European Courts of Human Rights
M. L. v. Poland
(nº 40119/21)
WRITTEN OBSERVATIONS
by
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Introduction

Ordo Iuris Institute is a Polish non-governmental legal association founded in 2013 with its registered office at Zielna 39, Warsaw, Poland. Bringing together academics and legal practitioners on various projects, our organisation is dedicated to the protection and defence of a legal culture based on the respect for human dignity, rights and freedoms.

In this case applicant alleges that lack of access to abortion for eugenic reasons violates her right to privacy (Article 8 of ECHR) and freedom from torture (Article 3 of ECHR). In the present observations Ordo Iuris will focus on the legal aspects of the case and will not comment on facts, nor determine the admissibility or reasonableness of this application.

1. Right to life of unborn human beings

1. The ECtHR has always represented the view that the margin of appreciation of states is wider in sensitive moral and ethical issues such as regulation of abortion, which means that authorities are both allowed to prohibit or to allow this procedure depending on the views on the nature of human life before birth. This view is based on the assumption that the right to life guaranteed in the Article 2 of the Convention should be interpreted in narrow manner i.e. as protecting only people who have already been born. However, there are strong legal arguments indicating that scope of the right to life – as guaranteed in ECHR and other international treaties - is much broader and encompasses also human beings in the prenatal period of their life.

2. First of all, it should be emphasized that the source of the right to life is not Art. 2 of the Convention, nor any other provision of an international treaty, but the human dignity itself, which imposes protection of human life regardless of the content of legal acts. The subject of protection under Art. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 6 of the International Covenant on Civil and Political Rights, Art. 6 of the Convention on the Rights of the Child is the human life. It is thus protected as a good itself, and not as a «carrier» of some indirect features such as self-awareness, the ability to experience emotions or the ability to feel pain. The fact that *nasciturus* is unconscious, does not experience emotions, and does not feel pain in the early stages of development does not contradict the fact that it is alive. Therefore, its life is subject to legal protection - any doubts as to the scope of this protection should be resolved in favour of the *nasciturus*. As rightly emphasised by Ireneusz C. Kamiński, ad hoc judge of the European Court of Human Rights, and Andrzej Wróbel, judge of the Polish Supreme Court, the right to life, closely related to the dignity of the human person and constituting a

condition for the enjoyment of other rights and freedoms, must remain the principle and any exceptions to the prohibition to take life must be interpreted strictly and extremely rigorously. [1]

3. The beginning of human life occurs at the moment of karyogamy, because it is when the male and female gametes merge into a new, centrally organised unity, quite different from the structure of a sperm, egg or mother cell; this new entity has a specific genetic code and potential. Assuming the normal availability of food and a favourable environment, this parental cell has the ability to direct its own development in such a way that a brain is formed capable of all the activities we thought were characteristic of human beings, activities that a person can perform. [2] These abilities already exist in the genetic material of the parent cell. In short, the humanity of an embryo is determined by its genetic uniqueness.

4. In the International Covenant on Civil and Political Rights, three types of words were used to define the subjective scope of rights - everyone, person and human being. "Everyone" is entitled to, inter alia, the right to liberty and security of person (Article 9 (1)) and freedom of thought, conscience and religion (Article 18 (1)). "Persons" are equal before courts and tribunals (Article 14 (1)) and before the law (Article 26), and must be treated humanely when deprived of liberty (Article 10 (1)). The term "human being" was used only once - in Art. 6 (1), according to which "every human being has the inherent right to life." Since, according to the fundamental rule of interpreting different notions differently, it seems that within the framework of the Covenant "human being" should be understood as meaning every human being, both born and unborn. This direction of interpretation seems to be confirmed by Art. 6 (5) of the Covenant, which prohibits execution of death sentences against pregnant women. In the light of the *travaux préparatoires*, the purpose of para. 5 was "saving the life of an innocent unborn child."[3] The content of paragraph 5 reflects the content of para. 1 - it therefore seems that the *nasciturus* is the subject of the right to life guaranteed by Art. 6 sec. 1 of the Covenant.

