21 February 2017, at which I voted against the majority.

1. I hold that the impugned Act is not in conformity with the Constitution and that the lack of conformity is drastic, so that the Act should be repealed.

The high sensitivity of the normative substance concerned in this matter, in all respects, requires that a harmful legal vacuum be avoided. This is why it should be repealed with deferred effect until a new act is enacted within a reasonable term not exceeding one year. The Croatian Parliament should be instructed to enact this new act, which will then provide a legislative solution in conformity with the democratic principles of a pluralistic society and in accordance with the comprehensive public and parliamentary procedure of preparation and promulgation, in line with the moral, worldview and cultural features of Croatian society, and that will strike a harmonious balance in achieving the reasonable alignment of the relevant constitutional values, respecting the guarantee of the right to life as the constitutional axiom in the specific context of the unique connection between the mother and the unborn child as a relation of "duality in unity", with all the implications arising from this special and incomparable relationship.

In this introductory part, I find it necessary to point out that this Constitutional Court case is not only about the resolution of worldview issues. The outcome of the decision-making process in this matter cannot be defined as an alternative — "either the 1978 Act or the prohibition of abortion". Such pronounced public perceptions arise from the logical "hoax" of excluding the third option. This case concerns the review of constitutionality of a specific impugned "model of abortion" from the 1978 Act, which is only one of the ways of regulating this matter. Therefore, by repealing the act, abortion is not prohibited, but the parliament is asked to enact a different act that would be in conformity with the Constitution (for example, by eliminating the legal provisions on public procurement or the tax collection model, etc.; this does not mean that public procurement or taxation is prohibited, but that only a certain normative model is declared not to be in conformity with the Constitution). Namely, the Constitutional Court is not "*arbiter mundi*", so it is not obligated to resolve worldview and ideological controversies between activists of this or that provenance, religious communities and bioethicists. The Constitutional Court is competent to pass a decision on the basis of "constitutional grounds" and the legitimate methods of legal interpretation of whether or not the impugned Act is in accordance with the Constitution of the Republic of Croatia or not. Accordingly, this matter is not about arbitration to resolve disagreements regarding ideas, but about decision-making at the level of legal positivism.

2. I find that the impugned Act is not in conformity with the Constitution primarily because it "fails the test" of the rule of law in view of the requirements arising from that principle

according to the Report of the Venice Commission of the Council of Europe of 2011. The requirement of legality primarily includes a “transparent, responsible and democratic process of passing laws”. I believe that it is not necessary to embark on demonstrating that the one-party communist system with its ideological profile and its practical performance was objectively not satisfactory, and that it was not set to fulfil the said requirements, especially in the case of a “sensitive” normative matter that involves different worldviews.

3. Even if we concede that, by the failure to adopt a new act on this matter since 1990 onwards, the described “deficiency” has been convalidated *via facti*, it has not been possible to remedy the substantive non-conformity with the Constitution, which I find evident.

The impugned Act, as is evident from its name, is based on the legal institutes and categories that do not exist in the Constitution of the Republic of Croatia and that rely—partly directly and partly via its meaning—on the express provisions of the former 1974 SRC Constitution as well as its ideological and value-based background. This is why the impugned Act, based on a strictly formal legal analysis at the level of “textual positivism”, is inappropriate for a Constitutional Court analysis in the true sense of the word. Namely, it “leaps out of the system”, representing a structurally dysfunctional normative work that cannot be fitted into the existing constitutional model. The Constitutional Court of the Republic of Croatia, in its decisions in cases U-I-28/93, 892/94, 283/97, repealed the provisions of the “old” laws (before 1990), holding that they are outside the constitutional framework of the “new” Constitution, that they are based on legal institutes and legal categories and terms that no longer exist in the constitutional order of the Republic of Croatia (point 36 of the ruling). I am of the opinion that this is also the case with the impugned Act, so the position in the stated Constitutional Court decisions should also be applied in this case.

4. The Constitution of the Republic of Croatia does not include the essential material law basis of the impugned Act. On the one hand, “the right of man to make free decisions concerning the birth of children” (Article 272 of the 1974 SRC Constitution), which implies the right to abortion as a family planning measure (typically for the communist models at the time – the USSR and most countries of so-called real socialism), is no longer in the catalogue of constitutional rights. From the position of European civilisational standards (which condemn abortion as a family planning measure), it is unacceptable normative atavism. On the other, this Act is fully in line with the provision of Article 248.1 of the 1974 SRC Constitution, according to which the inviolability of life is guaranteed exclusively to “man”. This formulation (in the constitutional context of the 1974 SRC Constitution) does not cover “unborn life”, which is clearly included in the protection stipulated in Article 21 of the Constitution of the Republic of Croatia – “each human being”.

Therefore, in relation to the impugned Act of 1978, the then legislator had the express (today non-existing) constitutional basis in Article 272 of the 1974 SRC Constitution (“the right of man to make free decisions concerning the birth of children”). It did not have a “problem” with unborn life, because Article 248.1 of the 1974 SRC Constitution (“life of man is inviolable”) did not bind it to protect *nasciturus* via legislation.

