Opinion of *amici curiae*

regarding declaration of the non-conformity of Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Act of 7 January 1993 on family planning, protection of the human foetus and admissibility conditions for the termination of pregnancy (Journal of Laws of 1993 No. 17, item 78, as amended) with the Constitution of the Republic of Poland

I. Introductory remarks

1. In the motion dated 22 June 2017, a group of Members of the Sejm of the Republic of Poland requested declaration of non-conformity of Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Act of 7 January 1993 on family planning, protection of the human foetus and admissibility conditions for the termination of pregnancy[1] (hereinafter as the Abortion Act) with Article 30 of the Polish Constitution, as they legalize eugenic practices towards an unborn child, thus denying him the respect and protection of his dignity.

2. In the event of failure to take into account of the above described allegation, the Applicants formulated a potential motion in which they demand that Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Abortion Act be declared non-conformant with Article 38 in conjunction with Article 30 and 31 paragraph 3 and with Article 38 in conjunction with Article 32 paragraphs 1 and 2 of the Polish Constitution since they legalize eugenic practices in the field of the right to life of an unborn child and make the protection of the right to life of an unborn child dependent on his health condition, which is a form of prohibited direct discrimination, and that Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Abortion Act be declared non-conformant with Article 38 in conjunction with Article 31 paragraph 3 and in conjunction with Article 2 and Article 42 of the Polish Constitution since they legalize termination of pregnancy without sufficient justification with the need to protect another value, constitutional law or freedom, and use indefinite criteria of this legalization, thus violating constitutional guarantees for human life.

[1] Journal of Laws from 1993 No. 17, item 78 as amended.

3. Article 4a paragraph 1 subparagraph 2 of the Abortion Act establishes eugenic conditions for termination of pregnancy, which can be performed by a doctor in the event that prenatal tests or other medical conditions indicate a high probability of severe and irreversible impairment of the foetus or an incurable disease threatening his life. In accordance with Article 4a paragraph 2 first sentence of the Abortion Act, in the case of determining a high probability of a serious and irreversible impairment or an incurable disease threatening the life of a conceived child, killing him is possible until he is able to live independently outside the mother's womb.

4. Human life and dignity of a human being constitute basic values, subject to legal protection. The obligation incumbent on public authorities to ensure this protection applies to all phases of human life, from its conception to natural death. It is guaranteed both by the Polish Constitution and by numerous international treaties that are binding for the Republic of Poland. Deep concern for universal values such as human dignity and legal protection of human life, which constitute the very foundations of European civilization and contemporary legal orders, makes it impossible to remain silent in this proceeding. Therefore, **signatories of the present opinion wish to express their position, namely that:**

Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Abortion Act is inconsistent with Article 2, Article 30 and Article 38 in conjunction with Article 31 paragraph 3 of the Polish Constitution.

5. Pursuant to Article 9 of the Polish Constitution: "The Republic of Poland shall respect international law binding upon it". At the same time, all international treaties that Poland is a party to, must be in line with the Polish Constitution (see Article 188 subparagraph 1 of the Polish Constitution), however, they prevail over statutes if they were ratified with prior consent granted by a statute (see Article 91 of the Polish Constitution). This is precisely the nature of i.a. all international treaties concerning freedom, civic rights or obligations stipulated in the Constitution (Article 89 paragraph 1 subparagraph 1 of the Polish Constitution). Thus, taking into account the content of the mentioned provisions of the Polish Constitution, which determine the place of international treaties in the system of sources of law commonly binding in the Republic of Poland, it is justified to make references in the subsequent part of the deliberations,

not only to the Polish Constitution itself (which is quoted as a model), but also to international treaties which were ratified by Poland.

II. Unborn child as a subject of human rights in the light of international law

6. The issue of protection of human life at the prenatal stage of development fits into the general discourse concerning human rights, or – to phrase it differently – it is a component of a set of rights that every man is entitled to, rooted already in the natural law (supra-positive)[2]. There is no rational basis to deprive children who were conceived but not born yet of the guarantee of legal protection of their life. In literature, it is often emphasized that a human passes through various stages of development whilst maintaining his or her subjective identity: "A human embryo is a whole living member of the species *Homo sapiens* in the earliest stage of his or her natural development. Unless denied a suitable environment, an embryonic human being will by directing its own integral organic functioning develop himself or herself to the next more mature developmental stage, *i.e.*, the foetal stage. The embryonic, foetal, infant, child, and adolescent stages are stages in the development of a determinate and enduring entity — a human being — who comes into existence as a single cell organism and develops, if all goes well, into adulthood many years later"[3]. This means that legal protection envisaged in the international law as well as in internal law is a right of every human – before just like after birth. Physical immaturity of a child that is just forming in the mother's womb, combined with a severe handicap or disease should predestine him to receive special protection from public authorities, and provide him - as soon as there is medical opportunity – with treatment or palliative care in conditions ensuring respect for the inherent dignity of a conceived as well as newly born child. Unfortunately, in the current legal situation, such children are deprived of legal protection, they can be killed on the basis of the probability of disability or illness.

7. The right of unborn children to legal protection of their lives is based in numerous international treaties, in particular the Convention on the Rights of the Child adopted by

[2] Cf. J. Maritain, *Introduction,* [in:] *Human Rights. Comments and interpretations,* Paris 1948, p. V et seq.
[3] R.P. George, A. Gómez-Lobo, *The Moral Status of Human Embryo,* «Perspectives in Biology and Medicine» 48/2 (2005), pp. 201-202.

the General Assembly of the United Nations on 20 November 1989[4] (hereinafter as: the Convention on the Rights of the Child). Pursuant to its Preamble – referring to the Declaration on the Rights of the Child of 1959 - every human being can enjoy the rights set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights **regardless of any differences arising from the circumstances of his or her birth, and the child - due to his physical and mental immaturity - needs special safeguards and care, including proper legal protection, both before and after birth**.

