Decision

dated 28 May 1997 (K. 26/96)

The Constitution Tribunal sitting with the bench composed of the Chairman and Reporting Judge, Andrzej Zoll, Zdzisław Czeszejko-Sochacki, Tomasz Dybowski, Lech Garlicki, Stefan J. Jaworski, Krzysztof Kolasiński, Wojciech Łączkowski, Ferdynand Rymarz, Jadwiga Skórzewska-Łosiak, Wojciech Sokolewicz, Janusz Trzciński and Błażej Wierzbowski

(...)

held

1. article 1, sub-section 2 of the Act dated 30 August 1996 Amending the Act on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion and Amending Certain Other Acts (Journal of Laws, Number 139, Item 646), **to the extent whereby the protection of life at the prenatal stage depends on the decision of the ordinary lawmaker, is inconsistent with articles 1 and 79, section 1 of the constitutional provisions that were upheld on the basis of article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Local Self-government** (Journal of Laws, Number 84, Item 426; amendments 1995, Number 38, Item 148, Number 150, Item 729; 1996, Number 106, Item 488), **as it violates the protection of human life at any stage of its development which is guaranteed by the Constitution.**

2. article 1, sub-section 4b and 4c of the Act dated 30 August 1996 Amending the Act on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion and Amending Certain Other Acts (Journal of Laws, Number 139, Item 646), is not inconsistent with article l sod 67, sections 1 and 2 and article 79, section 1 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Local Self government (Journal of Laws, Number 84, Item 426; amendments in 1995, Number 38, Item 148, Number 150, Item 729; 1996, Number 106, Item 488).

3. article 1, sub-section 5 of the Act dated 30 August 1996 Amending the Act on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion and Amending Certain Other Acts (Journal of Laws, Number 139, Item 646), **in the part concerning article 4a section 1, cub-section 4 of the Act dated 7 January 1993 on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion** (Journal of Laws, Number 17, Item 78, as amended in 1995, Number 66, Item 334) **is inconsistent with articles 1 and 79, section 1 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Local Self government** (Journal of Laws, Number 84, Item 426; amendments: 1995, Number 38, Item 148, Number 150, Item 729; 1996, Number 106, Item 488) **because it legalizes abortion without offering sufficient justification therefor as to the need to protect other constitutional values, rights or freedoms and uses vague legalization criteria, whereby the constitutional guarantees for human life are violated.**

4. article 2, sub-section 1 of the Act dated 30 August 1996 Amending the Act on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion and Amending Certain Other Acts (Journal of Laws, Number 139, Item 646), is not inconsistent with articles 1 and 67, sections 1 and 2 and article 79,

section 1 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Local Self government (Journal of Laws, Number 84, Item 426; amendments in 1995, Number 38, Item 148, Number 150, Item 729: 1996, Number 106, Item 488).

5. article 2, sub-section 2 of the Act dated 30 August 1996 Amending the Act on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion and Amending Certain Other Act (Journal of Laws, Number 139, Item 646), **is inconsistent with articles 1 and 67, section 2 of the constitutional provisions upheld by article 77 of the Constitutional AM dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Loca1 Self government** (Journal of Laws, Number 84, Item 426; amendments in 1995, Number 38, Item 148, Number 150, Item 729; 1996, Number 106, Item 488) **as by depriving a child of the possibility to claim damages ensuing from property rights against its mother, its rights were thereby limited in a way contrary to the democratic rule of law and equality.**

6. article 3, sub-section 1 of the Act dated 30 August 1996 Amending the Act on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion and Amending Certain Other Acts (Journal of Laws, Number 139, Item 646), **is inconsistent with articles 1 and 79, section 1 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Local Self government** (Journal of Laws, Number 84, Item 426; amendments: 1995, Number 38, Item 148, Number 150, Item 729; 1996, Number 106, Item 488) **as it violated the constitutional guarantees concerning the protection of the health of a conceived child and its undisturbed development.**

7. article 3, sub-section 2 of the Act dated 30 August 1996 Amending the Act on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion and Amending Certain Other Acts (Journal of Laws, Number 139, Item 646), **is not inconsistent with articles 1 and 67, sections 1 and 2 and article 79, section 1 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Local Self government** (Journal of Laws, Number 84, Item 426; amendments in 1995, Number 38, Item 148, Number 150, Item 729; 1996, Number 106, Item 488).

8. article 3, sub-section 4 of the Act dated 30 August 1996 Amending the Act on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion and Amending Certain Other Acts (Journal of Laws, Number 139, Item 646), **is inconsistent with articles 1 and 79, section 1 of the constitutional provisions upheld by article 77 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Local Self government** (Journal of Laws, Number 84, Item 426; amendments in 1995, Number 38, Item 148, Number 150, Item 729; 1996, Number 106, Item 488) **as it curtailed the legal protection of the health of a conceived child to such an extent that the remaining legal measures cannot fulfill the requirements of satisfactory protection of that constitutional value.**

Reasoning

(...)

3. (...)

The preliminary analysis of the contents of the provisions of the Act dated 30 August 1996 that were challenged by the applicant leads to the conclusion that they define the legal status of a fetus and the limits of legal protection of a fetus' interests, and in particular its health and life. Therefore, it seems that considerations concerning the constitutionality of the provisions challenged by the applicant should begin with finding out whether and to what extent the life and health of a fetus is covered by the protection within the framework of the constitutional regulations. Such findings will set the constitutional basis for a review of the majority of provisions of the Act dated 30 August 19% which are the subject of this evaluation.

The binding Polish constitutional regulations do not contain any provision that would directly address the protection of life. Nevertheless, it does not mean that human life is not a value protected under the Constitution. The fundamental provision from which the constitutional protection of human life should be inferred is article 1 of the constitutional provisions that have been upheld and, in particular, the democratic rule of law. Such a state can only exist as a commonwealth of people and only people can be recognized as the actual carriers of rights and obligations laid down by the State concerned. Life is the fundamental attribute of a human being. When that life is taken away, a human being is at the same time annihilated as the holder of rights and obligations. If the essence of a rule of law is a set of fundamental directives inferred from the sense of law proclaimed through democratic procedures, providing for the minimum level of fairness thereof, therefore, the first such directive must be the rule of law's respect for the value, i.e. human life from its outset, as its absence excludes the recognition of a person before the law. The supreme value of a state under the democratic rule of law shall be n human being and his/her interests of the utmost value: Life is such an interest and, in a state under the democratic rule of law, it must be covered by constitutional protection at every stage of development.

The value of legal interest covered by constitutional protection, such as human life, including life at the prenatal stage of development, cannot be subject to any differentiation. There are no sufficiently precise and justifiable criteria allowing for such a differentiation with respect to the stage of development of human life. Therefore, human life becomes a value protected under the Constitution from its outset. The same applies to the prenatal stage. The extension of constitutional protection over that stage of human life is furthermore acknowledged in the Covenant on Children's Rights ratified by the Republic of Poland on 30 September 1991. Paragraph 10 of the preamble, referring to the Declaration of Children's Rights, says that „a child, due to its physical and mental immaturity, requires special care and protection and in particular appropriate legal protection both before and after birth." The inclusion of the above rule in the preamble of the Covenant must lead to the conclusion that the guarantees included in the Covenant also apply to the prenatal stage of human life.

The recognition of the fact that every human being is eligible for the protection of his/her life from the moment of conception, has also been reflected in ordinary legislation. Article 1 of the Act on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion, both before and after amendment, declares that the right to life is protected, also at the prenatal stage, and that causing the death of a conceived child by way of abortion is, in principle, a prohibited and punishable act (new articles 152a and article 152b of the Penal Code, in the context of circumstances providing for the legalization of abortion).

The only grounds for banning abortion that generally (it will ensue from further deliberations) apply to pregnant women as such, must be the recognition of the value of the life of a conceived human being.

