SLOVAK REPUBLIC

JUDGEMENT

of the Constitutional Court of the Slovak Republic

In the name of the Slovak Republic

[EXCERPTS]

PL. ÚS 12/01-297

[…]

II.

Consideration of the constitutionality of the challenged provisions of the Act on Artificial Interruption of Pregnancy

A. The Constitutional Court's key sources for considering the constitutionality of the challenged provisions of the Act on Artificial Interruption of Pregnancy and their interpretation

First of all, the Constitutional Court accentuates that the Slovak Republic is a sovereign, democratic and law-governed state. It is not linked to any ideology or religious belief (Article 1 (1) of the Constitution). The Constitutional Court proceeded from this constitutional postulate when making decision in the given case. The Constitutional Court's role in this proceeding is neither answering the philosophical, moral or ethical question when the human life starts, nor the question of correctness or morality of artificial interruption of pregnancy and not even the question what an optimal legal regulation of artificial interruption of pregnancy in the Slovak Republic should look like, its only role is to answer the question what are the constitutional side fences that the Constitution sets to the legislator in relation to the legislation of artificial interruption of pregnancy. In other words, the key question to be answered in this proceeding by the Constitutional Court is the question whether the Constitution forbids the legislator the legislation of the artificial interruption of pregnancy in the way that is resulting from the contested provisions of the Act on Artificial Interruption of Pregnancy.

It results from the plaintiffs' petition that the Constitutional Court's role in this proceeding is primarily to consider the compliance of Section 4, Section 6, Section 7, Section 8 and Section 10 of the Act on Artificial Interruption of Pregnancy with Article 15 (1) and (4) of the Constitution.

According to the Constitutional Court's established jurisprudence the Constitution represents a legal unit that should be applied in mutual relationship of the entire constitutional norms.

Based on the aforementioned the Constitutional Court's role in this proceeding is considering the compliance of the challenged provisions of the Act on Artificial Interruption of Pregnancy with Article 15 (1) and (4) of the Constitution in connection with and in causal relationship with constitutional norms and principles as well as the Constitution protected values.

In specific circumstances the legal regulation of artificial interruption of pregnancy can represent not only infringement of Art. 15 (1) of the Constitution governing the right to life and protection of unborn human life, but also the fundamental right of pregnant woman to privacy governed by Art. 16 (1) and Art. 19 (1) and (2) of the Constitution, or, as the case may be, also her other rights, such as the right to health protection (Art. 40 of the Constitution) or the right to freedom of thought, conscience, religion and belief (Art. 24 (1) of the Constitution). At the same time the legal regulation of artificial interruption of pregnancy needs to be considered and interpreted in context with the constitutional principles and the Constitution protected values, especially the principle of proportionality creating an integral part of the general principle of the state governed by the rule of law expressed in Art. 1 (1) first sentence of the Constitution and it is a base for the constitutional balancing, or the principle of freedom resulting mainly from Art. 2 (3) of the Constitution. With reference to Art. 1 (2) of the Constitution in connection with Art. 7 (5) and Art. 154c of the Constitution, when considering the plaintiffs' petition the Constitutional Court had to respect the international commitments of the Slovak Republic relating in particular to the right to life and the right to privacy as well as the international judicial bodies jurisprudence, i.e. to consider the contested legal regulation from the international law resulting limits perspective.

With respect to a special relevance and sensitivity of the issue that create the subject of plaintiffs' petition the Constitutional Court deemed necessary to at least briefly analyze also the legal regulation of abortion in other countries as well as attitudes of some foreign constitutional courts to the abortion issue in relation to the protection of right to life in the way they are resulting from their jurisprudence.

1. The right to life and protection of human life prior to birth according to Art. 15 (1) of the Constitution - key basis of interpretation

According to Art. 15(1) of the Constitution:

"Everyone has the right to life. Human life is worthy of protection even prior to birth."

1.1 The right to life is an entrance gate and a pillar of the entire system of the fundamental rights and freedoms protection. The Constitutional Court has no reason to doubt the key position of the right to life in the system of fundamental rights and freedoms. An effective protection of the right to life is an inevitable (though not sufficient) prerequisite of real guarantees of a natural person's physical and mental integrity and there through also her all other rights and freedoms. These are after all „only" different quantitative aspects of the right to life, e.g. the right to life in a healthy environment or in an environment where everybody enjoys freedom of movement, expression, assembly, association, or the right to life, the privacy of which enjoys protection or within which one can use, enjoy or dispose of his/her property and the like.

The right to life acts *erga omnes* and is directly applicable since the Constitution does not assume that its protection would be linked with enforcement by law. The right to life thus enjoys protection both in vertical relation of public authority – natural persons and in

horizontal relations between natural persons and legal entities. In its several decisions the Constitutional Court pronounces that the state authority's role is to protect fundamental rights and freedoms not only towards state bodies but also towards anybody else, i.e. even toward natural persons or legal entities. Hence according to Art.15 (1) of the Constitution the state's obligation is not only to refrain from interfering with the right to life, but also a positive obligation to adopt and secure implementation of measures for an effective and real protection of the right to life.

In context with the aforementioned the fundamental question that should be answered by the Constitutional Court in this proceeding is whether it is the nasciturus (fetus) or only the born human that is the holder (subject) of the right to life.

1.2 It is clear from the wording of Art. 15 (1) of the Constitution that the constituent distinguishes between everyone's right to life (the first sentence) and the protection of unborn human life (the second sentence). This distinction suggests a difference between the right to life as a personal, subjective entitlement and the protection of unborn human life as an objective value (as stated hereinafter).

In order to consider the (non)conformity of the contested provisions of the Act on Artificial Interruption of Pregnancy with Art. 15 (1) of the Constitution the interpretation of the second clause "Human life is worthy of protection even prior to birth" is important. Meaning of the second clause of Art. 15 (1) of the Constitution can be explained in two utmost ways but the Constitutional Court can associate itself with none of them.

The first possibility is a regulatory irrelevance of this provision. According to this approach the provision of Art. 15 (1) second sentence of the Constitution is not a legal norm that would express an order, restriction or limits of what is allowed, but a declaration implying a desire that clearly contains an ethical rule (e.g. Čič, M. et al. Commentary on the Constitution of the Slovak Republic. Martin: Matica slovenská, 1997. 87 p.). However, construing the second sentence of Art. 15 (1) of the Constitution only as a proclamation is at principal conflict with the current concept of the Constitution that is not a document containing regulatory irrelevant proclamations, relevance of which is determined only by the legislator's further activity, but it is a real set of directly applicable norms, principles and values having their specific regulatory impact (see mainly Art. 152 (4) of the Constitution.)