Although the 1974 SRC Constitution stipulated protection of privacy in Article 249.1 ("the inviolability of the integrity of human personality, personal and family life, and other rights of personality are guaranteed"), it is entirely clear that the legislator at the time—who was in principle ideologically disinclined to protect privacy—obviously did not have in mind either privacy or the autonomy of the pregnant woman's personality, or women's reproductive rights, but simply "elaborated" in law the then existing, today non-existing, constitutional right (to make free decisions on whether conceived children will be born or put to death) in a legally and technically consistent and correct way, from the point of view of the then constitutional law order.

It should be repeated that the mentioned right in Article 272 of the 1974 SRC Constitution (basically, the right to abortion) was at the time not limited by any competing or divergent right with which it would have to be balanced. The guarantee of the inviolability of life belonged only to man, according to the 1974 SRC Constitution, so the legislator was free to "dose" the scope of the "right to abortion" at will.

It clearly follows from the above that the legislator in 1978 did not address or burden itself with the topical problem of human rights arising from privacy and the autonomy of personality and that it was even less preoccupied with balancing, i.e., "striking a fair balance between mutually conflicting rights" (the right of the unborn to life and the right of the mother–pregnant woman to privacy and self-determination). It seems inappropriate to me to draw the curtain of the rule of law and the constitutional values of a democratic society to mask a law that is a typical normative product of an ideologised activist state marked substantially by the absence of democracy and the rule of law. From that position, and this seems to me to be crucially significant, the statement that "the impugned legislative solution did not distort the fair balance between a woman's constitutional right to privacy (Article 35 of the Constitution) and to liberty and personality (Article 22 of the Constitution), on the one hand, and the public interest of protecting the life of unborn beings guaranteed by the Constitution as a constitutionally protected value (Article 21 of the Constitution), on the other (point 46, paragraph 3 of the ruling), is completely unacceptable in principle.

The legislative solution of 1978 could not take into consideration the constitutional values of 1990, and it particularly could not and was not obligated to balance them fairly, because those values did not exist at the time. The argumentative technique used in the ruling, as far as I see it, is reduced basically to a Constitutional Court review that is not standard. Namely, what is truly the normative substrate of the impugned Act is not reviewed, but what is, is a non-existing (virtual) normative concept of legislative balancing between antagonised (the then non-existing) statuses and rights under Article 35 and Article 22 in conjunction with Article 21 of the Constitution of the Republic of Croatia, although there was no such balancing in the impugned Act and, objectively, it could not be implemented either. Therefore, the assessment stated in the ruling that the problem was successfully resolved in the impugned Act "holds no ground" as it is based on erroneous initial premises.

It is as though the legislator of the time of the former state, which was indubitably not marked by the rule of law, without any will and intention of its own (preterintentionally), 40 years ago,

regulated this demanding matter normatively in the same way that corresponds to the highest standards of the protection of human rights and constitutional values of the Croatian state governed by the rule of law in the 21st century.

I find this approach deeply unacceptable.

5. This is particularly so because the ruling otherwise states that:

- "the impugned Act is formally not aligned with the Constitution" (point 49);

- the current "health, social, and science and educational systems" are based on other value bases and principles that correspond to the Constitution and international standards;

- in this regard the impugned legislative model for termination of pregnancy is "obsolete" and that it is "essential" to have it modernised! (point 49.1 of the ruling).

It is common sense that it is then in particular essential to "modernise" the legislative model in relation to the essence of the matter and the core of the problem. Therefore, the complete non-conformity of the impugned Act with the Constitution is manifest, so that is why it should be repealed in its totality.

6. Regarding the normative concept of Article 15 of the impugned Act, I completely agree with the important thesis of the ruling that corresponds to the clear and established position of the ECtHR (*Vo v. France*, 2004 — § 82 and 84, *P. and S. v. Poland*, 2012 — § 97, *A., B. and C. v. Ireland*, 2010 — § 222, 223, 226, 232, 233, 237 and 241) — that in view of the complexity and sensitivity of the problem of the embryo's status and the permissibility of abortion that primarily affects the moral, religious and ideological views of society, the national legislation always reflects the worldview, cultural and traditional specificities of the particular social environment and the national identity features of the state community concerned.

From this point of view, it is not possible to avoid the conclusion that the impugned Act is a normative product with the clear "taste and smell of the epoch" in which it was created, and whose major features are the following: one-party dictatorship with no rule of law, democracy or pluralism, the imposition of "collective truths" and of an official ideology based on the Marxist view of the world (1974 SRC Constitution, Fundamental Principles, Title V, points 2 and 3), which, in the dimension of "public morals", stands on radically atheist positions with important tenets on "class" morals that negate the existence of a universal and consistent value system.

No interpretative naphthalene can conceal the "smells of the past" of the impugned Act. It is imbued with an ideological and value-based paradigm from which it originates.

7. To accept that the impugned Act is in accordance with the Constitution, especially in relation to Article 15 of that Act, in the context of Article 21 of the Constitution, does not mean taking an ethical and worldview neutral position, as it basically means to stand by the value option that is at least thoroughly controversial from the perspective of the Croatian Constitution (and the real worldview of Croatian society).

Article 15 in conjunction with Article 1 of the impugned Act normatively articulates the absolute, unlimited and legally untethered freedom to decide whether an unborn life in that developmental phase will be allowed to develop or whether it will be killed: there is no obligation to establish an indication (medical, criminological-ethical, embryopathic or eugenic or any other), there is no obligation to undergo prior counselling (dissuasive or neutral) on the important aspects and effects of the procedure, there is no prescribed minimum period (*spatium deliberandi*) to deliberate before making such a momentous decision, in brief there are no conditions prescribed for termination of pregnancy. This "procedure" is for an unborn being indubitably *capitis deminutio maxima — nasciturus* becomes *moriturus* exclusively on the basis of a request submitted as the manifestation of subjective will.