5. The UN Convention on the Rights of the Child is one of the few international agreements that explicitly refer to the legal status of *nasciturus*. In accordance with the ninth citation of the preamble to the Convention, which refers to the Declaration of the Rights of the Child, "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". The preamble to this Convention is binding and determines the scope of the right to life guaranteed in Art. 6 (1) of the Convention.[4] This interpretation is supported by Art. 31 of the Vienna Convention on the Law of Treaties pursuant to which an international agreement is to be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the treaty in their context (1), and the context includes, inter alia, the text of the agreement, which also includes the preamble and annexes (2). So if the preamble speaks of the legal protection of a child "both before and after birth", then "a child" in the meaning of the Convention is a human being from conception to the age of 18. Secondly, the view of the non-binding, meaningless nature of a preamble contradicts the fundamental rule of

[1] A. Wróbel, I. C. Kamiński, comment no. 2 to Article 2 of the EU Charter of Fundamental Rights, [in:] *Karta Praw Podstawowych Unii Europejskiej. Komentarz*, (ed. A. Wróbel), Warsaw 2012, available at Legalis.pl.
[2] T.V. Daly, *The Status of Embryonic Human Life – A Crucial Issue in Genetic Counselling",* [in:] *Health Care Priorities in Australia: Proceedings of the 1985 Annual Conference on Bioethics* (ed. N. Tonti-Filippini), Melbourne 1985, p. 55 and 191.
[3] *Travaux préparatoires for the International Covenant on Civil and Political Rights*, A/C.3/SR.819, para. 17 i 33.
[4] See e.g. R. Joseph, *Human Rights and the Unborn Child*, Leiden-Boston 2009, p. 121-123; P. W. Smits, *The right to life of the unborn child in international documents, decisions and opinions,* Bedum 1995, p. 48-51.

interpretation, according to which a legal text must not be interpreted in such a way that parts of it become redundant. Thirdly, it is not without significance that Art. 1 of the Convention describes a child as a "human being" under the age of 18 and not as a "person", which seems to suggest that this provision applies both to born and unborn children.

6. Similar term is used in Convention on the Rights of Persons with Disabilities. Firstly, Article 10 states 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. Use of the term "human being" again implies that it encompasses also the unborn human beings. Secondly, by virtue of Article 4, all States Parties are obliged to ensure full realization of all human rights and fundamental freedoms for all persons with disabilities, without discrimination of any kind on the basis of disability. Thirdly, in accordance with Article 6 (2), States Parties shall prohibit all discrimination on the basis of disability. Fourthly, pursuant to Article 8 (1-2, a, ii) States Parties undertake to adopt immediate, effective and appropriate measures, including promotion of positive perceptions and greater social awareness towards persons with disabilities. Recognising the fatal disability as the basis for an abortion - to put it mildly - is not conducive to building positive perception of people with disabilities. In one of its opinions, the Committee on the Rights of Persons with Disabilities expressed the view that *[l]aws which explicitly allow for abortion on grounds of impairment violate the Convention on the Rights of Persons with Disabilities (Art,. 4,5,8). Even if the condition is considered fatal, there is still a decision made on the basis of impairment. Often it cannot be said if an impairment is fatal. Experience shows that assessments on impairment conditions are often false. Even if it is not false, the assessment perpetuates notions of stereotyping disability as incompatible with a good life.*[5]

7. Pursuant to Art. 2 (1) of the European Convention on Human Rights *[e]veryone's right to life shall be protected by law*. The doctrine sometimes refers to the context of signing the Convention, which may be of great importance for the interpretation of Art. 2 - in 1950, laws prohibiting abortion were in force in almost all States Parties, except in the case of a threat to the mother's life.[6] Against this background, the key question is whether the concept of "everyone" also includes unborn children. If the States Parties believed that "everyone" includes also *nasciturus* then to deny it protection on the basis of contemporary social views on abortion would no longer be merely an interpretation, but an unacceptable revision of Art. 2.[7] A broad interpretation of the concept of "everyone" is supported also by the course of work on the draft Convention, during which the proposals for formulating the subjective scope of the right to life using formulas of a narrower meaning, i.e. "each person", "all individuals", were clearly rejected.[8] Importantly, no State Party raised any objection to the admissibility of legalising abortion in accordance with the procedure provided for in Art. 64 of the ECHR.[9] The linguistic argument is not without

