

**UNOFFICIAL TRANSLATION OF THE DRAFT LAW PRESENTED TO THE POLISH PARLIAMENT BY  
CITIZENS' INITIATIVE "STOP ABORTION" ON JULY 5<sup>TH</sup> 2016  
PREPARED BY THE FEDERATION FOR WOMEN AND FAMILY PLANNING**

**ACT**

of ..... 2016

**amending the Act of 7 January 1993 on Family Planning, Human Embryo Protection and Conditions  
of Legal Pregnancy Termination and Criminal Code Act of 6 June 1997**

**Art. 1.** In the Act of 7 January 1993 on Family Planning, Human Embryo Protection and Conditions of Legal Pregnancy Termination (Journal of Laws No. 17, item 78 with amendments<sup>1</sup>), following changes are introduced:

1) title of the Act reads as follows:

„on universal protection of human life and preparation for family life“;

2) the preamble reads as follows:

“Recognising that expressed in the Constitution of the Republic of Poland principle of legal protection of the life of every human being is inextricably connected to the immanent to anyone, regardless of stage of development, and the inherent and inseparable human dignity, it is established as follows:”;

3) Art. 1 reads as follows:

„Art. 1. Every human being has the inherent right to life from the moment of conception, that is connection of female and male reproductive cells. The life and health of the child from its conception remain under the protection of the law.“;

4) in Art. 2:

a. para. 1 point 1 reads as follows:

„1) medical care for a pregnant woman and an unborn child,“;

b. para. 2a reads as follows:

„2a. Government administration and local government bodies, within their competences defined in specific provisions, are obliged to provide material support and care to families raising children with severe disability or life-threatening disease, as well as to mothers and their children, when it is reasonably suspected that the conception occurred as a result of a criminal act.“;

5) Art. 4 para. 1 reads as follows:

„1. Preparation for family life is introduced to the school curricula, that includes knowledge about the principles of responsible parenthood and the value of family and human life from conception to natural death. The curriculum must respect the moral standards of parents and sensitivity of students. Participation requires the written consent of parents or adult students.“;

---

<sup>1</sup> Amendments to the mentioned act were published in Journal of Laws from 1995 No 66, item 334, from 1996 No 139, item 646, from 1997 No 141, item 943, from 1999 No 5, item 32, from 2001 No 154, item 1792.

- 6) Art. 4a shall be repealed;
- 7) Art. 4b shall be repealed;
- 8) Art. 4c shall be repealed.

Art. 2. In the Act of 6 June 1997 Criminal Code (Journal of Laws No 88, item 553 with amendments<sup>2</sup>) following changes are introduced:

1) in art. 115 after § 23, a following § 24 is added:

„§ 24. An unborn child is a human at prenatal stage of development, from the moment of the connection of female and male reproductive cells.”;

2) art. 152 reads as follows:

„Art. 152. § 1. Whoever causes a death of an unborn child, shall be subject to imprisonment between 3 months and 5 years.

§ 2. If the perpetrator committing the act described in § 1 acts unintentionally, shall be subject to imprisonment up to 3 years.

§ 3. Also whoever provides aiding or abetting to commit the act specified in § 1, is liable within the provided consequences for its commitment.

§ 4. A physician does not commit crimes described in § 1 and § 2, if the death of the unborn child is a result of curative actions necessary to avert the imminent danger to the life of the unborn child's mother.

§ 5. If the perpetrator of the act specified in § 1 is the mother of the unborn child, the court may impose the extraordinary mitigation of punishment, or even renounce of inflicting it.

§ 6. Mother of the unborn child, who commits the act described in § 2 is not punishable.”;

3) art. 153 reads as follows:

„Art. 153. Whoever, using violence against the mother of the unborn child causes the death of the unborn child or using violence, illegal threat or deceit, leads the mother of the unborn child to the deprivation of life of this child, shall be subject to imprisonment between 1 and 10 years.”

4) art. 154 reads as follows:

„Art. 154. § 1. If the act referred to in Article 152 § 1 results in the death of the mother of the unborn child, the perpetrator shall be subject to imprisonment between 1 and 10 years.

---

<sup>2</sup> Amendments to the mentioned act were published in Journal of Laws from 1997 No 128, item 840, from 1999 No 64, item 729 and No 83, item 931, from 2000 No 48, item 548, No 93, item 1027 and No 116, item 1216, from 2001 No 98, item 1071, from 2003 No 111, item 1061, No 121, item 1142, No 179, item 1750, No 199, item 1935 and No 228, item 2255, from 2004 No 25, item 219, No 69, item 626, No 93, item 889 and No 243, item 2426, from 2005 No 86, item 732, No 90, item 757, No 132, item 1109, No 163, item 1363, No 178, item 1479 and No 180, item 1493, from 2006 No 190, item 1409, No 218, item 1592 and No 226, item 1648, from 2007 No 89, item 589, No 123, item 850, No 124, item 859 and No 192, item 1378, from 2008 No 90, item 560, No 122, item 782, No 171, item 1056, No 173, item 1080 and No 214, item 1344, from 2009 No 62, item 504, No 63, item 533, No 166, item 1317, No 168, item 1323, No 190, item 1474, No 201, item 1540 and No 206, item 1589, from 2010 No 7, item 46, No 40, items 227 and 229, No 98, items 625 and 626, No 125, item 842, No 127, item 857, No 152, items 1018 and 1021, No 182, item 1228, No 225, item 1474 and No 240, item 1602, from 2011 No 17, item 78, No 24, item 130, No 39, item 202, No 48, item 245, No 72, item 381, No 94, item 549, No 117, item 678, No 133, item 767, No 160, item 964, No 191, item 1135, No 217, item 1280, No 233, item 1381 and No 240, item 1431, from 2012 item 611, from 2013 items 849, 905, 1036 and 1247, from 2014 item 538, from 2015 items 396, 541, 1549, 1707, 1855 and from 2016 item 189.