The second possibility is to adjudicate the right to life, i.e. the quality of the fundamental right to nasciturus (unborn human life). The second sentence of Art. 15 (1) of the Constitution would thus be understood as a specification of the first sentence, hence eliminating any doubts of the fact that under the term "everybody" within the meaning of Art. 15 (1) the first sentence of the Constitution it is necessary to understand also the nasciturus. At least in some parts of their reasoning the plaintiffs incline to such conclusion. On the contrary, the plaintiffs elsewhere aim their argument to the fact that an unborn human life has the right to life, though this right doesn't need to be as intensive as the right to life of an already born person. From this point of view it could be observed that Art. 15 (1) of the Constitution entrenches two fundamental rights in both sentences, protection of which is guaranteed with different intensity. The Constitutional Court denies both approaches of the plaintiffs for reasons set forth hereinafter and this conclusion is not in contrary to its first premise contesting the thesis of regulatory irrelevance of Art. 15 (1) the second sentence of the Constitution.

It follows from the comparison of literal interpretation of the first and second sentence of Art. 15 (1) of the Constitution, in particular from the collocation "has the right to life" v. „worthy of protection", that the constituent in Art. 15 of the Constitution quite clearly distinguishes between the legal status of nasciturus and legal status of born person. This language interpretation is also supported by systematic interpretation. The bill of fundamental human rights and freedoms in its second chapter of the second part of the Constitution is introduced by provision of Art. 14, according to which everyone shall be entitled to his or her rights. It is at the same time beyond any doubts that the concept of everyone as used in this (but also in other) provisions of the Constitution should be understood as everybody who is born (see e.g. Čič, M. et al. Commentary on the Constitution of the Slovak Republic. Martin: Matica Slovenská, 1977. 82 p., or Prusák, J. Theory of Law. Bratislava: Comenius University. 279 p.), i.e. capacity to have rights arises by birth and ends by death, or, as the case may be, by declaration of the death. Hence the Constitution on principle links the occurrence of subjective rights only with the moment of birth of a human and not with his conception. In context with the issue that is subject of this proceeding it appears appropriate to mention e.g. Art. 41 (3) of the Constitution according to which both children born in and out of wedlock enjoy the same rights.

However, on the aforementioned grounds no regulatory irrelevance of Art. 15 (1) second sentence of the Constitution can be spoken of since the regulatory relevance of this provision, also regarding its very formulation and the constitutional context do not achieve such intensity that it could be spoken of as a fundamental right that is confinable only based on a strict balancing and proportionality towards other fundamental right by virtue of Art. 15(4) of the Constitution.

The concept of the second sentence of Art. 15 (1) of the Constitution as a fundamental right is contrary to the very motion for abrogation of certain parts of the contested Act on Artificial Interruption of Pregnancy. For the plaintiffs themselves admit that not every reason for abortion would have to be contrary to nasciturus' subjective right to life claimed by them by virtue of Art. 15 (1) of the Constitution.

Should the provision of Art. 15 (1) the second sentence of the Constitution actually create an absolute subjective right to life already prior to birth, then it would be necessary for the entire matter to apply Art. 15 (4) of the Constitution as correctly construed by the plaintiffs.

According to Art. 15 (4) of the Constitution it is not a breach of rights if someone was deprived of life in connection with an act that is not criminal according to law.

Provision of Art. 15 (4) of the Constitution indeed does not admit legalization of any act by which somebody can be deprived of life but legalization of only such act which is excusable by application of the proportionality principle. By virtue of the above quoted provision of Art. 15 (4) of the Constitution would hence come to collision of the constitutional rights of various nature, i.e. the nasciturus' right to life according to Art. 15 (1) of the Constitution on one hand and mainly the right of a woman to freely decide on her pregnancy continuance as a non-material value of private nature protected by Art. 16 (1) of the Constitution, or Art. 19 (2) of the Constitution, or, as the case may be with the rights according to Art.40 and Art. 41 (2) of the Constitution (the right to health protection of a pregnant woman) on the other hand.

The concept of the second sentence of Art. 15 (1) of the Constitution as an absolute subjective right and a subsequent application of Art. 15 (4) of the Constitution (which, within the

aforementioned implies the proportionality element) would therefore, contrary to what the plaintiffs themselves require, quite surely exclude abortion on the ground of protection of health of pregnant woman, on the genetic grounds or on the ground of pregnancy occurred in consequence of criminal act, as the nasciturus' right to life could in the situation of classical balancing of fundamental rights neither be outbalanced by protection of health of a woman nor by any other reasons connected mostly with protection of privacy of pregnant woman. And if, in the plaintiffs' opinion, the provision of Art. 15 (4) of the Constitution should possibly excuse also the health, genetic or social indication of interruption of pregnancy it gives rise both to the problem of dangerous emptying of the very concept of the fundamental right to life and the problem of creation of various categories of the right to life out which not each would be of the same significance. Especially the latter problem could potentially have a destructive impact upon the Slovak Republic as a state governed by the rule of law.

It is beyond dispute that the Constitution itself contains differently conceived fundamental rights whose logical structure or also enforceability by judicial power vary. Only the Art. 15 of the Constitution contains both the fundamental right to life according to para 1 of the first sentence to which corresponds the prohibition to deprive somebody of his life (para 2) and from which exemptions exist connected with protection of rights of others (Art. 15 (4) of the Constitution) and prohibition of capital punishment that is unconditional and is not subject to balancing (para 3). Both these rules thus differ in their nature and logical structure since the fundamental right corresponding to the first sentence of paragraph 1 and paragraph 2 represents the typical fundamental right that is subject of balancing throughout its application. The current theory of the Constitutional law designates such fundamental right as a principle striving for its accomplishment to a maximum possible degree depending on interaction with other (in individual cases with the fundamental right that is in conflict with it) fundamental rights and the constitutional values and with respect to the proportionality requirement representing the key concept for fundamental rights application. This interaction is in individual cases manifested as a balancing of one fundamental right with the constitutional values and other fundamental rights.

On the contrary, a logic form of prohibition of the capital punishment as per Art. 15 (3) of the Constitution or e.g. also the constitutional maxim *nullum crimen, nulla poena sine lege* (Art. 49 of the Constitution) are quite clearly utter and as such they are not subject to balancing (Alexy R. Theorie der Grundrechte, 3. Auf., Frankfurt am Main: Suhrkamp, 1996). As the third specific group of fundamental rights the Constitution, after all, entrenches social rights, which, with respect to their specific nature, may be claimed only within laws that exercise them (Art. 51 (1) of the Constitution.)

Regardless of the fact that the Constitution contains at least three types of fundamental rights, the provision of Art. 15 (1) the second sentence of the Constitution can not be confessed the statute of a specific fundamental right *sui generis* without having a dramatic reflection thereof on the general structure of fundamental rights according to the Constitution. There is a crucial constitutional principle valid on fundamental rights according to which people are free and *equal* in dignity and rights (Art. 12 (1) of the Constitution). The Slovak Republic legal order protects human life as the key value of a state governed by the rule of law. Regarding the constitutional prohibition of capital punishment a human can in principle be deprived of life only in case of protection of life or health of other persons (e.g. extreme emergency, inevitable self-defense, lawful use of weapon). By no means do the said cases doubt the principle that the right to life has the same weight regardless of its holder (subject). On the other hand, supplementing the Constitution with a „weaker" right to life by means of

jurisprudence, with which the holder of right *sui generis* (i.e. nasciturus in this case) could be endowed, what the plaintiffs demand in this proceeding, would be a dangerous precedent. Creating various categories of right to life out of which not all would have the same weight, or even creating new subjects of law by means of jurisprudence (next to the classical dichotomy of natural persons v. legal entities) would be in conflict with constitutional postulate on equality of people in rights. Such supplementation of the Constitution would at the same time have potentially incalculable consequences of creation of various categories of fundamental rights, content of which would be determined depending on holders of such rights.