[5] Comments of the Committee on the Rights of Persons with Disabilities on the draft General Comment No36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights, file can be downloaded from: https://www.ohchr.org/en/hrbodies/ccpr/pages/gc36-article6righttolife.aspx (28.10.2021).
[6] See decision of the Commission of 13 May 1980, *Paton v. United Kingdom*, §20, 3 Eur. H.R. Rep. 408 (1980).
[7] K. Freeman, *The Unborn Child and the European Convention on Human Rights: To Whom Does Everyone's Right to Life Belong [comments]*, [in:] „Emory International Law Review", Vol. 8, Issue 2 (Fall 1994), p. 647-648.
[8] *Travaux préparatoires of the European Convention on Human Rights* 78-80 (1985), p. 200 and 240; *Travaux préparatoires of the European Convention on Human Rights* 8-16, 258 (1975), p. 182.
[9] See *Reservations and Declarations for Treaty No.005 - Convention for the Protection of Human Rights and Fundamental Freedoms*, https://www.coe.int/en/web/conventions/full-list?module=declarations-by-treaty&numSte=005&codeNature=0 (4.11.2021).

significance. The authentic French version of the Convention also uses a broader term - *toute personne* ("someone", "everyone") instead of *homme* ("man"). In the German translation Article 2 uses the term of *Mensch*, similarly in Polish translation appears the word *człowiek* (man). However, it should be remembered that only the English and French versions have the value of authenticity.[10] Interestingly, the use of a narrower term by the German and Polish translator did not prevent the consolidation of the jurisprudence in both countries, according to which "human" in the meaning of international regulations is also an unborn human being.[11] The argument in favour of a broad interpretation of Art. 2 of the ECHR is also the "class" character of the right to life. Certain rights and freedoms, by their nature, are general rather than individual, which means that they are not attributed to specific individuals but to the human species as such. *Nasciturus* undoubtedly belongs to the human species at every stage of development.[12]

8. Leaving States Parties free rein in determining the subjective scope of the protection of human life seems contrary to the very concept of the margin of appreciation, which was supposed to refer only to rights and freedoms limited in their universal content, but was not to apply to rights with absolute or almost absolute nature.[13] Resignation from specifying the personal scope of Art. 2 of the Convention also seems inadmissible from the point of view of Art. 32 (1) of the Convention, which expressly entrusts the European Court of Human Rights with the interpretation of all provisions of the ECHR, and not only those on which there is a European consensus. The Court's refusal to establish a minimum standard of protection due to the lack of European consensus seems difficult to reconcile with the principle of universalism, according to which the Convention sets out generally applicable minimum standards for the protection of human rights. [14]

9. According to Jean-Paul Cost and Kristaq Traja, ECtHR judges, inability of Member States to reach consensus on the definition of human life does not mean that law ceases to apply to this issue: *Does the present inability of ethics to reach a consensus on what is a person and who is entitled to the right to life prevent the law from defining these terms? I think not. It is the task of lawyers, and in particular judges, especially human rights judges, to identify the notions – which may, if necessary, be the autonomous notions the Court has always been prepared to use – that correspond to the words or expressions in the relevant legal instruments (in the Court's case, the Convention and its Protocols). Why should the Court not deal with the terms "everyone" and the "right to life" (which the European Convention on Human Rights does not define) in the same way it has done from its inception with the terms "civil rights and obligations", "criminal charges" and "tribunals", even if we are here concerned with philosophical, not technical, concepts?* [15] In the opinion of judges Costa and Traja, Article 2 is applicable to the life before birth.[16]

[10] Commentary no. 1 to Article 2 of ECHR [in:] Ch. Grabenwater, K. Pabel, *Europäische Menschenrechtskonvention*, 6. Auflage 2016, Beck Online.
[11] Judgments of German Constitutional Court of 2 February 1975, (1 BvF 1,2,3,4,5,6/74) and of 28 May 1993 (2 BvF 2/90 and 4, 5/92); judgment of Polish Constitutional Tribunal of 28 May 1997 (K 26/96).
[12] K. Freeman, *op. cit.*, s. 650-651.
[13] See L. Garlicki (former ECtHR judge), commentary no. 18 to Article 1 of the ECHR, [in:] *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Tom I. Komentarz do artykułów 1-18* (ed. L. Garlicki), Warsaw 2010, available at Legalis.pl.
[14] L. Garlicki, commentary no. 15 to Article 1 of ECHR [in:] (ed. L. Garlicki), *op. cit.* .
[15] Separate opinion of Jean-Paul Costa and Kristaq Traja to judgment *Vo v. France*, §7.
[16] *Ibidem*, §16.