§ 2. If the act referred to in Article 153 results in the death of the mother of the unborn child, the perpetrator shall be subject to imprisonment between 2 and 12 years.”;

5) art. 157a reads as follows:

„Art. 157a. § 1. Whoever causes injury or life-threatening health disorder to the unborn child, shall be subject to imprisonment up to 3 years.

§ 2. If the perpetrator of the act specified in § 1 acts unintentionally, shall be subject to fine, penalty of restriction of liberty or imprisonment up to 1 year.

§ 3. The physician does not commit the offense specified in § 1 and § 2, if the injury or health disorder of the unborn child is a consequence of curative actions, necessary to avert the threat to the health or life of the unborn child or its mother.

§ 4. If the perpetrator of the act specified in § 1 is the mother of the unborn child, the court may impose the extraordinary mitigation of punishment, or even renounce of inflicting it.

§ 5. Mother of the unborn child, who commits the act described in § 2 is not punishable.”

Art. 3. The Act enters into force two weeks from the date of publication.

UNOFFICIAL TRANSLATION

## JUSTIFICATION

The Republic of Poland ensures the legal protection of every human life.  
- **Art. 38 of the Polish Constitution**

All are equal before the law.  
- **Art. 32 para. 1 of the Polish Constitution**

Since the creation, human life becomes thus a constitutionally protected value.  
This also applies to the prenatal phase.  
- **Constitutional Tribunal judgement of 28<sup>th</sup> May 1997, ref. No. K 26/96**

(...) any possible doubt as to the protection of human life should be resolved in favour of this protection (in dubio pro vita humana).

- **Constitutional Tribunal judgement of 7<sup>th</sup> January 2004, ref. No. K 14/03**

Child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

- **UN Declaration of the Rights of the Child of 20<sup>th</sup> November 1959, Convention on the Rights of the Child of 20<sup>th</sup> November 1989**

Among all the crimes which can be committed against life, procured abortion has characteristics making it particularly serious and deplorable.

- **John Paul II, Evangelium Vitae**

The one eliminated is a human being at the very beginning of life (...) weak, defenceless, even to the point of lacking that minimal form of defence consisting in the poignant power of a newborn baby's cries and tears. The unborn child is totally entrusted to the protection and care of the woman carrying him or her in the womb. And yet sometimes it is precisely the mother herself who makes the decision and asks for the child to be eliminated, and who then goes about having it done.

- **John Paul II, Evangelium Vitae**

The commandment YOU SHALL NOT KILL contains not only the ban.  
It calls us to certain attitudes and positive behaviour.

- **John Paul II – Radom, 4<sup>th</sup> June 1991**

More and more common, even among people with noble nature, mentality tolerating the practice of killing the unborn, inevitably leads also to acceptance of other forms of direct destruction of life, both of the elderly and the disabled or physically or mentally handicapped people, namely euthanasia.

- **John Paul II – Warsaw, 9<sup>th</sup> June 1991**

### 1. The need and purpose of the Act

1.1. The draft aims at adapting certain provisions of the Act of 7 January 1993 on family planning, human embryo protection and conditions of legal pregnancy termination (Journal of Laws No. 17, item 78, with amendments) (hereinafter: "the Act") and the Act of 6 June 1997 Criminal Code (Journal of Laws No. 88, item. 553, with amendments) (hereinafter: "the Criminal Code") in order to truly implement the expressed in Art. 38 of the Polish Constitution<sup>3</sup> principle of protection of human life, which includes life at every stage of its development, as well as international obligations in ensuring every child the inalienable right to life, guaranteed under Art. 6 para. 2 of the Convention on the Rights of the Child<sup>4</sup>, ratified by the Republic of Poland. The aim of the initiative is to restore the fullness of the human rights, with particular

<sup>3</sup> Journal of Laws 1997 No. 78, item 483 with amendments.

<sup>4</sup> Convention on the Rights of the Child, proclaimed by the United Nations General Assembly on 20th November 1989 (Journal of Laws 1991 No. 120, item 526), ratified by the Republic of Poland on 30<sup>th</sup> September 1991. In its judgement of 28<sup>th</sup> May 1997, ref. No. K 26/96, Constitutional Tribunal in reference to the Convention on the Rights of the Child stated, that *guarantees in the Convention apply also to the prenatal phase of human life*.

regard to the right to life, to the most vulnerable people who cannot defend themselves. At the same time, the draft ensures the implementation of the principle of equality before the law and puts an end to the legal discrimination against people in the prenatal stage of their development.

### 1.2. *The expected adoption of the draft by the legislative authority*

This draft is proposed in the hope to be positively received by the legislative authority. It should be noted that Law and Justice MPs clearly expressed their support for the full protection of life during the vote on the civil draft by the initiative “Stop Abortion” on 11<sup>th</sup> September 2015. Therefore, it is reasonable for the citizens supporting this initiative to expect that this morally unambiguous stance will be upheld in the current parliamentary term. Originating from the fundamental constitutional principles, the claim of universal protection of life should find support among MPs from KUKIZ'15, Polish People’s Party (PSL), Civic Platform (PO) and Modern Party (Nowoczesna).