"The right to terminate unwanted pregnancy" is illusory and it semantically attributes "unwantedness" to pregnancy as its objective feature, while this is solely in the function of ensuring the legal prerequisite for the permissibility of the procedure. However, in essence, it is only about the wish to terminate pregnancy — the choice "for" or "against" abortion (i.e., life) is determined by what (the holder of the confronted legal position) wants as the sole criterion and legitimising foundation for whatever alternative is selected.

Considering the way in which the legislation regulating the right to abortion is stylised, it is, therefore, not asked that the decision on abortion be the consequence of a reasonable and/or morally guided choice. One's wish as the expression of free will is sufficient.

This is the concept of creating a right (to abortion) as the projection of subjective will. Whatever one wants is morally correct. If the only criterion of choice is what one wants, any option is correct by the very act of being wanted. There is no "external" objective criterion of evaluating the ethical validity of the choice, there is no benchmark that would differentiate "good" from "bad", everything is "good" because it is wanted. As I see it, this is the concept of ethical relativism that negates the existence of an objective moral order and thus the possibility of applying the fundamental principles of humanist morals, the principle of distributive fairness as well as the classical legal ethical principles of objectively fair conduct (*honeste vivere, neminem laedere, suum cuique tribuere*). Moral relativism is in principle a legitimate option from the point of view of individual morals (*pro foro interno*), but in terms of the Constitution of the Republic of Croatia it is utterly dubious. The Constitution is not only a system of rules concerning the organisation of the state, the scope of work of state authorities and a solemn catalogue of various rights. It safeguards important values of a certain community: its national, cultural and value identity and its moral standards. This is not a morally neutral act, but the supreme law of the state that is based on values.

The principle of "social justice" as one of the highest values of the constitutional order of the Republic of Croatia and the foundation for the interpretation of the Constitution (Article 3 of the Constitution), and the category of "public morals" as one of the exhaustively stated universal constitutional limits of all rights and freedoms guaranteed by the Constitution (Article 16.1 of the Constitution), by their very nature exclude the concept of ethical relativism that negates the existence of an objective moral order and emphasise the so-called subjective values as a consequence of one's individual choice. In my opinion, the term "public morals" is not an empty

or irrelevant constitutional proclamation, but a constitutional category that implies the existence of binding universal and consistent moral principles of Croatian society. This is why I hold that the impugned Act, especially in the above-mentioned substantially disputable part, is conceptually unconstitutional, i.e., that it is drastically contrary to the ethos of the Croatian Constitution that does not permit, especially in a situation where constitutional rights are confronted, that the imposition of the desirability of a choice (here, the termination of pregnancy) is imposed by an exclusive benchmark of correctness, resulting in the termination or destruction of the very essence of the opposing right (here, right to life).

From the aspect of the Constitution, in my opinion the legislator must assume a certain position and clearly and normatively objectify the permissibility criteria for such a procedure. I do not wish to prejudge *a priori* the unconstitutionality of the legislative solution that would also take into account the woman's decision against maternity and the resulting obligations in the "abortion model", but such a solution must be conceived in conformity with the Constitution of the Republic of Croatia.

Otherwise, the "right to terminate an unwanted pregnancy" (*de facto*, to destroy an unborn life) as the expression of one's subjective will and choice guided by what one wants boils down to unlimited power and legalised self-will. If the right to privacy (even if it were "built into" the impugned Act, *dato sed non concesso*, as the constitutional basis for the right to abortion under Article 15 of the Act), as the right to one's own lifestyle and self-determination under Article 35 of the Constitution, according to Article 16 of the Constitution has its own legitimate limit based on constitutional law in the category of "public morals", then the category must include some objective substance of moral rules that determine what is correct and valuable, and what is not. On the other hand, if "public morals" is not something objective, i.e., a real and consistent value system, but if the only "rule" is to act according to one's free subjective will (ethical relativism), then "public morals" is in no place to realise the function of a constitutionally fixed limit on the right to the autonomy of personality. In that case, the limit itself is equalised with the personal freedom of choice and blends into it, because the freedom of choice is precisely the essence of the right to personal autonomy. In that context, "public morals" actually does not have the role of a constitutional institute, but it functions at the level of a semantic decoration (*flatus vocis*).

This part of my argumentation is not (at least not consciously) prompted by my need to venture into some general moralising, but it is motivated by the position of the ECtHR from the well-known case *A., B. and C. v. Ireland*, 2010. In § 223 of that decision, it is stated: "The Court recalls that it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals... By reason of their 'direct and continuous contact with the vital forces of their countries', State authorities are in principle in a better position than the international judge to give an opinion on the 'exact content of the requirements of morals' in their country, as well as on the necessity of a restriction intended to meet them." The above shows that also from the perspective of the European Convention the moral standards of a Contracting Sate or a specific social community have legally relevant significance in this problem and, as was the case in Ireland, for example, may have even a crucial impact on the national legislative model in the matter of the embryo's status and the permissibility of abortion.