1.3 No modern constitution, not excepting the Slovak Republic Constitution, is not value neutral, on the contrary, it is based on a relatively integrated system of values that the state esteems, respects and ensures their protection through the public authorities bodies. These values are of objective nature and they are an expression of the socially accepted common „good" and, in principle, they are of a non-material nature. Unlike the standard legal norms (rules of conduct) the state can not create objective values according to the current law theory and jurisprudence conclusions, but can only recognize and respect them, or base on them, or eventually emphasize the importance of certain values to the prejudice of or in relation to other values (compare e.g. Kühn, Z. Application of Law in Complicated Cases. To the Role of Law Principles in Jurisprudence. Prague: Karolinum, 2002. 94 p.). By an explicit expression of a certain objective value in the Constitution such the value gains a nature of a constitutional value enjoying the constitutional protection.

In the Constitutional Court's opinion an unborn human life has a nature of an objective value and the Court accentuates at the same time that next to the nasciturus' objective value the Constitution formulates and hence also protects many other objective values such as, e.g. freedom (Art. 2 (3), Art. 12 (1), but also e.g. Articles 17, 21, 23, 24 and Art. 2 of the Constitution etc.), equality (Art. 12 (1), but also e.g. Art. 30 (3) or Art. 47 (3) of the Constitution), human dignity (Art. 12 (1) and Art. 19 (1) of the Constitution), but also matrimony, parenthood, family (Art. 41 (1) of the Constitution) or health (e.g. Art. 20 (3), Art. 21 (3), Art. 23 (3) and Art. 24 (4) of the Constitution), nature (Art. 20 (3) and Art. 23 (3) of the Constitution), environment (e.g. Art. 20 (3) and Art. 44 (3) of the Constitution) or morality (Art. 24 (4) of the Constitution) and the like.

The Constitution guarantees to the objective values explicitly formulated in the Constitution the protection in various forms and with different intensity. The basic constitutional values like freedom, equality or human dignity, acquire through the way of the constitutional formulation (see Art. 2 (3) or Art. 12 (1) of the Constitution) a nature of common constitutional principles as the most universal rules of conduct, a concentrated form of which expresses the most universal objectives of law and they jointly create the system of basic values on which the state's constitutional order is based. By a specific manifestation of these basic values the Constitution at the same time acknowledges intensity of a fundamental right or freedom protection, e.g. personal liberty (Art. 17 of the Constitution), freedom of faith (Art. 24 of the Constitution), freedom of expression (Art. 26 of the Constitution), right to maintenance of human dignity (Art. 119 */translator' note: should prob. be Art. 19/* para 1 of the Constitution and the like, i.e. specific expressions of these basic values are formulated as a natural person's or legal entity's subjective entitlement towards the state. The Constitution confesses the intensity of a fundamental right protection also to other objective values such as the health or environment (Art. 40 the first sentence of the Constitution, or Art. 44 (1) of the Constitution), though "only within the limits of the laws executing these provisions" (Art. 51

(1) of the Constitution). The Constitution provides an extraordinarily high intensity of protection also to others from the abovementioned values (nature, morality) when it considers their protection a legitimate ground for limitation of some fundamental rights or fundamental freedoms (e.g. property rights - Art. 20 (3) of the Constitution, freedom of movement and residence - Art. 23 (3) of the Constitution, or freedom of religion and belief – Art. 24 (4) of the Constitution). The Constitution guarantees protection to the matrimony, parenthood and family by means of law (Art. 41 (1) the first sentence of the Constitution). From diction of Art. 15 (1) the second sentence of the Constitution ("Human life is worthy of protection even prior to birth") the state's obligation to protect a value of an unborn human life (nasciturus) can concededly be deduced, but the text clearly shows, compared with other abovementioned objective values, both a lower degree of concreteness of this obligation ("is worthy of protection") and a different degree of intensity of its constitutional protection.

The Constitutional Court remarks that the Constitution does not exclude balancing the fundamental rights and freedoms with the constitutional values, however, such balancing has different quality than the balancing of individual fundamental rights and freedoms.

1.4 It results from the aforementioned (item 1.3 in connection with item 1.2) that according to the Slovak Republic Constitution the nasciturus is not a subject of law to whom the fundamental right to life belongs according to Art.15 (1) the first sentence of the Constitution. Indeed, the nasciturus can become a subject of law ex tunc, and hence ex tunc also the holder of fundamental rights, however, on condition he is born alive.

The Constitutional Court also (item 1.2) denied regulatory irrelevance of the provision of Art.15(1) the second sentence of the Constitution. Hence the key question is what the regulatory relevance of this provision is. According to the aforementioned the Constitutional Court's legal opinion the analyzed provision of the Constitution conceives the protection of unborn human life as the constitutional value and thus it confesses a regulatory status on the level of the constitutional imperative to the need of protecting this value. The Constitutional Court has already emphasized that the provision of Art. 15(1) of the Constitution can not be interpreted separately but only in connection with the constitutional principles expressed mainly in Art. 1(1) the first sentence, Art. 2(3) and Art. 12(1) of the Constitution, as well as in other relevant the constitutional provisions, mainly Art. 16 (1), Art. 19 (1) and (2), but also Art. 41 (1) and (2) of the Constitution.

The obligation to protect an unborn human life is the constitutional obligation of all bodies of public authorities whose scope may in the specific circumstances involve such protection, including the legislator and the Constitutional Court. Protection of this constitutional value is first of all protected in the legislative way. Some possibilities of unborn human life protection are outlined directly in some other provisions of the Constitution (e.g. the right of pregnant women to special care, protection in labor relations and the right to adequate working conditions under Art. 41 (2) of the Constitution and its implementation through regular legislation by virtue of Art. 51 (1) of the Constitution). This obligation is not depending on whether nasciturus does or does not have the status of a subject of law; his presumption, in principle, being the fact that nasciturus himself is not a subject of law ipso jure (otherwise he would certainly dispose of the fundamental right to life).

The constitutional imperative of the protection of the unborn human life has its autonomous content – in case of doubts its final specification is a role of an authorized Constitution „interpreter" which is the Constitutional Court in the Slovak Republic. Though the

Constitutional Court, on behalf of the constituent, may not decide from when does the unborn human life exist, it may, and in this case even must decide on what is the content and what are the effects evoked by the constitutional obligation of protecting the unborn human life.

Considering the legal nature of Art. 15 (1) the second sentence of the Constitution as a value explicitly expressed by the Constitution establishing an imperative aimed for all bodies of public authority it is necessary to interpret this provision in comparison with classical fundamental right. The state's obligation of securing protection of fundamental right, which is a positive aspect of the concept of fundamental right, is naturally not identical with the state's obligation to secure protection of the value guaranteed by the Constitution. Therefore, whereas it is valid about the fundamental right that „where there is a right, there is also a legal protection", and that is also by judicial power (see Judgment II. ÚS 58/97), in case of the constitutionally guaranteed value such protection is weaker regarding a possible deliberation that the legislator disposes of also in connection with the diction of the Constitution.