### 1.3. *Human dignity and the right to protection of life*

According to the norm expressed in art. 38 of the Constitution, the Republic of Poland bears the responsibility to ensure the legal protection of every person’s life. This means that public authorities are not only obliged not to take actions that negatively affect the constitutionally protected value of life, but also have positive obligation<sup>5</sup> to undertake such activity that fully leads to realisation of the constitutional guarantee of protection of the right to life. Such view was confirmed by the Constitutional Tribunal in its judgment of 23<sup>rd</sup> March 1999 in case under ref. No. K 2/98<sup>6</sup>. The Tribunal stated that since “the Constitution results in an objective value system, it is the legislator’s obligation to state such law so that it allows for the protection and realization of these values to the fullest possible extent” and “regardless of the <<defensive>> nature of the right to life, Art. 38 also results in public authorities’ commitment to take action to protect life”<sup>7</sup>. The indicated range of obligation means both the need to take action at the level of legislation defining the boundaries of illegality, as in the case of modification of the Act, as well as to introduce amendments that ensure true respect for the enacted principles, which justifies the need to modify the Criminal Code. The discussed claim is also presented in the constitutional law discourse, namely P. Sarnecki argues that actions taken by the authorities should create “legal and factual institutions and states that reduce or eliminate threats to human life”<sup>8</sup>. Finally, the Tribunal in its case law developed a principle according to which “any possible doubt as to the protection of human life should be resolved in favour of this protection (*in dubio pro vita humana*)”<sup>9</sup>. The need to protect human dignity at the earliest stage of its development has been recently noticed also by the Court of Justice of the European Union. In 2011 in its judgement in case *Brüstle vs. Greenpeace*<sup>10</sup> the Court confirmed that the legal protection coming from human dignity begins at the moment of conception, in the embryonic stage, because “fertilization begins the process of human development”. This

---

<sup>5</sup> P. Sarnecki [in:] L. Garlicki (ed.), *Constitution of the Republic of Poland*, commentary to Art. 38, p. 3.

<sup>6</sup> Constitutional Tribunal’s judgment of 23<sup>rd</sup> March 1999, ref. No. K 2/98, OTK 1999, No. 3, item 38.

<sup>7</sup> Ibid.

<sup>8</sup> P. Sarnecki [in:] L. Garlicki (ed.), *Constitution of the Republic of Poland*, commentary to Art. 38, p. 3.

<sup>9</sup> Constitutional Tribunal’s judgement of 7<sup>th</sup> January 2004, ref. No. K 14/03, Journal of Laws of 15<sup>th</sup> January 2004.

<sup>10</sup> The Court’s judgement (Grand Chamber) of 18<sup>th</sup> October 2011 in case *Brüstle vs. Greenpeace* (C-34/10).

statement was confirmed three years later, in the judgment in case *International Stem Cell Corporation vs. Comptroller General of Patents, Designs and Trade Marks*<sup>11</sup>.

1.4. The current legislation, which touches upon the issue of the right to life, should be assessed in the context of the principles described above. This also applies to the Act of 7<sup>th</sup> January 1993 on family planning, human embryo protection and conditions of legal pregnancy termination. According to the art. 1 “right to life is protected, also at the prenatal stage, within the limits specified in the Act”. The provision in the quoted form lost its binding force long time ago, by the decision of the Constitutional Tribunal of 28<sup>th</sup> May 1997 in case of ref. No. K 26/96 regarding the extent to which protection of life in the prenatal stage depends on the decision of the ordinary legislator. Since the mentioned decision, the provision the wording of Article 1 has not been adjusted. In other words, although the Tribunal found the provision unconstitutional, the legislator has not decided to change it for nineteen years. Such practice needs to be assessed as unambiguously negative and treated as an example of a gross legislative violation and lack of respect for the Constitutional Tribunal’s decisions.

#### 1.5. *Existing provisions repealing the protection of the right to life*

Current Art. 4a of the Act of 7<sup>th</sup> January 1993 on family planning, human embryo protection and conditions of legal pregnancy termination sets conditions allowing for legal abortion. In accordance with para. 1 of the mentioned provision, the Act establishes three situations when the person is entitled to legal abortion:

1. when the pregnancy poses a threat to the life or health of the pregnant woman,
2. when prenatal tests or other medical findings indicate a high probability of severe and irreversible foetus malformation or incurable life-threatening disease,
3. if there is reasonable suspicion that the pregnancy is the result of a criminal act.

#### 1.6. *Constitutional objections to the current legal status*

The described legal status raises serious doubts as to its compatibility with the norms of the Constitution, in particular with Art. 38 and Art. 30. The Constitution requires the legislature to ensure the protection of human life, closely associated with the inherent (and therefore over-positive) nature of the human dignity at every stage of development, which covers the time both before and after birth. This principle is reflected in the decision of the Constitutional Tribunal of 28<sup>th</sup> May 1997, ref. No. K 26/96: “The significance of the constitutionally protected legal value of human life, including life developing at the prenatal stage, cannot be differentiated. There are no sufficiently precise and justified criteria allowing for such differentiation depending on the phase of development of human life. Since the creation, human life becomes thus a constitutionally protected value. This also applies to the prenatal phase”. As a result, on the grounds of constitutional jurisdiction is indisputable that “since the creation, human life becomes thus a constitutionally protected value. This also applies to the prenatal phase”. Although the Tribunal allows for situations, when the intensity of the protection of life at all its stages and under circumstances does not need to be the same, however it highlights that the protection must always be “sufficient from the perspective of the protected value”. The indicated direction has been developed in the Constitutional Tribunal’s judgment of 30<sup>th</sup> September 2008 in case of ref. No. K 44/07<sup>12</sup>, where the Tribunal

---

<sup>11</sup> The Court’s judgement (Grand Chamber) of 18th December 2014 in case *International Stem Cell Corporation vs. Comptroller General of Patents, Designs and Trade Marks* (C-364/13).