Therefore, with respect to the earlier mentioned provisions of the Croatian Constitution on the constitutional category of “public morals” as the positive legal determinant (and not “meta” or “retro” constitutional force), it was necessary to present one’s opinion on that dimension of the problem in the context of specifying the content and scope of the right to privacy, especially because of the objection of several proponents who embrace and point precisely to this moral dimension of the case. In my opinion, instead of an extensive comparative analysis (of selected foreign legislation and decisions issued by foreign constitutional courts), the results of which cannot be used as an argument in the decision of the Croatian Constitutional Court on whether a national act is in conformity with our Constitution, it was necessary also to examine the “requirements of morals” of Croatian society, because without this the analysis of the balance between the opposing legal interest positions under Articles 21 and 35 of the Constitution is not complete! This is so because this is not about a relation that would be morally neutral (“beyond good and evil”). And this is my argument for the view that the impugned 40-year-old Act should be repealed and the Croatian Parliament enabled to adopt a new one that will regulate the matter in accordance with the current moral, worldview, and cultural context of Croatian society.

8. In relation to the essence of the problem — the interpretation of the content and effect of Article 21.1 in relation to Article 22.1 and Article 35 of the Constitution of the Republic of Croatia, I point out as an introduction that I do not find the methodological approach in the ruling acceptable. Instead of approaching the subject matter of the Constitutional Court analysis directly, the imposing quantity of various comparative overviews, despite the praiseworthy effort that went into collecting them, *de facto* clouds the view and is not of any help in drawing the final conclusions.

In this matter, the pronounced diversity of national cultures and legal standards is obvious and notorious in Europe (point 23 of the ruling), so the constitutional and legal solutions of other countries that reflect their worldviews and their other traits may be of some informative significance for a discussion in creating the national legal model, but they are not useful in this Constitutional Court case. The way in which national legislation in different countries addresses controversial questions is wholly irrelevant for an evaluation of whether the national Act is in conformity with the Croatian Constitution. The fact that the model of the impugned Act corresponds, for example, in its entirety to the laws of the countries of the former USSR and eastern Europe and, *mutatis mutandis*, to the laws of Portugal, Spain, the Slovak Republic, and France cannot be an argument for a valid approach to this Constitutional Court case. That very same model of the impugned Act, on the other hand, does not correspond at all to the legal solutions of FR Germany, Ireland, Poland, Hungary, etc. It does not seem purposeful and constructive to me to enter into a classification of comparative models based on the criterion of restrictiveness, or modernity or liberalism, within the framework of Constitutional Court discourse that should be marked primarily by the sacred principle of the supremacy of the Constitution and the use of the constitutional argument (point 23.1 of the ruling). Such metajuridic criteriology implies the setting of values that is eventually meaningless. To examine whether, for example, the Portuguese or Slovaks are more liberal than the Germans, Poles or the Irish in terms of abortion simply cannot be of any help in resolving “our” problem.

The same applies in relation to the positions expressed in the decisions of some European constitutional courts. Not only do those positions also reflect the "national culture" and their constitutional and national identity, but the constitutional bases are also simply entirely different from the position of positive law, so the purpose and meaning of the comparison falls short even in principle. Logicians would say that the *tertium comparationis* is missing, so the comparison is erroneous in the sense of formal logic. Therefore, in relation to the possibility of using the positions of other constitutional courts within the framework of the "constitutional argument" for our Croatian Constitutional Court decision, the only meaningful thing to do is to consult the argumentation of the constitutional courts of those states whose constitutional texts include a comparable–identical or at least a materially similar provision on the right to life ("the right to privacy" as, basically, *status libertatis* is generally defined everywhere as personal freedom or freedom of self-determination, while the content is left to the "imaginativeness" of jurists and human rights activists, in short — the *crux* is in the right to life). In that regard, in the case law of the Constitutional Court of the Republic of Croatia, the position is that "… in the Croatian constitutional order, in view of comparable constitutional grounds (emphasis by author), the case law of the German Federal Constitutional Court is applicable; it has universal meaning for illuminating questions connected with the tax policy in a social state…" (U-IP-3820/09 and 3826/09 of 17/11/2009 - OG 143/09). This is why it was necessary in the framework of this case, in using comparative Constitutional Court solutions, to reach only for compatible constitutional grounds and positions based on such grounds, which may be of significance for illuminating the issue under deliberation. Based on my insight, the comparable constitutional grounds on the right to life in terms of the Constitution of the Republic of Croatia are those included in Article 38 of the Constitution of the Republic of Poland and Article 2.2 of the Constitution of the Republic of Germany ("*Jeder hat das Recht auf Leben* ...").

The judgment of the Constitutional Court of Poland K-26/96 reads, amongst other things, as follows:

"It is not possible to decide on having a child in a situation when that child is already developing at the prenatal stage and, in this sense, parents already have it. Therefore, the right to have a child may only be interpreted in the positive aspect thereof, not as a right to destroy a developing human foetus. In the negative aspect, the right to a responsible decision … is solely reduced to the right of refusing to conceive a child."

This judgment is not even mentioned in the selected case law of the European constitutional courts mentioned in the ruling.

