Warsaw, December 16th 2016

The Citizens’ Assembly
The Republic of Ireland
Dublin

Dear Members of the Citizens’ Assembly,

the Ordo Iuris Institute for Legal Culture (hereinafter: The Ordo Iuris Institute or Ordo Iuris) welcomes the opportunity to make a submission to the Citizens’ Assembly established by the Irish government in order to consider, *inter alia*, the limitation or even repeal of the Eighth Amendment to the Irish Constitution. The Ordo Iuris Institute would strongly advise against changing the Eighth Amendment which recognises the right to life of every unborn child as equal to the right of their mother.\(^1\)

The Ordo Iuris Institute for Legal Culture is an independent legal organization incorporated as a foundation in Poland. It gathers academics and legal practitioners aimed at the promotion of a legal culture based on the respect for human dignity and rights. Ordo Iuris pursues its objectives by means of research and other academic activity, as well as advocacy and litigation. Third party interventions by Ordo Iuris have been accepted by Polish and international courts and institutions, e.g. the Polish Supreme Court, the European Committee of Social Rights, and the European Court of Human Rights. The Institute submitted its opinions to the Venice Commission, the Secretary General of the Council of Europe, 

Commissioner for Human Rights and the Committee on Political Affairs and Democracy of the Pace. We hope the Citizens’ Assembly will find our intervention supportive.

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SUBMISSION TO THE CITIZENS’ ASSEMBLY
ON THE EIGHTH AMENDMENT OF THE IRISH CONSTITUTION

1. PROTECTION OF LIFE IN THE REPUBLIC OF IRELAND

In 1983 the Irish electorate voted to add to the Irish Constitution the Eighth Amendment - a clause explicitly recognising the right to life of every unborn child as equal to the right to life of his or her mother. Under the pressure from abortion advocates in 2013 a new law was enacted – The Protection of Life During Pregnancy, which enabled to perform an abortion under three circumstances: if „there is a real and substantial risk of loss of the woman’s life from a physical illness” (art. 7 (1)), if „there is an immediate risk of loss of the woman’s life from a physical illness” (art. 8 (1)), or if „there is a real and substantial risk of the woman’s life by way of suicide” (art. 9 (1)). However, changing the law caused a public debate in Ireland whether abortion should be made accessible in other cases such as conception as a result of a criminal act, lethal foetal abnormality or even on demand.

In the light of this recent discussion on the Eighth Amendment to the Irish Constitution, the Ordo Iuris Institute speaks against discrimination of unborn children. We would like to remind that conception as a result of rape or an incurable defect of a child are not sufficient premises so as to waive the protection of life of unborn children. Furthermore, abortion – as an inappropriate and disproportionate measure - cannot be comprehended as a way of treatment. Otherwise, mother’s health would be given greater value than a child’s life. The only admissible exception is initiating treatment in order to save mother’s life, which may cause the death of a child – a legal construction known as “an act of God”. These basic rights of the child stem from international law protecting children at the earliest stage of their development.

2. INTERNATIONAL STANDARDS ON THE RIGHT TO LIFE

The Universal Declaration of Human Rights (1948) states in its preamble that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human

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2 Authors: Magdalena Olek, Aleksandra Mirkowicz, Joanna Banasiuk, Assistant Professor, Aleksander Stepkowski, Professor.
family is the foundation of freedom, justice and peace in the world. Among those rights article 3 of the Declaration enlists the right to life, liberty and security.

Following this declaration, in 1959 the UN General Assembly adopted the Declaration of the Rights of the Child (hereinafter: the DRC)\(^5\) containing fundamental principles of children’s rights. Among others, the Preamble of the DRC highlights the children’s need for special care and protection, “including appropriate legal protection, before as well as after birth.” The Declaration of the Rights of the Child was followed in 1990 by the UN Convention on the Rights of the Child (hereinafter: the CRC)\(^6\). The CRC confirms the above resolution explicitly recognizing the right to life of the unborn child. Moreover, article 6 of the CRC together with the preamble\(^7\) guarantees the inherent right to life of every child, holding that “States’ Parties recognize that every child has the inherent right to life” and that “States’ Parties shall ensure to the maximum extent possible the survival and development of the child.” This construction of the CRC was directly upheld by the Polish Act on the Ombudsman for Children of 6\(^{th}\) January 2000 in its Article 2(1) describing the child as “every person from the moment of conception until the age of majority”.