10. Judge Georg Ress put the case more bluntly: *There can be no margin of appreciation on the issue of the applicability of Article 2. A margin of appreciation may, in my opinion, exist to determine the measures that should be taken to discharge the positive obligation that arises because Article 2 is applicable, but it is not possible to restrict the applicability of Article 2 by reference to a margin of appreciation. The question of the interpretation or applicability of Article 2 (an absolute right) cannot depend on a margin of appreciation. If Article 2 is applicable, any margin of appreciation will be confined to the effect thereof.*[17] Judge Ress also expressed the view that the right to life expressed in Art. 2 of the Convention is also applicable to unborn children: *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.The structure of Article 2 and, above all, the exceptions set out in paragraph 2 thereof, appear to indicate that persons are only entitled to protection thereunder once they have been born and that it is only after birth that they are regarded as having rights under the Convention. In view of the "aim" of the Convention to provide extended protection, this does not appear to be a conclusive argument. Firstly, a foetus may enjoy protection, especially within the framework of Article 8 § 2 (see Odièvre v. France [GC], no. 42326/98, § 45, ECHR 2003-III). In addition, the decisions of the Commission and the Court contain indications that Article 2 is applicable to the unborn child. In all the cases in which that issue has been considered, the Commission and the Court have developed a concept of an implied limitation or of a fair balance between the interests of society and the interests of the individual, that is to say the mother or the unborn child. Admittedly, these concepts were developed in connection with legislation on the voluntary, but not the involuntary, termination of pregnancy. However, it is clear that they would not have been necessary if the Convention institutions had considered at the outset that Article 2 could not apply to the unborn child. Even though the Commission and the Court have left the question open formally, such a legal structure proves that both institutions were inclined to adopt the ordinary meaning of "human life" and "everyone" rather than the other meaning. Similarly, the practice of the Contracting States, virtually all of which had constitutional problems with their laws on abortion (voluntary termination of pregnancy), clearly shows that the protection of life also extends in principle to the foetus. Specific laws on voluntary abortion would not have been necessary if the foetus did not have a life to protect and was fully dependent till birth on the unrestricted wishes of the pregnant mother. Nearly all the Contracting States have had problems because, in principle, the protection of life under their constitutional law also extends to the prenatal stage.*[18].

11. Also, the EU Charter of Fundamental Rights does not introduce a differentiated standard of protection of life for born and unborn people. When considering the legal status of a *nasciturus*, the following are of particular importance:

[17] Separate opinion of George Ress to judgment *Vo v. France*, §8.
[18] *Ibidem*, §4.

- Art. 1: "Human dignity is inviolable. It must be respected and protected. ";

- Art. 2, sentence 1: "Everyone has the right to life";

- Art. 3 (1): "Everyone has the right to respect for his or her physical and mental integrity"

- Art. 3 (2b): "In the fields of medicine and biology, the following must be respected in particular: (...) the prohibition of eugenic practices, in particular those aimed at selecting persons (...)" and Art. 3 sec. 2 lit. d: "(...) the reproductive cloning of human beings is prohibited."

