



ORDO IURIS

INSTITUTE FOR LEGAL CULTURE

Warsaw, 31th July 2018

**Honorable Member
United Nations Committee
on the Rights of Persons with Disabilities**

*Dear Madam or Sir, Member of the United Nations Committee
on the Rights of Persons with Disabilities,*

The *Ordo Iuris* Institute for Legal Culture together with **Europejska Federacja dla Życia i Godności Człowieka One of Us, Federacja Stowarzyszeń Rodzin Katolickich w Europie FAFCE, Fundacja Centrum Wspierania Inicjatyw dla Życia i Rodziny, Fundacja Jeden z Nas, Fundacja Małych Stópek, Krajowy Komitet Europejskiej Inicjatywy Obywatelskiej Mama, Tata i Dzieci, Inicjatywa Stop Seksualizacji Naszych Dzieci, Polska Federacja Ruchów Obrony Życia, Stowarzyszenie Rodzice Chronią Dzieci**, welcomes the opportunity to assist the United Nations Committee on the Rights of Persons with Disabilities in its adoption of the Concluding Observation for Poland on its 20th Session (27 August -21 September 2018).

The *Ordo Iuris* Institute for Legal Culture is an independent legal organization incorporated as a foundation in Poland. It gathers academics and legal practitioners aimed at the promotion of a legal culture based on the respect for human dignity and rights. The *Ordo Iuris* pursues its objectives by means of research and other academic activity as well as advocacy and litigation.

The *Ordo Iuris* Institute is among the organizations that are consulted by the Polish Government within the legislative process. Third party interventions (including *amici curiae* briefs) by *Ordo Iuris* Institute have been accepted by Polish courts of all levels, including the Supreme Court of the Republic of Poland.

The Institute has been also permitted by the President of the European Court of Human Rights to deliver third party interventions and allowed by the President of the European Committee of Social Rights to submit observations. The *Ordo Iuris* Institute submitted its opinions to the Venice Commission, the Secretary General of the Council of Europe, Commissioner for Human Rights, the Committee on Political Affairs and Democracy of the PACE and constitutional courts of numerous countries. The experts of the Institute are consulted and allowed to deliver interventions in matters of democracy and the rule of law i.a. by the Monitoring Committee of the Parliamentary Assembly of the Council of Europe and by the Department of State of the United States of America. Moreover, *Ordo Iuris* Institute has ECOSOC consultative status with the United Nations.

We hope the Committee on the Rights of Persons with Disabilities will find our intervention supportive.



Jerzy Kwaśniewski
President of the Board
Ordo Iuris Institute for Legal Culture

**Alternative Report of the Ordo Iuris Institute
to the United Nations Committee on the Rights of Persons with Disabilities**

the 20th Session of the Committee (27 August -21 September 2018)

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I. Executive Summary

The following report refers to the situation of respecting in Poland selected rights contained in the Convention on the Right of Persons with Disabilities.

I section: Equality and non-discrimination indicates current discrimination of disabled people and consequently their human dignity because of the validity of the Article 4a section 1 item 2 of *the Act of 7 January 1993 r. on family planning, protection of human fetuses, and the conditions under which pregnancy termination is permissible*. Constitutional case-law of the Constitutional Tribunal of Poland is invoked, which clearly stated that human life cannot be deprived of the protection only because it is burdened with severely and irreversibly impairment or incurably and fatal illness and that discrimination against people due to any reasons is prohibited. Secondly, the *I section* raise the problem of discriminating of human embryos on the basis of legal condition “embryos capable of proper development” that leaves far-reaching discretion in interpreting this term. Thus, it creates the possibility of making selection of human embryos for factors that cause disabilities. Thirdly, the *section* also presents a legal analysis about so-called “conversion therapy”.

II section: Women with disabilities describes the problem of violence in Poland in the light of the European Union Fundamental Right Agency survey from 2014.

III section: Children with disabilities and right to life describes that the existing statutory conditions of abortion does not correspond to the international and constitutional protection of the right of life of the unborn child with disabilities. From the moment of conception human life becomes a constitutionally and internationally protected value, it concerns both phases of human development before and after birth.

IV section: Awareness-raising reminds about conventional obligation to amend or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities and about constitutional obligation to ensure legal protection of life to every human being. The section presents the legislative proposal of the “End Abortion” Civil Committee that provides abolishing discrimination on statutory level of unborn children with disabilities by ensuring them the same legal protection that is enjoyed by healthy children. Furthermore, it presents recent public opinion survey (June 2018) on the perception of people with disabilities, including children in prenatal phase with suspected disability, by society. The *section* also presents an analysis about so-called “hate-speech”.

V section: Freedom from cruel, inhuman or degrading treatment or punishment describes cases of children with Down-Syndrom that survived late-term eugenic abortion.

VI section Health describes how “sexual and reproductive health” is provided for women and girls with disabilities.

II. Introduction

According to the Preamble to the Convention on the Rights of Persons with Disabilities¹ “children with disabilities should have full enjoyment of all human rights and fundamental freedoms on an equal basis with other children”, whose rights are outlined in the Convention on the Rights of the Child². The definition of a child is given in Article 1 of the Convention, which states that a “child” means “every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”. Moreover, Article 7 of the Convention clearly states that “States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children”. Furthermore, Article 2 section 1 of the Convention on the Rights of the Child points to the fact that “States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's (...) disability.” According to the Convention on the Rights of the Child, legal protection of a child encompasses both the period before as well as after his or her birth. The Declaration of the Rights of the Child³, and subsequently the Convention on the Rights of the Child are founded on the basic principle that “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”. Implementation of the purpose of the Convention – “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”, in particular as regards children with disabilities, is guaranteed both by the Constitution of the Republic of Poland⁴, ratified international agreements, as well as legislation. In the case of the Constitution of the Republic of Poland, articles: 2, 18, 30, 32 sections 1 and 2, 38, 72 section 1 and 68 section 3 have particular legal significance for protection of children with disabilities. Moreover, the Act of 6 January 2000 on the Ombudsman for Children states in Article 2 that “a child is every person from the moment of conception until the age of majority”⁵.