Among universally binding international treaties protecting human rights, special importance shall be attributed to The International Covenant on Civil and Political Rights (hereinafter: the ICCPR) stating in Article 6(1) that „every human being has the inherent right to life”\(^8\). The term “inherent” means an inseparable and permanent quality of a specific reality, which is neither acquired nor lost in the course of its development, but is present in every case in which the reality is so qualified. The inherent and inalienable right to life is an attribute of every human being and international human rights instruments properly recognize it as a primary right\(^9\) being a precondition for the enjoyment of any other human right. This means

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7. According to art. 31 (2) of the VCLT, the preamble of a treaty provides necessary interpretive context.


Article 6(1) of the ICCPR protects the life of every human being in every stage of its development, as the inherent dignity of a human person starts with the very first moment of its existence and continues as long as the person continues its existence, neither longer, nor shorter.

The ICCPR protects the right to life of “every human being”, which includes people in the prenatal phase of their development. Moreover, article 6 of the ICCPR impliedly recognizes the right to life of the unborn child, which is being constituted by its full context. Article 6(5) states that “The death sentence shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women”. Such a provision is a consequence of the recognition of the independent status of the unborn child in respect of his or her mother, which was explicitly confirmed during preparatory work on the ICCPR. The UN’s reports clearly mentioned that the principal reason that the death sentence should not be carried out on pregnant women was to “save the life of an innocent unborn child”\(^\text{10}\) and “was inspired by humanitarian considerations and by consideration for the interests of the unborn child”\(^\text{11}\). This approach reveals that Article 6(5) of the ICCPR not only protects human beings during the pre-natal period of life but also recognizes them as holders of human rights. When talking about the rights of the unborn child, who is by nature a human being, the only possible moment to which we can attribute the inception of the child’s rights is the moment of conception. This moment, which is a matter of scientific fact\(^\text{12}\), determines the beginning of a new human life. The consequence of such a material reality (life either exists or does not) is a formation of an individual right to life of the unborn child and the corresponding obligation of the States’ Parties to protect that human life. Human life is a continuum that begins at conception and advances in stages until death, irrespective of the name given to these stages (be it: zygote, blastocyst, embryo, foetus, infant, child, adolescent or adult).

Further confirmation of the protection of the life of the unborn child could be found in the ICCPR’s prohibition of the discrimination based on birth or status\(^\text{13}\). The guarantee of protection for every child does not differ regardless of age, including gestational age. It would

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\(^\text{10}\) See A/3764 § 18. Report of the Third Committee to the 12th Session of the General Assembly (5 December 1957).

\(^\text{11}\) See A/2929, Chapter VI, §10. Report of the Secretary-General to the 10\textsuperscript{th} Session of the General Assembly (1 July 1955).

Preparatory work are considered in accordance with the Article 32 of the Vienna Convention on the Law of Treaties (United Nations, Treaty Series, vol. 1155, p. 331, [hereinafter: the VCLT] ) to be a “supplementary means of interpretation”. On the other hand another confirmation of this interpretation is found in the fact that a majority of States Parties to the ICCPR at the time of its adoption had laws that prohibited abortion in all cases.


\(^\text{13}\) The ICCPR., art. 24 and 26.
be profoundly inconsistent and evidently arbitrary and discriminatory to grant different scopes of protection depending on the given moment during the pregnancy.

Besides CRC and ICCPR protection of the life of the unborn child is guaranteed i.a. by:

- Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, which includes “imposing measures intended to prevent births within the group” in the definition of genocide\(^\text{14}\);
- Article 16 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War\(^\text{15}\), which states that “the wounded and sick, as well as the infirm, and expectant mothers, shall be the object of particular protection and respect”. Also Articles 76-77 of the First Additional Protocol to the Geneva Conventions\(^\text{16}\) and Article 6 of the Second Additional Protocol to the Geneva Conventions\(^\text{17}\) calls for avoidance of “the pronouncement of the death penalty on pregnant women”.

Protection of the life of the unborn child is also envisaged in regional human rights treaties. The American Convention on Human Rights stipulates in Article 4(1) that “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”. A similar situation takes place also in Europe.

**Council of Europe system of the human rights protection**

Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states: “Everyone’s right to life shall be protected by law”. Moreover, the European Court of Human Rights (hereinafter: the Court) identified the need to ensure protection of the unborn child by claiming that “Article 2 of the Convention is silent on the temporal limitations of the right to life”\(^\text{18}\). Thus, it protects “everyone” without any limitation of the temporal scope of the right to life. Furthermore, in the same case, the Court affirms that “it may be regarded as a common ground between States that the embryo/foetus belongs to


\(^\text{16}\) International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

\(^\text{17}\) International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, 1125 UNTS 609.

