

SVK-2009-3-002

a) Slovakia / b) [Constitutional Court](#) / c) Plenum / d) 04-12-2007 / e) PL. ÚS 12/01 / f) / g) *Zbierka zákonov c. 14/2008, Zbierka nálezov a uznesení Ústavného súdu Slovenskej republiky* (Official Digest), 1/2007; [www.concourt.sk](http://www.concourt.sk) / h) CODICES ([Slovak](#)).

Keywords of the Systematic Thesaurus:

- [02.03.03](#) Sources - Techniques of review - **Intention of the author of the enactment under review.**
- [02.03.06](#) Sources - Techniques of review - **Historical interpretation.**
- [03.16](#) General Principles - **Proportionality.**
- [03.19](#) General Principles - **Margin of appreciation.**
- [04.06.03.01](#) Institutions - Executive bodies - Application of laws - **Autonomous rule-making powers.**
- [05.03.02](#) Fundamental Rights - Civil and political rights - **Right to life.**
- [05.03.32](#) Fundamental Rights - Civil and political rights - **Right to private life.**

Keywords of the alphabetical index:

Abortion-on-demand / Abortion for health reasons / [Abortion](#), sub-law / [Child](#), [unborn](#), [protection](#) / [Woman](#), [pregnant](#), right to privacy.

Headnotes:

Abortion on demand of a pregnant woman in the first 12 weeks of pregnancy is in conformity with the right to life (including the clause stating that human life is worthy of protection even before birth) as set in the Constitution.

A regulation (e.g. Ordinance of the Ministry of Health) itself cannot state that abortion for genetic reasons is allowed up to 24 weeks of pregnancy because this issue should be covered by a law.

Summary:

I. A group of MPs filed a claim before the Constitutional Court challenging those provisions of the Abortion Law which allowed abortion on demand in the first 12 weeks of pregnancy. They argued that those provisions meant there was no legal protection of human life during the first 12 weeks of pregnancy. They stressed the importance of the right to life and insisted on the original intent of the legislator to protect unborn life from conception onwards. Although the right to life and the right to privacy need to be balanced, and there can be exemptions to the prohibition of abortion, this is not the case regarding abortion on demand, where a woman is not obliged to prove any threat to her human rights.

The petitioners also challenged those provisions of the regulation which allowed abortion for genetic reasons up to 24 weeks of pregnancy, although the Law allowed abortion only in the first 12 weeks of pregnancy.

II. The Constitutional Court initially stated that the Slovak Republic is a state governed by the rule of law and is ideologically neutral. The Court pointed out that its role is to review the challenged Law from the constitutional point of view, not to answer a variety of non-legal questions related to abortion. After stressing the principle of unity of the Constitution, which necessitates balancing various conflicting constitutional rights, the Court noted that the Abortion Law was also related to the right to privacy, freedom of conscience and the right to health.

The Court went on to say that the required balance of constitutional rights precludes the absolute priority of a particular constitutional right over the others. In order to find the just equilibrium in this case, Parliament must establish the legal framework which protects human life before birth on the one hand, and secures the right to privacy of the woman on the other. This matter is within the powers of Parliament; however, the Court is authorized to review whether the outcome is in line with the mutual relations of the respective rights embodied in the Constitution.

The most important challenged provision, Section 4 of the Abortion Law, reads:

«A woman's pregnancy may be terminated if she demands it in writing, if the pregnancy does not exceed 12 weeks, and if her state of health does not prevent it.»

It must be stressed that the Court reviewed solely abortion-on-demand in the first 12 weeks of pregnancy, not the Abortion Law as such or other reasons for abortion.

The right to life is a crucial human right, is binding *erga omnes* and is directly applicable. It is a right that is applied both vertically and horizontally and the state has a positive obligation to protect it. The question is therefore whether the subject of the right to life is only an already born human being, or whether it also includes unborn life.

The first sentence of Article 15.1 of the Constitution refers to, the right to life. The second sentence reads: Human life is worthy of protection even before birth.' (hereinafter, the «worthy of protection clause»). The Court identified two possible contradicting interpretations of the worthy of protection clause. On the one hand, this clause is legally irrelevant, and on the other it includes the subjective right to life of the unborn. The Court rejected both these interpretations. The worthy of protection clause does not include the subjective right to life for several reasons: not only is the wording different from the right to life clause in the first sentence, but moreover Article 14 of the Constitution reads that every person is entitled to his or her rights (legal capacity) leaving no doubts that every person in Article 14 of the Constitution is only a living, born person. According to Article 15.4 of the Constitution, no infringement of the rights set out in the preceding parts of Article 15 occurs if someone is deprived of life as a result of an act which is not criminal according to the law. If the worthy of protection clause were considered a subjective right and Article 15.4 of the Constitution were applied, then the rights of a woman could not be balanced against the right to life of the unborn. This could mean not only the banning of abortion on demand, but also abortion for other reasons, which were not challenged. Balancing the right to life of the unborn and the right to life of the mother could lead to strong restrictions on abortion, and if there were an attempt to leave some reasons for abortion, then different categories of the right to life could be developed which the Court found unacceptable. It is not acceptable to develop a special kind of subjective right from the worthy of protection clause, a kind of weaker' right to life. This would also breach the principle of equality.