¹ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly*, 24 January 2007, A/RES/61/10; hereinafter as the “Convention”.

² UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, hereinafter as “Convention on the Rights of the Child”.

³ *United Nations Declaration of the Rights of the Child*, G.A. Res. 1386 (XIV) (20 November 1959); hereinafter: *Declaration of the Rights of the Child*].

⁴ *The Constitution of the Republic of Poland of 2 April 1997* (Journal of Laws No. 78, item 483 as amended); hereinafter: “the Constitution of the Republic of Poland”.

⁵ Article 2 section 1 of *the Act of 6 January 2000 on the Ombudsman for Children* (Journal of Laws of 2017 item 922).

III. Equality and non-discrimination (Article 5)

a. Equality and non-discrimination and General principles (Articles: 5 and 3)

Equality and non-discrimination of the rights of children with disabilities is a natural consequence of the existing natural principle of innate and inalienable human dignity. This universal principle is inherent to all human rights and all human beings without any distinctions and it states that all human beings have equal worth and dignity and that all human beings should enjoy equal rights. Thus, discrimination against any person on the basis of disability constitutes a violation of the inherent dignity and worth of the human person. This recognition of the universal principle was acknowledged in the Universal Declaration of Human Rights⁶ and the UN Charter⁷ that are foundations for the Convention. They both give an explicit ground for equal dignity that is inherent for “all members of the human family”⁸ and that “everyone has the right to recognition everywhere as a person before the law”⁹. In practice it means that the UDHR rejects discrimination against any member of the human family, on the basis of any kind, including on the basis of human personhood. Article 2 of the UDHR asserts firmly that “everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind (...)” and Article 6 of the UDHR specifically deals with the matter of division of human beings into persons and non-persons in the terms that “Everyone has the right to recognition everywhere as a person before the law”¹⁰. Additionally, Article 12 of the Convention emphasises that equal recognition before the law also applies to persons with disabilities. Therefore, according to Article 6 of the UNHR in connection with Article 12 of the Convention and Article 55 of the UN Charter equal treatment principle is for everyone, i.e. for every human being and for each member of the human family. Such equal protection derives from the inherent dignity of a human being, every human being without exceptions. Realization of this equal treatment principle is especially important in assuring equal promotion and protection of human rights of all human beings with disabilities, including those who require more intensive support, namely disabled children before and after birth. This means that inherent dignity of a human being starts with the very first moment of his or her existence. As to the beginning of existence and further development of the human being, it is undisputable that, from the point of view of science, human life begins at conception. It is then

⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III); hereinafter: “UDHR”.

⁷ United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI; hereinafter: “UN Charter”.

⁸ See Preamble of the UDHR.

⁹ Article 6 of the UDHR.

¹⁰ This is also reaffirmed in Article 16 of the *International Covenant on Civil and Political Rights*, 16 December 1966, UN General Assembly, United Nations, Treaty Series, vol. 999, p. 171; hereinafter: “ICCPR”.

that every uniquely defined individual member of humanity is formed and begins to exist.¹¹ This was also confirmed in the ruling by the Grand Chamber of the Court of Justice of the European Union in *Oliver Brüstle v. Greenpeace e.V.* (2011)¹², where it was clearly stated, that “fertilisation is such as to commence the process of development of a human being”.¹³ From this moment, legal protection derived from inherent and inalienable human dignity begins, independently of the health status of the human being. In this regard, discrimination against an unborn child on grounds of impairment and disability is an evident violation of the equal dignity principle (Article 5 of the Convention).¹⁴ Application of the non-discrimination principle to unborn children stemmed from Article 12 of the Convention in connection with Article 6 of the UNHR. Moreover, such an application implies the statement of the Committee on the Rights of Persons with Disabilities to the Human Rights Committee that recognizes an unborn child as a person before the law.¹⁵

Violation of the above mentioned natural principle of human dignity through discrimination of persons with disabilities is currently taking place in the light of legally valid Article 4a section 1 item 2 of the Act of 7 January 1993 r. on family planning, protection of human fetuses, and the conditions under which pregnancy termination is permissible¹⁶. In accordance with the wording of section 1 item 2 of the above mentioned Act, authorized person may in the light of the Act, perform an abortion if “prenatal tests or other medical premises indicate a high probability of severe and irreversible impairment of the foetus or an incurable disease threatening his life”. According to the “Report of the Council of Ministers on the implementation and the consequences of the application in 2016 of the Act of 7 January 1993 on family planning, protection of human fetuses, and the conditions under which pregnancy termination is permissible” in 2016 alone, 1098 unborn children were killed legally, 1042 of which because of suspected disabilities, mostly related to suspicion of trisomy 21 (so called “Down syndrome”)¹⁷.

¹¹ See e.g., Sadler, T.W. *Langman's Medical Embryology*, 7th edition. Baltimore: Williams & Wilkins 1995, p. 3 (noting that “the development of a human begins with fertilization, a process by which the spermatozoon from the male and the oocyte from the female unite to give rise to a new organism (...)”); Moore, Keith L. and Persaud, T.V.N. *The Developing Human: Clinically Oriented Embryology*, 7th edition. Philadelphia: Saunders 2003, p. 2 (noting that “the union of an oocyte and a sperm during fertilization” marks “the beginning of the new human being.”).