General requirements entrenched in Art. 13 of the Constitution (equality in restricting rights and freedoms, finding their essence and meaning), as well as the need of proportionality of restriction of a certain fundamental right, may only be applied adequately to the constitutional value and to the constitutional imperative of protection resulting therefrom. The key difference compared with the application of fundamental rights being mainly the extent of allowable deliberation that the legislator possesses under the Constitution when deciding on a legal regulation of artificial interruption of pregnancy, mainly when balancing the constitutional imperative expressed in Art. 15 (1) the second sentence of the Constitution on one hand and the pregnant woman's fundamental right to protection of privacy under Art. 16 (1) and Art. 19 (1) and (2) of the Constitution (or other eligible fundamental rights, mainly the right to protection of health - see below), not excepting the pregnant woman's fundamental right to life under Art. 15(1) the first sentence of the Constitution on the other hand. Therefore, it is first of all the legislator who should decide on the best way of reaching the constitutional imperative and take measures preventing from action that is able to prohibit transformation of an unborn (thus so far only a potential) human life to a born human life with exception of action, interest in which exceeds the societal interest in protection of the unborn human life. To this constitutionally acceptable extent of deliberation also the extent of its review by the Constitutional Court have to be adapted. The Constitutional Court proceeded with the constitutional review only within the thus specified extent (see part III. B hereinafter).

2. The right to privacy according to Art. 16 (1) and Art. 19 (1) and (2) of the Constitution – key basis of interpretation

According to Art. 16 (1) of the Constitution the inviolability of a person and his/her privacy shall be guaranteed. It may be restricted only in cases specifically provided by a law.

According to Art. 19 (2) of the Constitution everyone shall have the right to the protection against unjustified interference in his or her private and family life.

According to Art. 2 (3) of the Constitution everyone may do what is not forbidden by a law and no one may be forced to do what the law does not enjoin.

2.1 The Constitutional Court has repeatedly specified the content of the constitutional regulation of the universal personal rights constituted as the right to the inviolability of a

person and her privacy (Art. 16(1) of the Constitution) and the right to the protection against unjustified interference in private and family life (Art. 19(2) of the Constitution). The right to protection of private life is an inalienable right of natural person. The constitutional protection of privacy according to Art. 16 (1) of the Constitution is linked with inviolability of a person. With the object of protection conceived in this way a person's privacy is linked with her physical integrity (II. ÚS 19/97) and the right of an individual within certain social relations sphere to live according to his own conception - free from undue restrictions, commands or prohibitions laid by bodies of public authority (II. ÚS 19/97, II. ÚS 7/99, II. ÚS 16/99). The essence of the right to the protection against unjustified interference in the private and family life according to Art. 19 (2) of the Constitution consists in the right of an individual to decide according to his own deliberation on whether and in what extent should the facts from his private life be made available to others.

In accordance with the European Court of Human Rights jurisprudence it needs to be said that respecting the private sphere of life has to involve also the right to create and develop relations with other human beings and the part of right to privacy is also the family life including the relations among close relatives. With the rights defined in this way directly relates the general constitutional principle of freedom (Art. 2 (3) of the Constitution), which, as has already been mentioned, is one of the fundamental values of a democratic state governed by the rule of law and which consists in the state's obligation to respect and protect the sphere of individual's personal autonomy.

Thus these rights and principles in mutual connection guarantee a certain "internal sphere", in which the individual can live according to his own conception and exclude "the outer world" from it, and the sphere, in which the individual can freely advance, fulfill his/her personality and enter relations as well as develop relations with other persons. Therefore the right to privacy and to protection of private life in connection with the freedom principle in its most basic specification, relying also upon the fundamental right to human dignity, guarantees a possibility of autonomous self-determination to the individual.

2.2 The woman's decision-making on her own mental and physical integrity and its layers, inter alia on whether she will conceive a child and what will her course of pregnancy be like, falls within this ambit and is protected (by the Constitution). By becoming pregnant (intended, unintended, voluntary or in consequence of violence) the woman does not release her right to self-determination. Withal, the pregnancy is a state connected with the woman's considerable physical and also mental strain, with pains, constraints and inconvenience, hence the state able to significantly reduce the woman's possibilities to freely fulfill her personality. Therefore any restriction upon woman's decision-making whether she means to bear such obstacles in her autonomous self-realization, and hence whether she means to remain pregnant till its natural completion, constitutes an interference with the woman's constitutional right to privacy. Such interference can be constitutionally lawful or constitutionally unlawful.

2.3 It results from the Constitutional Court jurisprudence that even the constitutional right to privacy in the extent already defined, is not of an absolute nature. For the Constitution does not guarantee its protection against any interference. It only guarantees protection against unlawful interference. According to the general rule, an interference with the right to privacy is lawful exclusively in cases when it is in compliance with Art. 2 (2) and (3), Art. 13 and Art. 152 (4) of the Constitution, as well as with all other provisions of the Constitution that are legally relevant when exercising the right to privacy (I. ÚS 33/95, II. ÚS 7/99, II. ÚS 16/99).

Thus the lawfulness of interference with the right to privacy is the function of its compliance with both formal and material essentials stated in the Constitution. From the formal point of view such interference must be based on a legal power of a relevant public authority to make interference, while the interference can only be made in the way established by law (mutatis mutandis I. ÚS 33/95). Therefore interference with the right to privacy is only admissible when it is in compliance with law. Such law, however, has to meet certain material quality as well – it must pursue one or some of so called legitimate aims and at the same time in the interest of protection of such aim in a democratic society it must be unnecessary. Interference thus has to reflect a pressing social need to protect one or several legitimate aims and in relation to such aim it must be a proportionate means of its protection. Examination of proportionality of the interference with the right to privacy in relation to legitimate aim of its restriction is a question of balancing this fundamental right with other fundamental rights and freedoms as well as with the constitutional principles and the constitutional values that find themselves in mutual tension with it.

2.4 Balancing the constitutional rights, principles and values standing in mutual conflict follows the principle of so called practical concordance substance of which, according to the Federal Constitutional Court in Germany, consists in "harmonization of the relevant constitutional values and in preserving their creative tension". The obligation to balance the constitutional rights, principles and values that are in mutual conflict, results also from the fact that the rights and freedoms contained in the Constitution's second chapter dispose *prima facie* of the same value. Hierarchy of these rights and freedoms does not rely upon some doctrinal predetermination, but it is a function of a specific context and circumstances under which the concerned rights, principles and values find themselves in mutual tension. In the imaginary hierarchy of the constitutional rights, principles and values, the value linked with protection of unborn human life therefore neither stands, and considering the form of its constitutional formulation, nor can stand *a priori* higher than other constitutional rights, principles or values related with the issue of artificial termination of pregnancy, *in concreto* the right to privacy in its integral conception. Content and regulatory implications of the constitutional obligation to protect unborn human life are therefore to a significant extent also the matter of content and regulatory implications of a pregnant woman's right to privacy.