<sup>12</sup> Constitutional Tribunal’s judgement of 30<sup>th</sup> September 2008, ref. No. K 44/07, OTK A 2008, No. 7, item 126.

stated that “there is no doubt that human life is not subject to valuation on the basis of age, health status, expected length, or any other criteria”. Consequently, it is acceptable to increase the standard of protection of the right to life in the prenatal stage of development, however it needs to be regarded as unacceptable to lower the standard of protection to the level which does not ensure every human at the prenatal stage of development the sufficient protection of this right.

1.7. It also needs to be considered that according to Article 9 of the Constitution, Poland, bound by the international law, is obliged to obey the signed international agreements. As a result, the authorities are obliged to implement the provisions of the Convention on the Rights of the Child (Journal of Laws 1991 No. 120, item. 526), according to which, in reference to the tenth paragraph of the preamble, “the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth”. This means that all the guarantees in the Convention – including the expressed in Art. 6 right of every child to life – also apply to unborn children. Moreover, Art. 24 para. 2 point d of the Convention guarantees adequate health care for mothers in the period before and after childbirth. As indicated by the Constitutional Tribunal in its judgement of 28<sup>th</sup> May 1997, ref. No. K 26/96, this obligation aims in the first place – in the light of Art. 23 para. 1 and the Convention’s preamble – at the realisation of the right to the highest attainable standard of health for the unborn child.

1.8. Obviously, even though the constitutional guarantee of protection of life indisputably belongs to the most fundamental values, it is not of the absolute nature<sup>13</sup>. In other words, as an exception, the law may allow for situations when the protection of the individual's life is given up to another, or even the same value guaranteed by the provisions of the Constitution. An example of such a structure could be a collision of the right to life of two people in a critical situation. There is no doubt then as to the constitutionality of norms, which exclude the illegality of acts (art. 25 of the Criminal Code – legal self-defence) or the guilt of the individuals, which results in lack of the committed crime (Art. 26, para. 2 of the Criminal Code – the state of necessity) of taking the life of another human away<sup>14</sup>. It results from the institution of the general part of the Criminal Code and does not require keeping in the legal frame exceptions to the universal protection of life of a child at the prenatal stage of development.

#### 1.9. *Assessment of the proportionality of statutory restrictions on the right to the protection of life*

Even though the Constitution allows for situations when limiting the protection of the constitutionally guaranteed rights is possible, it also clearly indicates the restrictions of such actions. This is the function of Art. 31 para. 3 of the Constitution. Prerequisites for limiting legal protection include: statutory form of limitation, the necessity to introduce the limitation in the democratic state, the functional relation of the limitation to the implementation of the values mentioned in Art. 31 para. 3 (national security, public order, protection of the environment, health and morals, rights and freedoms of others) as well as the prohibition of violating the essence of particular right or freedom. From the statement that restrictions may be imposed only if they are necessary in a democratic state, the Constitutional Tribunal

---

<sup>13</sup> Constitutional Tribunal’s judgement of 23<sup>rd</sup> March 1999, ref. No. K 2/98, OTK 1999, No. 3, item 38.

<sup>14</sup> Constitutional Tribunal’s judgement of 30<sup>th</sup> September 2008, ref. No. K 44/07, OTK A 2008, No. 7, item 126.

derived the requirement of the so-called proportionality test<sup>15</sup>, which must be met by a regulation in order to demonstrate its compliance with the Constitution. Consequently, the regulation restricting particular right or freedom must be useful and necessary, and the preferred value must be adequately proportionate to the sacrificed value (proportionality *in the strict sense*).

1.10. During assessing the provisions of the Act, which result in reduction in the protection of human life, the following questions need to be answered:

1. whether the introduced regulation is able to achieve its intended effects;
2. whether it is necessary for the protection of the connected public interest;
3. whether the effects of the introduced regulation remain in adequate proportion to the damage to the sacrificed value, which is life.

1.11. *Repeal of the right to protect the life of a child in order to protect the life or health of the mother*

According to the Art. 4a para. 1, point 1 of the Act of 7 January 1993 on family planning, human embryo protection and conditions of legal pregnancy termination, the legislator protects life or health of the woman at the expense of the child's life. In some cases abortion may save the woman's life. Undoubtedly, the prerequisite of suitability is fulfilled. However, the fulfilment of the prerequisite of necessity cannot be claimed. It needs to be taken into account that the Constitutional Tribunal allows for an exception from the right to the protection of human life only in a situation, where undoubtedly it is irreconcilable with the corresponding rights of other people. Every case of the limiting the legal protection of human life – in relation to general standards – must therefore be considered as a measure of last resort. Meanwhile, in the light of contemporary medical standards, abortion cannot be in any circumstances deemed necessary to save the mother's life<sup>16</sup>. As a result, the condition of necessity is fulfilled only in a situation when conducting abortion is the only possible way that objectively makes it possible to save the mother's life. If there are any other tools to avoid risks for the value in the form of the mother's life, then there is no justification for sacrificing the life of the unborn child, and the regulation that allows for such possibility is simply unconstitutional.