The legal protection covering the life of a fetus is also contemplated by other provisions in force. Under article 31 of the Penal Code of 1969, the death penalty does not apply to pregnant women, irrespective of when they become pregnant. There is only one rational justification for this provision, namely the one indicating the value of the life of a human being in the womb of a sentenced woman. The protection of a fetus' life has priority over any and all justification offered by the penal policy; in that case the value of such justification is greater than the right to life of a child's mother. The regulation contained in article 31 of the Penal Code expressly refers to the value of a fetus' life as seen by the lawmaker.

The regulation, based on which the life of a conceived child can be regarded as a constitutional value, is also in article 79, section 1 of the constitutional provisions laying down the obligation to protect motherhood and family. It is justifiable to say that the protection of motherhood cannot only mean the protection of interests of pregnant women and mothers. The nominative qualification used in the constitutional provisions points to a definite relation between a woman and a child, including a child that has just been conceived. Pursuant to article 79, section 1 of the constitutional provision, the entirety of this relation bas the quality of constitutional value, bence it covers the life of the fetus, since its absence would break the motherhood relation. Therefore, the protection of motherhood cannot be understood as protection exercised from the point of view of the interests of a mother/pregnant woman only. Similar conclusions should also be drawn fiom an analysis of the notion „family" as a constitutional value. This notion entails the protection of a certain complex social situation being a sum of relations, primarily between parents and children (although, in a wider sense, the notion of family should also cover other relations arising from blood ties or adoption). The basic, procreation function of the family must assume that the life of a conceived child must be covered by protection offered to the family under the constitution. The protection offered to the relation of fatherhood or motherhood to born children should also extend to children at the prenatal stage of life.

The statement that human life, at each stage of development, is a constitutional value and is subject to protection, does not mean that the intensity of that protection at each stage of life and in all circumstances should be the same. The intensity and type of legal protection is not a simple consequence of the value of the protected interest. The intensity and type of legal protection, apart from the value of protected interest, is influenced by numerous factors of a different nature that must be taken into account by the ordinary lawmaker when deciding on the type and intensity of legal protection. Nevertheless, that protection should always be sufficient from the point of view of the value under protection.

The constitutional guarantees for health of a conceived child should be primarily inferred from the constitutional value of human life, also at the prenatal stage. The protection of human life cannot be solely understood ns the protection of the minimum biological functions necessary to exist, but ns the guarantee's for normal development and also for the acquisition and maintenance of a normal psycho-physical condition relevant for a given age of development (stage of life). No matter how many factors are deemed material from the point of view of the condition in question, it e beyond doubt that it covers a certain optimal, from the point of view of life processes, condition of the organism of a given person, both in the aspect of physiological end mental function. This condition can be identified as the notion of psycho-physical health. Therefore, the constitutional guarantees for the protection of life should also necessarily extend to the protection of health, and provisions containing such guarantees are, at the same time, the basis for inferring the constitutional obligation to protect

health, irrespective of the degree of physical, emotional, intellectual or social development. Since human life, also at the prenatal stage, is a constitutional value, any attempts to limit the recipients' legal protection of health at that stage would have to offer a non-arbitrary criterion justifying such differentiation. The existing state of empirical sciences cannot provide the basis for the introduction of such a criterion.

The view that human life should be covered by legal protection also at the prenatal stage, is directly confirmed in the Covenant of Children's Rights. Under article 24, section 1 of the Convention „the States-Signatories recognize a child's right to enjoy the best possible state of health..." Section two of the same article provides that „the States-Signatories shall attempt to ensure the full realization of that right and in particular shall adopt relevant measures in order to:... d) ensure appropriate prenatal and postnatal care for mothers." Therefore, irrespective of the wording of paragraph 10 of the preamble to the Covenant, in light of which the notion of a child used in the Covenant should also cover unborn child, article 24 contains a plain directive that „the right to enjoy the best possible state of health" also applies to a conceived child. It can be the only explanation for the obligation ensuing from section 2, namely the provision of prenatal care for mothers. This obligation was not introduced in view of the interest of a pregnant woman alone but, as laid down in article 24, section 2, in principio to ensure the full realization of that ri ht (e.g., the right set forth in section 1). Therefore, it expressly applies to guarantees of enjoyment of the best possible health condition by a conceived child.

The basis for the constitutional protection of the health of an unborn child can also be found in article 79, section 1, whereby, *inter alia*, motherhood and family are recognized as constitutional values. As mentioned earlier, the notion of motherhood expresses the necessary relationship between mother and child existing on many levels – biological, emotional, social and legal. The function of this relationship is the normal development of human life at an early stage, when special care is needed. This care is irreplaceable at the earliest stage when it is effected on the biological level. No one but the mother can sustain the life of a conceived child at that stage.

In consideration of the aforesaid function of motherhood, the constitutional protection of that value cannot be understood as being in the mother's interest only. The fetus and its normal development must receive equal protection in that regard. It naturally covers the protection of the health of a conceived child and the ban against causing health disorder or bodily injury to a fetus.

Taking all the foregoing arguments into account, it should be beyond doubt that the constitutional provisions guarantee the protection of health of a conceived child and, in particular, it can be inferred from these provisions that the lawmaker is responsible for laying down a ban on violating the health of a conceived child and remedies warranting the adequate observance of this prohibition.

4.1. Pursuant to article 1, section 2 of the Act on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion of 30 August 1996 (Journal of Laws, Number 139, Item 646), the existing article 1 of the Act dated 7 January 1996 on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion (Journal of Laws, Number 17, Item 78, amended in 1995, Number 66, Item 334) has been amended to read as follows:

„The right to life shall be protected, including the prenatal stage thereof, to the extent laid down in the law."

Before the amendment, article 1, section 1 read as follows:

„Every human being shall have the inherent right to life from the moment of conception.” And section 2:

„The life and health of a child from the moment of conception shall be under legal protection.” Before the amendment, article 1 of the Act of 7 January 1993 clearly stated that a conceived child had the right to life by declaring that this right was inherent. Furthermore, by saying that such child's life and health are under legal protection, it confirmed that both these rights became legal interest, hence repeating the guarantee ensuing from constitutional provisions and in particular articles 1 and 79, section 1.

Following the amendment by the Act dated 30 August 1996, article 1 of the Act of 7 January 1993 says that the right to life shall be protected, also at the prenatal stage to the extent laid down in the law. The resulting difference is as follows:

a) the declaration of inherent right to life has been canceled;

b) the identification of the period during which the right to life is available was modified by replacing the phrase „from the moment of conception” with the phrase „the prenatal stage,” and furthermore

c) the child's health has been deleted from the scope of legal protection contemplated under article 1, likewise child's health before birth; another difference is the fact that

d) before amendment, article 1 of the Act of 7 January 1993 did not specify in detail "legal protection” covering the life and health of a conceived child. The same amended provision provides that the right to life at the prenatal stage is protected to the extent specified in the law. Therefore, the assessment as to whether article 1, as worded in the amended act, conforms with the constitution, shall comprise two independent issues:

a) whether the contents of the orders and bans ensuing from this provision collide with a specific constitutional value; and

b) whether such a value has been violated by the abrogation of earlier provisions.

Article 1, sub-section 2 of the amended act has a double normative meaning: it derogates earlier rules by enacting a new regulation. Both the lawmaker's acts are subject to review by the Constitutional Tribunal in light of their compliance with constitutional standards.

As regards the new meaning of article 1 of the Act of 7 January 1993, whereby „the right to life shall be protected, including the prenatal stage thereof to the extent laid down in the law,” doubts relate, as also alluded by the lawmaker, to the expression used in the above provision. namely that the right to life at the prenatal stage shall be protected „to the extent laid down in the law.” This expression means that the life of an a *nasciturus* is covered by legal protection, however only to the extent clearly defined in ordinary law.