Thence if follows that on the one hand the legislator must not ignore the imperative contained in Art. 15 (1) the second sentence of the Constitution - the obligation to provide protection to an unborn human life. On the other hand the legislator must respect the fact that everyone, including a pregnant woman, has the right to decide on his/her private life and to protect implementation of his/her own conception of it against unlawful interference. A pregnant woman's option to ask a competent institution for artificial termination of pregnancy is one of variations by which the constitutional right to privacy and to self-determination in connection with the principle of freedom can be asserted.

In terms of subject of this proceeding it should be kept in mind that the role of the Constitutional Court is seeking the way out from collision between a value protected by the Constitution (unborn human life) and a limitable human – fundamental right (the right of woman to privacy). When restricting human rights, respect must be given to their essence and meaning (Art. 13(4) of the Constitution). The constitutional value of unborn human life can therefore be protected only to such extent, that this protection did not cause an interference with the essence of woman's freedom and her right to privacy and consequently did not mean entailing an obligation that is exceeding the ambit of the Constitution.

It needs to be kept in mind that if a woman, during any phase of her pregnancy, could not decide on her own accord whether to carry the fetus to term or have her pregnancy interrupted, then it would mean an obligation to carry the fetus to term, an obligation which has no support in the Constitution and at the same time it would infringe upon the essence of her right to privacy as well as her personal freedom. The legislator undoubtedly can and in the interest of protecting the constitutional value of the unborn human life even must establish the procedure and time limits if a woman decides for an artificial termination of pregnancy, but the legislator's procedure must not be arbitrary, it should allow for a real decision by the woman on artificial interruption of her pregnancy and for respecting the constitutional value of the unborn human life.

The need for balance of these rights, values and principles concerned in the reviewed case shows that absolutization of one of them, e.g. an absolute prohibition of artificial interruption of pregnancy, or, on the contrary, voidance of any restrictions thereof, is out of the question. For their balancing therefore the scope of protection that is an unborn human life worthy needs to be set and also the extent and effects of woman's right to self-determination, to control of her own body and destiny need to be set namely in their mutual relation. Such balancing, indeed, lies within the legislator's competence, but it is within the Constitutional Court's competence to judge whether a concrete result of balancing on the side of legislator corresponds to the relation between the constitutional value specified in provision of Art. 15 (1) the second sentence of the Constitution on the one hand and the rights, principles and values specified in provisions of Art. 16, Art. 19 and Art. 2 (3) of the Constitution on the other hand.

3. Art. 7 (5) and Art. 154c (1) of the Constitution and the international commitments of the Slovak Republic relating to the right to life and protection of the nasciturus (the unborn human life)

According to Art. 7(5) of the Constitution international treaties on human rights and fundamental freedoms and international treaties for whose exercise a law is not necessary, and international treaties which directly establish rights or duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.

According to Art. 154c(1) of the Constitution international treaties on human rights and fundamental freedoms which the Slovak Republic has ratified and were promulgated in the manner laid down by a law prior entry of this constitutional law into force, shall be a part of its legal order and shall have precedence over the law if they provide a greater scope of constitutional rights and freedoms.

It follows from Art. 7(5) and Art. 154c(1) of the Constitution that the statutory regulation of artificial interruption of pregnancy in the Slovak Republic must be in compliance not only with the Constitution, but also with international treaties on human rights and fundamental freedoms that were ratified by the Slovak Republic and promulgated in the manner laid down by a law and relate to the right to life or the protection of nasciturus (the unborn human life).

From this point of view it was necessary to analyze the challenged provisions of the Act on Artificial Interruption of Pregnancy mainly with the concerned provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child as well as the

Convention on the Elimination of all Forms of Discrimination against Women irrespective of the fact that the plaintiffs do not object to discrepancy of the challenged provisions of the Act on Artificial Interruption of Pregnancy with the respective provisions set forth in the international conventions.

3.1 The Convention for the Protection of Human Rights and Fundamental Freedoms

According to Art. 2 (1) of the Convention everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

According to Art. 2 (2) of the Convention deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

a) in defence of any person from unlawful violence;
b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
c) in action lawfully taken for the purpose of quelling a riot or insurrection.

In terms of the consideration of constitutionality of the challenged provisions of the Act on Artificial Interruption of Pregnancy crucial is the answer to the question whether the diction "everybody's right to life" contained in Art. 2 (1) of the Convention includes also the nasciturus.

The Commission expressed itself to this question e.g. in re Paton v. United Kingdom (decision from 1980) where it stated *inter alia* that «The life of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant woman.» Similarly the Commission or the European Court for Human Rights did not adjudicate protection guaranteed under Art. 2 of the Convention to the nasciturus also in re X. v. United Kingdom (decision 1980), H. v. Norway (decision from 1992) and the last time e.g. Evans v. United Kingdom (judgment from 2006).

It follows from the Commission and the European Court of Human Rights rulings in the mentioned cases that according to their present jurisprudence the fetus (nasciturus) is not a person entitled to the "right to life" under Art. 2 (1) of the Convention obviously on the account that granting a foetus the same rights as persons would place unreasonable limitations on the Article 2 rights of women, as persons already born. It also quite clearly follows from this and from other rulings of the Commission and the European Court of Human Rights that the individual states have a wide margin of appreciation in the issue of a regulation of the artificial interruption of pregnancy. Also the argument as to when the right to life arises falls within the margin of appreciation that in general the European Court of Human Rights concedes to individual states in this area (e.g. Vo v. France, 2004 judgment).

In relation to the aforementioned the Constitutional Court emphasizes that not even Art. 2 (2) of the Convention can be applied to protection of fetus in context of which also provision of Art. 15 (4) of the Constitution needs to be interpreted. For it results from Art. 2 (2) of the Convention that deprivation of life is not in contravention of the right to life only in case when it results from the use of force which is no more than absolutely necessary in a) defense of any person from unlawful violence; b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; or, as the case may be c) in action lawfully taken for the purpose of quelling riots or insurrection. Therefore, the provision of Art. 2 (2) of the Convention shall not apply to the fetus and the legal regulation of artificial interruption of pregnancy since such interpretation would basically deny any possibility of induced abortion also by reason of mother's life and health protection (even the plaintiffs do not doubt the constitutionality of this reason).