8. In accordance with Article 31 of the Vienna Convention on the Law of Treaties, drawn up in Vienna on 23 May 1969[5] (hereinafter as: the Vienna Convention): "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 1. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes […]". Therefore, it must be stated that the interpretation of all provisions of the Convention on the Rights of the Child must take into account the content of its preamble, and therefore the provisions of the Convention also apply to a conceived child who is still unborn[6].

9. It is in this context that Article 1 of the Convention on the Rights of the Child should be comprehended, which defines a child as "every human being below the age of eighteen years". It is also worth noting, as is emphasized in the literature, that the Convention stresses subjectivity of the child[7]. As E. Verhellen pointed out: "…children's rights are understood as the human rights of children, i.e. fundamental claims for the realisation of social justice and human dignity for children. The right to participate in democratic decision-making, to autonomy and to exercise rights independently are important aspects of how to realise these claims. The ontological view behind the children's rights movement and the changing child image that accompanies it, is that children are human beings. Therefore, children are entitled to all human rights. Children

[4] UNTS vol. 1577, New York 1999, No. 27531 (1990), pp. 3-178; Journal of Laws from 1991 No. 120, item 526 as amended.
[5] UNTS vol. 1155, New York 1987, No. 18232 (1980), p. 331-512; Journal of Laws from 1990 No. 74, item 439.
[6] Cf. S. Yoshihara, *Human Rights and the Unborn Child by Rita Joseph* [review], «The National Catholic Bioethics Quarterly» Autumn 2011, p. 600.
[7] E. Verhellen, *The Convention on the Rights of the Child. Reflections from a historical, social policy and educational perspective,* [in:] *Routledge International Handbook of Children's Rights Studies*, [eds.] W. Vandenhole , E. Desmet , D. Reynaert , S. Lembrechts, London 2015, pp. 50-51.

do not need to be given rights, they have them"[8]. In the context of the quoted provisions of the Convention, it should be stated that the remarks of E. Verhellen fully apply to a conceived child who is still unborn.[9]. **Considering the content of the preamble to the Convention, one cannot have the slightest doubt that every human being is a child from the moment of conception (the connection of male and female gametes) until the day on which he or she reaches the age of 18[10]. Unborn children always enjoy all human rights to the same extent as children after birth.**

10. Moreover, it needs to be reminded that **the rights set out in the Convention on the Rights of the Child belong to all children on an equal basis**. Article 2 of the Convention expressly prohibits the use of any discrimination in this regard: "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members." It is clear from the above that circumstances such as the moment of birth, age, disability, etc., cannot justify differentiation of the child's legal status.

11. Analysis of the content of Article 2 of the Universal Declaration of Human Rights of 1948[11] (hereinafter as: the Declaration of Human Rights) leads to similar conclusions. It states that *everyone* is entitled to enjoy all rights and freedoms proclaimed in the content of the Declaration, irrespective of differences in race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or any other status. As R. Joseph, correctly notes, the term *everyone* indicates that the provisions of the Declaration also apply to an unborn child[12].

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[8] *Ibid., pp.* 45-46.
[9] P.A. Tozzi, *Sovereignties: Evaluating Claims for a 'Right to Abortion' under International Law, Protection of Human Life in Its Early Stage. Intellectual Foundations and Legal Means,* [ed.] A. Stępkowski, Frankfurt am Main 2014, p. 59.
[10] *Ibid.*
[11] The Declaration was adopted as a Resolution 217/III A of the General Assembly of the United Nations on 10 December 1948 – original text of the Declaration is available at: http://www.un.org/en/universal-declaration-human-rights/ (accessed: 16 July 2018).
[12] R. Joseph, *Human Rights and the Unborn Child,* Leiden-Boston 2009, p. 63.

12. The universal nature of human rights, which essentially are the rights of every being that belongs to the human species, was already raised during the work on the Declaration of Human Rights. A.J. Lien pointed out that "Human rights are universal rights or enabling qualities of human beings **as human beings** or as individuals of human race, attaching to the human being wherever he appears, without regard to time, place, colour, sex, parentage or environment. They are really the **keystone of the dignity of man**." [bolding by the author of the present opinion][13].

13. The fact that the Author uses the phrase *human being* is a proof of the broadest possible subjective scope of the human rights formulated in the Universal Declaration of Human Rights. In the literature on the subject, sometimes an attempt is made to create an artificial distinction – most often ideologically motivated – between the terms *person* and *human being*, although in fact they have the same and identical scope of meaning. The term *human being* is by some authors treated – completely wrongly – as broader in meaning than the term *person*, allegedly referring only to people already born[14]. What is worth emphasizing, U. Soirila, while explaining the difference between the terms *human being* and *person*, pointed out that history knows cases when the term *person* was not referred to slaves, women or children. Currently, this is done in relation to conceived and yet unborn children[15]. This historical parallel is not only very meaningful, but also extremely accurate. Thus, regardless of certain unjustified discrepancies which occur in the literature, one must explicitly support the identicality of the terms *human being* and *person*, which in the field of international law always mean every man, and therefore also the unborn child.