\(^\text{18}\) Vo v. France, no. 53924/00, 8 July 2004 at para. 75 (hereinafter: Vo v. France).
human race” and that she/he “requires protection in the name of human dignity”\(^1\). The Court emphasised the need to interpret “the right to life” in the light of current evolution of scientific knowledge, as well as recent legal instruments protecting human dignity and the embryo. Scientific progress should be seen both in the field of biotechnologies and in the field of prenatal and neonatal medicine which has considerably improved the viability threshold of the foetus.\(^2\) Non-discriminatory protection of the unborn child, irrespective of the stage of development (e.g. embryo, foetus) is also provided for by other European legal instruments such as the Convention on Human Rights and Biomedicine (“Oviedo Convention”) with its Additional Protocol on the Prohibition of Cloning Human Beings and the Additional Protocol on Biomedical Research\(^3\).

**European Union Law**

European Union law recognizes and protects human dignity. Therefore, the Court of Justice of the European Union (hereinafter: the CJEU) has recognized that legal protection stemming from human dignity (thus also protection of life) begins at the moment of conception as „fertilisation is such as to commence the process of development of a human being”\(^4\). This standpoint was repeated three years later in *International Stem Cell Corporation v. Comptroller General of Patents, Designs and Trade Marks* (C-364/13)\(^5\). The Court of Justice of the European Union thus has determined a uniform interpretation and implementation of both the definition of the “human embryo” and the scope of its protection among all Members States of the European Union with regard to patent protection of biotechnological inventions. However, due to the rooting of the decision in the objective empirical premises, it should be seen as the beginning of the formation of a consensus on the scientific and legal definition of the beginning of life within the European states.

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\(^1\) Ibid. at para. 84; similar opinion was included in case: H v. Norway, no. 17004/90, Inadmissibility decision of former Commission, 19 May 1992 at para. 167 (hereinafter: H v. Norway).

\(^2\) Ibid. at para. 84.

\(^3\) Article 1 of that Convention (adopted by Council of Europe, 4 April 1997) emphasizes the need to „protect the dignity and identity of all human beings”. The scope of the “human being” as a undefined and broad term could be thus applied to the embryo and prenatal life.


Case-law of Constitutional Courts in Europe concerning the protection of life

National constitutional jurisdiction in a number of European countries also asserts that the life of an unborn child is protected.

According to the German Federal Constitutional Court, the life developing in the womb of the mother is an independent legal value enjoying the protection of the German constitution. Thus, it is the State’s duty to protect and foster this life, even against the mother. The dean of the Faculty of Law in the University of Bonn, professor Christian Hillgruber states, in reference to the position of the German Federal Constitutional Tribunal that, “[a]bortion means the killing of a human being, who has a fundamental right to life and protection of his/her dignity. Therefore, on the grounds of German constitutional law, there is absolutely no such thing as an often claimed “right to abortion.” Rather it is the state’s duty to provide appropriate legal protection for the unborn child. On the grounds of the decision of the Federal Constitutional Court, abortion must be viewed as fundamentally against the law and therefore prohibited; and the expectant mother should be legally bound to carry the unborn child until delivery (BVerfGE 39, 1, 44; 88, 203, 253). This state of constitutional law is however not fully envisaged in the statutory regulations. Christian Hillgruber is speaking of the „discrepancy between what is and what should be, the dramatic hiatus between the superordinate constitutional law and ordinary legislation which is not observing the preeminence of the Constitution“.

The Hungarian Constitutional Court shared the above opinion, providing that “the State's duty is to protect human life from its inception and so the right to self-determination could not be supplementary even at the earliest stages of pregnancy”. The Hungarian Constitutional Court also added that “the right to equal dignity coupled with the right to life, ensured that the value of human life could not be legally differentiated”.

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28 Ibid.
International Standards Concerning Non-Discrimination of Disabled Persons

In the light of the suggested exceptions to the full protection of life that appeared in the public debate in Ireland, the issue of the disabled people must be analysed. It is necessary to underline that in the light of the UN Convention of the Rights of Persons with Disabilities (hereinafter: the CRPD) „discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person”\(^\text{29}\). Article 4 of the CRPD obliges the State Parties to “ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability”. The disabled should be guaranteed that they are equal before and under the law and entitled without any discrimination to the equal protection and equal benefit of the law (art. 5 of the CRPD). Therefore, an abortion due to a suspected handicap clearly discriminates the unborn, violating the basic rights of people with disabilities, stemming from the CRPD.