The notion of „limits of protection” covers both the rule which directly prohibits the violation of specified interests, in this case – the life of *a nasciturus*, as well as the means provided for the enforcement of that rule. The stipulation whereby the life of *a nasciturus* is only protected within statutory limits must mean that the regulation contained in the ordinary law is the only source of prohibition, if any, to impair life. On a similar basis, it is only the ordinary law that may lay down the means and measures to enforce that prohibition.

The power of the ordinary lawmaker to lay down measures guaranteeing the observance of the rule prohibiting the impairment of life of a conceived child is quite obvious in the second case, however granting the exclusive power to lay down the prohibition as such cannot be reconciled with the lawmaker's obligation to protect constitutional values.

Consequently, the dependence of the binding force of the ban against violating *a nasciturus* life on regulations contained in ordinary laws leads to a complete lack of protection of its life in a situation when the lawmaker would fail to enact such a prohibition or limit its extent.

Therefore, the current wording of article 1 of the Act provides the ordinary lawmaker with the right to decide whether and to what extent the life *of a nasciturus* is covered by legal protection. Accordingly, it means that the statutory basis for such a prohibition is required for the binding force of the prohibition to violate the life of *a nasciturus* within the legal framework. However, this authority amounts to the infringement of constitutional provisions referring to the protection of life.

If the life of a human being, including that of a conceived child, is a constitutional value, then no ordinary law can lead to any kind of censorship or suspension of the binding force of constitutional provisions. The ban against impairing human life, including that of a conceived child, ensues from rules of a constitutional nature. Therefore, the ordinary lawmaker cannot have the power to decide on the conditions of the binding force of such a prohibition, thus turning constitutional rules into conditional rules. In particular, it cannot make it dependent on regulations contained in ordinary laws. Hence, the enactment, by the ordinary lawmaker, of any regulations whereby the binding force of constitutional guarantees would be conditional only, is in conflict with the constitutional rules.

Since life, including life at the prenatal stage, is one of the fundamental constitutional values, article 1 of the statute, as worded in the Act dated 30 August 1996, whereby the prohibition to violate that value is made dependent on the ordinary lawmaker's decision, contravened the constitutional regulations which were the basis for protecting life at the prenatal stage, in particular articles 1 and 79, section 1 of the constitutional provisions that remained in force. The ordinary lawmaker is only authorized to 1ay down exceptions, if any, whose occurrence, in consideration of the conflict of interests which are constitutional values, rights or freedoms, necessitates the sacrifice of one of the conflicting interests. The lawmaker's consent to sacrifice one of the conflicting interests, ns resulting from the conflict of one constitutional interest with another constitutional interest, right or freedom, shall not deprive it from the attribute of a constitutional interest eligible for protection.

The earlier analysis of the normative amendment of article 1 proves that the article has been narrowed. As mentioned before, the new provision does not mention the legal protection of a child's health, including a conceived child, nor does it include the declaration of the inherent nature of the right to life and, in addition, it lays down a different period during which the right to life is covered by legal protection.

The abrogation of the declaration that the right to life is inherent cannot be deemed a normative amendment. The inherent nature of a given right or freedom does not depend on the lawmaker's whim and, therefore, it cannot he abolished through a legal act (derogation). The scope of the lawmaker's power does not cover the award or withdrawal of the right to life treated as a constitutional value. Therefore, irrespective of the fact whether or not the lawmaker directly states it in the law, it cannot affect the inherent nature of the right to life.

Since the lawmaker used a different expression to specify in article 1 the period during which human life is covered by legal protection, we can infer that its intention was to modify the extent of that protection thereby. The change of words is, however, of no special difference to meaning. Before the amendment, article 1, section 1 of the law referred to the period „from the moment of conception" and, after the amendment, it provides for the „prenatal stage." The latter expression indicates, in particular, that the legal protection of human life also covers a period before birth, however the initial point thereof is unspecified.

Nevertheless, the change of words alone cannot lead to the conclusion that the lawmaker wanted to shift the moment from which protection applies. However, in a situation where the new phrase does not provide a basis for claiming that the period of protection of life at the prenatal stage has been narrowed when compared to that specified in article 1, section 1 before the amendment, the change of words alone does not provide a basis for imputing the lawmaker with such intentions. Therefore, the extent of protection of human life as ensuing from constitutional rules, shall be decisive and the amendment of article 1, section 1 of the Act of 7 January 1996 cannot be interpreted as an attempt to define a new moment from which human life is covered by legal protection.

As it has been established already, the health of a human being, including that of a conceived child, has unquestionably the quality of being a value covered by constitutional protection. Therefore, any and all actions aimed at the impairment of human health must be considered, from this point of view, as an impairment of legal interest. The abrogation of the provision which only reaffirms the constitutional protection of human health, including that of a conceived child, cannot be construed as legalization of the impairment as such or a waiver of legal sanctions (e.g., penalties) by the lawmaker applicable to actions that impair that interest. However, the waiver of sufficient measures of protection of the interest, as a constitutional value, must be regarded as a breach under constitutional guarantees for such interest.

As said before, the constitutional guarantees extended to a given interest, right or freedom lead to the recognition of such a value as a legal interest. Such value becomes eligible for legal protection and is, first and foremost, the ordinary lawmaker's responsibility. The basic instrument guaranteeing this protection is the enactment of orders or prohibitions aimed at the inviolability of that interest. Due to the existence of these prohibitions (or orders), any specific action violating the constitutional value in question shall be deemed unlawful.

This type of protection, although of an original and basic nature, is not sufficient. The necessary component of the system of protection of constitutional values is the introduction of specific consequences ensuring the efficiency of subject matter rules, and procedures allowing for the enforcement of such subject matter rules, as well as the consequences of the failure to respect them.

We may say that the constitution is and may be the direct source of orders and bans in force within the legal system and applying to specified constitutional values. The ban against violating the freedom of expression, association, security of the person or the inviolability of correspondence stem from the Constitution alone. However, concurrently, if the Constitution is the sole basis to determine whether an action violating or limiting a given constitutional value is illegal, it would be necessary to establish whether the action concerned can be sufficiently justified in connection to the exercise of another constitutional value. In particular e.g., the violation of an assailant's life may be justified by the need to protect the victim's life.

Therefore, in spite of the constitution's direct regulatory power, the ordinary lawmaker is not released from the obligation to proclaim subject matter rules referring to the protection of constitutional values and, in particular, any conflicts that might arise in connection with the practical application of constitutional values should be resolved by it on a general basis. In addition, the lawmaker should define a procedure for the enforcement of subject matter rules by laying down legal consequences if they are not respected and enforcement procedures.

As regards the latter, the lawmaker has considerable latitude to pursue a specific policy ensuring the effectiveness of any subject matter rules proclaimed by it. However, there are

limits to this freedom. In particular, the lawmaker cannot waive the protection of a given legal interest in its entirety, as it is obligated to ensure „sufficient protection" thereof.

The normative sense of the abrogation of article 1, section 1 of the Act dated 7 January 1993 in the part concerning the protection of a child's health, including that of a conceived child, should be assessed in the above context. The abrogation means that article 1 of that statute can no longer be relied on as regards the inference of the ban against impairing a child's health, including that of a conceived child. This determination alone does not constitute the basis for deeming this amendment contrary to the constitutional provisions referred to in the petition. The challenged statute's compliance with the Constitution shall be decided by the rules introducing legal remedies furthering the protection of a conceived child's health.

4.2. The challenged article 1, sub-section 4, letter b, vests new wording to article 4, section 2 of the Act of 7 January 1993 by stating, in particular, that:

„The Minister of National Education shall introduce a subject Knowledge of Human Sexual Life' to the school curriculum."

The amended provision actually repeats the earlier regulation, however where article 4, section 2 – before the amendment – referred to the introduction of specific knowledge to the scholastic curricula, after the amendment – this obligation was more precisely defined as the obligation to introduce a new subject. This obligation concerns knowledge of human sexual life. However, it does not abolish the obligation arising from article 4, section 1 of the Act of 7 January 1993 to introduce to the curriculum knowledge „about the principles for conscious and responsible parenthood, the value of the family, conceived life and the methods and means of birth control".