¹² *Oliver Brüstle v. Greenpeace e.V.*, C-34/10, decided on 18 October 2011; hereinafter: *Oliver Brüstle v. Greenpeace e.V.*

¹³ *Oliver Brüstle v. Greenpeace e.V.*, para. 35.

¹⁴ See par. 6 of the *General Comment No. 6 on equality and non-discrimination*, adopted by the Committee at its nineteenth session (14 February–9 March 2018); hereinafter: “the General Comment No. 6”.

¹⁵ See Committee on the Rights of Persons with Disabilities *Comments on the draft General Comment No 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights*, par. 1, available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx> [last accessed: 27 July 2018].

¹⁶ Act of 7 January 1993 on family planning, protection of human fetuses, and the conditions under which pregnancy termination is permissible (Journal of Laws No. 17, item 78 as amended); hereinafter; “the Act”.

¹⁷ Report of the Council of Ministers on the implementation and the consequences of the application in 2016 of the act of 7 January 1993 on family planning, protection of human fetuses, and the conditions under which pregnancy termination is permissible – adopted by the Council of Ministers by circulation on 15 January 2018, transferred to the Sejm on 23 January 2018. <https://bip.kprm.gov.pl/kpr/bip-rady-ministrow/informacje-i-sprawozda/4632,informacje.html> [last accessed: 27 July 2018].

Statistical data for the period 2002-2016 presented in the aforementioned Report, due to the existence of statutory premises contained in Article 4a section 1 item 2 of the Act, unambiguously show a rising trend in abortions due to suspected disability of the unborn child.¹⁸ This lethal discrimination is based not only on evident grounds of impairment, disability or a disposition to them but also on presumption of a given health status, genetic or other predisposition towards illness. Such presumptions, as was rightly stated in paragraph 22 of the draft of the General Comment No. 6 on Article 5 of the Convention, constitute also grounds of discrimination.¹⁹ The rights granted in Article 4 section 1 item 2 of the Act make use of such a discriminating presumption of “high probability” of impairment or illness. However, a “high probability” both of a severe and irreversible impairment of the foetus as well as of an incurable disease threatening the child’s life is hard, or even impossible to state from the perspective of development of medical knowledge and technical capabilities. Above all, development of medicine points to the fact that as the child develops in the mother’s womb, his or her health condition improves in many cases, resulting in the illness not being a threat to the child’s life anymore.²⁰ Moreover, technical capabilities of contemporary medicine make it impossible to unambiguously state that a child is unable to survive outside of the mother’s body.²¹

Human life cannot be deprived of protection simply because it is burdened with severe and irreversible impairment or an incurable and terminal illness. This was also confirmed by the Constitutional Tribunal in the verdict of 30 September 2008 in the case under file ref. no. K 44/07, stating that “human life is not subject to valuation because of age, health condition, expected duration, or any other criteria”²². Premises based on Article 4a section 1 item 2 of the Act are not rooted in values, rights and freedoms expressed in the Constitution of the Republic of Poland. It is impossible to find in the Constitution any norm that would justify treatment of people who are severely and irreversibly or incurably ill as unworthy of full protection of life and health. Quite on the contrary, Article 32 section 2 of the Constitution of the Republic of Poland confirms that discrimination “for any reason whatsoever” is prohibited, and moreover Article 68 section 3 of the Constitution of the Republic of Poland obliges public authorities to ensure special health care to children, also with disabilities and impairments. In fact, that premise taking away absolute safeguards of the right to life due to inborn defects, leads to stigmatization of all persons with disabilities. The above view on discrimination and stigmatization of unborn children due to their disability or suspected disability is close to the position of the Committee

¹⁸ Ibid., Table no. 16 Pregnancy terminations in the years 2002-2016 (country-wide) –per reasons, p. 108.

¹⁹ See par. 20 and 21 of the General Comment No. 6.

²⁰ The justification of the project of the draft of the bill proposed by the “End Abortion” Committee, p. 3.

²¹ Ibid.

²² The Verdict of the Constitutional Tribunal of 30 September 2008, file ref. no. K 44/07, item 7.5.

on the Rights of Persons with Disabilities presented within the framework of the discussions on adoption of General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights²³.

Widespread support for citizens' initiatives aimed at protection of human life, as well as growing awareness of the bloody and brutal truth about abortion techniques, shamefully hidden until now, lead to the conclusion that the society has matured and is ready to restore full statutory protection of life and health to people discriminated against because of their health condition. Opinion polls show that the opposition of Poles to abortion grew significantly since the first citizens' initiative foreseeing a ban on abortion was submitted in 2011. At the same time, there has been a drop in the number of people who opposed banning abortion, while at the same time ensuring their support for full protection of life. The number of opponents of eugenic abortion grew by almost a half, from 21% to 30%.²⁴ Furthermore, recently submitted citizens' initiative "End Abortion" was supported by almost 830 thousand citizens, four times more than the opposite initiative²⁵.

In connection with the above, currently existing legal discrimination against an unborn child on grounds of impairment and disability as regards the right to life requires urgent repealing. The solution has already been presented in the proposed amendment to the Act in the "End Abortion" citizen's initiative that ensure the same legal protection for children with disabilities and impairments that is enjoyed by healthy unborn children. Unfortunately, consideration of the civic project has been postponed for half a year. Recently, on 2nd July 2018 the Sejm Social Policy and Family Commission established a subcommittee to deliberate on the project. That is another inexplicable step in postponing adoption of the project.²⁶

b. Equality and non-discrimination and Human embryos

On 1st of November 2015 the Act on the treatment of infertility entered into force ("T.I").²⁷ It does not only meet the standards of proper policy arising from internal legislation but also raises a number

²³ See Committee on the Rights of Persons with Disabilities *Comments on the draft General Comment No 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights*, par. 1, available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/GC36-Article6Righttolife.aspx> [last accessed: 27 July 2018].