The relevant positions on the right to life assumed in the decisions of the German Federal Constitutional Court (e.g., "The right to life is guaranteed to all living beings; there is no difference at all between certain stages of a life in development, before birth, or between born beings and those yet to be born, 'everyone' within the meaning of Article 2.2.1 is 'everyone living' — any human individual in possession of life; therefore, 'everyone' also means an unborn human being. The life of the foetus is protected throughout pregnancy, it has priority generally over the pregnant woman's right to self-determination and may not be brought into question at any period … a temporally restricted relay of responsibility for the right to life of

nasciturus to the competence of a third party to make a free, legally unbound decision, even if that third party is its mother, would no longer guarantee the legal protection of life within the meaning of proportionality …") are presented in the ruling as an "isolated case", *de facto* as a constitutionally jurisprudential rarity (point 31.5.3 of the ruling).

On the other hand, from the content of the key arguments in the ruling that explain the conformity of the impugned legal model of abortion with the Constitution of the Republic of Croatia (point 44.1, 45 and 46 of the ruling), it is clear that the argumentative substrate of the decision of the Constitutional Court of the Slovak Republic no. US-12/01 of 4 December 2007 included in points 13, 14, 15, 17 and 18 of that decision (reproduced in detail in point 17 of the ruling) is accepted in full. In principle, I do not dispute the justifiability and legitimacy of accepting outside solutions (in view of the case law of the Constitutional Court of the Republic of Croatia mentioned earlier which inaugurated the possibility of such a "model" for elaborating one's own standpoint), especially because the Slovak decision is immaculately elaborated. The problem, however, is in the dimension of formal logic that is the essential guardian of the rationality of discourse. Namely, *tertium comparationis* is missing, because the constitutional bases are not comparable, not even to the minimum degree. The Croatian Constitution stipulates in Article 21.1: "Each human being has the right to life"! The Slovak Constitution, based on the content of the mentioned decision of the Slovak Constitutional Court, in Article 15.1 of the Constitution of the Slovak Republic, "… differentiates between the right of each person to life (the first sentence) and the protection of an unborn human life (the second sentence), which shows us that there is a difference between the right to life as a personal, subjective element, and the protection of an unborn human life as an objective value" (point 2 of the decision). In view of the constitutional provision formulated in this way, which is completely different from the Croatian constitutional standard, the Slovak Constitutional Court finds that "… *nasciturus* is not a legal subject that is entitled to the right to life stated in the first sentence of Article 15.1 of the Constitution … The second sentence of Article 15.1 of the Constitution views protection of an unborn human life as a constitutional value… in relation to the values guaranteed by the Constitution legal protection is weaker … the key difference is primarily in the scope of discretion to which the legislator is entitled when making a decision on the legal regulation of abortion pursuant to the Constitution…" (points 9 through 12 of the decision of the Constitutional Court of the Slovak Republic US-12/01 of 4 December 2007). Considering that in accordance with the Slovak Constitution, therefore, *nasciturus* is not entitled to the right to life (because that is expressly stipulated), but the protection is only a "constitutional value" (some sort of a reflex of constitutional law), so that the standard *ubi ius, ibi remedium* does not apply, it is clear that the right of the pregnant woman to the protection of her privacy referred to in Article 16.1, and Article 19.1 and 19.2 of the Slovak Constitution, which is conceived precisely as a subjective constitutional right *stricto sensu* (and not a constitutional value), has primacy because of its stronger legal significance over the protection of an unborn life as a constitutional value, the normative status of which is weaker. (Portugal's constitutional model is conceived in a comparable way: an unborn child is expressly not regarded as a right-holder, but only as the embodiment of a constitutional value, which consequently enables precedence of the mother's right to self-determination, which is the legitimising foundation for the permissibility of abortion (point 5.1, paragraph 4, and point 31.2, paragraph 2 of the ruling)).

9. Article 21.1 of the Constitution of the Republic of Croatia, on account of its being substantively different from the Slovak and Portuguese constitutional grounds, prevents a comparison with the models of those countries as well as the justifiability of using the positions from the decisions of the constitutional courts of those states in this Croatian case. This is why the positions of the Constitutional Court doctrine (on an unborn being as (only) the embodiment of a constitutional value, and not a holder of the right to life), presented only as the expression of "modern constitutionalism", have very questionable useful value in this case (point 5.1 of the ruling). On the one hand, the criterion of "modernity" is not verifiable and it is relative and in itself is not an agenda for a constitutional law approach, and, on the other, in view of the notorious diversity in the constitutional models of European states, generalisations based on Portuguese, Spanish, French and Slovak casuistics are incomplete and cloud the reality of pluralism in national models. Despite all visible attempts to create an atmosphere of concordance concerning this problem, concordance evidently does not exist at any international level and even less so at the constitutional level within the meaning of the generally accepted supranational standards that would affect the domestic constitutional or Constitutional Court "scene". The regulation of the status of the embryo and abortion enters into the area of "free judgement of the national state", and so in the zone of constitutional identity and national sovereignty within the meaning of the supremacy of the constitution as the supreme right of the country ("constitutional patriotism"). This is why the terms and categories included in the constitutional provisions of a national state must be interpreted in accordance with the principle of the rule of law in the context of the highest values of the constitutional order of that national state and not by implanting foreign models that have different standards, texts and values.