Both before and after the amendment, article 4, section 1 establishes the rule of jurisdictional grounds for a decision to modify scholastic curricula in compliance with that provision. However, after the amendment, that power was modified by imposing on the minister the obligation to introduce a specific subject. Nevertheless, it does not seem that this formulation of the Minister of National Education's power would violate any constitutional rules.

The general rules for introducing new school subjects and modifying the binding curriculum are laid down in the Education System Act. Under that statute, the Minister of National Education has the general power to define the scholastic curricula, specifically to decide on the contents and character of individual school subjects. Nevertheless, the Minister of National Education does not have complete freedom in curriculum development; this is the case not only because the operation of educational institutions must necessarily take into account parents' constitutional rights to bring up their children in line with a defined hierarchy of values and life philosophy. As regards primary education, education is enforced by means of compulsory education. The latter, likewise any and all obligations imposed on citizens by the State, is subject to detailed constitutional review.

Obligating the Minister of National Education to introduce a new subject called the „knowledge of human sexual life" does not constitute independent jurisdictional grounds for a decision. The fulfillment of that obligation should primarily take into account any and all rules directly ensuing from the Education System Act which provides a general framework for the contents and purpose of school education and the procedure for determining the contents of scholastic curricula. In addition, the exercise of the power laid down in article 4, section 2 should be consistent with constitutional rules and values.

However, until the Minister of National Education exercises his power contained in the provision challenged by the applicant, there are no sufficient grounds for claiming that the delegation as such is contrary to the Constitution. And although imparting knowledge about human sexual life touches upon axiological issues which in no case can be reduced to purely empirical knowledge escaping moral assessment, it does not mean that teaching this subject must necessarily lead to the violation of specific constitutional rules, and primarily the parents' right to „provide for such upbringing and teaching children which agree with their own religious and philosophical beliefs" (see article 2, sentence 2 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Values).

Therefore, we must acknowledge that the Minister of National Education's obligation, as laid down in article 4, section 1 in the wording set forth in article 1, sub-section 4b of the Act dated 30 August 1996, to introduce a new school subject entitled „Knowledge of Human Sexual Life" does not violate, as such, any rules of a constitutional nature.

4.3. The challenged regulation of the amended Act dated 30 August 1996 introduced a new provision to the Act dated 7 January 1993 on Family Planning, the Protection of the Human Fetus and the Conditions for the Admissibility of Abortion, whereby an abortion may only be performed by a physician when the pregnant woman's living conditions are extremely difficult or when her personal situation is difficult (article 4a, section 1) and the pregnancy continued for no more than 12 weeks (article 4a, section 2). The formal condition for the performance of abortion by a physician is the submission of a written consent by the woman (article 4a, section 4) and her statement concerning difficult living conditions or difficult personal situation and, furthermore, a certification of consultation from some other physician providing basic medical care besides the abortionist or some other authorized person (article 4a, section 6). At least three days must expire between the consultation and the abortion. The procedure can be performed in a public health care institution or in private surgery. At the same time, the lawmaker declared (article 4b) that persons covered by social insurance or eligible for free medical care under separate provisions shall have the right to have the abortion performed free of charge in a public health care institution.

The assessment of the normative importance of article 4a, section 1, sub-section 4 proves that it legalizes certain actions aimed at the performance of abortion. Therefore, it sanctions actions which, as a rule, are prohibited. In the context of the remaining provisions of that statute and, in particular, the new wording of article 1 and articles 152a and 152b of the Penal Code, we must also conclude that, on the grounds of the new regulations applicable to a conceived child, its life remains protected from the moment of conception and any and all actions aimed at taking its life, abortion in particular, are generally prohibited.

However, article 4a, section 1, sub-section 4, limits this prohibition by authorizing a physician to kill a fetus living for less than 12 weeks, against the submission of documents referred to in article 4a, sections 4 and 6 by the pregnant woman, provided that three days elapse between the aforesaid consultation and the actual procedure.

The legalization of abortion-related actions taken by the physician must necessarily entail auxiliary activities related to abortion and performed by other medical personnel, likewise the activity of the mother, aimed at the performance of abortion by a physician. Nevertheless, article 4a, section 1, sub-section 4 does not constitute the basis for legalizing the activities taken individually and directly by a mother causing the fetus' death.

The conclusion, that the regulation contained in article 4a, section 1, sub-section 4, entails legalization, should also be inferred from the fact that the lawmaker provided for financing abortion procedures performed in public health care institutions with public funds and, furthermore, that article 4b bestowed on pregnant women the right (claim) to abortion

addressed to public health care institutions. Hence it is not possible to claim, in the present legal framework, that abortion performed by a physician on the grounds of what is termed the social situation provided for in article 4a, section 1, sub-section 4, which contemplates a pregnant woman's difficult living conditions or difficult personal situation, that it is only a circumstance excluding the possibility of applying penal sanction with no reference to the lawfulness or illegality of abortion as such.

Such an interpretation would be admissible if the regulation of article 4a, section 1, sub-section 4 was an integral part of the Penal Code and supplemented, in particular, the abrogated article 149a, paragraph 3 containing a list of circumstances in which the person who caused the death of a conceived child does not commit crime. However, since this regulation is contained in a separate law which does not specify in detail the types of punishable actions, the fact of putting public institutions under an obligation to take organizational abortion-related activities and, furthermore, financing them with public funds, removes any trace of doubt that, under the provisions in force since 4 January 1997, abortion is legal in circumstances laid down in article 4a, section 1, sub-section 4.

The purpose of abortion allowed by the lawmaker under article 4a, section 1, sub-section 4, is to expel a developing fetus (embryo) from its mother's organism. Since this provision applies to abortion until 12 weeks of life, at this stage of medical science, the expulsion of a fetus from a mother's body is equal to causing the death of that fetus. The lawmaker does not specify in detail whether the fetus dies when still in its mother's organism or after its expulsion from that organism.

This kind of abortion necessarily entails taking the life of a developing fetus. The essence of the regulation under review, contained in article 4a, section I, sub-section 4, is the legalization of activities aimed at taking the life of a fetus, to be taken in specific circumstances defined in this provision. Therefore, in order to assess whether or not this legalization conforms with the Constitution, one should establish whether:

a) the interest, whose violation has been legalized by the lawmaker, is a constitutional value;

b) the legalization of such violations of that interest can be justified against constitutional values, in particular, as the outcome of resolving the conflict of specific values, rights or freedoms guaranteed under the Constitution; and

c) the lawmaker respected the constitutional criteria for resolving such conflicts and, in particular, whether it observed the requirement, which has been many times inferred by the Constitutional Tribunal from article 1 of the constitutional provisions (the democratic rule of law), of resolving conflicts between the interests, rights and freedoms protected under the Constitution on a proportional basis.

The recognition of the fact that human life, also at the prenatal stage, is a constitutional value, is without prejudice to the point that in certain exceptional situations the protection of that value may be limited or even waived in order to protect or enforce other constitutional values, rights or freedoms.

The decision of the ordinary lawmaker who waives the protection of a given constitutional value or even legalizes events of violations of that value, must be justified on the basis of the aforesaid conflict of constitutional interests, rights or freedoms. Nevertheless, the lawmaker is not entitled to resolve such conflicts in a discretionary, arbitrary manner Its guiding principle should be, in particular, the result of comparison of conflicting interests, rights or freedoms. The criteria for the extent of admissible violation should be adequate to the essence of the conflict pending resolution.

From that point of view, the regulation contained in article 1, sub-section 5 of the Act dated 30 August 1996, in the part covering the legalization of abortion when the living conditions of a pregnant woman are difficult or her personal situation is difficult, does not meet the above requirements · in several respects.