14. Provisions similar in content to Article 2 of the Universal Declaration of Human Rights are also present in other international treaties. In this context one can point out Article 2 paragraph 1 of the International Covenant on Civil and Political Rights of 1966[16] (hereinafter as: ICCPR), which states that: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and

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[13] A.J. Lien, *A Fragment of Thoughts concerning the Nature and the Fulfillment of Human Rights,* [in:] *Human Rights. Comments and interpretations,* Paris 1948, p. 11.
[14] Cf. comments on mismatch of this differentiation by A. Stępkowski: *The Necessity for a Holistic Approach to Protecting Human Life,* [in:] *Protection of Human Life in Its Early Stage. Intellectual Foundations and Legal Means,* [ed.] A. Stępkowski, Frankfurt am Main 2014, p. 97 et seq.
[15] U. Soirila, *Persons and Things in International Law and "Law of Humanity",* «German Law Journal» 18/5 (2017), p. 1164.
[16] UNTS vol. 999, New York 1983, No. 14668 (1976), p. 171-348; Journal of Laws from 1977 r. No. 38, item 167.

subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". States Parties of the ICCPR have therefore undertaken to respect the rights set out in it, regardless of whether a person has already been born or is still in the prenatal period. In the light of the aforementioned provision, it should also be assumed that the obligation to ensure the rights and freedoms guaranteed in the ICCPR, including the legal protection of life, is enjoyed by every person regardless of age (Article 2 paragraph 1 speaks of "or other status").

15. A similar provision is contained in Article 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950[17] (hereinafter as: ECHR), which states that: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Also in the case of ECHR, R. Joseph's comments concerning the conceptual scope of *everyone*[18] remain valid. Once again, it must be repeated that the term *everyone* means every person, and therefore also the unborn child. The content of this Convention cannot be changed even by the case law of the European Court of Human Rights in Strasbourg.

16. The provisions of the Abortion Act included in the review of the Constitutional Tribunal make abortion admissible in situations of high probability of disability or fatal disease of the conceived child. In fact it means **legal admissibility of negative selection of unborn children due to their health condition and results in physical elimination of people suspected of disability or illness, which in an unspecified, although presumably short time, will result in the death of the child**. In this regard, it should be stressed that, according to the preamble of the Convention on the Rights of Persons with Disabilities of 2006[19] children with disabilities should fully enjoy all human rights, on an equal basis with other children and taking into account the provisions of the Convention on the Rights of the Child. Referring to this legal document, one must also emphasise that in the reservation presented by Poland during ratification of the Convention on the Rights of Persons with Disabilities it was clearly stated that

[17] ETS No.005; Journal of Laws from 1993 r. No. 61, item 284 as amended.
[18] R. Joseph, *op. cit.,* p. 63.
[19] UNTS vol. 2515, New York 2011, No. 44910 (2008), p. 3-193; Journal of Laws from 2012 r., item 1169.

Article 25a cannot be interpreted as a way of confirming the right of an individual to abortion or ordering the state to provide access to it[20].

17. It should also be pointed out that permissibility of abortion due to probability of a serious and irreversible impairment of a conceived child or a life-threatening illness is a manifestation of eugenic practices that should not be allowed in a democratic and law-abiding state. As is rightly noted in the literature on the subject, eugenic practices constitute "the biggest attacks on human rights"[21].

18. Analysing the issue of the status of a conceived child as a subject of human rights, one should refer to opinions, recommendations, guidelines and other similar documents issued by international committees monitoring compliance with UN conventions. It should be emphasized that there is no uniform position of committees monitoring compliance with UN conventions on legal protection of life of an unborn child. The United Nations Committee on the Rights of Persons with Disabilities has agreed that: "Laws which explicitly allow for abortion on grounds of impairment violate the Convention on the Rights of Persons with Disabilities (Article 4,5,8)"[22]. However, contrary to this, other Committees, including above all – which is particularly regrettable – the Committee on the Rights of the Child, try to exert pressure on the States Parties to the Convention on the Rights of the Child so that they lower the standard of legal protection of conceived life by providing so-called "access to abortion"[23].

19. It should be noted that all documents and recommendations issued by such bodies are only suggestions and do not constitute a source of binding international law. It should be made clear that the core task of committees set up in UN conventions is to examine reports submitted by States Parties and to make concluding observations or

[20] Publication pending in UNTS No. A-44910 – available at: https://treaties.un.org/doc/Publication/UNTS/No%20Volume/44910/A-44910-Poland-08000002804a471f.pdf (accessed: 16 July 2018).

[21] J.M. Serrano Ruiz-Calderón*, Eugenics as a Human Right,* [in:] *Protection of Human Life in Its Early Stage. Intellectual Foundations and Legal Means,* [ed.] A. Stępkowski, Frankfurt am Main 2014, p. 72.

[22] Committee on the Rights of Persons with Disabilities: Comments on the draft General Comment No. 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights, http://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/CRPD.docx (accessed: 19 June 2018).

[23] Committee on the Rights of the Child: General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (Article 24), 2013, CRC/C/GC/15, http://www.refworld.org/docid/51ef9e134.html (accessed: 19 June 2018). See in particular § 31, 54, 70. Cf. also: J. Adolphe, *"New Rights" in Public International Family Law? What International Law Actually Says,* «Ave Maria Law Review» 10/1 (2011), p. 149 et seq.

general comments regarding the reports submitted. The committees do not have the power to change the content of the treaties on the basis of which they were established, to introduce into them new regulations or reinterpret the existing ones, to make legally valid (binding) interpretation of any international treaties or to issue binding suggestions, recommendations or general comments (which is particularly evident in the example of Part V of the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations on 18 December 1979[24]).

20. It should be emphasized that contrary to some opinions that are devoid of any legal basis, the international law binding on the Republic of Poland does not recognize the concept of the "right to abortion". It is worth invoking the general rule of law, according to which *ex iniuria ius non oritur,* i.e. one cannot derive law from lawlessness. Therefore, there is no such structure as "subjective right to abortion" - neither in Polish law nor in international law binding on Poland.