12. In German literature, an original line of argumentation was formulated to justify an expanding interpretation of the subjective scope of human dignity, which consists of four arguments, i.e. the human species (*Speziesargument*), continuation (*Kontinuumsargument*), identity (*Identitätsargument*) and potentiality (*Potentialitätsargument*), jointly defined as *SKIP-Argumente*. They are based on the following reasoning:

1) of the genus (*Spezies*): a) every member of the human race has (inherent) dignity, b) every human embryo belongs to the human race, and therefore c) every human embryo has dignity;

2) from continuation (*Continuum*): a) every human being that has certain qualities or abilities, also has dignity, b) every human embryo developes, under normal conditions, gradually (continually) and without morally relevant stages, into a human being that has certain properties or abilities (e.g. autonomy as goal-setting capacity, freedom, cognitive abilities, self-awareness, preferences, interests), and therefore c) every human embryo has dignity;

3) identity (*Identität*): a) every human being that has certain qualities or abilities, has dignity, b) adult people who have certain qualities or abilities are morally identical with human embryos, c) every human embryo has dignity;

4) from potentiality (*Potentialität*): a) every human being that potentially possesses certain properties or abilities has dignity, b) every human embryo is a being that potentially has certain properties or abilities, and thus c) every human embryo has dignity. [19]

13. As rightly emphasised in the legal academic literature, on the basis of the Charter, human dignity is a normative feature related to the biological existence of a human being, and therefore human life, also in the prenatal period, is protected by Article 1 of the Charter. [20] The same seems to be true of Art. 2 of the Charter, i.e. human life is a feature related to the biological and physical existence of a human being.[21]

2. Margin in appreciation in regulation of abortion

14. However, the current and dominant view of the ECtHR is different. As mentioned above, the Court has traditionally always accepted - and in many cases still accepts - that the margin of appreciation of states is wider in sensitive moral and ethical issues.[22] Importantly, the Court adheres to this doctrine of a wide margin of discretion,

[19] G. Damschen, D. Schonecker, *Argumente und Probleme in der Embryonendebatte – ein Überblick*, [in:] *Der moralische Status menschlicher Embryonen* (ed. G. Damschen, D. Schonecker), Berlin 2002, p. 2–5.
[20] L. Bosek, *Ochrona godności człowieka w prawie Unii Europejskiej a konstytucyjne granice przekazywania kompetencji państwa*, Przegląd Sejmowy 2008/2, p. 69.
[21] H. Jarass, commentary no. 5 to Article 2 of ECHR, [in:] H. Jarass, *Charta der Grundrechte der EU*, 3. Auflage 2016, Beck Online.
[22] Judgments of: 16.7.2014 *Hämälainen v. Finland*, §75; 22.4.1997, *X, Y and Z v. the United Kingdom*, §44; 26.2.2002, *Fretté v. France*, §41; *Christine Goodwin v. United Kingdom*, §85.

even after the majority of the Member States have already adopted a uniform practice. For example in the case of abortion the Court has consistently recognised that states are free to decide on the extent to which human life is protected in the prenatal phase, even though in 45 out of 47 countries of the Council of Europe (see below) abortion is available on request or for socio-economic reasons. The Court, however, rightly respects the position of the minority of states that protect the lives of unborn human beings.

15. In the case of *Vo v. France* the Court has already underlined the lack of consensus in Europe and in the scientific community as to the legal and scientific definition of human life, acknowledging that defining the beginning of human life should belong to the margin of appreciation of the Member States.[23]

16. This position was confirmed and developed in the judgment *A., B. and C. v. Ireland*. The Grand Chamber of the ECHR ruled on the applications of three Irish women, the first two of whom argued that the legislation protecting the lives of unborn human beings violated their right to privacy, while the third applicant did not raise such argument but instead focused on the allegation that there was no proper procedure guaranteeing her access to abortion in accordance with the Irish law (which allowed for the abortion only in the event of a threat to the mother's life). In regard to applications of A. and B., the Court ruled that there had been no violation of their right to privacy - thus confirming the current position, according to which Art. 8 of the Convention does not confer the right to abortion.[24] In regard to application of C., the Court found a violation of Art. 8 of the Convention, due to the lack of a procedure in Irish law that would enable determining whether the pregnancy in a specific case poses a threat to woman's life and, if it does, to conduct legal abortion.[25]

17. Therefore, in light of the current jurisprudence, the Member States are allowed to decide on legalising or banning abortion.