As it is possible to infer from article 4a, section 1, the grounds for legalization of abortion laid down in sub-section 4 were the difficult living conditions or the difficult personal situation of a pregnant woman. When confronted with the remaining grounds for abortion listed in article 4a, section 1, we may conclude that such difficult living conditions and in particular the difficult personal situation does not mean any threat to life or health of a pregnant woman (as regulated under sub-section 1) nor results from any genetic defects of the fetus (sub-section 2), nor is it related to the fact that the pregnancy is a consequence of a prohibited act (sub-section 3). Therefore, sub-section 4 had to be laid down for situations that do not fall within the scope of the remaining provisions contained in article 4a, section 1.

As far as difficult living conditions are concerned, they include in particular the financial situation which, as pregnancy progresses and later on, following the birth of a child, may further deteriorate, or the opportunity for improvement could be forfeited. In case of a difficult personal situation, the lawmaker probably meant a specific mental condition related to pregnancy. This condition which may result from confused relations with other people (both family members and others) or arising in connection with the necessity to curtail the fulfillment of certain needs of a woman, including her personal rights and freedoms.

Therefore, although the grounds specified in article 4a, section 1, sub-section 4, are rather vague (and will be discussed later), it is possible to conclude there from that the value protected under that regulation would be the maintenance of a specified property status by a pregnant woman who could experience deterioration or lose the chance for improvement due to the continuation of pregnancy and giving birth to a child or, possibly, the maintenance, by a pregnant woman, of the existing status of her relations with other people and the scope of fulfillment of specific needs, rights and freedoms.

However, the conditions laid down in article 4a, section 1, sub-section 4 must be construed in light of section 6 of the same provisions. According to that regulation, it is only the woman herself who can identify the circumstances listed in sub-section 4 by submission of a relevant statement in that matter. Hence, the lawmaker prejudged that the grounds described in article 4a, section 1, sub-section 4 should be understood as subjective. Therefore, in light of that provision, the legal interest shall be a woman's subjective conviction of a possible threat to her financial situation, personal relationships or the opportunity to fulfill own needs, rights and freedoms.

The grounds laid down in article 4a, section 1, sub-section 4 do not refer to extreme situations which, at the same time, could be deemed inconsistent with the principle of protecting dignity of a human being.

Furthermore, it is possible to infer from the preamble to that Law that the regulations in question were proclaimed on the basis of, *inter alia*, recognition of every person's right to a responsible decision to have children.

The comparison of the value of such interest that are in conflict in view of constitutional standards, disqualifies the regulation contained in article 4a, section 1, sub-section 4. Human life, as underlined in the preamble to the statute, is the fundamental interest of a human being. The right of a pregnant woman not to deteriorate her financial situation results from the constitutional protection of freedom of free development of one's living conditions and the related right of a woman to satisfy her own financial needs and those of her family. However,

that protection cannot be so far-reaching as to lead to the violation of the fundamental interest, namely human life, as the conditions of existence are of a secondary nature and may vary.

As mentioned earlier, in the event of a difficult personal situation, the protection of human life at the prenatal stage may be in conflict with a number of various legal interests relating to reputation, proper relations with other persons, the ability to exercise specific rights and freedoms. However, the lawmaker has not specified which constitutional value is concerned. The notion of „a difficult personal situation" used by the lawmaker does not provide for even approximate identification of the designations concerned. The situation become more complex when we try to define that notion in the context of indications resulting from system interpretation. The difficult personal situation is not a situation involving any threat to life or health (referred to in article 4a, section 1, sub-section 1) or a difficult financial situation since the latter is expressed, although not in a very precise manner, by the phrase „difficult living conditions." Furthermore, the difficult personal situation is described as a situation which is not a simple result of pregnancy since such simple obstructions are not sufficient to legalize abortion. Any attempts to define that notion may exclusively lead to the statement that it applies to a general limitation of rights and freedoms of a pregnant woman. However, the impossibility of stating precisely which rights and freedoms are at stake is a consequence of the vague notion used by the lawmaker.

Due to the vague formulation of the grounds for abortion by the lawmaker it is impossible to identify the nature of values protected under the Constitution, in consideration of which the lawmaker decides to legalize the violation of another constitutional value. It is inadmissible, especially when taking human life is permitted thereupon, namely the violation' of the fundamental interest of a human being, as stated by the same lawmaker in the preamble. The vagueness of the notion of „difficult personal situation" disqualifies, in light of the constitutional requirements, article 4a, section 1, sub-section 4 of the Act of 7 January 1993 as worded after the amendment. It permits the inference of a rule allowing one to take life with no consideration of other constitutional values. The vague formulation of this ground actually undermines the principle of protection of human life at the prenatal stage.

Since human life has essentially been recognized as a constitutional value, it results in the necessary limitation of rights of a pregnant woman. The developing life not only uses mother's interest in the biological sense thereof bat also may limit, for strictly factual considerations, the exercise of rights end freedoms by its mother. From the legal perspective, the correlate of the developing life of a child is a set of obligations imposed on both a child's mother and father, which dramatically expand upon its birth. The conception of a child and the awarding of legal protection to its life at the prenatal stage necessarily entails the emergence of obligations on the part of the child's mother and father That change in legal status cannot justify taking the life of a conceived child. The constitutional provisions contemplating the legal protection of motherhood and family assume that parental obligations cannot affect the extent of protection of a conceived child's life.

The Act dated 7 January 1993, after the amendment, also assumes that the limitation of rights and freedoms of a pregnant woman as resulting from the origination of new obligations cannot, as such, justify taking the life of a conceived child.

The necessary condition for legalizing abortion is, within the framework of the statute, the „difficult personal situation." However, is it possible to justify, against the background of the Constitution, taking a conceived child's life on these grounds?

We should say that it is not possible. In particular, it is noteworthy that the occurrence of the difficult personal situation resulting, *inter alia*, from the necessity to take care of children, can also take place after the birth of a child. A similar situation may occur with

respect to other persons eligible for care (spouse, parents). No such situation, even when the burden of new obligations is considerable, constitute sufficient grounds for taking a conceived child's life whose conception instigated these obligations.

Therefore, if, as regards the life of a fetus, such circumstances are sufficient to legalize abortion, it must necessarily mean that the ordinary lawmaker contemplates a different value of life for a conceived child than for the life of a born child.

Finally, we must consider whether the regulation of article 4a, section 1, sub-section 4 can be justified with the right to a responsible decision about having children. Such a right can actually be inferred from the scope of human fundamental rights and freedoms and, within the framework of constitutional provisions, from the guarantees for motherhood and family offered thereby. The right to parenthood must be interpreted in both the positive and negative sense thereof. It must account for the ban against activities to limit the freedom of having children as well as the ban against activities to force people to have children.

This right applies, in particular, to the decision to conceive a child. In fact, any intervention herein, either by the State or other persons, should be regarded as an inadmissible violation of every human being's rights. Hence the question whether the right to decide on having child may be understood in a wider sense as the right to decide to give birth to a child. In that case, it would be inadmissible to enact any legal prohibition to give birth to a conceived child that could be enforced by the State. Similarly, it would be impermissible to establish any penalties related to giving birth. Any and all public or private interests that might justify the enactment of such a regulation would be opposed to highest value of a conceived child's life and the parents' right to have children.

The consideration of the right to give birth in the negative sense thereof, namely the right to perform an abortion, is a different matter In that situation, since a life has already originated, the right to decide whether to have a child would essentially be reduced to the right not to give birth. 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 fetus.

In the negative aspect, the right to a responsible decision to have children is solely reduced to the right of refusing to conceive a child. However, when a child has already been conceived, that right can only be exercised in the positive sense thereof, that is as *inter alia* the right to give birth and to raise a child.

The right to decide whether to have a child is, due to the nature of things, the joint right of a child's mother and father. This right can only be exercised through a voluntary decision to conceive a child. In that context, this right cannot be relied on as the constitutional basis for legalizing abortion for „social" considerations because the statute shifted the decision about a child's life to its mother only. That right is not the individual right of a child's mother and, for that reason alone, the regulation of article 4a, section 1, sub-section 4 cannot be justified by the intention to create conditions for exercising that right.