21. From the presented review of international obligations of the Republic of Poland and the arguments outlined, it is indisputably evident that a child who has been conceived but not born yet, is a man, and is therefore the subject of human rights. The child is entitled to these rights as a being belonging to the human species, with a unique genetic code that distinguishes the child from the mother in whose womb he is present[25]. Such a child has his own dignity, respect and protection of which, is the responsibility of public authorities. Basic condition for the respect of human dignity is to provide, without any exception, every unborn child with legal safeguards of the protection of his life that will, in an effective and actual manner, secure the child against attempts at depriving him of his life by other people, that is, causing his death, both before and after birth.

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[24] UNTS vol. 1249, New York 1990, No. 20378 (1979), p. 13-142; Journal of Laws from 1982 r. No. 10, item 71.

[25] As the St. Pope John Paul II emphasized in his speech delivered on 5 October 1995 at the forum of the General Assembly of the United Nations: "During my previous Visit to the United Nations on 2 October 1979, I noted that the quest for freedom in our time has its basis in those universal rights which human beings enjoy by the very fact of their humanity. It was precisely outrages against human dignity which led the United Nations Organization to formulate, barely three years after its establishment, that Universal Declaration of Human Rights which remains one of the highest expressions of the human conscience of our time" – see http://w2.vatican.va/content/john-paul-ii/en/speeches/1995/october/documents/hf_jp-ii_spe_05101995_address-to-uno.html (accessed: 12 June 2018).

III. Assessment of conformity of the reviewed provisions with Article 30 of the Polish Constitution and with international law standards concerning protection of human dignity

22. Both the provisions of the Polish Constitution relating to freedoms and rights of humans and citizens, and the international system of human rights protection is built around inherent dignity of the human being (lat. *dignitas humana*)[26], which distinguishes the man from all other beings [27]. There is therefore no "human right to dignity" because it is itself the source of all his freedoms and rights, which – as the French legal historian J. Gaudemet pointed out – have since the eighteenth century been sometimes referred to as "fundamental rights"[28].

23. Pursuant to Article 30 of the Polish Constitution: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities". As emphasized in the literature on the subject: "The first general principle is dignity: as an inherent and an inalienable essence of human being. Dignity constitutes a source of all freedoms and rights of any person and citizen. Dignity is inviolable, which means that it cannot be relinquished even by the act of freewill man. Being the first and the most important general principle dignity is defined here by the description of its characteristics. According to the Constitution dignity belongs to each human, is a personal and indefeasible right rooted in Constitution and the state is responsible for its protection. Until now, it can be said that for the Polish lawmaker dignity is the cornerstone of the Polish state. It, is the source of all freedoms and rights and is rooted in natural law"[29].

24. The close connection between the protection of human dignity and legal guarantees of the protection of human life was noticed in the jurisprudence of the Polish

[26] Cf. M. Butrymowicz, *Human Dignity in Law – A Case Study of the Polish Legal System,* « The Person and the Challenges» 6/2 (2016), p. 87 et seq.; O. Schachter, *Human Dignity as a Normative Concept,* «The American Journal of International Law» 77 (1983), p. 848 et seq.; J. Adolphe, *The Legal Anthropology…,* p. 18-19; M. Lebech, *On the Problem of Human Dignity: A Hermeneutical and Phenomenological Investigation,* Würzburg 2009, p. 112 et seq.; A. Barak, *Human Dignity. The Constitutional Value and the Constitutional Right,* Cambridge 2015, p. 34 et seq.
[27] Cf. J. Maritain, *The Rights of Man…, p.* 5-6.
[28] J. Gaudemt, *Des 'droits de l'homme' ont-ils été reconnus dans l'Empire romain?,* «Labeo» 33 (1987), p. 8.
[29] M. Butrymowicz, *op. cit.*, p. 92.

Constitutional Tribunal. **In its judgment of 27 January 2004, the Tribunal stated: "There can be no protection of human dignity if there are no sufficient grounds to protect life"**[30].

25. In the light of the standards of international law, it should be recognized that actions discriminating against people with disabilities result in violation of their inherent dignity. Such a conclusion can be derived from the preamble to the Convention on the Rights of Persons with Disabilities, according to which **discrimination against anyone on the basis of disability "is a violation of the inherent dignity and value of the human person"**. It should be pointed out that in the context of the said Convention, discrimination based on disability means: "any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation" (*See* Article 2 of the Convention).

26. The preamble to the Convention on the Rights of the Child also refers to human dignity. Already in the introduction, it stipulates that recognizing the inherent dignity and equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. As regards children with disabilities, it has been assumed that a child with a mental or physical disability should be provided **full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.** (Article 23 paragraph 1 of the Convention on the Rights of the Child). Eugenic abortion obviously nullifies any chances for this opportunity. Furthermore, in the light of the provisions of the Convention on the Rights of the Child, children with disabilities should **be enjoying special care on the part of public authorities**: "States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child" (Article 23 paragraph 2 of the Convention on the Rights of the Child). Giving up punishment for eugenic abortion –

[30] Ruling of the Constitutional Tribunal of 27 January 2004, K 14/03, OTK ZU 2004/1A/1.

which is in fact introduced by the challenged statutory provisions – not only does not implement the provisions of the Convention, but is a clear example of negation of the letter and the spirit of the Convention on the Rights of the Child.