18. If a Member State decides to legalise abortion in certain cases (e.g. threats to the life or health of the mother, rape, child impairment), the Court interprets it as providing the right to abortion **at the level of the national law**. Therefore a woman acquires this right if she meets the conditions laid down **in the national law**. In such a situation, **at the Convention level**, a positive obligation arises for the state to establish procedures ensuring that the right to legal abortion will not be a theoretical nor illusory. The abortion cases examined by the Court concerned mainly applications of women who complained about the lack of appropriate procedures - they wanted to perform abortion under domestic law, but due to the doctors' refusal, they could not effectively confirm that they met the conditions. When the women tried to challenge the compliance of domestic abortion law with the Convention, the Court dismissed the applications claiming that states enjoyed wide discretion in this matter.

3. Abortion law in Poland

19. Taking advantage of the margin of discretion in the field of protection of life in the prenatal phase, Poland introduced a ban on abortion under the pain of criminal sanctions. The ban is constitutionally justified. Firstly, in accordance with the jurisprudence of the Polish Constitutional Tribunal, the constitutional guarantees of protection

[23] Judgment of 8.7.2004, *Vo* v. *France*, §82.
[24] Judgment of 16.12.2010, *A., B. and C. v. Ireland*, §241-242.
[25] *A., B. and C. v. Ireland*, §267-268.

of life apply also to unborn human beings.[26] It is not admissible in a state ruled by law to differentiate the protection of life depending on the stage of biological development; secondly, the prohibition of abortion serves the implementation of public morality, which the European Court of Human Rights itself found acceptable in the above-mentioned case of *A., B. and C. v. Ireland*.

21. Pursuant to the Polish law abortion constitutes a offense (Polish: *czyn zabroniony*, «forbidden act») punishable by imprisonment. In accordance with Article 152 of the Criminal Code, termination of pregnancy with the consent of a woman, but in violation of the provisions of the statutory law, is punishable by imprisonment of up to 3 years (§1). The same punishment applies to anyone who provides a pregnant woman with help in terminating a pregnancy in violation of the law or urges her to do so (§2). Whoever commits the act specified in §1 or 2, when an unborn child has achieved the ability to live independently outside the pregnant woman's body, shall be subject to the imprisonment for a term of between 6 months and 8 years (§3).

22. At the same time, however, the Polish law provides for three exceptional situations in which performing an abortion does not entail criminal liability. In accordance with Article 4a (1) of the Act of 7.1.1993 on Family Planning Protection of the Human Foetus and Conditions for Termination of Pregnancy abortion is not be punishable if:

1) pregnancy poses a threat to the life or health of the pregnant woman;
2) there is a justified suspicion that the pregnancy resulted from a forbidden act.

Till 27 January 2021 the law allowed abortion also in case of eugenic reasons – when prenatal tests indicated a high probability of a severe and irreversible impairment of the foetus or an incurable life-threatening disease - but full panel of Constitutional Tribunal ruled such solution violated *nasciturus* right to life.[27]

23. In the light of the ruling of the Constitutional Tribunal sitting in full panel passed on 28.5.1997, stating that human life in the prenatal phase is a constitutional value, and the conditions for abortion were specified in the Polish law as **justifications** (Polish: *kontratypy*) excluding the unlawfulness of the forbidden act (abortion), it is difficult to accept the thesis that public authorities have some kind of legal obligation to facilitate access to abortion. It would be the only case in which the state would be obligated to inform about places where a criminal offense can be committed with impunity. This view has been confirmed in the jurisprudence of the Supreme Court[28] and academic legal literature[29] and therefore remains accurate until this day. Ordo Iuris is aware of different views which appear to be dominant – however, it should be emphasised that the correctness of a view is not determined by the number of judgments and publications supporting it, but by rational arguments. These in turn indicate the correctness of the view which describes conditions for abortion in the Polish law as justifications.

[26] Ruling of Constitutional Tribunal of 28 May 1997, Ref. No. K 26/96.
[27] Judgment of Constitutional Tribunal of 22 October 2020, Ref. No. K 20/20, which entered into force on 27 January 2021 at the moment of publication in Journal of Laws.
[28] Resolution of the Supreme Court 22 February 2006, Ref. No. III CZP 8/06.
[29] M. Wild, *Roszczenia z tytułu wrongful birth w prawie polskim*, Przegląd Sądowy 2005/1, p. 51; W. Borysiak, *Naruszenie przez lekarza prawa rodziców do planowania i przerywania ciąży jako podstawa roszczenia odszkodowawczego. Glosa do wyroku SN z dnia 13 października 2005 r., IV CK 161/05*, Państwo i Prawo 2006/7, p. 117; M. Gałązka, K. Wiak, *Glosa do wyroku ETPC z 20 marca 2007 r. w sprawie Alicja Tysiąc przeciwko Polsce*, Przegląd Sejmowy 2007/3, p. 218.