As mentioned earlier, the essence of constitutional values, by reference to which attempts can be made to justify the regulation laid down in article 4a, section 1, sub-section 4, does not entail their priority or at least equality in relation to the value of human life, also at the prenatal stage. The only rational attempt to justify the regulation concerned on the basis of the Constitution, might be proving that the value of a human life before birth differs from its value after birth. In such a situation, the comparison of conflicting values could lead to a resolution adverse to the life of a *nasciturus.*

We have emphasized many times here that any attempt to differentiate the value of a human life on a rational basis should specify a criterion of differentiation. To that end, it is not enough to refer to specific statutory regulations providing for a different treatment of the property rights of a child before and after birth. Irrespective of the fact that, in this case, it refers to a different category of rights, ordinary legislation cannot directly affect the determination of the scope of protection set out under the constitutional provisions, even for the reason that it might err in the identification of the hierarchy of values set out in the Constitution.

Therefore, irrespective of earlier determinations, that is, irrespective of the proven violation of the proportional treatment of constitutional values as regards the resolution of any conflict of such values by the lawmaker, that is the legalization of abortion in the circumstances specified in article 4a, section 1, sub-section 4, we must say that the lawmaker failed to respect other constitutional values applicable to the resolution of that type of conflict and, in particular, sufficient specification of the criteria for the admissibility of violating constitutional values. When the lawmaker decides to legalize actions aimed at violating a constitutional value, it must specify an adequate range of circumstances where such a violation is admissible. The sufficiency feature must, in particular, refer to the essence of conflict between the constitutional values to be resolved by the regulation adopted. That condition has not been met as regards the regulation ensuing from article 4a, section 1, sub-section 4 of the Act of 7 January 1993.

When identifying the basic subject matter grounds for legalizing the death of a conceived child, the lawmaker defined them as the situations of a pregnant woman who decides to undergo an abortion. However, the circumstances listed in article 4a, section 1, sub-section 4, are not in any way related to the existence of pregnancy. Under that provision, even if difficult living conditions and in particular the difficult personal situation were not related to a developing fetus and the subsequent possible birth of a child, they provide grounds justifying abortion. In that respect, the grounds laid down in the challenged provision were defined inadequately m relation to the conflict of constitutional values that were supposed to constitute a basis therefor.

The time of occurrence of the circumstances justifying abortion has not been specified and, in particular, even a short, temporary occurrence of the circumstances referred to in article 4a, section 1, sub-section 4, offers grounds for causing the death of a conceived child. It does not fit the essence of the conflict of constitutional values in question.

The lawmaker provided for the legalization of actions causing the death of a fetus, but only for actions referring to taking the life of a fetus under 12 weeks of life. In the context of the entire act, this criterion is fully arbitrary. As regards the essence of the conflict that may arise between a pregnant woman’s interests covered by constitutional protection and the constitutional protection of life at the prenatal stage, the essence of conflict does not change, either before or after the 12th week of pregnancy. It is only possible to point out that the scope of factual limitations and burdens that might affect a pregnant woman after the 12th week of pregnancy could definitely increase when compared to an early stage of pregnancy.

The lawmaker does not legalize abortion in view of future difficult living conditions, if any, or a difficult personal situation that might occur when pregnancy is continued or after childbirth, however it relates these circumstances to the moment when a pregnant woman makes the abortion decision although, as we said before, this circumstance could be temporary; pregnancy and childbirth do not have to affect the future situation of a mother. In other words, abortion performed on the basis of article 4a cannot be the means for avoiding a

future threat to interests of a pregnant woman, but intends to remove the existing violation of these interests.

4.4. Article 2 of the Act dated 30 August 1996 provided for two amendments of the legal framework. On one hand, the existing article 8, paragraph 2 of the Civil Code has been deleted and, on the other hand, article 446^1 has been appended. The conformity of the aforesaid amendments with the Constitution should be analyzed separately.

The provision of the Civil Code which was abrogated through article 2, sub-section 1 of the Act dated 30 August 1996, read as follows:

„Also any child conceived shall have legal capacity; it shall, however, only have property rights and obligations provided that it has been born alive."

Since under article 8, paragraph 1, every human being shall have legal capacity from the moment of birth, the abrogation of paragraph 2 whereby that capacity has been vested in a conceived child should be treated as a withdrawal of legal capacity that was previously vested in a conceived child.

The legal capacity referred to in article 8 is the condition to acquire rights under civil law, both property and non-property rights.

Naturally, the abrogation of article 8, paragraph 2 does not mean that a conceived child forfeited the capacity of being recognized as a person within the general framework of civil law. By virtue of article 927, paragraph 2, of the Civil Code, a child already conceived may be the holder of succession-related rights. Pursuant to article 182 of the Family and Guardianship Code, it is possible to appoint a guardian of a child already conceived, though not yet born. Hence the unequivocal conclusion that a special provision may, within the extent of legal relations regulated thereby, create legal capacity of a conceived child.

The sole abrogation of the general clause of article 8, paragraph 2 of the Civil Code does not have to result automatically in the lack of a conceived child's legal capacity. The absence of that clause before 1993 did not prevent courts from construing this capacity with respect to certain rights provided for in the Civil Code, by interpreting individual provisions of civil law According to the doctrine of law, the introduction of article 8, paragraph 2 to the Civil Code was not „a novelty in relation to the thing accepted by the judicature and doctrine on the basis of the existing provisions of the Civil Code" (see A. Mączynski, K. Zawada: *Kwartalnik Prawa Prywatnego,* Number 3, 1995, p. 418). Therefore, there are no grounds for negating the continued validity of that practice after the abrogation of article 8, paragraph 2 of the Civil Code. Certain claims (e.g., referred to as war veteran cases by the applicant) can be founded in article 446^1 of the Civil Code, as pertinently noted by the Prosecutor General's representative during trial.

The lawmaker's decision to abrogate the general clause vesting legal capacity is actually justified by the fact that, in light of the psycho-physical condition of a fetus, its capacity of „being" the holder of rights specified in the Civil Code is quite limited. The legal capacity referred to by the provisions of the Civil Code is purely functional and applies only to civil law institutions. In particular, the legal capacity provided for in article 8 of the Civil Code cannot be identified with being recognized as a person – a holder of rights within the entire system of law. Each and every person can be recognized as a holder of rights. However, the legal capacity under civil law may depend on the stage of development of human life. Therefore, there is no way to read that decision in the context of completely depriving *a nasciturus* of legal capacity under civil law or the system of law in its entirety. The abrogation of the general clause whereby legal capacity under civil law is vested, shall in no way affect the award of legal protection for such important legal interests as life or health of *a nasciturus*

and, in particular, its dignity (see sub-section 10 of the Council of Europe Recommendation Number 1046 whereby a human embryo or fetus should be treated with respect, in all circumstances, as due by reason of human dignity). As mentioned before, the bases for the protection in question are rooted in the constitutional provisions.

Despite the concern expressed by the applicant, the abrogation of article 8, paragraph 2, does not lead to the violation of rights available to children already conceived who were born before the effective date of the Act dated 30 August 1996, that is by 4 January 1997.

As stated earlier, the abrogation of the general clause vesting legal capacity in *a nasciturus,* does not mean that it is not eligible for it as regards specific rights, both property and non-property rights, on the basis of special provisions covering such rights.

Moreover, it should be noted that the Act dated 30 August 1996 does not include any transitory provisions. Nevertheless, by reference to an interim provision in Chapter 3 of the Act dated 23 April 1964 – the Provisions Implementing the Civil Code (Journal of Laws, Number 16, Item 94, as amended), one may conclude that, in light of article XXVII, paragraph 1, whereby „until the effective date of the Civil Code, the legal capacity and the capacity to perform legal acts shall be evaluated in accordance with that Code," all children already conceived who had that legal capacity before 4 January 1997 were stripped of that legal capacity after that date.