27. Dignity of the unborn child has also been recognized in the case law of the **Court of Justice of the European Union (hereinafter as: "the CJEU").** The Court – referring to the content of Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of biotechnological inventions[31] – noted that dignity is vested from the moment of connection of human male and female gametes, which begins the process of human development in the prenatal phase: "In that regard, the preamble to the Directive (Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of biotechnological inventions – the author's note) states that although it seeks to promote investment in the field of biotechnology, use of biological material originating from humans must be consistent with regard for fundamental rights and, in particular, the dignity of the person. Recital 16 in the preamble to the Directive, in particular, emphasises that «patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person». To that effect, as the Court has already held, Article 5(1) of the Directive provides that the human body at the various stages of its formation and development cannot constitute a patentable invention. Additional security is offered by Article 6 of the Directive, which lists as contrary to *ordre public* or morality, and therefore excluded from patentability, processes for cloning human beings, processes for modifying the germ line genetic identity of human beings and uses of human embryos for industrial or commercial purposes. Recital 38 in the preamble to the Directive states that this list is not exhaustive and that all processes the use of which offends against human dignity are also excluded from patentability (see *Netherlands* v *Parliament and Council*, paragraphs 71 and 76). The context and aim of the Directive thus show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected. It follows that the concept of 'human embryo' within the meaning of Article 6(2)(c) of the Directive must be understood in a wide sense. Accordingly, any human ovum must, as soon as fertilised, be regarded as a «human embryo» within the meaning and for the purposes of the application of Article 6(2)(c) of the Directive, since that fertilisation is such as to commence the process of development

[31] OJ L 213, vol. 41, 30 July 1998, p. 13.

of a human being"[32]. The CJEU also stressed that human embryos encompass also unfertilised human ova into which a cell nucleus from a mature human cell was implanted and unfertilised human ova whose division and development has been stimulated by parthenogenesis[33].

28. Also the **European Court of Human Rights** in the case *Vo v. France* admitted that "it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person […] require protection in the name of human dignity […]"[34]. Although the Court did not deduce from the correctly determined premise that the conceived child is fully protected under Article 2 of the ECHR, some of the judges submitting a dissentings opinions in Vo v. France pointed out at this logical consequence. Judge G. Ress stated that there had been a violation of Article 2 of the ECHR in the subject matter adjudicated by the Court, and, therefore, that is was applicable to an unborn child: "The Vienna Convention on the Law of Treaties (Article 31 § 1) requires treaties to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose. The ordinary meaning can only be established from the text as a whole. Historically, lawyers have understood the notion of «everyone» («toute personne») as including the human being before birth and, above all, the notion of «life» as covering all human life commencing with conception, that is to say from the moment an independent existence develops until it ends with death, birth being but a stage in that development"[35]. In the conclusions, Judge G. Ress stated: "Since I consider that Article 2 applies to human beings even before they are born, an interpretation which seems to me to be consistent with the approach of the Charter of Fundamental Rights of the European Union, and since France does not afford sufficient protection to the foetus against the negligent acts of third parties, I find that there has been a violation of Article 2 of the Convention. As regards the specific measures necessary to discharge that positive obligation, that is a matter for the respondent State, which should either take strict disciplinary measures or afford the protection of the criminal law (against

[32] *See* Judgment of the Court (Grand Chamber) of 18 October 2011. Oliver Brüstle v. Greenpeace eV., case C-34/10, par. 32-35.
[33] *Ibid.,* par. 36.
[34] ECHR 2004/16 Case of Vo v. France, 8 July 2004, No. 53924/00 (Grand Chamber), par. 84.
[35] Dissenting opinion of judge G. Ress to ECHR 2004/16 Case of Vo v. France, 8 July 2004, No. 53924/00 (Grand Chamber), par. 4.

unintentional homicide)"[36]. Similar were the conclusions reached by judge A. Mularoni and judge V. Strážnická[37].

29. References to human dignity of a conceived child are also found in the documents issued by the Council of Europe. In accordance with recommendation 1046 of the Parliamentary Assembly of the Council of Europe of 1986 "…human embryos and foetuses must be treated in all circumstances with the respect due to human dignity…"[38].

30. Legislation that does not ensure or deprive a person of legal protection of his or her life is, at the same time, an expression of disrespect for dignity, which is a source of freedom and human rights, and betrays the absolute order to protect it. In the light of such legislation – as, for example, contested in the present case – a man is reduced to an object of law, which accepts the legal fiction of the lack of the man's own subjectivity as a human being, which is completely inadmissible pursuant to **Article 30 of the Polish Constitution**. It should be remembered that the Constitutional Tribunal stated: "The basic attribute of a man is his life. Deprivation of life, therefore, annihilates the man as a subject of rights and obligations. If the core of the principle of the rule of law is a set of basic directives derived from the essence of a democratically made law and guaranteeing a minimum level of justice, then the first such directive must be to respect, in the rule of law, values without which any legal subjectivity is excluded, i.e. human life from the beginning of its creation. A democratic state of law puts the man and the interests most valuable to him as the prime value. One of them is life, which in a democratic state of law must remain under constitutional protection at every stage of its development"[39].

31. It should be stated, therefore, that nothing is more dehumanizing and aimed against inherent dignity than depriving a human (at any stage of development) of the legal protection of his life. This leads to the conclusion that Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Abortion Act are not conformant with Article 30 of the Polish Constitution, as well as the provisions

[36] *Ibidem,* par. 9.
[37] Dissenting opinion of judge A. Mularoni joined by judge V. Strážnická, to ECHR 2004/16 Case of Vo v. France, 8 July 2004, No. 53924/00 (Grand Chamber).
[38] Council of Europe, Parliamentary Assembly Recommendation 1046 (1986) on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes (http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=15080&lang=en, accessed: 11 June 2018).
[39] Ruling of the Constitutional Tribunal of 28 May 1997, ref. no. K 26/96, OTK 1997/2/19.

contained in the above-mentioned acts of international law, which enjoin the protection of personal dignity.