1.12. Similarly, it is hardly possible to agree with the statement that the threat to the health of the mother justifies causing the death of the unborn child. In its judgment of 30 September 2008, in the case of ref. No. K 44/07<sup>17</sup>, the Constitutional Tribunal stated clearly that “it would be definitely unacceptable in a democratic state which implements the principles of social justice and protecting life and the inalienable human dignity, to limit the legal protection of human life in order to protect values that are lower in the constitutional hierarchy, eg. ownership and other property rights, public morality, the environmental protection or even the health of other people. (...) This prerequisite can be generally described as a requirement of the symmetry of values: sacrificed and saved”. In this context, it is worth noting that the constitutional law discourse leaves no doubt that the conclusion regarding the strong priority

---

<sup>15</sup> See f.ex. Constitutional Tribunal's judgement of 26<sup>th</sup> April 1995, ref. No. K. 11/94, OTK in 1995, part I, item 12 and Constitutional Tribunal's judgements of: 28<sup>th</sup> June 2000, ref. No. K. 34/99, OTK ZU No 5/2000, item 142 and ref. No. P 14/01, as well as Constitutional Tribunal's judgement of 3<sup>rd</sup> June 2008, ref. No. K 42/07, OTK ZU No 5/A/2008, item 77).

<sup>16</sup> See Dublin Declaration, Dublin 2012, <http://www.dublindeclaration.com/translations/> (accessed: 12.01.2016).

<sup>17</sup> Constitutional Tribunal's judgement of 30<sup>th</sup> September 2008, ref. No. K 44/07, OTK A 2008, No. 7, item 126.

of the protection of life over the protection of health is correct<sup>18</sup>. Consequently, in case of a conflict between the right to the life of the child and health of the mother, such symmetry definitely does not occur. Theoretically saved value is not in proportion to the value sacrificed, and ultimately the discussed acquiescence does not meet the legal conditions for permitting the limitation of constitutionally protected values expressed in Art. 31 para. 3 of the Constitution. Furthermore, according to modern medical knowledge, with the use of the achievements of the modern medicine, if the risk is related to the mother's health, it is not necessary to kill the child in order to reduce it.

*1.13. Repeal of the right to protect the life of the child due to the high probability of severe and irreversible foetus malformation or incurable life-threatening disease*

On the other hand, in the case of Art. 4a. para. 1 point 2 of the Act of 7 January 1993 on family planning, human embryo protection and conditions of legal pregnancy termination, it is hardly possible to identify the constitutionally protected value that could justify the deprivation of legal protection of life from the child, who has high probability of a severe and irreversible malformation or incurable life-threatening disease. The so-called eugenic prerequisite is not supported with the values, rights and freedoms expressed in the content of the provisions of the Constitution. It is impossible to find in the Constitution any norm that would justify treating people seriously and irreversibly or terminally ill as not deserving of full protection of life and health. It's actually the opposite. According to the Art. 32 para. 2 of the Constitution, discrimination "for any reason" is prohibited, furthermore Art. 68 para. 3 of the Constitution obliges public authorities to provide special health care to children, also those disabled and disadvantaged. Human life cannot be deprived of protection only because of the serious and irreversible impairment or incurable and fatal disease. It was also considered by the Constitutional Tribunal in its judgment of 30<sup>th</sup> September 2008 in case of ref. No. K 44/07, stating that "human life is not subject to valuation on the basis of age, health status, expected length, or any other criteria". As a result, the prerequisite of the existence of the value that needs to be protected by sacrificing the value of the human life. Finally, in the context of Art. 9 of the Constitution, it is worth mentioning the international law that binds Poland in the form of the Convention on the Rights of Persons with Disabilities, signed in New York on 13<sup>th</sup> December 2006 (Journal of Laws 2012, item 1169). According to the Preamble "discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person". Moreover, according to Art. 10 "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". There is no doubt that the repeal of the guarantee of the right to life of children with disabilities of illnesses at the prenatal stage of development is in obvious opposition to the inherent nature of human dignity and supremacy of human life in the hierarchy of values protected by law, both domestic and international.

1.14. The differentiation of the value of the human life according to the utilitarian indicators of its quality, normativity and ability, once introduced into the legal system, opens the way for further exceptions. The state, usurping the power over life, the state is capable of taking the protection of life away from other "useless" (from its point of view) groups of people. Keeping

---

<sup>18</sup> B. Banaszak, *Constitution of the Republic of Poland. Commentary*, Warsaw 2012, commentary to the art. 38, Nb. 4., SIP Legalis.

in the legal system prerequisite which deprives from the absolute guarantees of the right to life due to congenital defects leads to the stigmatization of all people with disabilities. The existing broad support for the civil life protection initiatives, as well as the growing awareness of the bloody and brutal truth about shyly hidden abortion techniques, lead to the conclusion that society is ready to bring back to the people discriminated on the grounds of their status, sex or origin the full protection of their lives and health.

*1.15. Repeal of the right to protect the life of the child due to the suspicion that it was conceived as a result of a criminal act*

Finally, referring to the norm expressed in Art. 4a. para. 1 point 3, first it must be precisely read, indicating that it applies both to rape (Art. 197 of the Criminal Code), or the sexual abuse of helplessness or disability (Art. 198 of the Criminal Code), but also to another criminal acts, for example sexual intercourse of two people under fifteen (Art. 200 § 1 of the Criminal Code), incest (Art. 201 of the Criminal Code), and even sexual intercourse in a public place resulting in a public scandal, which under Art. 51 § 1 of the Act of 20<sup>th</sup> May 1971 Code of Petty Offenses (Journal of Laws 2015, item 1094) is a criminal act.

