

ON ABORTION

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.

12. The general requirements anchored in Article 13 of the Constitution (equality when limiting rights and freedoms, and when establishing their essence and meaning) as well as the requirements of proportionality for limiting a special fundamental right, are applicable only appropriately to the constitutional value and to the constitutional imperative of protection resulting from it. In comparison to the application of fundamental rights, the key difference is particularly the scope of admissible deliberation which belongs to the law-maker during decision-making on the legal regulation of abortion pursuant to the Constitution, namely when balancing the constitutional imperative expressed in Article 15 sec. 1 second sentence of the Constitution on the one side and the fundamental right of the pregnant woman to the protection of her privacy pursuant to Article 16 sec. 1 and Article 19 sec. 1 and 2 of the Constitution on the other.

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 a consequence 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 self-realisation, 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 law-maker 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 constitution-makers (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.

(Finding of the Constitutional Court of the Slovak Republic, Ref. No. I. ÚS 12/01 of 4 December 2007, published in the Collection of Laws of the Slovak Republic under no. 14/2008, volume 8)