3.2 The International Covenant on Civil and Political Rights

According to Art. 6 (1) of the International Covenant on Civil and Political Rights (hereinafter referred to as the "International Covenant") every human being has the right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

It is known from the negotiating history on the International Covenant that a proposal was rejected according to which its Art. 6(1) should apply also to the period before birth. It is confirmed in *Travaux preparatoires* of the Commission, where it is stated that a proposal has been proposed and rejected that stated "The right to life is inherent in the human person from the moment of conception, this right shall be protected by law" and by a vote of 55 to 0, with 17 abstentions the Commission ultimately voted to adopt Art. 6**,** which did not contain the reference to conception. [U. N. GAOR, 12th Sess., agenda item 33, 119 p. (q), U. N. Doc. A/3764 (1957)]. On the contrary, the concluding observations of the Human Rights Committee jurisprudence, which interprets and monitors state parties compliance with the International Covenant, show repeated condemnations of strict legal prohibitions of abortion that produce maternal mortality as a violation of women's right to life under Art. 6 and a recommendation to states to review and amend legislation criminalizing abortion (see e.g. Concluding Observations of the Human Rights Committee Chile, 30 March 1999, U. N GAOR, Hum. Rts. Comm., 65th Sess., 1740th mtg. para 15, U. N. Doc. CCPR/C79/Add.104, or Argentina, 15 November 2000, U. N. Doc. CCPR/CO/70/ARG, para 14 etc.). In 2005, the Human Rights Committee went even further in its jurisprudence, when it observed in relation to an individual complaint of K. L. v. Peru [Human Rights Committee, CCPR/C/85/D/1153/2003/(2005) UNHRC 64 (22 November 2006)] that a state's obligations to respect and ensure the right set out in art. 7 of the International Covenant (under Art. 7 of the International Covenant no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation, note) require it to guarantee a woman's access to abortion in cases where pregnancy threatens her physical or mental health, including because of severe fetal impairment.

3.3 Convention on the Rights of the Child

According to Art. 1 of the Convention on the Rights of the Child a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

According to Art. 6(1) of the Convention on the Rights of the Child the states parties recognize that every child has the inherent right to life and according to Art. 6(2) of the Convention shall the states parties ensure to the maximum extent possible the survival and development of the child. The Convention on the Rights of the Child thus states an inalienable right to life and a state's obligation to ensure the survival and development of the child.

In the context of Art. 1 of the Convention on the Rights of the Child (definition of the child) the Art. 6 of the Convention on the Rights of the Child needs to be interpreted as the right of a child born, not a child conceived, though it is not explicitly expressed in the Convention on the Rights of the Child. However, it results from the definition of the child, according to which a child means every human being, i.e. a natural person capable of independent human existence. This also corresponds with Art. 7 of the Convention on the Rights of the Child, according to which every child shall be registered immediately after birth, i.e. a child means human being after birth.

This conclusion is neither impaired/disputed by the Preamble of the Convention on the Rights of the Child, according to which "as indicated in 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 drafting group proposing this text of the Declaration of the Rights of the Child underlined in a special statement that the term "human being" refers only to born persons, which is consistent with the long-standing understanding, rooted in the Universal Declaration of Human Rights. Also The jurisprudence of the Committee on the Rights of the Child, which interprets and monitors states parties compliance with the Convention on the Rights of the Child, also denies a right to life to the foetus by expressing repeated concern over adolescent girls' access to safe abortion services. The Committee on the Rights of the Child also stated that safe abortion is part of adolescent girls' right to adequate health or to basic health and welfare. It also called for review of state practices under the existing legislation authorizing abortions for therapeutic reasons with a view to preventing illegal abortion and to improving protection of the mental and physical health of girls.. It follows from the aforementioned that the definition of a child for purposes of the Convention on the Rights of the Child does not include a foetus.

It can be stated in relation to this conclusion that there is an absence of contradiction of the considered/challenged legal regulations with this international convention, by which the Slovak Republic is bound.

3.4 The Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women contains obligations of states, which are state parties, aimed at elimination of all forms of discrimination against women based on the principle of equality and respect for human dignity in the individual fields of societal life, not excepting the field of health care and care of the family.

According to Art. 12(1) of the Convention on the Elimination of All Forms of Discrimination against Women the states parties undertake to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

According to Art. 14(2) of the Convention on the Elimination of All Forms of Discrimination against Women the states parties undertake to ensure to women in rural areas the right to have access to adequate health care facilities, including information, counseling and services in family planning.

According to Art. 16(2) of the Convention on the Elimination of All Forms of Discrimination against Women the states parties undertake to ensure, on a basis of equality of men and women, the same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

The Convention on the Elimination of All Forms of Discrimination against Women is in this area based on the principle of equality of men and women and also on the free choice to plan one's own family and freely decide on the number and spacing of children without any other conditions restricting this right. At the same time the jurisprudence of the European Court of Human Rights has to be mentioned (e.g. Boso v. Italy, 2002 judgment), according to which the legislative regulation of pregnancy interruption concerns primarily private life, a pregnant woman – the future mother, and the interruption of pregnancy must primarily consider her right, because she is primarily concerned by the pregnancy and its continuation or termination; rights of a potential father, even though a husband, may not be interpreted so widely as to involve also his right to consult this question with him or to file an action in connection with artificial interruption of pregnancy that his wife intends to undergo.

The role of a state party of the Convention on the Elimination of All Forms of Discrimination against Women is to project the obligations resulting therefrom into the legislative, judicial, administrative and other measures. It means that also this Convention provides a space for stating an absence of contradiction of the considered/challenged legal regulations with this international convention, by which the Slovak Republic is bound.

4. Legal regulation of artificial interruption of pregnancy in other states and the relevant jurisprudence of the constitutional courts

The laws on abortion adopted by most European states respect women's choice during the first trimester of pregnancy, and protect women's rights to life and health throughout the pregnancy. This approach implicitly weighs the rights of the pregnant woman more heavily than any claim, whether characterized as a right or protection, on behalf of the foetus. Of the 46 member states of the Council of Europe, 40 permit a woman to terminate a pregnancy without restriction during the first trimester, or only with a symbolic or formal indication of a reason, or on broad therapeutic grounds. Severe restrictions on abortions are only valid in a small number of states (Andorra, Ireland, Liechtenstein, Malta, Poland and San Marino).

The Germany's view of abortion went through a significant advancement. Since the German Federal Constitutional Court judgment (BVerfGE, 39, 1 of 1975), in which the Court observed performance of abortions to be unconstitutional, the new legal regulation on artificial interruption of pregnancy effective from 1 October 1995 and the amendment of the Criminal Code went through an advancement in this issue, performance of abortion is not punishable/unlawful, it shall be performed by a physician by the 12th week of pregnancy and the pregnant woman shall undergo a mandatory consultation three days before pregnancy interruption at the latest, while the consultation centers network shall be ensured by the state.

Also the Switzerland's view of abortion went through an advancement when following a referendum held in 2002 the Swiss declared for an "ease" of conditions set forth by law of 1942 and for cancellation of the full-area prohibition of artificial interruption of pregnancy. On the other hand, the referendum against abortions held also in 2002, but in Ireland, was not successful from the point of view of an "ease" of the strict prohibition of abortions.

The individual legal orders do not concur in the legal status of human fetus, but excepting a few exemptions, they admit artificial interruption of pregnancy also by other reasons than merely for the purpose of protection of mother's life. Though there is no absolute consensus on the legal status of nasciturus within the constitutional law of European states (but also Canada and USA), this consensus seems to exist to the extent that majority of the European and North American states do not consider nasciturus a subject of law that disposes of a subjective right to life (see e.g. Dworkin, R. Life's Dominion: An Argument about Abortion and Euthanasia. London: Harper, 1993).