²⁴ Communiqué from CBOS poll no. 51/2016, Opinions on admissibility of abortion, Warsaw 2016, p. 5). Cf. also IBRiS poll of 6 October 2016.

²⁵ See < <http://zatrzymajaborcje.pl/> > [last accessed: 27 July 2018].

²⁶ See < <https://www.pch24.pl/projekt-zakazu-aborcji-eugenicznej-zamrozony-metoda-na-podkomisje.61330.i.html> > and < <http://wyborcza.pl/7,75398,23625017,pis-przelozyl-aborcje-zzamazarki-do-lodowki.html> > [last accessed: 27 July 2018].

²⁷ The Act of 25 June 2015 *on the Treatment of Infertility* (Journal of Laws of 2017, item 865); hereinafter: "the T.I."

of legal, medical and ethical concerns. First of all, in an undeniably manner violates the provisions of the Convention contained in Articles: 3, 5, 10, and 25.

Above all, the T.I. allows eugenic selection of human embryos. The law only in a very narrow range prohibits selecting embryos within framework of pre-implementation genetic diagnosis (PGD), due to the phenotypic characteristics such as sex²⁸. At the same time, there have been no restrictions on the selections made for other reasons. Furthermore, in the case of selection on grounds of sex, the T.I. provides far-reaching exception when this selection would serve to prevent the recurrence of genetic disease in the family. The law does not specify, however, whether the possibility of this selection applies only to diseases linked to sex, or also to any other disorders associated with the sex chromosomes. In practice, this means the admissibility of an unlimited eugenic selection, on the basis of an arbitrary assessment of the results of genetic tests. Typically eugenic solution of the T.I is „testing” in order to “determine the suitability of reproductive cells or embryos for use in assisted reproductive medical procedure”²⁹. As a result, the legal protection has been limited only to the group of “embryos capable of proper development”³⁰ leaving far-reaching discretion in interpreting this term. Thus, the T.I. creates the possibility of making selection of human embryos for factors that cause disabilities.³¹

In the context of the T.I., the Constitutional Tribunal issued recently (April 2018) decision³², in which confirmed the prohibition of discrimination against children at the pre-natal stage of development. The Constitutional Tribunal recalled that the embryo is not just a “biological material”. Every human embryo deserves legal protection as it is stipulated by law for protection of the best interest of the conceived child.³³ The best interest of the child, including the best interest of the human embryo (which is the early stage of the child’s development) requires that his or her life, health, welfare and rights are protected.³⁴ At the same time, the Constitutional Tribunal stressed that due to inherent human dignity confirmed in Article 30 of the Constitution of the Republic of Poland, an human embryo as a child at the early stage of development cannot be treated as a “thing”, i.e. it cannot be treated as a means to achieve the goal (parenthood or lack thereof) or the object of the subjective right of another person (e.g. right to privacy).³⁵ The above statement of the Constitutional Tribunal as well as the obligation of the Poland

²⁸ Article 26 par. 2 of the T.I.

²⁹ Article 2 par. 1 clause 25 of the T.I

³⁰ Article 83 of the T.I.

³¹ In the light of the *Convention on the Rights of Persons with Disabilities*, United Nations, such solution should be treat as prohibited discrimination on the grounds of disability, which clearly violates human dignity.

³² Decision of the Constitutional Tribunal of 18 April 2018, file ref. no. K 50/16.

³³ *Ibid.*, item 4.4.

³⁴ *Ibid.*, item 4.5.

³⁵ *Ibid.*, item 4.5.

enshrined in Article 30 of the Constitution of the Republic of Poland – to protect and respect dignity of every human being, would now require full guarantee, also at the level of the T.I., so as to exclude any possibility of eugenic selection of human embryos.

c. Equality and non-discrimination and “Conversion Therapy”

An legal analysis of the potential prohibition of offering and conducting “conversion therapy” on the basis of the law in force in Poland leads to the conclusion that such action will violate a number of applicable laws, containing guarantees to protect patient’s rights as well as Article 25 of the Convention and Article 12 of the International Covenant on Economic, Social and Cultural Rights³⁶. First of all, such a ban can lead to the situation that patients experiencing disorders related to sexuality can have significant problems with obtaining reliable and professional help and therapy.

The introduction of a ban on conducting “conversion therapy” may be a violation of the Act on Patient’s Rights and the Patient’s Rights Ombudsman³⁷ as well as the Act on Mental Health Protection³⁸. The first of the acts guarantees the patient access to methods and services that allow him or her to take up fight against a given disorder or unwanted mental condition. Psychotherapeutic activities applied to people experiencing gender identity disorders are standard therapeutic procedures in such a cases. The second act obligates Poland to support mental health as a special interests of a human being. Secondly, the prohibition of a conversion therapy may in fact lead to the necessity to stop sexological support of people experiencing a problem with their own identity in the course of depression and schizophrenia. It should be strongly emphasized that disorders related to sexuality are not considered as mental diseases, but rather as mental disorders (concerning the psychological sphere). Thirdly, the removal of this disorder will lead to the elimination of the possibility of supporting children in similar clinical situation. Therefore, it will constitute violation of the rights of the child as a patient with a special right to diagnosis and therapeutic support. Psychosexual development of a child may be linked to numerous changes, crises and difficulties. An exclusive acceptance of such a condition is an anti-health action that leaves the patient without care.