24. Therefore, the Ordo Iuris Institute is of the opinion that the fact that the legislator decides to allow to conduct certain non-medical services such as abortion does not automatically mean that there is a legal obligation to ensure actual access to it and information about it.

25. It follows from the above that the Polish law does not grant women with the right to abortion, but only chooses not to prosecute abortion in exceptional, dramatic situations for a woman. In such a situation, the Court should consider whether its case-law on the effectiveness of a right to abortion under domestic law applies to Polish legislation. It is difficult to investigate whether Poland provided the applicant with effective tools enabling her to exercise the right to abortion, if Polish legislation does not grant such a right at all.

Conclusions

26. In view of the above, the following conclusions should be made:

a) The beginning of human life occurs at the moment of karyogamy, because it is when the male and female gametes merge into a new, centrally organised unity, quite different from the structure of a sperm, egg or mother cell; this new entity has a specific genetic code and potential.

b) There are strong legal arguments indicating that scope of right to life – as guaranteed in ECHR, ICCPR, CRC, CRPD - encompasses also human beings in the prenatal period of their life. Firstly, linguistic argument – in provision regulating the right to life ICCPR, CRPD and CRC use the term "human being" which in international terminology means both born and unborn beings. ECHR uses the term "everyone" which is broader than "person" or "individual" and, above all, the notion of "life" which covers 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. Secondly, historical argument - in 1950, laws prohibiting abortion were in force in almost all States Parties, except in the case of a threat to the mother's life. Importantly, no State Party raised an objection to the admissibility of legalising abortion in accordance with the procedure provided for in Art. 64 of the ECHR. Thirdly, practical argument - the practice of the Contracting States, virtually all of which had constitutional problems with their laws on abortion (voluntary termination of pregnancy), clearly shows that the protection of life also extends in principle to the foetus. Specific laws on voluntary abortion would not have been necessary if the foetus did not have a life to protect and was fully dependent till birth on the unrestricted wishes of the pregnant mother. Fourthly, SKIP-Argument should be taken into account (see §12).

c) However, in light of the current jurisprudence of ECtHR, protection of human life before birth is a matter falling within margin of appreciation. Therefore, Member States are allowed to decide on legalising or banning abortion. Constitutional Tribunal delegalized abortion on grounds of impairment in order to safeguard the constitutional right to life at prenatal phase of development.

d) From the perspective of the ECtHR legalisation of abortion in certain cases (e.g. threats to the life or health of the mother, rape, child's impairment) results in creation of a right to abortion **at the level of the national law**. A woman acquires this right, if she meets the conditions laid down **in the national law**. In such a situation, **at the Convention level**, a positive obligation arises for the state to establish a procedure ensuring that the right to a legal

abortion will not be theoretical nor illusory. In the opinion of the Ordo Iuris Institute, **such obligation arises only when the national law actually defines access to abortion as a «right».** If, however, the national law defines abortion – in principle – as a crime and by the way of exception allows to perform it with impunity the «right» never arises nor an obligation to make it effective.

e) Under the Polish law abortion constitutes a forbidden act punishable by imprisonment. Conditions for the abortion have been constructed in the Polish law as **justifications** (Polish: *kontratypy*) excluding the unlawfulness of a forbidden act (abortion). It is therefore difficult to accept the thesis that public authorities have some kind of legal obligation to facilitate access to abortion. The fact that the legislator decides to allow to conduct certain non-medical services such as abortion does not automatically mean that there is a legal obligation to ensure actual access to it and information about it. It derives from the above that the Polish law does not grant women a right to abortion, but only chooses not to prosecute abortion in exceptional situations which are dramatic for the woman. In such a situation the Court should consider whether its case-law on the effectiveness of a right to abortion under domestic law applies to the Polish legislation, which does not formulate a right to abortion.