3. ABORTION LAW IN POLAND

The example of the Republic of Poland explicitly shows that every exception to recognizing the right to life of every unborn child as equal to the right of their mother leads to a serious decrease of the level of life protection.

Since 1993 in Poland an abortion can be performed legally only if:

1. pregnancy endangers the mother’s life or health;
2. prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable life-threatening disease;
3. there are strong grounds for believing that the pregnancy is a result of a criminal act\(^\text{30}\).

Though meant only as rare exceptions the above premises allowing to perform an abortion year by year has been interpreted broader and used more frequently. In 1994 782 unborn children were killed, whereas in 2015 this number increased up to 1040. The highest increase is noted among the number of abortions conducted because of the eugenic reasons. More than


900 abortions per year are performed on children with a suspected handicap due to, among all, Down, Turner or Edward Syndromes\(^{31}\).

As a result, the rights of children who survived an abortion are also breached. Some months ago, at the Warsaw-based Holy Family Hospital, a child with suspected Down syndrome, having been born alive during abortion, was dying alone, left without any medical assistance and deprived of his fundamental rights.

In 1997, the **Polish Constitutional Tribunal** ruled, that „the democratic state based on the rule of law considers the human being, as well as goods precious to him as the highest values. Human life is a good, which (…) must be under constitutional protection at every stage of its development. The constitutionally protected value of human life, including the prenatal stage of development, cannot be differentiated. (…) Thus, from the moment of conception the human life is a constitutionally protected value. It also concerns the prenatal stage”. The Tribunal added that parents cannot decide on having a child when the child is already developing in the mother’s womb, as the right to have a child can only be understood in a positive aspect – not as a right to annihilate the developing human foetus\(^{32}\).

Moreover, the Polish Constitutional Tribunal clearly attributed this meaning to the right to life, as declared in Article 38 of the currently binding Constitution of the Republic of Poland (at that time it was awaiting entry into force). Therefore, it is highly doubtful, if the premises allowing abortion in specific situations in Polish law are conformant with the Constitution. It must be noted, that the only one premise already reviewed in this respect, namely allowing for abortion due to difficult social conditions until the end of the 12\(^{th}\) week of pregnancy (abortion on demand), was declared unconstitutional. According to the court, “one can decide to have a child when the child is already developing in the prenatal stage, and in this sense it is already owned by the parents. The right to have a child can therefore be interpreted solely in positive terms and not as a right to the destruction of developing human life. The right to make responsible decisions about having children is therefore reduced to the solely negative aspect of the right to refuse to conceive a child. Then, however, when the child has already been conceived, the right can only have a positive aspect”.

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4. INFLUENCE OF ABORTION ON WOMEN’S HEALTH

Abortion, as a voluntary deprivation of life of a child while developing in mother’s womb, by no means can be considered as an object of a human right. For this reason, denying unborn children the right to life often might constitute torture and thus violates Article 7 of the ICCPR, as well as Article 3 of the ECHR. It is especially tangible in cases of the methods, since dilatation and evacuation are open acts of torture when the foetus, still alive, is dismembered to be pulled out of the womb in pieces. These practices along with leaving new-borns to die without any care (practiced often in case of late abortions), constitutes infanticide, blatant violations of both their human dignity and universal and fundamental human rights, especially Article 6 (1) of the ICCPR (“No one shall be arbitrarily deprived of his life”) and the CRC.

Last but not least, though legal abortion supposedly saves women’s health, statistics as well as research conducted by scientists prove that it has the opposite effect. An analysis of the interrelation between law allowing for abortion and the efficiency of maternal health protection clearly shows a positive correlation between the intensity of protection of human life in the prenatal phase and the protection of maternal health. For instance in Chile, the maternal mortality ratio significantly decreased since the introduction of laws limiting access to abortion - within 14 years since abortion was banned in Chile in 1989, the maternal death ratio decreased by 69.2%. In Mexico, states restricting access to abortion have an average maternal mortality rate 23% lower than in the rest of Mexican states. In Poland, when access to abortion was reduced, the maternal mortality ratio decreased from 15 in 1993 to 3 in 2015. In contrast, countries providing wide access to so called “safe abortion”, regardless of