³⁶ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

³⁷ The Act of 6 November 2008 *on Patient’s Rights and the Patient’s Rights Ombudsman* (Journal of Laws of 2017 r. item 1318 as further amended), hereinafter: “the Act on Patient’s Rights and the Patient’s Rights Ombudsman”.

³⁸ The Act of 19 August 1994 *on Mental Health Protection* (Journal of Laws of 1994, item 882 as further amended).

Proposed Recommendations:

1. *To amend the Act of 7 January 1993 on family planning, protection of human foetuses, and the conditions under which pregnancy termination is permissible by abolishing Article 4a section 1 item 2 discriminating persons with disabilities at the prenatal stage of their development.*
2. *To legally regulate the legal status of an unborn child acknowledging that the he or she is a patient in the understanding of the Act of 6 November 2008 on Patient's Rights and the Patients' Rights Ombudsman.*
3. *To ensure particular healthcare to children with disabilities before their birth, to which the country is obliged on the basis of Article 68 section 3 of the Constitution of the Republic of Poland.*
4. *To provide legal provisions that guarantee that assisted reproductive techniques prohibits selecting human embryos due to any of their characteristics.*
5. *To provide legal provisions that guarantee that every patient, particularly children, have effective, full and universal access to professional help and therapy, including so-called "conversion-therapy".*

IV. Women with disabilities (Article 6)

The system of counteracting domestic violence in Poland is one of the most effective in Europe. This fact is confirmed by the European Union Fundamental Right Agency's analysis of the phenomenon of the violence against women.³⁹ According to the research, only 19% of Polish women have been subject to violence with the EU-average 33%.⁴⁰ In comparison to the entire European Union, Poland is characterized by the lowest rate of violence experienced by women from the current or former partner. In addition, Poland has the highest reporting rate of violence in European Union. Poland is also distinguished by a small number of cases of sexual abuse of women over the age of 15 and during the last 12 months preceding the interview (almost two times less than the European average, which is

³⁹ European Union Agency for Fundamental Rights, *Violence against women: an EU-wide survey. Main results*, Luxembourg 2014 http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-main-results_en.pdf, p. 28–29 [last access: 27 July 2018].

⁴⁰ European Union Agency for Fundamental Rights, *Violence against women:...*, Op. cit., Luxembourg 2014. see par. 4 in I part of the report from survey.

the third result in the Union, on a par with Slovenia). Poland also goes well in the light of statistic on violence against girls (compared to other EU countries, to beat girls is rare in Poland). Only 14% of surveyed women said that they experienced physical violence in childhood. Data on psychological violence indicate that in the vast majority of Polish families, there are no such acts. Only 5% of surveyed women met in childhood with such a behavior from one of their family members. Also among adult Polish women, not much, 37 % declare that they experienced psychological violence from current or former partner. The research shows that Polish women feel safe. Most of them (over 60%) do not avoid specific places and situations because of the fear of becoming a victim of such acts. The research of the Fundamental Right Agency has the high degree of reliability due to the high degree of methodological correctness. Data was collected directly from people who belong to the research group, and not, for e.g. on the basis of police statistics. The research treats the studied area appropriately broadly – they focus not only on psychical violence but also on psychological and sexual violence.

Proposed Recommendations:

- 1. To provide legal provisions that legally strengthen the family, that is the best development environment for all its members and the best environment for combating violence.*

V. Children with disabilities and right to life (Articles: 7 and 10)

Validity of the above mentioned Article 4a section 1 item 2 of the Act constitutes violation not only of general principles but above all of all rights safeguarded in Article 7 (1) and Article 10 of the Convention

The right to life of an unborn child is indisputable, as it is properly recognized as an attribute of every human being in international human rights instruments.⁴¹ Article 6 of the ICCPR impliedly recognizes the right to life of the unborn child, which is being constituted by its full context. Article 6 (5)

⁴¹ See i.a.: the UDHR; the ICCPR; Declaration of the Rights of the Child; the CRC; *Declaration of the Rights and Duties of Man*, 9th International Conference of American States, Bogota, Colombia, 1948; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14* (4 November 1950) [hereinafter: “European Convention on Human Rights”]; Organization of American States, *American Convention on Human Rights*, “*Pact of San Jose*”, Costa Rica (22 November 1969); Organization of African Unity, *African Charter on Human and Peoples' Rights (Banjul Charter) as amended by Protocol adopted in 1998* (27 June 1981); Cairo Declaration on Human Rights in Islam (5 August 1990).

of the ICCPR acknowledges independent status of the unborn child in respect of his or her mother, which was explicitly confirmed during preparatory work on the ICCPR. The UN's reports clearly mentioned that the principal reason that death sentence should not be carried out on pregnant women was to "save the life of an innocent unborn child"⁴² and "was inspired by consideration for the interests of the unborn child"⁴³. This approach reveals that Article 6 (5) of the ICCPR not only protects human beings during the pre-natal period of life but also recognizes them as holders of human rights. An unborn child, who is by nature a human being, can be considered as holder of such rights from the moment of conception. This moment, which is a matter of scientific fact, determines the beginning of a new human life. The consequence of such reality is the formation of an individual right to life of the unborn child and corresponding obligation of the States Parties to protect this human life.

Moreover, the preamble of the Convention on the Rights of the Child explicitly recognizes the right to life of the unborn child. The preamble states that "the child, by reason of his physical and mental immaturity, need special safeguards and care, including appropriate legal protection, before as well as after birth." In the context of the preamble of the Convention on the Rights of the Child, Article 1 of the Convention on the Rights of the Child that defines child as "every human being below the age of eighteen years" does not say thus that the status of a "child" is attributed at the time of birth. Furthermore, the Article 6 of the Convention on the Right of the Child holds that "States Parties recognize that every child has the inherent right to life" and that "States Parties shall ensure to the maximum extent possible the survival and development of the child."