10. In view of the content of Article 21.1 of the Croatian Constitution, there is no basis to differentiate between the status of one "entitled" to the right to life and the status of a "constitutionally protected value", a status which (point 45 of the ruling) includes an "unborn being", with the major consequence of only indirect constitutional protection on the basis of public interest (and not *proprio iure*). Public interest in that model terminates, and so does protection, in the event of conflict with the stronger right of the woman to privacy in the segment of "autonomous self-determination" when asked "whether she wishes or does not wish to bring pregnancy to term" (point 44.1 of the ruling). The said constitutional provision, however, recognises only one status of the holder of the right to life ("each human being"). *Nasciturus* is either a human being or not, *tertium non datur*. If it is, then *nasciturus* enjoys the constitutional guarantee of protection of the right to life by the state and its bodies, including the legislative branch in its full scope. If it is not a human being, then *nasciturus* does not fall within Article 21.1 of the Constitution of the Republic of Croatia and may not be a "protected value" either, because the Croatian Constitution does not recognise that category. In this case, the situation with the unborn would remain unchanged in relation to the situation according to the previous 1974 SRC Constitution. At the time, Article 248.1 guaranteed inviolability of life only to man, which indisputably permitted the conclusion that prenatal life is not included in protection extended by that Constitution. Therefore, I am of the opinion that in Article 21.1 of the Constitution an unborn being, if it "falls" within the norm, does not have "subtenant status", that the unborn being is not a lower-ranking right-holder of a reflex to the right to life, i.e., that *ius vivendi* belongs to the unborn being in full or not at all. Any other approach that would

include the creation of various categories of the right to life is at odds with the constitutional postulate of equality, because it results in different legal types of protection of the same right. The construction of an unborn being as a “protected value” with indirect legal protection, while at the same time not answering the question when life begins and determining the content of the term “each human being” is, in my opinion, interpretation *contra constitutionem*.

11. In terms of the international acts stated in the ruling, I do not see that the positions included in the various resolutions, recommendations, guidelines, etc., of the committees and specialised agencies of the UN, WHO and other bodies (point 26.2 of the ruling), the acts of which do not create international legal obligations for states, because they do not have the authority to impose obligations on national states under general international law, would have any constitutional significance for this case, so it is clear that they are acts with *ultra vires* effect.

11.1. In terms of the international treaties that bind the Republic of Croatia, because they became part of internal Croatian law whose force is above the law following their ratification (Article 141 of the Constitution), the *sedes materiae* for the question of the commencement of the right to life is indubitably the Convention on the Rights of the Child (point 10 of the ruling) of 20 November 1989, which entered into force on 2 September 1990 and became binding for the Republic of Croatia as of 8 October 1991 (OG — International Treaties 12/93). That Convention recognised the “inherent right to life” (Article 6.1) of every child, which should be interpreted contextually, along with the preamble of the treaty that is important for determining the aim and purpose of the instrument being interpreted, in accordance with the general rules for the interpretation of international treaties (Article 31 of the Vienna Convention on the Law of Treaties). This method of interpretation is also expressly emphasised in the case law of the ECtHR (*Golder v. The United Kingdom*, 1975; *Banković and Others v. Belgium and Others*, 2001). By examining the term “inherent right to life” that belongs to “every child” through the interpretative optics of the preamble (paragraph 9) of the Convention, in which it is emphasised that “… the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before (emphasis by author) as well as after birth", it is indisputable that in addition to all the benefits of protection extended by the Convention, including the fundamental right to life, which is a major condition for all other rights, the teleological interpretation of the Convention includes unborn children. It would be unreasonable to conclude that the Convention guarantees “special safeguards and care, including appropriate legal protection” to the unborn and, yet, that the key right, which is the condition for protection and care, is not guaranteed. The term of the right to life as an “inherent” right should be connected here with the term “inherent dignity … of all members of the human family …” (paragraph 1 of the preamble of the Convention), which in connection with the former does not exclude the unborn. The said Convention is *lex posterior* and *lex superior* in relation to the impugned act, with the effect of derogation of its provisions that are in contravention of the Convention.

11.2. With respect to the European Convention on Human Rights, it is essential to consult the case law of the ECtHR, which may confirm a violation of the ECHR even where the national court has ruled in a particular case perfectly and strictly in accordance with the national

constitution and law, but, from the perspective of the ECtHR, not in accordance with the ECHR. This shows that the ECHR, *de facto*, has significance that is above the constitution.

The case law of the ECtHR obviously does not restrict "national approaches" (point 15 of the ruling), because the ECtHR leaves the key question (whether the "unborn" are regarded as entitled to the right to life and whether the right to life or the right to privacy have primacy) to the domain of "free discretion" of national states. Therefore, it is equally legitimate for a state to choose or not to choose to regard the "unborn" as persons with the aim of protecting life (*Vo v. France*, § 85. — point 27.1.). It is not possible to derive any binding instruction for the national legislation from the case law of the ECtHR, as all options are possible. It is evident that the unborn are not expressly included, but they are not excluded from the term "everyone" in Article 2.1 ECHR, which regulates the right to life. In this context, "everyone" is also the "unborn" if so proclaimed by the national power (which is precisely the case with Article 21 of the Constitution of the Republic of Croatia). On the other hand, the provision of Article 8 ECHR (the right to respect for private and family life) does not provide the basis for constructing the "right to abortion" as an autonomous right that would, hierarchically, prevail over the right to life. Namely, with respect to the "right to abortion", the ECtHR is explicit: Article 8 ECHR (the right to private life) "… cannot be interpreted as conferring a right to abortion…" (*P. and S. v. Poland*, 2012; and *A., B. and C. v. Ireland*, 2010, § 214).