1.16. In the case of rape or sexual abuse of helplessness or disability, the protected value seems to be the right of the mother to make responsible decisions about having children, expressed in the preamble of the Act. First it needs to be noted, however, that the Constitutional Tribunal has already stated in its judgement of 28<sup>th</sup> May 1997, ref. No. K 26/96, that “the right to have a child can be interpreted only in positive sense and not as a right to the destruction of developing human foetus”. It is impossible to decide to have a child when the child is already developing in the prenatal stage. In other words, there is no right to not give birth to a child. As a result, the indicated prerequisite allowing for termination of pregnancy is not justified by any value, law or constitutional freedom. What’s more, rape constitutes a criminal and shameful act, and the victim experiences physical and mental pain, however, when focusing on the issue of the psychological situation of the rape victim, one cannot lose sight of the problem of one more – equally important – person, that is the child, which is in no way responsible for the act committed by its father to its mother. In the case of abortion, even greater evil is created, as the child becomes another victim of this dramatic situation. Current prerequisite described in the Art. 4a. para. 1 point 3 of the Act is a unique case in today's legal culture of responsibility with one's life for the actions of third parties. The law allows for the negative consequences of criminal activities of the rape offender to affect an innocent person – the child. The problem is even more serious as the form of such responsibility is the deprivation of life. Statutory deprivation from the right to life of the conceived children, whose father (or parents) is suspected of committing a criminal act, forms the unacceptable in the modern legal system return to criminal liability for the fault of others. It cannot also be forgotten that such legal permission leads to a deeper pain of the mother, adding to the trauma of being a rape victim suffering from the post-abortion syndrome. Admissibility of the provision of the repeal of the protection of life is a vivid example of the capitulation of the state, which not only did not prevent the crime, but also it is not able to provide adequate support to the mother and child, offering only the permission and subsidy to kill an innocent human. Also the proportion in which the value of freedom to make decisions about having children and the right to life relate to each other leaves no doubts.

1.17. However, in the case of criminal acts where the intercourse occurs in accordance with the will of those involved, it is hardly possible to talk about the issue of protecting the right of

the mother to make decisions regarding having children, because it concerns people who voluntarily undertake sexual intercourses.

#### *1.18. Summary of the proportionality assessment of restrictions to the right to the protection of life*

Therefore, it is reasonable to state that the current content of the Act not only does not implement the claim of the protection of life in the fullest possible way, but actually in a manner noncompliant with the norms of the Constitution it limits the right to life expressed in its Art. 38. Consequently, the proposed changes aim to ensure the absolute protection of the constitutional right to life, which is also in line with the recommendations of the Venice Commission of the Council of Europe from 4<sup>th</sup> April 2006<sup>19</sup> regarding the conditions for the limitation of constitutional rights.

#### *1.19. The necessity of criminal sanctions in order to ensure the standard of protection of the right to life*

The proposed changes in the Criminal Code are a necessary supplement to the criminal tool through which the state can actually carry out its tasks to guarantee the values expressed in Art. 38 of the Constitution. Not only a clear decision regarding the boundaries of illegality at the level of the sanctioned norm is needed – what the author provides by proposing a number of amendments to the Act – but also it is necessary to properly shape the sanctioning norm, on which depends the actual level of the protection. It is hard to talk about effective protection of the right to life by establishing a legal standard of prohibiting the killing of the unborn child, if the legislator does not establish sanctions for its violation. Such sanction may also experience weakening by introducing wide range of conditions allowing to mitigate or waive the punishment. In other words, crucial for the proper protection of the right to life prohibition of the prenatal murder requires the guarding criminal sanction not to be hampered by the mandatory exceptions, while retaining the possibility to reduce or waive the punishment in individual cases.

#### *1.20. Conceptual unification of the criminal provisions*

Proposed amendments to the Criminal Code unify also the content of the provisions contained in the various regulations, as well as in the Criminal Code. Art. 157a, located in the same chapter as Art. 152 and 153 of the Criminal Code, as a mark of criminal offense indicates “injury to the unborn child or health disorder posing a threat to its life”. It is the will of the authors to consistently use the term “unborn child” instead of dehumanizing terms such as “the subject of pregnancy”.

## **2. Current situation**

2.1. According to data from the National Health Fund, in 2014 1 812 legal abortions were performed and subsidised on the basis of Article 4b of the Act<sup>20</sup>.

---

<sup>19</sup> Opinion of the European Commission for Democracy Through Law of 4<sup>th</sup> April 2006, Point III. 7 and IV. 9 [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2006\)015-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2006)015-e) (accessed: 12/01/2016)

<sup>20</sup> In the statistics named as procedure M-17 – induction of miscarriage.

2.2. In 2013 – according to the report of the Council of Ministers on the implementation and results of the application of the Act of 7<sup>th</sup> January 1993 in 2013<sup>21</sup> - there were legally caused deaths of 751 unborn children, out of which 725 under the suspicion of their disability.

### **3. The proposed changes**

#### *3.1. Change of the title of the Act*

In connection with the introduced modifications, it is reasonable to change the title of the Act. So far it has contained issues of “human embryo protection” and “the conditions of legal pregnancy termination”. Due to the proposed terminological changes, it is not advisable for the content of the Act to remain contradictory to its title. Similarly, due to the removal of the circumstances currently legally allowing to cause the death of the unborn child (called termination of pregnancy), the title of the Act should not be misleading.

#### *3.2. Change of the Preamble of the Act*

Another consequence of the introduced amendments is also modification of the preamble of the Act. As it undoubtedly has a normative value, it needs to remain consistent with the rest of the Act. As a result, preamble in the proposed form emphasizes the need for full protection of life, including the unborn children, indicating that it is a value preferred by the legislator over other constitutional values, rights and freedoms.