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33 It also violates the Article 37 of the CRC, which stipulates “No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.”
34 Scientific evidence proves that fetuses and premature babies can feel pain at least as much as adults. Fetuses are responsive to touch at 8 weeks and have the physical structure to experience pain at 20 weeks. See “The Fetal Pain: The Evidence”, http://www.doctorsonfetalpain.com/.
35 These practices violate the Article 2 and the Article 24 of the CRC seen in the light of its preamble. Similarly they violate the rights enshrined in the European Convention on Human Rights, notably: the right to life (Article 2), prohibition of the inhuman treatment (the Article 3) and discrimination on any ground i.a. “birth”. See Petition for the rights of new-borns surviving their abortion submitted to the Parliament Assembly of the Council of Europe on 16th April 2015.
their wealth and resources to provide for better protection of mothers, witness a higher maternal mortality ratio than Poland (United States 14/100,000, France 8/100,000, Germany 6/100,000)\textsuperscript{39}. The data provided by the World Health Organization indicate that in England, over the last decade maternal mortality has been twice higher than in Ireland, where Ireland grants a full protection of life\textsuperscript{40}.

Moreover, a study published in the Medical Science Monitor summarizing results of a research conducted in Denmark on 463,473 women\textsuperscript{41} shows short and long-term negative influences of abortion to a woman’s health and life. As for early abortion, the risk of maternal death increased 80% in the first year following the procedure. 10 years later the risk was still 40% higher than risk for women who delivered their baby. At the same time, the authors asserted that pregnancy may induce health benefits for women. Delivering the first baby (instead of killing it by putting it to death by means of abortion) decreases the risk of cancer in the breasts, ovaries and uterus. Carrying a child may also contribute to other health benefits due to decreasing unhealthy or potentially dangerous behaviour. An article in The British Journal of Psychiatry in 2011 synthesized 22 researches carried out from 1995 to 2009 and concluded that there was a 81% higher risk of a serious mental problem in women who had an abortion compared to women who delivered\textsuperscript{42}.

Protecting the life of a child at the prenatal stage of its development implies a necessity to protect the life of the mother. Therefore, if the necessary medical treatment directed towards protection of a mother’s life results in the death of the unborn child, such a side effect of the medical treatment must not be understood as abortion depriving the child of his or her right to life. Abortion is an act of protecting the mother’s life directed towards taking of the life of a child while developing in mother’s womb whereas a double effect of an action protecting mother’s life does not necessarily need to be referred to as an abortion. Such a double effective medical treatment can be directed only towards protection of mother’s life and not


towards putting the child to death. It is to be permitted not only by virtue of the mother’s right to life, but also by virtue of the right to life of her unborn child, who is only able to live if she is alive. In Ireland, the protection of the mother’s life has been guaranteed by *The Protection of Life During Pregnancy*\(^{43}\) introduced in 2013. Therefore, there is no necessity for further extensions of exceptions to the Eighth Amendment. On the contrary, it is advisable to remove article 9 of *The Protection of Life During Pregnancy* allowing to perform an abortion if „there is a real and substantial risk of the woman’s life by way of suicide”. The above premise is too vague, causing possibility of abuse as well as violation of the rule of the legal certainty.

5. GENERAL ASSESSMENT

In respect of the provisions of international agreements and case-law presented above, the Republic of Ireland has set the highest standard of protection of people in the prenatal stage of their development, fully implementing the obligations arising from the *Universal Declaration on Human Rights* (the Preamble), the *Convention on the Rights of the Child* (art. 6), the *International Covenant on Civil and Political Rights* (art. 6) or the *European Convention on Human Rights* (art. 2) and recognized by the European Court of Human Rights\(^{44}\) and the European Court of Justice\(^{45}\). The Republic of Ireland is among 60 countries in the world that do not discriminate unborn children and that at the same time do not restrict possibilities to save mother’s life, if it is endangered. Only 72 countries out of 196 allow abortion on demand and/or abortion due to social reasons. Thus, adopting changes to the Eighth Amendment would be a serious setback in protection of human rights. In the light of the Irish Constitution and international standards, the proper legislative action should be meant to remove from *Protection of Life During Pregnancy* the premise concerning the risk of the mother’s suicide.

Abortion violates human dignity, breaches vital human rights guaranteed by international law and contributes to deterioration of woman’s physical and mental health. Thus, the *Ordo Iuris* Institute strongly advises against changing the Eighth Amendment to the Irish Constitution.