IV. Assessment of conformity of the reviewed provisions with Article 38 in conjunction with Article 31 paragraph 3 of the Polish Constitution and with international law standards regarding the legal protection of human life (right to life)

32. Eminent French philosopher and co-creator of the Universal Declaration of Human Rights Jacques Maritain pointed out that the right to life, which he also defined as the *right to existence*, is a fundamental right of a *human person as such*[40]. This statement should be recalled, because the right to life of every human being guarantees the possibility of exercising all other rights. It is vested in every man due to the fact that he is a subject and never an object of rights.

33. Pursuant Article 38 of the Polish Constitution: "The Republic of Poland shall ensure the legal protection of the life of every human being". The quoted provision does not make the scope of this protection conditional on the stage of human life. This view was also expressed by the Polish Constitutional Tribunal in its ruling of 27 May 1997, in which it stated that: "The quality of a constitutionally protected legal value, which is human life, including life developing in the prenatal phase, cannot be differentiated. There are no sufficiently precise and justified criteria allowing for such a differentiation based on the development phase of human life. Since its creation, human life becomes a constitutionally protected value. This also applies to the prenatal phase"[41].

34. The quoted ruling is of fundamental importance for assessing the constitutionality of the provisions subject to review in the present case[42]. It is pointed out in Polish legal studies that: "The conclusion of the ruling of the Constitutional Tribunal provides that the status of a human being in the Polish legal system may not be determined by the statutory provisions. The competence of the law maker does not include making

[40] J. Maritain, *The Rights of Man and Natural Law,* London 1944, p. 44 and 60.
[41] Ruling of the Constitutional Tribunal of 28 May 1997, ref. no. K 26/96, OTK 1997/2/19. *See* also: L. Bosek, [in:] *Medical Law: Cases and Commentaries,* [ed.] M. Safjan, Warsaw 2012, p. 44.
[42] Also P.A. Tozzi seems to emphasize the meaning of the quoted fragment of the ruling of the Constitutional Tribunal: *op. cit., p.* 63.

decisions about capacity of the human being to be the subjects of rights and even about the every human's right to life, «without which any capacity to be the subject of rights is excluded»"[43].

35. The view expressed in the jurisprudence of the Constitutional Tribunal was also shared by the Polish Supreme Court (Civil Chamber), which in the judgment of 26 November 2014 stated: "When analysing the problem of applying Article 446 § 4 of the Civil Code in this case, it is necessary to take into account the regulations included in the Polish legal system, in the light of which both the foetus and the unborn child are protected by law. The right to life is a constitutional value, Article 38 of the Constitution provides every human being with legal protection of life"[44]. In the Supreme Court judgment (the Chamber of Labour Law, Social Insurance and Public Affairs) passed on 30 November 2016 (III PK 17/16), it was underscored that "in the Polish legal system, it is a principle that – regardless of normative changes made – the applicable regulations stress the subjective nature of *nasciturus"*[45]. In turn, in the Supreme Court jurisprudence (Criminal Chamber) it was noted that on the basis of the standard of protection of life contained in Article 38 of the Constitution: "a criminal law model is possible in which criminal liability for unintentional actions taken against a conceived child would be envisaged, and also which would at the same time introduce uniform intensity of life protection from conception"[46]. Therefore, "Polish criminal law protects human life from conception to death. (…) It is obvious that the mere existence of the provisions: Article 152, 153 and Article 157a of the Criminal Code exclude any doubt as to the fact that human life and health are protected from conception to death."[47]

36. It should also be emphasized that the right to life is one of the most important (and, in fact, the most important) of human rights articulated in acts of international law. According to Article 3 of the Universal Declaration of Human Rights: "Everyone has the right to life, liberty and security of person". The right to life – as shown in the Preamble to the Declaration – is enjoyed by "all members of the human family"[48].

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[43] L. Bosek, *op. cit., p.* 45.
[44] Judgment of the Supreme Court of 26 November 2014, III CSK 307/13, OSNC 2015/12/147.
[45] Judgment of the Supreme Court of 30 November 2016, III PK 17/16.
[46] Decision of the Supreme Court of 30 October 2008, I KZP 13/08, OSNKW 2008/11/90/37.
[47] Resolution of the Supreme Court of 26 October 2006, I KZP 18/06, OSNKW 2006/11/97/1.
[48] R.G. Wilkins, J. Reynolds, *International Law and the Right to Life,* «Ave Maria Law Review» 4/1 (2006), p. 124-125.

37. Article 6 paragraph 1 of ICCPR states, in turn, that: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life". It should also be reminded that the right to life of an unborn child is underlined very clearly in Article 6 paragraph 5 of ICCPR, which **prohibits the execution of a death sentence on a pregnant woman**. This provision results from recognition of the independent status of the unborn child in relation to his mother, which was clearly confirmed in the preparatory work on the Covenant. Documents from preparatory work on the Covenant, which according to Article 32 of the Vienna Convention, constitute supplementary interpretative material, clearly state that **the main reason why death penalty should not be executed on pregnant women is** "**to save the life of an innocent unborn child" and the inspiration with humanitarian reasons and consideration of the interests of the unborn child[49]. Article 6 paragraph 5 of the Covenant not only protects human life at the prenatal stage of development, but also fully respects his legal personality and inherent human rights**[50].

38. Pursuant to Article 2 paragraph 1 of ECHR "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law". As previously emphasized, the term "everyone" means every person, and therefore also the unborn child.

39. In accordance with Article 6 paragraph 1 of the Convention on the Rights of the Child : "States Parties recognize that every child has the inherent right to life". It should be emphasized that the term *every child* it also means every conceived child. This results both from the content of the preamble and from Article 1 of the Convention, as well as from the legislative technique adopted by the authors of the Convention, which assumes that the rights that are addressed only to children characterized by specific features contain an appropriate caveat in the content of the appropriate editorial unit, unless

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[49] *See* A/3764 § 118. Report of the Third Committee to the 12th Session of the General Assembly, 5 December 1957 [Article 6 para. 4 mentioned in the text is currently Article 6 para. 5 – author's note], http://uvallsc.s3.amazonaws.com/travaux/s3fs-public/A-3764.pdf?null, (accessed: 4 June 2018); see A/2929, Chapter VI, §10, Report of the Secretary-General to the 10th Session of the General Assembly, 1 July 1955, http://uvallsc.s3.amazonaws.com/travaux/s3fs-public/A-2929_0.pdf?null, (accessed: 6 June 2018).