As for the national constitutional courts jurisprudence, these have so far relatively often addressed the legal status of the fetus in the context of laws on access to abortion. The plaintiffs indeed refer to the comparative law and jurisprudence of some constitutional courts (Germany, Poland, Spain), out of which an alleged European consensus on a relative strict approach to the legal regulation of artificial interruption of pregnancy should result; this argumentation, however, is not acceptable due to several reasons. Admittedly, the right to life belongs to the fundamental rights constitutionally guaranteed across the entire Euro-Atlantic civilization. However, the content of this fundamental right differs significantly in the individual states. Next to a small group of states where killing of nasciturus falls under the most serious crimes and pregnancy interruption is practically inadmissible (Ireland and Malta) there exist, on the contrary, states with no pregnancy interruption regulation by criminal law, it is guaranteed by law to a very high extent and is even subsidized by health insurance (Sweden, typically). Divergences between the constitutional systems are also confirmed by the fact that while in some European states the nasciturus' right to life is protected by the constitution (e.g. Art. 40.3.3 of the Irish Constitution), in other states it is the right of a woman to artificial interruption of pregnancy that is protect by the constitution (see Art. 55 of the Slovenian Constitution).

Compared to the states indicated by the plaintiffs where the constitutional courts arrived at the conclusion that a pregnancy interruption on request of a woman without any restrictions whatsoever is unconstitutional, a whole range of states can be listed, in which the constitutional courts could not find any constitutional problem even in a very widely framed regulation of pregnancy interruption (a regulation similar to the Slovak one), (e.g. Austria, Holland or France). Both the Austrian and Dutch Constitutional Courts have rejected a "foetal rights" challenge to national legislation that liberalized access to abortion, holding *inter alia*, that Art. 2 of the Convention should not at all be applied to protect the unborn. In 1975, the French *Conseil Constitutionnel* upheld the French abortion law, adopting the view that a foetus is not a child entitled under the French Constitution. While the Federal Constitutional Court of Germany decided that abortion should remain technically illegal, it also specified that if a pregnant woman chooses abortion after seeing a counselor, she should not be prosecuted. The Federal Constitutional Court in Germany recognized the rights of the pregnant woman, including the right to the free unfolding of her personality, and to bodily integrity and life and protection of her dignity. In connection with this jurisprudence of the Federal Constitutional Court in Germany even the relatively strict legal regulation on

abortions is flexible and it essentially submits the rights of the fetus to the rights of the pregnant woman.

The constitutional or similar courts in some states arrived at the conclusion that the state is prohibited to interfere with its legislation in the legal regulation of abortions during the first two trimesters of pregnancy, while this prohibition in the given legal orders results from the right of a woman to the protection of privacy (USA and Canada). For instance, in the USA following the Supreme Court decision in Roe v. Wade 410 U. S. 113 (1975), as has been confirmed, though partially modified by the decision by Planned Parenthood of Southern PA. v. Casey, 505 U. S. 833 (1992), the constitutional right of a pregnant woman to the protection of privacy is reflected in the woman's right to terminate her pregnancy without unnecessary interference by the state, namely until the moment of the fetus's viability (i.e. till the end of the second trimester of pregnancy). In many European states the regulation of pregnancy interruption, which is similar to the Slovak regulation, has not induced any constitutional issues (e.g. Scandinavian states, Holland or the Czech Republic).

Regarding the differentiated legal regulation of abortions, as well as the constitutional extent of guarantees of the right to life and the right to the protection of privacy, the arguments by comparison of legal regulations with the constitutional law is more of an ancillary argumentation value.

B. The Constitutional Court's conclusions on the constitutionality of the challenged provisions of the Act on Artificial Interruption of Pregnancy

1. The plaintiffs' base position is the allegation that during the first 12 weeks of the existence of pregnancy the human life enjoys no legal protection. If it were so, the legislator would with respect to the wording of Art. 15 (1) the second sentence of the Constitution indeed create an unconstitutional situation.

When considering the plaintiffs' objection, first of all the fact has to be considered that the imperative of protection of unborn human life expressed in Art. 15(1) the second sentence of the Constitution needs to be understood in the context of the entire legal order of the Slovak Republic and not only of the Act on Artificial Interruption of Pregnancy. In other words, the fulfillment of this legislator's role needs to be considered also from the perspective of the legal protection of the unborn human life guaranteed by other legal regulations.

It results from the analysis of the legal order of the Slovak Republic that it ensures the protection to the unborn human life primarily through the protection of the pregnant woman. In this context mainly the protection of the pregnant woman (mother) in labor relations can be mentioned. Out of several provisions of the Labor Code aimed at protection of the pregnant woman [see e.g. Section 55 (2) a) and f), Section 87 (3), Section 89 (3) d), Sections 161 to 164] e.g. provision of Section 161 (2) the first sentence of the Labor Code can be mentioned, according to which a pregnant woman may not be assigned works that according to medical opinion endangers her pregnancy for health reasons consisting in her person. Such protection of the pregnant woman, at the same time, undoubtedly means also the protection of the fetus, while in this case the legislator does not limit the legal protection to a certain stage of pregnancy. Similarly, the criminal law provides for the protection of the life of the fetus for the entire period of pregnancy (see Sections 150 to 152 of the Criminal Code), though it often does so „only" through the protection of the mother's life and health [Section 139 (1)b) of the

Criminal Code in connection with e.g. the provision of Section 144 (2) d), Section 145 (2)c) or Section 147 (2)a) of the Criminal Code].

From the perspective of the direct protection of the fetus the civil law regulation can be mentioned, according to which the nasciturus is fully protected, namely ex tunc, though in this case the protection is conditioned by its live birth (provision of Section 7(1) of the Civil Code expressing the traditional Roman law maxim *Nasciturus pro iam nato habetur*). The nasciturus' property rights are also undisputedly protected by the relevant provisions of the Criminal Code (e.g. Section 212 of the Criminal Code), although again „only" upon the condition that the child is born alive and actually acquires the right in rem. However, this is of no influence upon the fact that these provisions of the Civil Code and the Criminal Code can also be considered as fulfilling the imperative expressed in Art. 15 (1) the second sentence of the Constitution.

Based on the stated examples, which are far from being comprehensive, it can be observed that the plaintiffs' claim, according to which the unborn human life during the first 12 weeks of the existence of pregnancy does not enjoy any legal protection, is not true.

2. Hence the only problem of the constitutional-law quality remains the protection of the unborn human life against its own mother. Under the Act on Artificial Interruption of Pregnancy the pregnancy interruption can be performed during the first 12 weeks without proving any specific reason, only upon request of the woman. The plaintiffs view this to be unconstitutional when they claim that it enables abortion without requiring the woman "to prove that other constitutional right is endangered". The Constitutional Court does not agree with this and by the reasons hereinafter mentioned it states that the decision on whether it is necessary to entrench in a certain limited period into the legal order a possibility of artificial interruption of pregnancy on request of the pregnant woman, is exclusively upon the legislator who, when making decision, as stated hereinafter, is limited by requirements laid upon him by the Constitution.

The Constitutional Court above all fully associates itself with the view that "the life of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman." (see the opinion of the European Commission for the Protection of Human Rights, X. v. the United Kingdom, decision of 13 May 1980, DR 19, 244 p.). The fact that the legislator approaches the social relation between the pregnant woman and the unborn child in a specific way, is therefore fully justified and in compliance with the Constitution of the Slovak Republic (compare Art. 41(2) of the Constitution, according to which, *inter alia*, a pregnant woman shall be guaranteed a special treatment).