Articles 30 and 38 of the Constitution of the Republic of Poland also confirm the principle of protection of human life at every stage, both before and after birth. This principle is referred to for instance in the ruling of the Constitutional Tribunal of 28 May 1997, file ref. no. K 26/96, where the court once again confirmed that "The value of constitutionally protected legal interest – human life – including life developing in the prenatal phase, cannot be differentiated. There are no sufficiently precise and justified criteria to allow such a differentiation depending on the development phase of a human being. Since its creation, human life is a constitutionally protected value. This also applies to the prenatal phase."⁴⁴

⁴² See A/3764 § 18. Report of the Third Committee to the 12th Session of the General Assembly (5 December 1957).

⁴³ See A/2929, Chapter VI, §10. Report of the Secretary-General to the 10th Session of the General Assembly (1 July 1955).

⁴⁴ Ruling of the Constitutional Tribunal of 28 May 1997, K 26/96, item 3.

Proposed Recommendations:

1. *To restore full statutory protection of unborn children with presumed disabilities equal to full constitutional protection of dignity and the right to life of every human being irrespective of the phase of development (prenatal phase of human development) and irrespective of health condition (presumption of disability).*

VI. Awareness-raising (Article 8)

a. Awareness-raising and General obligations (Articles: 8 and 4)

According to Article 4 (b) of the Convention, State Party is obliged to take all appropriate measures, including legislative steps, to amend or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities. Furthermore, in line with Article 38 of the Constitution of the Republic of Poland, the Republic is obliged to ensure legal protection of life to every human being. This means that public authorities are not only obliged to refrain from activities that negatively impact life as constitutionally protected value, but they are also burdened with a positive duty to undertake such activities that fully lead to implementation of the constitutional safeguard of protection of the right to life. This view is confirmed by the Constitutional Tribunal in the verdict of 23 March 1999 in the case under file ref. no. K 2/984. The Tribunal stated that “since a certain objective system of values stems from the constitution, the legislator is obliged to pass laws that make protection and implementation of these values in the broadest possible sense possible”⁴⁵, and also that “irrespective of the «defensive» wording of the right to life, Article 38 obliges public authorities to undertake actions aimed at protection of life”⁴⁶. The Constitutional Tribunal reiterated also that “(...) the ban on violating human life, including the life of the unborn child, results from norms of constitutional character. In such a situation, ordinary legislator cannot be authorized to decide about the conditions of validity of such a ban, thus making constitutional norms conditional.”⁴⁷. Moreover, it needs to be emphasised that neither Article 30 nor 38 of the Constitution of the Republic of Poland introduce any time limitations suggesting that the obligation to respect and protect human dignity and right to life becomes valid upon birth or at some later point in time. As a consequence, it means that public authorities are obliged to respect

⁴⁵ Ruling of the Constitutional Tribunal of 23 March 1999, file ref. no. K 2/98, item 3.

⁴⁶ Ibid.

⁴⁷ Ruling of the Constitutional Tribunal of 28 May 1997, K 26/96, item 4.1.

and protect human dignity and the right to life from the moment of conception.⁴⁸ The said scope of duties means that actions need to be taken at the level of the Act, which in practice would mean adopting the proposed amendment to the Act presented in the citizens' initiative of the "End Abortion" Committee⁴⁹. The proposed amendment to the Act also foresees abolishing discrimination on statutory level of unborn children with disabilities by ensuring them the same legal protection that is enjoyed by healthy children at present. Its purpose is to restore compatibility between the statutory and the constitutional protection of dignity and the right to life of unborn children with disabilities.

b. Awareness-raising and Awareness-raising Campaigns

In accordance with General Comment No. 6 States parties are obliged to organize awareness-raising campaigns among all sectors of government and society. The aim of these action should be combating discrimination and changing compounded pejorative disability stereotypes and negative attitudes such as that persons with disabilities are unproductive economic and social burdens to society. In this regard particularly important is latest research conducted in June 2018 by CitizenGo Poland⁵⁰ on the way of perception of people with disabilities. The research shows that there is still a group of people who refuses the right to life for unborn children with suspected disability. Moreover, about one-fifth of society claim: (a) from a health point of view that people with disabilities should undergo mandatory sterilization and (b) from economic point of view that people with disabilities are too heavy burden for society. It shows clearly that more actions should be taken to promote the acceptance and tolerance of people with disabilities, especially unborn children with suspected disability. 87% of respondents see also such a need to increase actions in favor of people with disabilities.

c. Awareness-raising and "hate-speech"

Currently applicable legal regulations embracing also behaviors motivated by hatred (also so-called "hate speech") also against persons with disabilities, are sufficient. There are both criminal and civil law institutions securing the interest of the indicated social groups. In the case of criminal law guarantees

⁴⁸ See. A. Zoll, *Opinia prawna w sprawie oceny konsekwencji i skutków prawnych projektu zmiany art. 30 i 38 Konstytucji RP*, [in:] „Przed pierwszym czytaniem”, *Konstytucyjna formuła ochrony życia. Druk sejmowy nr 993*, Biuro Analiz Sejmowych Kancelarii Sejmu, Warsaw 2007, no. 3, p. 105.

⁴⁹ On 10 January 2018 the draft of the bill proposed by the "End Abortion" Committee was accepted for further proceedings in the Sejm by a majority of votes 277:134.