However, two interpretations of that regulation are possible:

a) Since article XXVII categorically commands the application of new provisions to the assessment of legal capacity, also with respect to persons who acquired that capacity under the previous law, the forfeit of legal capacity must necessarily entail the loss of rights and obligations connected with that capacity. However, in that case, the deprivation of such rights would be a violation of the rule laid down in article 1 of the constitutional provisions, that is the democratic rule of law, by violation of the protection of equitably acquired rights ensuing from the said rule.

b) A different interpretation is possible though. Article XXVI of the provisions implementing the Civil Code provides for a general rule whereby „legal relations commenced before the effective date of the Civil Code shall be governed by existing law, unless the following rules stipulate otherwise." This clause may be interpreted in the context of article XXVII, discussed earlier, to the effect that persons deprived of legal capacity on the basis of the new provisions are actually unable to exercise it after the effective date of such provisions, in other words, they cannot become holders of „new" rights and obligations. Nevertheless, they retain, pursuant to that article XXVI, legal capacity with respect to legal relationships commenced before the effective date of the new provisions.

This interpretation is justifiable in light of the interim rules set forth in the Act entitled the Provisions Implementing the Civil Code and, furthermore, respects the constitutional protection of equitably acquired rights.

For the above reasons, we must acknowledge that the abrogation of article 8, § 2, of the Civil Code by virtue of article 2, sub-section 1, of the Act dated 30 August 1996, has caused no violation of the constitutional provisions listed in the allegation. The Constitutional Tribunal has no responsibility for reviewing the rationality of the lawmaker's decision from the point of view of the cohesiveness of the system of law.

4.5. By virtue of article 2, sub-section 2, of the Act dated 30 August 1996, the existing provision of article 446^1 of the Civil Code has been amended by appending the following sentence:

„A child may not enforce such claims (i.e., claims for redress of the damage it suffered before birth) against its mother."

The normative meaning of this provision is clear It limits the child's ability to enforce claims against its mother for damage it suffered at the prenatal stage. In essence, such damage can only cover the impairment of health and bodily integrity. However, such claims may also involve property, in particular when, as a result of the activity of a person under an obligation to take care of a conceived child, its rights acquired at the prenatal stage have been diminished (e.g., refusal or squandering of succession).

Any objections to the regulation laid down in article 2, sub-section 2, of the Act dated 30 August 1996, can be reduced to two basic issues.

By virtue of the constitutional obligation of „sufficient protection" of specific constitutional values, the ordinary lawmaker is obligated to provide for specific measures furthering the protection of such values, however that obligation cannot be reduced solely to a prohibition of their violation. The lawmaker should additionally enforce such measures that would provide for sufficient guarantees for the observance and enforcement of such prohibitions. Such guarantees may be of a different nature – both civil and administrative or, as a last resort, penal. The Constitution does not specify, save for the general rules, the shape of these guarantees; nevertheless, they must necessarily ensure „sufficient" protection in specific cultural, social and economic conditions.

Assessing the new regulation introduced to article 446^1 of the Civil Code in the above light, one should conclude that it amounts to a deteriorated standard of protection of interest of a conceived child. in particular its health, in a very sensitive sphere – in respect to actions of a pregnant woman, that is the guarantor of these interests. A pregnant woman is not only the very person who, for practical reasons, has the greatest opportunity to violate the interests of a conceived child as she decides on, for instance, the application of relevant measures of protection provided for in the law in case of a violation or threat to the interests of a fetus.

If a mother of a conceived child is guilty acting in a way that violates the interests of a child, the possibility of claiming damages after its birth would be, in practice, the only real instrument ensuring the protection of the interests of a fetus in relation to its mother under civil law.

The deprivation of the ability to claim redress of damage suffered before birth against a mother constitutes a limitation of a child's property rights, and sufficient grounds are missing for such a limitation in the constitutional values. Because of that, this Tribunal has decided that the limitation of a child's property rights by narrowing the scope of article 446^1 of the Civil Code violates the democratic rule of law.

Depriving a child of the possibility of claiming against its mother the redress of damage it suffered before birth by reason of its mother's activity also violates the principle of equal treatment provided for in article 67, section 2 of the constitutional provisions. It is not possible to explain on the basis of the relevant constitutional values why a mother who caused damage is to be released from liability under civil law, whereas other persons (e.g., the child's father, physician) are to be held liable for the same damage. The infringement of equal treatment is further confirmed by the fact that, under civil law, a mother is held responsible for any damage caused to a child after it has been born just as other persons. Therefore, the time when damage was caused in this case (before or after birth) cannot be considered a material differentiating criterion for the occurrence of a duty to redress damage.

4.6. Article 3, section 1 of the Act dated 30 August 1996 derogated article 23b of the Penal Code. The latter regulation provided that a *conceived child cannot be a subject of other*

activities than those furthering the protection of its life and health or of its mother, except for the ones listed in §2. The exception referred to prenatal examinations that do not clearly aggravate the risk of miscarriage and are carried out if a conceived child comes from a family with a genetic load, or in the case of suspected genetic disease that can be cured, partially cured or its effects can be limited during the prenatal period, or when serious fetal damage is suspected.

Therefore, article 23b of the Penal Code expressly provided for the prohibition to violate the bodily integrity of a fetus or to disturb its development processes, excluding cases of prenatal examinations for eugenics determinations, however such examinations cannot be clearly dangerous to a fetus.

After the abrogation of article 23b, the question remains open on whether activities violating a fetus' bodily integrity or disturbing its development processes are still banned or whether it is allowed to perform them irrespective of the purpose of such activity or motivation of persons performing them.

In consideration of the:

a) Abrogation of article 1, section 2 of the Act of 7 January 1993, as worded before the amendment, and in particular the deletion of the phrase saying that the health of a conceived child shall be under legal protection from the moment of conception;

b) Abrogation of article 156a of the Penal Code providing for penal liability for causing bodily injury to a conceived child or health disorder threatening its life, where no other measures of protection have been provided under the law; and furthermore

c) Limitation of liability for damage caused to a child before its birth,

one may conclude that the existing legal system does not offer any measures to protect a fetus' health and undisturbed development. At the same time, however, the aforesaid interests remain under constitutional protection, especially the health of a conceived child.

After the abrogation of article 23b of the Penal Code and until the effective date of the Medical Profession Act dated 5 December 1996 (Journal of Laws, 1997, Number 28, Item 152), our legal order offered no legal protection whatsoever to *a nasciturus* against experiments when in the mother’s womb or against such others that do not serve the interests of the conceived child. Following the abrogation of these provisions, legal protection has also been waived in relation to a human fetus living outside its mother’s organism. This status of legal protection does not meet European standards. At this point we should refer to a convention which has not yet been signed by the Republic of Poland i.e., the Convention for the Protection of Human Rights and Dignity with respect to the Application of Biology and Medicine, as accepted by the Ministers' Committee on 19 November 1996. Under article 18 of the Convention, the creation of human embryo for the purpose of scientific research is prohibited and sufficient legal protection to such embryo must be ensured. Laws enacted in European countries are similar. Recent enactment include the French law of 29 July 1994 introducing, e.g., the prohibition to create human embryo for research or experimental purposes and for commercial and industrial purposes, and the German law on 13 December 1990, whereby cloning, creation of chimeras and hybrids, as well as the creation of embryo for other purposes besides inducing pregnancy is prohibited. Poland still lacks statutory regulations in the sphere of bio-ethics.

In this context, the abrogation of the provision prohibiting activities that violate the interests of a human fetus should be considered a drastic deterioration of the minimum protections standards required under the Constitution in light of a conceived child’s right to

protect its health and security of the person laid down in articles 1 and 79, section 1 of the constitutional provisions which were upheld.