With the Act on Artificial Interruption of Pregnancy, the constitutionality of which the plaintiffs contest, the legislator on one hand endeavors to handle the constitutional imperative contained in Art. 15(1) the second sentence of the Constitution and on the other hand the pregnant woman's fundamental right to decide about herself, which results from the fundamental right according to Art. 16(1) of the Constitution and also according to Art. 19 (1) and (2) of the Constitution in the interpretative implications hereinabove (see part A.2). If a conclusion is drawn by the legislator from this balancing that the pregnant woman has the right without unnecessary restriction by the state to request pregnancy interruption during a certain phase of her pregnancy, while during the subsequent weeks, except for some strictly specified exemptions, the fetus's integrity will be strictly protected also against its own mother (but not by means of the criminal law – see below), this conclusion itself is not

impugnable in the Constitutional Court's opinion as a noncompliance with the constitutional imperative contained in Art. 15 (1) the second sentence of the Constitution; however provided only that the legislator does not commit an inadmissible excess.

3. Above all, the Constitutional Court can not associate itself with the plaintiffs' allegation that the Act on Artificial Interruption of Pregnancy does not provide the unborn human life any protection against its mother during the first 12 weeks of its development. For the Act preferentially sets a mechanism (procedure), based on which an interruption of pregnancy can be performed, while such mechanism also considers the interests of the unborn human life. It results from the analysis of legal regulation contained in the Act on Artificial Interruption of Pregnancy that the mechanism formulated mainly in Section 7 of the Act effects also against the woman's ill-considered or premature decision on artificial interruption of pregnancy. This mechanism consists in four successive steps necessary for interrupting her pregnancy. First, the woman has to request artificial interruption of pregnancy in writing. Then she undergoes a medical examination and consults a physician and during such consultation she must be instructed on „possible health consequences of an artificial interruption of pregnancy". Such instruction is undoubtedly provided with the aim of acting on the pregnant woman so that she considers backing out of her intent to perform the intervention, by which not only the protection of the woman's health is ensured, but (though it is not expressly stated in the above quoted part of Section 7 of the Act on Artificial Interruption of Pregnancy) also the protection of the unborn human life. The physician is obviously the most appropriate person for implementation of the protection of the unborn human life and for interference in the unique relation between nasciturus and its mother also with respect to the text of the Hippocratic oath traditionally taken by physicians for millennia and which personalizes the fundamental medical ethical code, while the oath clearly reflects a principal ethical disagreement of medical profession with the pregnancy interruption. After consultation with the physician the woman must insist on the intervention (Section 7) and then pay the fee pursuant to Section 11 of the Act on Artificial Interruption of Pregnancy. The valid regulation hence ensures that the woman's will outweighs the protection of the unborn human life only after a due deliberation based also on relevant medical information provided in an accessible form.

Moreover, it can be drawn from the provision of Section 11 of the Act on Artificial Interruption of Pregnancy, the constitutionality of which the plaintiffs also contest, that the abortion according to Section 4 of this Act is not a health intervention, but on the contrary, this intervention is paid for, which differs the domestic regulation from other states where the cost of pregnancy interruption is subsidized by health insurance.

The Constitutional Court deemed also important to mention that the domestic criminal law has been distinguishing for almost sixty years the unique relation of nasciturus and its mother and does not protect the fetus against its mother even if she would abort her pregnancy herself or ask another for the same or let another do the same (present Section 153 of the Criminal Code). This provision itself, whose constitutionality has never been contested by anybody during proceedings before the Constitutional Court, is only another argument for the conclusion that the second sentence of Art. 15 (1) of the Constitution can not be understood as the one constituting an absolute subjective right acting *erga omnes*.

4. Unconstitutionality of the Act on Artificial Interruption of Pregnancy is also not given by the fact that the legal regime of an unborn human life differs depending on the stage of pregnancy. From the constitutional imperative constituting the legislator's obligation to protect human life prior to birth results no conclusion that the legal protection of the fetus

against the mother must be identical in each individual phase of prenatal development (similarly also Drgonec, J. The Constitution of the Slovak Republic. Commentary. Šamorín: Heuréka, 2004. 113 p.) On the contrary, also from the European Court of Human Rights jurisprudence (mainly Vo v. France) a minimal European consensus can be drawn consisting in the base, according to which the unborn human life should be protected during pregnancy with the intensity growing gradually from the conception to the birth. It results from the aforementioned that also the key judgments by the US Supreme Court Roe v. Wade 410 U. S. 113 (1973) and Planned Parenthood of Southearn PA. v. Casey, 505 U. S. 833 (1992) are based on the same base.

The course of pregnancy and the relation between the fetus and its mother can be defined best as a unity in duality, where in the first phase of pregnancy prevails the unity of the mother and the fetus, while in the subsequent phases the duality of the mother and the fetus is more emphasized. Distinguishing among the individual phases of prenatal development in respect of a pregnancy interruption possibility is well founded also with respect to the European legal orders, but not only these, that allow, analogous to the Slovak Republic, interruption of pregnancy on request (e.g. Scandinavian states, Holland, France, Austria, the Czech Republic), but also those distinguished by very strict conditions for the performance of abortion (e.g. Poland, as for abortion for health, eugenic or legal reasons, which is also admissible only in a certain, the first phase of pregnancy) [see more in A.4].

In the Constitutional Court' s opinion the option of twelve weeks as a limit for performance of pregnancy interruption on request of the mother can not be considered arbitrary. This period depends on the creation of the fetus's sensibility and it is in compliance with the prevailing European practice of relevant legislation in states enabling interruption of pregnancy on request (or, as the case may be, on the ground of social indication) that usually ranges from the 10^{th} to 15^{th} week of pregnancy. At the same time the Constitutional Court's opinion results from the fact that the period of 12 weeks needs to be considered as the period, which in regard to the real possibility of ascertaining the very existence of pregnancy, provides the mother with a rational chance to consider the option of pregnancy interruption and its possible performance. If this period should be considerably shorter, then the purpose (aim) of the law, which is to enable the woman to decide on her motherhood, did not have to be fulfilled. If, on the contrary, the period were considerably longer (e.g. the first two trimesters of pregnancy), it could come into conflict with the constitutional imperative of Art. 15 (1) the first sentence of the Constitution, mainly regarding the proportionality of the said regulation in relation to the constitutional value of the protection of the unborn human life. At the very most, the Constitutional Court repeatedly emphasizes that the body competent to establish the maximum time limit for the performance of pregnancy interruption is the legislator, while the Constitutional Court examines (and may not examine anything else through the optics of the constitutional imperative expressing the constitutional value) only a possible excess in the legislator's consideration, but not the fact whether the given period optimally complies with the recent findings of medical science.

5. […]

6. Based on all aforementioned reasons the Constitutional Court adjudged that the challenged provisions of the Act on Artificial Interruption of Pregnancy are not inconsistent with the specified articles of the Constitution.