⁵⁰ See < <http://otoczlowiek.org/#badania> > [last accessed: 27 July 2018].

it can be mentioned i.a.: insult (Article 216 of the C.C.⁵¹), slander (Article 212 of the C.C.), transgression of personal inviolability (Article 217 of the C.C.), making a threats to another person (Article 190 of the C.C.), public inciting to the commission of an offence (art. 255 of the C.C.). In addition, to the above mentioned provisions there is also legal obligation of the court to take into consideration the motivation of the offender in determining the penalty. In accordance with Article 53 of the Criminal Code one of the circumstances to be taken into account in imposing appropriate penalty is the motivation of the perpetrator of the offence. Moreover, when imposing penalty the court shall take into account the level of social consequence of an act, in which it assesses the motivation of the perpetrator (Article 115 §2 of the Criminal Code). In the case of actions based on motivation deserving special condemnation, the level of social consequence of an act is higher than in the absence of such a motivation, which in consequence manifests in more severity punishment. There is no doubt that the discriminatory motivation – on the basis of disability, in the case of any offence, deserves a negative assessment and thus constitutes a circumstance that speaks for a larger dimension of penalty. The possibility to evaluate motivation of the perpetrator, which was given legal significance by determining a dimension of penalty, is a sufficient measure to counteract crimes motivated by hatred against people with disabilities. Moreover, such a solution allows in a broader perspective to counteract: devaluation of law, introducing excessive casuistry into criminal law and disproportionate violation of rights and freedoms. With respect to the fact, that criminal law is the most interfering in rights and freedoms, any new criminal provisions introducing new offences must be proportionate, necessary and consistent with Article 31 par. 3 of the Constitution of the Republic of Poland establishing the principle *ultima ratio* of criminal law. This rule clearly indicates that criminal law is of subsidiary nature and that the creation of new criminal law provisions (general but also new offences) should not be the case when other areas of the law provide sufficient solution.

In addition, to criminal law regulations, there are also civil law provisions that allow to hold persons behaving on the basis of hatred for civil liability. Behaviors motivated by hatred against person with disabilities allow the application of Article 23 and Article 24 of the Civil Code⁵², which refer to protection of personal interests. It is this institution of the civil law that protects intangible values, which in most cases are violated in the case of the so-called “hate speech”. According to Article 23 of the Civil Code the catalog of personal interest includes i.a.: “health, freedom, reputation, freedom of conscience, name or pseudonym, image, privacy of correspondence, inviolability of home

⁵¹ The Act of 6 June 1997 – *Penal Code* (Journal of Laws of 2017 item 2204, as further amended); hereinafter: “the Criminal Code” or “C.C.”.

⁵² The Act of 23 April 1964 – *Civil Code* (Journal of Laws of 2018, item 1025 as further amended); hereinafter: “the Civil Code”.

and scientific, artistic, inventive or improvement achievements”. Undoubtedly, this includes classic behaviors motivated by hatred, which concern mostly health, freedom and reputation. The means of protection which allow reactions to infringement of personal interests are described in Article 24 of the Civil Code. These include: obligation to remove effects of infringement, monetary recompense or that an appropriate amount of money be paid to a specific public cause. Moreover, the court can impose the obligation to discontinue a given adverse action. It is worth mentioning that the illegality of actions violating personal interest is presumed. As a consequence, in terms of procedural requirements, the burden of proof as to the lack of illegality in action violating personal interest, is imposed on the alleged violator of such a good. The above regulations, envisage both by criminal and civil law, counteract in a complete and sufficient manner so-called “hate speech” against people with disabilities.

Proposed Recommendations:

- 1. To initiate works on introducing amendments to Article 1 of the Act, which became invalid on 23 December 1997 in accordance with the ruling of the Constitutional Tribunal of 28 May 1997 in the case number K 26/96.*
- 2. To organize more actions that will promote the acceptance and tolerance of unborn children with suspected disabilities.*

VII. Freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15)

Rights and freedoms of born children with disabilities such as right to life and freedom from torture or cruel, inhuman or degrading treatment or punishment are also violated by killing them in situation of surviving late-term eugenic abortions. The information that the *Ordo Iuris* Institute was confidentially provided shows that at the end of August 2014 in the Independent Specialist Care Centre for Mother and Child in Opole a child, who survived late-term eugenic abortion, was killed by the medical staff.⁵³ The information submitted shows that doctors undertook to perform an abortion on the child with Down Syndrome. During an abortion there have been complications and caesarean section was undertaken. The child was born alive. They cut the umbilical cord and weighed them (weighed approx. 600 g.)

⁵³ See < <https://www.ordoiuris.pl/ochrona-zycia/ordo-iuris-zawiadamia-prokurature-o-podejrzeniu-usmiercenia-dziecka-ktore-urodzilo> > [last accessed: 27 July 2018] .

The child breathed independently and screamed very loud. Heart worked properly and the child manifested a strong will to live. The hospital staff decided to accept it officially on a ward and put in incubator. The child stayed there for about four hours, during which organs function like at healthy newborn's. Despite this, according to the acquired information, at the express request of the doctors carrying out abortions, a childcare and the rescue of his life was abandoned. Any steps to allow the infant to survive, including the activities resuscitation, were not taken. The infant died. In this case, criminal proceedings have been initiated by the District Public Prosecutor's Office in Opole. Furthermore, the Ombudsman for the Patient turned to Prosecutor with a request to answer whether the proceedings were instituted in this case and what are the arrangements for purpose to initiate possible proceedings before that body.⁵⁴