However, the re-enactment of article 23b of the Penal Code may cause a problem of its compliance with article 4a, section 1, sub-section 2 of the amended act. Since the significance of article 23b of the Penal Code transcends the issue of abortion, article 4a, section 1, sub-section 2 should be treated, in relation to the former article, as a special provision.

4.7. Article 149a and article 149b of the Penal Code have been abrogated by virtue of article 3, sub-section 2 of the Act dated 30 August 1996.

The abrogation of article 149b has not entailed any normative changes in the scope of penal liability as a new provision to the Penal Code, i.e., article 152a, virtually repeats the contents of the abrogated provision; the only change are words used to describe taking the life of a fetus, however it does not affect the scope of penalties in that respect.

Article 149a, paragraph 1, used to provide for penal liability for causing the death of a conceived child by listing, in paragraphs 2 and 3, situations where such action was punishable (if caused by a conceived child's mother) or where it was not subject to punishment.

However, the abrogation of article 149a has not automatically resulted in a situation where actions subject to that provision before the effective date of the amended act of 30 August 1996, ceased to be punishable actions. In particular, a series of such actions is still subject to penal liability on the basis of the new article 152b, paragraphs 1 to 3, of the Penal Code. However, in both cases, the provision excluded the penal liability of a pregnant woman as such, whereas activities of providing assistance in abortion attempted by a pregnant woman alone were penalized.

The difference in the scope of penal liability relating to taking the life of a fetus is actually reduced to waiving punishment when encouraging a pregnant woman to perform abortion herself and, in addition, waiving punishment where the scope of legal abortions has been expanded, in particular abortions performed in the circumstances described in article 4a, section 1, sub-section 4 of the Act, although it also applies, for instance, to legalizing abortion if pregnancy resulted from a banned act in private surgeries (which were previously prohibited, and hence punishable). However, the applicant has not based its complaint on the extension of the grounds for legalization. In fact, the essential difference arising between the scope of penal sanctions provided for in the abrogated article 149a of the Penal Code and the new article 152b of the same Code is as follows: the former provision used to contemplate penalties for taking the life of a conceived child through extra-corporeal fertilization which has not been implanted into a mother's organism. The present wording („abortion") of article 152b, paragraph 1, excludes its possible application to the aforesaid activity.

The question of legal protection for a fetus developing outside its mother's organism is, however, a separate issue as it does not only refer to the abrogation of article 149a but also affects the conformity of other challenged provisions with the Constitution (see sub-section 4.6 hereof).

The modification of the scope of penalization resulting only from amending the penal provisions can hardly be treated as a violation of constitutional rules by the said amendment (article 149a has been replaced by article 152b). The question of developing legal protection, under penal law, of specific rights and freedoms guaranteed in the Constitution, provides the lawmaker with considerable freedom, especially that the application of the measures of penal protection, is regulated by a number of rules that are not directly related to the actual violation of specific rights and freedoms. The said rules refer in particular to the purposes of penalty

and, for that reason, they are clearly of a criminal policy nature. Any considerations of a criminal policy nature fall within the domain of the ordinary lawmaker.

However, it does not mean that the lawmaker has the absolute discretion to develop protection of specific fundamental rights and freedoms, including the manner of protection under penal law. From the point of view of constitutional criteria, this protection should be sufficient and proportional to the importance of the interests at stake. Nevertheless, the assessment in that regard requires a comprehensive analysis of the entirety of remedies provided for within the legal framework for the protection of specific rights. Hence the absence or limitation of the means of protection offered under penal law do not necessarily have to mean that the said protection is insufficient from the point of view of constitutional criteria.

In consideration of the above conclusions, we must acknowledge that article 3, sub-section 2 of the Act dated 30 August 1996 has not violated the constitutional provisions referred to in the application.

4.8. Article 156a of the Penal Code has been derogated by virtue of article 3, sub-section 4. The former article provided for penal liability for causing bodily injury to a conceived child or causing a health disorder that could threaten a child's life. That provision used to be the only express basis for punishing activities which impaired a conceived child's health. The abrogation of that provision means the de-penalization of a considerable scope of such activities. It is not possible to neglect the fact that some activities consisting in causing health disorders or bodily injury and in particular those posing a direct threat of miscarriage, may be punishable as attempted abortion under article 152a or article 152b, if the perpetrator's possible intention was to cause a fetus' death.

Please remember that the undisturbed development and health of a conceived child also enjoy constitutional protection as interests directly derived from the constitutional value of human life, including life at the prenatal stage.

Hence the question whether quashing the penalty for actions causing such effect amounts to the violation of constitutional guarantees of protection of the health of a conceived child?

The derogation of article 156a should be assessed in the context of all measures provided by the lawmaker for protecting the health of a fetus and hence the conclusion that the lawmaker failed to satisfy the requirement of sufficient protection of constitutional values when setting aside guarantees provided under penal law.

Causing health disorder or bodily injury constitutes a violation of particularly important legal interests. Such actions might cause a child's permanent disability, after birth, too. At the same time, there are no circumstances, in particular ones rooted in the Constitution, that could justify the violation concerned. Causing health disorders or bodily injury to a conceived child affects a completely defenseless creature who, however, is able to feel pain. Such actions may often have characteristics of „cruel and inhuman" treatment which is absolutely prohibited under the rules of international law. At the same time, actions causing health disorders or bodily injury to a child are treated as a brutal interference into the rights of a woman who disagrees with such action.

Civil law provisions, if any, providing for the possibility of demanding the cessation of activity violating personal interests and enabling a child to claim the redress of damage it suffered before birth (article 446^1) cannot be deemed, in this case, as a sufficient instrument of protection of a child's interests. First of all, the possibility of defending a child's rights provided for in civil law is limited, by reason of the nature of things, to the necessary

representation of a child by its mother (or by its father in certain cases). This construction virtually excludes the possibility of defending a child against its mother (even more, since under amended article 446' a child cannot claim redress of damage it suffered from its mother). Meanwhile, there are no reasons for which a child should not be protected from willful activity of its mother (or father, with mother's consent) causing health disorders or bodily injury to a child.

The waiver of punishment of willful actions causing health disorders or bodily injury to a conceived child, with or without the consent of a pregnant woman, constitutes a radical limitation of the protection of a child's health to which it is entitled, in particular in relation to its mother's actions. There are no grounds for limiting the scope of that protection, either in the basis of penal policy recognizable under the Constitution or otherwise.

The abrogation of article 156a also caused such a limitation of the magnitude of the protection of health of a conceived child so that legal measures, serving that protection that remained after the abrogation, fail to satisfy the requirements of „sufficient protection." For that reason, the abrogation of article 156a should be deemed as a violation of the constitutional guarantees provided for the protection of the health of a conceived child on the basis of articles 1 and 79, section 1 of the constitutional provisions which were upheld.

4.9. The application also mentioned the non-compliance of all challenged provisions with article 67, sections 1 and 2 of the constitutional provisions. However, in the opinion of the Constitutional Tribunal the issue of the conformity between the challenged provisions and the Constitution, except for article 2, sub-section 2 of the Act dated 30 August 1996, should be reviewed in view of sufficient protection of health and life of a conceived child as interests of a constitutional value. However, considering the scope of complaint and the highly incomplete status of many constitutional provisions that are still in force today, there was no basis for reviewing the challenged provisions of the Act dated 30 August 1996 in view of the rights of a conceived child. Both constitutional provisions covered by the allegation and referring to such rights, cannot serve as a model for reviewing the conformity between the challenged provisions and the Constitution. On the other hand, however, the lack of conformity between article 2, sub-section 2 of the challenged Act and article 67, section 2 of the constitutional provisions has already been discussed above.

The Constitutional Tribunal based its decisions on the constitutional provisions in force. Article 38 of the Polish Constitution adopted on 2 April 1997 confirms the legal protection of the life of every human being. Therefore, the constitutional grounds on which the Constitutional Tribunal's decision is based, were confirmed and expressly stated in the Polish Constitution.