Nevertheless, the worthy of protection clause has some legal relevance. The Court declared that the Constitution also contains objective values. The worthy of protection clause may be considered an objective value, whereby this value is less specific than basic rights, so constitutional protection is lower. According to the Court, the legislator has a wide margin of appreciation when fulfilling the worthy of protection clause. The right to privacy also includes the possibility for a woman to make decisions about her pregnancy, at least up to a particular stage of the pregnancy. The Court had to consider whether the right to privacy and the constitutional value of unborn life were properly balanced.

The Court took into consideration related international treaties and decisions of the European Court of Human Rights, Human Rights Committee and foreign courts of constitutional type. There was also a review of foreign legal regulations on abortion. The Court concluded that all those arguments merely have supportive value.

If there was no protection of the unborn life during the first trimester, when abortion-on-demand is allowed, then there would be a contradiction with the worthy of protection clause. The Court argued that this protection should be viewed from the perspective of the whole Slovakian legal order. The unborn child is protected via the special protection of pregnant women under labour and criminal law. The Court accepts the opinion that the life' of the foetus is intimately connected with, and cannot be regarded in isolation from, the life of the pregnant woman. The unborn child is also protected against his or her own mother's will by the special four-step procedure including counselling at the doctor's before the abortion. The Court also stated that the period of the first trimester is constitutionally acceptable. It is not arbitrary because, on the one hand, it is not too short for pregnant women to consider abortion and thus to fulfil the aim of the Law and, on the other, it is not too long to breach the constitutional value set in the worthy of protection clause. In any case, the legislator has a wide margin of appreciation in this respect.

With respect to the contention of the petitioners that the original intention of the legislators to protect unborn life from conception onwards must be taken into account, the Court stated that the historical method of interpretation has only a supportive role. The original intent of the MPs was not decisive, but the objective text of the Constitution was.

Following this argumentation, the Court rejected the petition to abrogate the challenged provision allowing abortion-on-demand in the first trimester.

According to Section 12 of the regulation issued by the Ministry for Health, pregnancy may be terminated up to 24 weeks for genetic reasons. The petitioners also challenged this provision, because the Law allows abortion only up to 12 weeks. The Court stated that the Law allows both abortion on demand and abortion for health reasons. The Law itself does not put a time limit on abortion for health reasons. Section 12 cannot therefore be compared to the 12 week period, which is set in the Law solely for abortion-on-demand. The only question is whether the legal norm set in Section 12 could be set only in the regulation, or whether it is *praeter legem*. The Court stated that the 24-week period cannot be considered insufficiently relevant to put in the Law and it is also not a technical question in the expert sense which usually belongs in a regulation. On the contrary, the period is very important, because it limits the right to privacy of pregnant women balanced against the worthy of protection clause.

Therefore, according to the Court, the provision breached Article 123 of the Constitution (Competence of a ministry to issue regulations) and Article 2.2 of the Constitution (Principle of legality).

#### Supplementary information:

Five judges wrote dissenting opinions to the first part of the decision. In a joint dissenting opinion, three judges wrote that Article 15.1 of the Constitution implies that unborn life has extraordinary constitutional value. The challenged provision itself and the rest of the legal order do not provide protection to unborn life in the first trimester. The right to life as a core constitutional value of unborn life has a quality which is not comparable with the right to privacy of a woman.

Another judge stressed that only abortion-on-demand in the first trimester was challenged, not the Abortion Law as a whole. He noted that counselling cannot be considered as part of the protection of unborn life, because women may demand abortion notwithstanding this. He considered the challenged provision as not conforming with Article 15.1 of the Constitution, because there is no legal or administrative protection of unborn life in the first trimester.

The last judge wrote that there was no difference between the protective obligations of the legislator stemming from the right to life clause and the worthy of protection clause. Human life has equal value whether unborn or born. It is not acceptable to absolutise either the right to life or the right to privacy. According to the dissenter, unborn life in the first trimester is in a vacuum from the point of view of values and the absence of regulation. The right to privacy is exclusively preferred, which is not proportionate. Although there is no textual basis in Article 15 of the Constitution, the legislator arbitrarily distinguishes between unborn life before and after the 12th week of pregnancy. Consequently there is no protection of unborn life in the first trimester.