#### *3.3. Amendment to Art. 1 of the Act*

Amendment to Art. 1 implements the Constitutional Tribunal’s judgment of 28<sup>th</sup> May 1997 in case of ref. No. K 26/96, stating clearly that “every human being has the inherent right to life from the moment of conception” and it cannot be restricted by law, regardless of the stage of human development, and also that “child’s life and health are protected by the law from the moment of conception”.

#### *3.4. Definition of the term “conception”*

Furthermore it is offered to define the term “conception”. This term is known to Polish case law and jurisprudence. Despite the achievements of the courts and the doctrine, there are still concepts that seek to limit the scope of protection of the right to life. As a consequence, in order to strengthen already existing guarantees, it seems necessary to introduce a legal definition of conception as the moment of connection of the male and female reproductive cells. Moreover, the proposed solution will improve the interpretation of the provisions of other laws. Such definition will have impact not only on the Act, but also on restoration of the standards based on other normative acts, in line with the concept of the adjoint norms. As a result, bearing in mind the need to avoid any doubt or interpretation distorting the intentions of the authors, it was decided to indicate explicitly that the moment of conception is a combination of the male and female reproductive cells.

#### *3.5. Empowerment of the unborn child as a patient*

Amendments in Art. 2 para. 1 point 1 of the Act aim to establish the terminology that does not dehumanize the unborn child. Consequently, the proposed modification changes the term “foetus” into the known and currently legally coexisting term “unborn child”. Such solution also empowers the unborn child and provides obligation to treat them as a patient under the

---

<sup>21</sup> Council of Ministers’ report on the implementation and results of the application in 2013 of the Act of 7<sup>th</sup> January 1993 on family planning, human embryo protection and conditions of legal pregnancy termination (Publishing no. 3686 of 15<sup>th</sup> June 2015, p. 91-92).

Act of 6<sup>th</sup> November 2008 on the rights of the patient and the Ombudsman for Patients' Rights (Journal of Laws 2016, item 186).

### *3.6. Removing the provisions already regulated by other legal acts*

The draft repeals Article 2 para. 2a on access to information and prenatal tests, especially when there is an increased risk or suspicion of a genetic or developmental defect of the foetus or an incurable disease threatening the life of the foetus. It is directly related to the repealed Art. 4a. para. 1 point 2, which makes references to prenatal tests and information in the Act groundless. Regardless of the above, access to prenatal tests is guaranteed under the legislation regulating access to medical services, and therefore addition of these provisions to the Act constituted unnecessary *superfluum*.

### *3.7. The rights of the parents and preparation for family life*

According to the Art. 53 para. 3 of the Constitution, parents have the right to ensure moral and religious parenting and education of their children in accordance with their beliefs. Current Art. 4 para. 1 of the Act does not fully implement this freedom as it leaves out of the area of parental decision an important area of education, strictly related to educational consequences of the moral and religious upbringing profile preferred by parents. Consequently, a change is offered that obviously in no way prevents or limits the opportunity of implementing the school curricula that introduce the knowledge on human sexuality, included in a broader context of the principles of responsible parenting, but only constructs the requirement to obtain written permission from the parents of adult students, highlighting also that education in this field must respect the moral norms of the parents and the sensitivity of the students.

### *3.8. Principles of weighing the protection of life and health of the mother and the unborn child (see also points 1.11. - 1.12. above)*

Previously presented arguments (points 1.11. - 1.12.) regarding weighting a possible collision of values of life or health of the mother and the life of a child as well as conducted analysis of the constitutionality of the solutions allowing for abortion in one of the cases described above, both justify the repeal of Article 4a of the Act, which so far has allowed for legal abortion in a situation where it poses a threat to the life or health of the pregnant woman.

3.9. At the same time, the project introduces to the amended Art. 152 and 157a of the Criminal Code applicable regulations of the exceptions, related respectively to the curative actions necessary to avert the direct threat to the life of the unborn child's mother, resulting in the death of the unborn child, and the curative actions necessary to avert the treat to the health or life of the unborn child or its mother, resulting in injury of the unborn child or its life-threatening health disorder. Signalling again that, according to medical knowledge abortion (meaning action aimed directly at the death of the unborn child) is never a necessary solution to the threat to health or life of the mother of the unborn child, it needs to be assumed that the curative actions may be associated with an acceptable risk to the child's life as a value equal to the life of the mother. This observation is reflected in the proposed wording of Article 152 § 4 and Article 157a § 3 of the Criminal Code.

### *3.10. Protecting the life of the unborn child, when there is a high probability of severe and irreversible foetus malformation or incurable life-threatening disease (see also points 1.13. - 1.14. above)*

Similarly, recalling the earlier arguments (points 1.13. - 1.14.), given the lack of protected value that justifies limiting the protection of the right to life, it is proposed to repeal Article 4b of the Act, which currently makes it lawful to kill an unborn child when prenatal tests or other medical findings indicate a high probability of severe and irreversible foetus malformation or incurable life-threatening disease.

*3.11. Protecting life of the unborn child, when there is the suspicion that it was conceived as a result of a criminal act (see also points 1.15. - 1.17. above)*

Finally, given the argument mentioned in points 1.15. - 1.17. above, it is also proposed to repeal Article 4c of the Act, which allows for abortion, provided that there is a reasonable suspicion that a child has been conceived as a result of a criminal act.