[50] Cf. also Adolphe, *The Legal Anthropology of Human Rights,* [in:] *Protection of Human Life in Its Early Stage. Intellectual Foundations and Legal Means,* [red.] A. Stępkowski, Frankfurt am Main 2014, p. 22.

something different results from the essence of the law itself (this caveat, obviously, does not concern the legal protection of life, which by its very nature has a universal dimension). By way of example one may point to **Article 7 paragraph 1 of the Convention, which clearly states that the right to receive a name and acquire citizenship, as well as the right to know and to be cared for by his or her parents is only vested in the child who is already born**. Article 12, on the other hand, limits the right of the child to express views on matters pertaining to him to children capable of forming their own views.

40. The obligation of life legal protection of life was clearly articulated also in Article 10 of the Convention on the Rights of Persons with Disabilities: "States Parties reaffirm that every human being has the inherent right to life and shall take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others."

41. The fact that performing an abortion can never be treated as an ordinary "medical procedure" that deserves moral affirmation was reflected in the Resolution of the Parliamentary Assembly of the Council of Europe No. 1763 of 2010, where it is clearly stated that it **leads to death of the conceived child**, due to which it is necessary to ensure the right to refuse to perform it with the possibility of invoking conscientious objection: "No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason"[51].

42. The above findings lead to the obvious conclusion that Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Abortion Act are contrary to Article 38 of the Polish Constitution and those provisions of international treaties binding on the Republic of Poland that establish the right to life (guarantee the legal protection of life). Eugenic abortion leads to physical elimination (interrupts the physical existence) of a conceived child due to negative (merely) assumption about the possible state of his health.

[51] Resolution 1763 of the Parliamentary Assembly of the Council of Europe of 7 October 2010 http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17909&lang=en (accessed: 6 June 2018)

43. Determining the content of Article 38 of the Polish Constitution does not end the analysis of the legal problem which is examined by the Constitutional Tribunal in the present case. In a democratic state ruled by law, the exercise of human rights and freedoms (and thus their protection) may be subject to limitations due to the principle of proportionality and the so-called weighing of constitutional principles and values. This also applies to life of human being, the protection of which is not absolute. Pursuant to Article 31 paragraph 3 of the Polish Constitution: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights".

44. The quoted provision provides the admissibility of limitation in the exercise of constitutional freedoms and rights on the fulfilment of certain conditions. First of all, these limitations must be included in a normative act with the rank of a statute. Secondly, they are allowed only if they are necessary in a democratic state for the protection of its security or public order, or to protect the environment, health and public morals, or the freedoms and rights of others. Thirdly, limitations must not violate the essence of the freedoms and rights they concern.

45. Although the provisions subject to review are included in a statute, they raise fundamental doubts from the perspective of the principle of specificity of law, a component of the democratic legal state. Pursuant to the ruling of the Constitutional Tribunal of 30 October 2001: "Firstly, any provision limiting constitutional freedoms or rights should be formulated in a way that allows unambiguous determination of who and in what situation is subject to limitations. Secondly, this provision should be precise enough to ensure its uniform interpretation and application. Thirdly - such a provision should be formulated so that the scope of its application covers only those situations in which reasonably acting legislator actually meant to introduce a regulation limiting the exercise of constitutional freedoms and rights"[52].

46. Both Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Abortion Act do not satisfy the requirements formulated by the Tribunal in the aforementioned ruling. They use imprecise phrases such as "high probability". In

[52] Ruling of the Constitutional Tribunal of 30 October 2001, ref. no. K 33/00, OTK 2001/7/217.

the context of dynamic development of medical sciences, the term "incurable disease" is also difficult to interpret. The regulations also do not state whether "incurable disease" must result in a direct threat to life, or perhaps only a potential threat. This problem has been noticed in the legal literature[53].

47. Article 31 paragraph 3 of the Polish Constitution also provides for a catalogue of values, the protection of which can justify a limitation of constitutional freedoms or rights. These are: [a] public safety, [b] or public order, [c] protection of the environment, [d] protection of public health, [e] protection of public morals, [f] freedoms and rights of others. Due to the fact that protection of the life of a particular person occupies a very high position in the hierarchy of constitutional freedoms and rights, limiting legal protection of life is permissible only when it is "necessary in a democratic state", whereby the premise of necessity must be interpreted very restrictively[54]. This was best expressed by the Constitutional Tribunal: "The condition for limiting the right to legal protection of life is, therefore, a situation in which there is no doubt that it could not be reconciled with analogous rights of other people. This premise can be described generally as a requirement of symmetry of legal interests: of the devoted interest and the saved interest"[55]. The Tribunal also noted: "In a democratic legal state, implementing the principles of social justice and protecting life and inalienable dignity of a man, it would be definitely unacceptable to limit the legal protection of human life in order to protect interests located lower in the constitutional hierarchy, e.g. property and other property rights, public morals protection of the environment or even the health of other people."[56] With this in mind, it should be stipulated that none of the values provided for in this catalogue can justify the admissibility of eugenic abortion. It is not justified by the grounds for protecting public health and the rights and freedoms of others, since the reviewed provisions do not concern the protection of mother's life and health. The issue of the conflict of legally significant interests – i.e. the life of the unborn child and the life and health of his mother - was settled by Article 4a paragraph 1 subparagraph 1 of the Abortion Act, which in the present case lies beyond the review of the Constitutional

[53] *See* O. Pankiewicz, *An Essay About the Values Justifying Eugenic Abortion as Confronted Edith the Constitution ad the Real World, Protection of Human Life in Its Early Stage. Intellectual Foundations and Legal Means,* [ed.] A. Stępkowski, Frankfurt am Main 2014, p. 181.
[54] P. Sarnecki, Articlecommentary on Article 38 of Constitution, [in:] L. Garlicki, M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, vol. II, Warsaw 2016, note 7.
[55] Ruling of the Constitutional Tribunal of 30 September 2008 r., K 44/07.
[56] *Ibidem*.