Unfortunately, this is not the only case. At the beginning of the 2014, a girl with Down Syndrome was born in the Provincial Specialist Hospital in Wrocław, who was to be killed as a result of the so-called "late-term abortion". The childbirth of the girl was induced in her 23/24 weeks of age. When the doctors realized that she was alive they started saving her life. Despite this, the child died one month later.⁵⁵ Another case took place in March 2016 at the "Holy Family" Specialist Hospital in Warsaw. The Hospital performed against the boy with Down Syndrome an abortion procedure of killing, but the child survived. The boy weighed 700 gram, showed signs of life activity, including screams, but was left without any care or medical help. He died after about an hour. The case was taken by the District Public Prosecutor's Office in Warsaw and also by the Ombudsman for the Patient.⁵⁶

On the basis of Polish criminal law protection of unborn child's life is reflected in Article 148 § 1 of the Criminal Code, which provides for criminal liability for killing a man. "Person" within the meaning of this provision is also a child born as a result of incorrectly performed abortions. The Polish Supreme Court rulings in this regard is clear and consistent. Leaving alone breathable child unattended in order to kill is a crime of murder.

⁵⁴ See < <https://www.ordoiuris.pl/ochrona-zycia/prokuratura-w-opolu-objela-nadzorem-sluzbowym-postepowanie-w-sprawie-zabojstwa> > [last accessed: 27 July 2018].

⁵⁵ See < <https://wpolityce.pl/polityka/185473-to-wydarzylo-sie-naprawde-we-wroclawskim-szpitalu-przeznaczone-do-aborcji-dziecko-z-zespolem-downa-urodzilo-sie-zywe-wowczas-lekarze-zaczeli-je-ratowac> > [last accessed: 27 July 2018].

⁵⁶ See < <http://prawy.pl/28170-jest-zawiadomienie-do-prokuratury-w-sprawie-bestialskiego-mordu-na-dziecku-w-warszawskim-szpitalu/> >, [last accessed: 27 July 2018] < <https://fakty.interia.pl/mazowieckie/news-po-aborcji-dziecko-urodzilo-sie-zywe-minister-poruszony.nId,2165481> > [last accessed: 27 July 2018].

Proposed Recommendations:

- 1. To ensure that children who survive an abortion will not be deprived of medical care, which belongs to them as a live-born persons under the European Convention on Human Rights and the Convention on the Rights of the Child.*

VIII. Health (Article 25)

It should be recalled that towards Article 25 (a) the reservation made by Poland shall still apply. It states that: “The Republic of Poland understands that Article 23.1 (b) and Article 25 (a) shall not be interpreted in a way conferring an individual right to abortion or mandating state party to provide access thereto, unless that right is guaranteed by the national law.”⁵⁷ In the case of Polish law, the Constitution of the Republic of Poland only confirms the right to life, whereas the Act⁵⁸ mentioned above (*III a Equality and non-discrimination and General principles*) provides only three exceptions to the right to life, but does not establish any subjective so-called „right to abortion”. Lack of the so-called “right to abortion” is in accordance with the Constitution of the Republic of Poland but also with the binding universally agreed international law, which as was instated above (*V Children with disabilities and right to life*) include only right to life. Moreover, sexual and reproductive rights, according to the paragraph 7.3 Programme of Action of the International Conference on Population and Development from Cairo⁵⁹ „embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents”. In the case of the “international human rights documents and other consensus documents” Poland is only bounded by the: Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, International Covenant on Civil and Political Rights, Convention for the Protection of All Persons from Enforced Disappearance, Convention on the Elimination of All Forms of Discrimination against Women, International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities. The “other consensus documents” due to their non-binding nature, including the Programme of Action from Cairo, do not constitute binding universally agreed international law that will be accepted by and binding for Poland. Thus, guaranteeing human rights in the field of “sexual

⁵⁷ See Reservation made by the Republic of Poland of 25th October 212, No. 44910 Multilateral.

⁵⁸ Article 4a par. 1 of the Act.

⁵⁹ *Programme of Action of the International Conference on Population and Development*, Cairo, 5-13 September 1994 (A/CONF.171/13/Rev.1); hereinafter: “the Programme of Action from Cairo”.

and reproductive health” should be seen as guaranteeing access to the highest attainable standard of health⁶⁰ without discrimination on the basis of disability. Ensuring and protecting these rights is carried out in accordance with the Act on Publicly Funded Health Care⁶¹ and the Act on Primary Health Care⁶². The public health-care system guarantees general access to care on an equal basis for everyone, including people with disabilities. The Act on Publicly Funded Health Care regulates the scope and terms of the care provided, the principles and method of financing, and the tasks of the public authorities in ensuring equal access to health care. The Act on Primary Health Care defines the goals and organization of primary health care and the principles of ensuring the quality of healthcare services in the field of primary care. Moreover, the Minister of Health regulation of 6 November 2013 on guaranteed benefits in the field of specialized outpatient care guarantee specialized gynecological and obstetric services for women and girls, including for people with disabilities.⁶³

Proposed Recommendations:

- 1. To ensure that “sexual and reproductive rights” or “sexual and reproductive health” will not in any way conferring an individual right to abortion (in material and procedural aspect).*

⁶⁰ Article 12 of the of the ICESCR.

⁶¹ Article 1 of the Act of 27 August 2004 – *on Health Care Services Financed from Public Funds* (Journal of Laws of 2017, item 1938, as further amended).

⁶² Article 1 of the Act of 27 October 2017 – *on Primary Health Care* (Journal of Laws of 2017, item 2217, as further amended).

⁶³ §3 par. 1 clause 1) of the Regulation of the Minister of Health of 6 November 2013 on *Guaranteed Services in the Field of Outpatient Specialist Care* (Journal of Laws of 2016, item 357, as further amended).