*3.12. State obligation to provide care to families raising children affected by severe impairment or life-threatening disease, as well as to the mothers and their children, where there is reasonable suspicion that the conception occurred as a result of a criminal act*

The proposed amendment to Article 2 para. 2a obliges government authorities and local government bodies to provide material support and care to families raising children affected by severe impairment or life-threatening disease, as well as to the mothers and their children, where there is reasonable suspicion that the conception occurred as a result of a criminal act. Such solution results from the moral obligation of the state to support those most in need and in the toughest circumstances, to which certainly belong those mentioned above.

*3.13. Criminal law protection of the right to life*

As indicated in point 1.19., the modification of the criminal law is also a realization of the state's positive obligation to protect the values expressed in Art. 38 of the Constitution. As a result, it is necessary to not only clearly outline the boundaries of illegality at the level of the sanctioned norm – what the author does, proposing a number of amendments to the Act – but also it is necessary to appropriately shape the sanctioning norm as on its limits and existence depends the level of the actual protection.

*3.14. Confirmation of criminal sanctions for abortion providers (helpers) and people instigating a prenatal homicide (instigators)*

The proposed changes also prevent access to medical abortion, often accessible by means of distance communication, in particular the growing phenomenon of availability of pharmacological abortion drugs purchased over the Internet. Adequate protection is only possible with the use of relevant institutions of the criminal law. Consequently, it is necessary to repeat in a specific section of the Criminal Code, in the proposed Article 152 (prenatal homicide), that anyone who helped or persuaded the mother to commit a prenatal infanticide, also bears full responsibility for abetting.

*3.15. Extraordinary mitigation or withdrawal from punishment of the unborn child's mother, who intentionally caused the death of the unborn child*

In case of the mother, who in the current circumstances usually is a direct perpetrator of that act (takes the abortion pills), the court may apply extraordinary mitigation of punishment or renounce of inflicting it. Such formulated scope of the court's actions allows for the proper and free from the rigid case resolutions adjustment of the court's reaction to the degree of the perpetrator's fault and awareness. In particular, it would allow for renouncement of inflicting the punishment, whenever the killing of the unborn child was forced by the pressure

of the family environment, the child's father or other circumstances. At the same time, it will be possible to use of the full sentence against those responsible for instigating and providing the abortion.

### *3.16. Exclusion of criminal liability of the mother who unintentionally caused the death of the unborn child*

In a situation where the perpetrator of the acts described in the Art. 152 § 2 and 157 § 2 of the Criminal Code is the mother of the child, it is proposed to exclude the option of punishment by the use of the term "not punishable". This exemption applies to unintentional acts, in principle involving insufficient care of the unborn child's mother, which is required in her condition. The proposed provisions mean that the legislator treats such actions as unlawful and culpable, however excludes the mother from the threat of sanctions, taking into account that usually the loss of a child in such situation is in itself a source of the suffering of the mother, who wanted a child, and as a result of their imprudent behaviour, she caused its death or damage to its body. At the same time a third party, including a doctor who as a result of their negligence led to the death or injury to the unborn child, is subject to punishment for this act on the grounds of Art. 152 § 2 and 157 § 2 of the Criminal Code.

### *3.17. Definition of "unborn child" in the Criminal Code*

In connection with the modification of the aforementioned provisions of the Criminal Code, it was decided to introduce a definition of the unborn child to § 24. It was highlighted that the unborn child is a human being in the prenatal stage of development, since the connection of the female and male reproductive cells. Introduction of the term "unborn child" to the Criminal Code glossary protects from not taking into account the definition of conception discussed above along with the reconstruction of the sanctioned norms, thus emphasizing the clear intention of the authors.

### *3.19. The date of the entry into force of the amended provisions*

The project provides the standard *vacation legis*, which is two weeks from the date of publication.

## **4. Expected consequences**

### *4.1. Social consequences*

The citizens' draft may contribute to the long-term growth of social sensitivity, humanitarian attitudes, demographic growth and end of the progressing – even among doctors – social stigmatization of certain groups of people, particularly people with disabilities, who at the prenatal stage of development are currently deprived from legal protection of life.

### *4.2. Economic consequences*

The draft does not cause any economic consequences.

### *4.3. Financial consequences*

With the estimated cost of one abortion at 1 275 - 1 326 PLN and the number of subsidised abortions in 2014, the draft enables the budget of the National Health Fund to save from 2.3 million to up to 2.5 million PLN a year. Analysis of the financial consequences of the obligations provided in the proposed Article 2 para. 2a of the Act, that is the obligation to provide material support and care for families with children affected by severe impairment or life-threatening disease, as well as to the mothers and their children, where there is reasonable suspicion that

the conception occurred as a result of a criminal act, shall be subject to analysis in the course of legislative work related to implementing acts.

## **5. Financing sources**

5.1. The project does not entail any burden for the state budget or local government budgets.

## **6. Foundations for the draft implementing acts**

6.1. The draft does not introduce any statutory delegations, which would require issuing the implementing acts.

## **7. Statement of draft's compliance with EU law**

7.1. Subject of the proposed regulation is not covered by EU law.

## **8. Conclusion**

8.1. It needs to be considered that implementation of the draft of the bill protecting human life from conception could stimulate the development of the international human rights framework based on the inherent and inalienable human dignity, which entails the obligation to respect human life from conception. Poland as a sovereign state, a Member of the United Nations, the European Union and the Council of Europe, by taking a decisive step in the defence of the weakest, could initiate an international campaign aiming at spreading the right to life for all people, regardless of their health status, gender or origin.

UNOFFICIAL TRANSLATION