Tribunal, even though in the light of the regulations of the Polish Constitution and international obligations of the Republic of Poland, this provision – in the part covering the mother's health – is also difficult to consider compliant with legal provisions of higher legal force – in accordance with the system of sources of law adopted in the Polish Constitution - than a statute.

48. The permissibility of killing a conceived child due to **mere suspicion** ("high probability") of illness or disability obviously violates the very essence of the right to provide legal protection of life, because its effect is the complete abolition of this protection. This is in obvious contradiction with Article 38 in conjunction with Article 31 paragraph 3 of the Polish Constitution and the principle *in dubio pro vita humana* recognized in the case law of the Constitutional Tribunal[57]. Even if the regulations required **certainty** on the part of the doctor in this respect, it should be emphasized that the duty of the medical services is to rescue, treat or provide palliative care, and never to kill people in medical facilities.

49. Thus, it must be stated that Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Abortion Act are in conflict with Article 38 in conjunction with Article 31 paragraph 3 of the Polish Constitution, because they abolish legal protection of the life of a conceived child who is suspected (without certainty) of an incurable illness or a serious and irreversible (but not necessarily life threatening) disability, which is not only not justified by the need (or even the possibility) of protecting any of the values indicated in Article 31 paragraph 3 of the Constitution, but also violates the essence of the legal protection of life guaranteed in Article 38 of the Polish Constitution to every man.

V. Assessment of conformity of the reviewed provisions with Article 2 of the Polish Constitution

50. The protection of human dignity, which is not possible without effective legal protection of his life, is an obligation binding on the Republic of Poland under international treaties, which it undertook to observe. Also the provisions of Chapter II of

[57] Ruling of the Constitutional Tribunal of 27 January 2004, K 14/03, OTK ZU 2004/1A/1.

the Polish Constitution impose on public authorities the duty to respect and protect human dignity, which is the source of human and civil freedom, and in particular the right to legal protection of life, taking the most important place in the hierarchy of human freedoms and rights.

51. Violation of these laws by Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Abortion Act has already been demonstrated above. At this point, it is worth drawing the attention to another provision of the Polish Constitution, which appears in the proposal of the group of deputies initiating proceedings in the present case, though not playing a leading role. What is meant, is Article 2 of the Polish Constitution, according to which "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice." This provision formulates the supreme systemic principle, referring to the nineteenth-century concept of the state of law (*Rechtsstaat*), which, however, in history has had its good and bad aspects come into foreground. To, in fact, legitimate postulate of legalism – that the state authorities should act on the basis and within the limits of law – to meet the expectations attached to it, the content of the law must respect universal values.

52. This axiological dependence was perfectly captured by the Polish Constitutional Tribunal, which in 1997 in a ruling confirming unconstitutionality of provisions legalizing abortion in the case of difficult living conditions or a difficult personal situation of the mother, started the grounds of its ruling with a statement that should be quoted *in extenso*: "The basic attribute of a man is his life. Deprivation of life, therefore, annihilates the man as a subject of rights and obligations. If the core of the principle of the rule of law is a set of basic directives derived from the essence of a democratically made law and guaranteeing a minimum level of justice, then the first such directive must be to respect, in the rule of law, values without which any legal subjectivity is excluded, i.e. human life from the beginning of its creation. A democratic state of law puts the man and the interests most valuable to him as the prime value. One of them is life, which in a democratic state of law must remain under constitutional protection at every stage of its development. The value of a constitutionally protected legal right, which is human life, including life developing in the prenatal phase, cannot be differentiated."[58]

[58] Ruling of the Constitutional Tribunal of 28 May 1997, ref. no. K 26/96, OTK 1997/2/19. See also: L. Bosek, [in:] *Medical Law: Cases and Commentaries,* [ed.] M. Safjan, Warsaw 2012, p. 44.

53. In this ruling – probably the most important in its history – the Constitutional Tribunal perfectly captured the essence of a democratic state of law. A democratic state of law is one in which one cannot kill people, especially those innocent and most vulnerable – the unborn and the disabled.

54. For these reasons, it is justified that the Constitutional Tribunal unequivocally reiterates and develops its apt findings from over 20 years ago, and states that Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Abortion Act contradict also Article 2 of the Polish Constitution.

VI. Summary

55. To summarize the arguments presented in this opinion, it must be stated that the admissibility of depriving of life an unborn child who is highly likely to suffer from diseases or disabilities are inconsistent with Article 2, Article 30, Article 38 in conjunction with Article 31 paragraph 3 of the Polish Constitution and numerous acts of international law. The reviewed legal provisions are very imprecise and do not take into consideration the current advancement of medical knowledge. Above all, however, they offend the human dignity of unborn children by depriving them of their legal guarantee of protection of life. In connection with this, we, the undersigned, present the following opinion:

Article 4a paragraph 1 subparagraph 2 and Article 4a paragraph 2 first sentence of the Abortion Act are inconsistent with Article 2, Article 30, Article 38 in conjunction with Article 31 paragraph 3 of the Polish Constitution.