11.3. Finally, the decision of the Grand Chamber of the European Court of Justice of October 2011 in the Case C-34/10 *Brüstle v. Greenpeace*, which includes an explicit position on prenatal life — its beginning from conception and its protection (repeated also in the case of the same court C-364/13 of 18 December 2014) is of indisputable significance to this matter. According to the position of the CJEU, life is regarded as beginning from conception and it is protected from that moment, in the context of the patent protection of biotechnological innovations. This context, however, does not exclude the validity of extending the said position to the general problem of the status of the embryo, i.e., other normative fields that affect the question of the beginning of life and its protection, unless some other intended meaning with the same normative formulation is evident from the circumstances of the specific matter. In my opinion, in line with the interpretational requirement of terminological consistency in using norms - definitions, the position presented — that life as a biological-material reality begins at the moment of conception and enjoys legal protection — is applicable generally, because its source arises from objective empirically verifiable premises (the life cycle of new biological-material formation begins at conception). The described position shows the approach of the CJEU in the interpretation of the term human dignity in Article 1 of the Charter of Fundamental Rights of the European Union ("Human dignity is inviolable. It must be respected and protected"). In the context of the decision in Case C-34/10, it should be concluded that the protection of life is derived from respect of human dignity, which is an intrinsic property of human existence from the moment of conception.

12. In relation to the essence of the problem of the embryo's legal status, I do not agree with the opinion that "… the question of 'when life begins' is not within the jurisdiction of the Constitutional Court" (point 45.1 of the ruling) and that the Constitution is not to define the

notion of “each human being”, so that the ruling leaves the notion wholly unexplained (point 42.2 of the ruling).

From the side of formal logic, the final conclusion that the unborn being has only the status of an indirectly protected value under Article 21 of the Constitution (and not the status of someone entitled to the right to life) does not have, in this case, a valid premise (point 45 of the ruling) — namely, where is this derived from? This type of reasoning is a *non sequitur* if the initial notion of “each human being” is not defined (since its meaning and the referential framework are not specified) and, at the same time, in terms of the beginning of life, which is a key determinant for the unborn, the Constitutional Court does not have jurisdiction. What is then the basis for excluding *nasciturus* from the circle of those entitled to the right to life? As far as my position on Article 21 of the Constitution is concerned and on the duty of the Constitutional Court in this case, it is essential and quite self-evident that the Constitutional Court should interpret the notion of “each human being”, and such an interpretation requires essentially the defining of the beginning of life, in fact, the right to life. Without it, it is not possible to determine the beginning of constitutional protection and of the guarantee of the right to life. It is not possible at all to determine whether the legislator has regulated the matter of abortion in conformity with the Constitution and whether the counterposed rights were duly balanced in terms of constitutional law if the initial values subject to such balancing were not previously defined. It is also not possible to examine whether the Act has violated the constitutional right to life if the circle, or the scope of those entitled to that right, has not previously been interpreted. The consequence of the approach embraced in the ruling is, in essence, the exclusion of the unborn from the status of those entitled to the right to life and their positioning in the category of “protected value”. This status does not have a personal right ensured by the principle “where there is a right, there is a protection of that right”, and the status is completely dependent on the legislator’s evaluation of the opportunity of public interest in the scope and nature of protection that should be provided in the case of abortion. I am of the opinion that this construction of protection extended to the unborn is unfounded from the point of view of constitutional law.

The Constitutional Court must define terms that are a constitutional category. Not infrequently, such terms are defined in a broad framework, i.e., without radical strictness in refining them (e.g., peace-keeping, social justice, “or other status” in Article 14.4, humane treatment, public morals, etc.), so this is why it is necessary to apply adequate methods of interpretation and techniques to the interpretation of the constitutional text. The authors of the Constitution indubitably used the notion of “each human being” with the intention of expressing a specific content and meaning, and not to remain unclear. In my opinion, the said key formulation in Article 21.1 of the Constitution could not have been defined without full awareness that the style in which the constitutional text is formulated will have direct repercussions on the issue of the evaluation of the embryo’s status in the context of abortion, i.e., that the provision is not neutral. It is also clear that the framers of the Constitution obviously wanted to expand the circle of those whose life is protected by the Constitution in letter and spirit through the significant amendment to the earlier constitutional provision of Article 248.1 of the 1974 SRC Constitution (“the life of man is inviolable”). For the right to life, the existence of the life of a human being is sufficient and there is no need for anything else.

It is wholly erroneous to claim that the question of "when life beings" is not within the jurisdiction of the Constitutional Court. It was explained earlier that the beginning of life is the definitory determinant of "each human being" as a constitutional category.

The theoretical explanation that the question should be left "only and solely" to the Croatian Parliament, viz.: "… pursuant to the principle of the separation of powers and the constitutionally enshrined separation of competences" (point 5.1 of the ruling), does not seem acceptable to me. This is so because constitutional terms should be interpreted by the Constitutional Court. "Each human being" is not an irrelevant category from the aspect of constitutional law, but a crucial segment of the fundamental and highest-ranking constitutional right that is a condition for the realisation of all other rights. Regarding the formulation of the constitutional text, and the same is true for the Polish and German Constitutional Courts as they have comparable constitutional bases, the Croatian Constitutional Court must resolve the issue when the right to life begins, because this is when constitutional protection also begins. The principle of the separation of powers and the principle of democracy require that the Parliament regulates all fundamental social relations by law. However, not those that are regulated by the Constitution directly, or not in a way that is not in conformity with the Constitution. How would the Constitutional Court perform its constitutional role of protecting everyone from the arbitrariness or self-will of the public authorities, including from the "tyranny" of law, if it were deprived of its basic instrument — an authoritative interpretation of the Constitution that must be respected by everyone. Ultimately, the Constitution is what the Constitutional Court says it is. This is why in the present context there is no place for self-limitation of the Constitutional Court in the performance of its duties.

13. In terms of the question of the beginning of life, to begin with, there is indisputable scientific consensus in biomedicine that the life process of a new "formation" as a material reality whose existence is verifiable and that has its biological form (*somatic habitus*) begins at the moment of conception (fusion of gametes). There are no controversies regarding this, since this arises exclusively from meta-empirical discourse. Yet it is questionable whether this new biological entity has the character of a human being from the moment of its creation by conception in view of the human dignity inherent in each human being and whether it acquires the status of those entitled to the right to life as a subjective right *ab initio*.

In my opinion, it is indisputable that Article 21.1 of the Constitution, exclusively on the basis of a legally positivist approach, relates to an unborn being from the moment of its creation by conception. The "unborn" is a living formation (material reality), it is not part of still life, it is not a thing or an animal or an organ of its mother, it is of human origin (genetic humanness — conceived by human parents), it grows and develops autonomously further to its own genetic programme. This growth is purposefully guided and the formation is beyond any doubt a living being — a member of the human species. What is it if not a human being? To claim that a human being within the meaning of Article 21.1 of the Constitution is created at a later phase of development of the unborn, and not at the moment of conception, implies that the product of conception is an undefined living formation — a "non-being" or a "pseudo-being" — which then metamorphoses into a human being which, in the course of its progressive growth and

development (contrary to the general principle *ex nihilo nihil fit*), becomes entitled to the right to life.

From the legal point of view, the *onus probandi* in this controversy lies with the one claiming that the formation developing in the mother's womb is not a human being or is not a human being from its beginning.

In conclusion, in my opinion, the embryo is not an "unhuman being", i.e., a "non-being", but a human being in a certain phase of its development and that is why, pursuant to inherent human dignity, it is entitled to the right to life in accordance with Article 21.1 of the Constitution in its full scope. In the life process (which, in biological terms, begins from conception) as an ongoing process, it is not possible to determine reliably and non-arbitrarily a point at which this "ontological leap" from a non-being to a being occurs. The only point that is determined reliably and non-arbitrarily is the moment of conception at which the life process begins. It is then that a human being with inherent human dignity *ab initio* is created, regardless of the phase of its development, size, functional abilities, dependence on others or the existence of a developed consciousness about itself.

Any different conclusion — for example the conclusion that the biological form in which life that is of human origin exists does not mean at the same time the existence of human dignity, but that it is recognised only at a later stage by the legislator's arbitrary will — is not in accordance with the protection of life as a fundamental constitutional value. In such a solution, the legislator acts as an arbitrator and extends legal protection and human dignity further to its own arbitrary discretion based on exclusively quantitative criteria.

14. Given that, in accordance with the above analysis, an unborn being falls under the protection of Article 21.1 of the Constitution as entitled to the right to life, the impugned legislative model of abortion is not in conformity with the Constitution.

The right to be born (to come into this world) is inherent in the right to life and that right is above the right to privacy (the right to a certain lifestyle). Only the mother's right to life has equal legal ranking as the right to life of an unborn being.

The right to privacy does not imply the right to an abortion, since it negates and destroys the very essence of the right to life. *Vice versa*, the right to life does not destroy the very essence of the right to privacy, but limits it, because the quantitative content of the right to privacy can be expanded and reduced without undermining its identity, i.e., in the event of limitation, its essence is not destroyed. On the other hand, the right to life cannot be limited; it can only be either fully existing or completely ended. Life either exists or does not exist.

This is why I hold that the interpretation of the ruling in the part in which primacy is granted to the right to privacy against the constitutional category of the right to life is an interpretation *contra constitutionem*, because it negates the primary (fundamental) significance of the right to life that is a core right, placed higher than the right to privacy. This conclusion arises not only from the circumstance that this is a first-ranking right from the constitutional catalogue that is a logical condition (*conditio sine qua non*) for all other rights, but especially from the fact that the

right to life within the meaning of Article 17.3 of the Constitution is precisely the material core (inviolable essence) of the Constitution that may not be limited even in the event of extraordinary situations and threats to the state, thus falling into the category of the constitutional identity of the Republic of Croatia. The right to privacy does not have such a status and is not comparable to the right to life in terms of value.

Therefore, the impugned legislative model is contrary to the Constitution, because the legal possibility of disposing with or terminating unborn life within the meaning of Article 15 of the impugned Act on the basis of unlimited subjective will represents a manifest violation of the constitutional obligation of the state authority set out in Article 21.1 of the Constitution. The said provision binds the state to extend comprehensive (including legal) protection of life to any human being, even *nasciturus*. Considering that human life is the highest constitutional value, this obligation of the state authority is particularly challenging and serious.

The impugned Act indubitably violates that obligation grossly.

Miroslav Šumanović, m.p.