

Keywords: *the right to life, the legal status of the human embryo, the prenatal stage of human development, the constitutional and legal protection of the right to life of the unborn child.*

Derega W. Ochrona prawa do życia dziecka nienarodzonego w prawie międzynarodowym i krajowym oraz odpowiednia polityka publiczna w tym zakresie

W artykule przedstawiono podstawowe normy prawne dotyczące gwarancji uznania ochrony prawnego dziecka w fazie prenatalnej. Człowiek w tym stadium posiada godność i prawo do życia, zagwarantowane w prawie międzynarodowym i w ustawodawstwie demokratycznych państw. w opracowaniu zwrócono uwagę na konieczność ustalania tych standardów w ustawodawstwie ukraińskim oraz realizacji odpowiedniej polityki publicznej w tym zakresie.

Słowa kluczowe: *prawo do życia, status prawny embrionu ludzkiego, prenatalna faza rozwoju człowieka, konstytucyjna i prawna ochrona prawa do życia nienarodzonego dziecka*

Дерега В.В. Захист права на життя ненородженої дитини в міжнародному та національному законодавстві та відповідна державна політика

У статті викладені основні закріплені у міжнародному праві і в законодавстві демократичних держав гарантії прямого правового визнання дитини на пренатальній стадії розвитку людським індивідом, який володіє людською гідністю та правом на життя. Підкреслюється необхідність закріплення цих норм і в українському законодавстві, а також проведення відповідної державної політики.

Ключові слова: *право на життя, правовий статус людського ембріону, пренатальна стадія розвитку людини, конституційно-правовий захист права на життя ненородженої дитини*

Дерега В.В. Защита права на жизнь нерожденного ребенка в международном и национальном законодательстве и соответствующая государственная политика

В статье изложены основные закрепленные в международном праве и в законодательстве демократических государств гарантии прямого правового признания ребёнка на пренатальной стадии развития человеческим индивидом, обладающим человеческим достоинством и правом на жизнь. Подчеркивается необходимость закрепления этих норм и в украинском законодательстве, а также проведение соответствующей государственной политики.

Ключевые слова: *право на жизнь, правовой статус человеческого эмбриона, пренатальная стадия развития человека, конституционно-правовая защита права на жизнь нерожденного ребенка.*

Introduction

Human life in any civilized society is the supreme value. Therefore, the main human right is the right to life. All other rights and freedoms are derived from it. The right to life is a natural and inalienable right of every human being.

The recognition, observance and protection of this right is the responsibility of the state. The government must protect the complex of personal, inalienable rights and freedoms. First and foremost, the right to be protected the most defenseless - children.

It is a child under any circumstances, should be among the first to receive social protection and assistance, as the constant care of the children is a significant condition for the development of the nation, the state, the international community as a whole.

This theme is updated by the fact that demographic decline is one of the most serious threats for Ukraine today. Ukraine is in deep demographic crisis that threatens its territorial integrity, and the very existence of its statehood. It became increasingly clear the importance of a set of legal measures for the establishment and implementation of mechanisms and protection of rights and freedoms of the child, the most important of which is the right to be born as a component of the right to life.

Analysis of recent research

The essence of right to life and problems of legal status of the human embryo are considered in the works of scientists I.Ponkin, V.Eremyan, M.Kuznetsov, A.Ponkina, K.Svitnev, N.Besedkina, S.Zhursimbaev, S.Buletsa, V.Vatras and others.

The problems of the constitutional and legal protection of the right to life of the unborn child in Ukraine examined in the works of researchers L.Lyubich, S.Tsebenko, G.Reznik, O.Goncharenko, A.Kulish, K.Levandovski and others.

In spite of considerable attention to the above issues, the state of its scientific readiness is considered insufficiently. This stipulated the topic choice of a given work.

Statement of research objectives

The purpose of this paper is to analyze the condition of the protection of the right to life for the unborn child in international and domestic legislation and appropriate public policy.

Results

The right to life is the inalienable right of every human being, protected by law. Its content is that no one can be deprived of his life intentionally.

The right to life is a fundamental human right protected by international law and the constitutions of most democratic countries, including Ukraine. Also,

the right to life imposes on the State the duty of the state in every possible way to protect human life from any unlawful encroachment and other threats, to provide legal, social, economic, environmental and other conditions for normal, healthy and dignified life. The right of the child at the prenatal stage of life is the derivative of the natural inalienable human right to life.

The level of development of modern medicine has created a number of problems associated with the implementation of the right to life and to health protection. These problems are required legal authorization. We are talking about issues such as artificial insemination, abortion, surrogacy motherhood, scientific experiments with human embryos, and other issues associated with childbirth.

As stated in the Recommendation of Parliamentary Assembly of the Council of Europe "Use of human embryos and foetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes" (was adopted by the Assembly on 24 September 1986) [1]: "aware that this progress has made the legal position of the embryo and foetus particularly precarious, and that their legal status is at present not defined by law" (point 6), "aware that adequate provisions governing the use of living or dead embryos and foetuses do not at present exist", and "human embryos and foetuses must be treated in all circumstances with the respect due to human dignity".

That is, in other words, at the present stage, there is an urgent need for legislation to establish the legal status of the human embryo, and exactly from the point of view of human dignity. The destruction of a human embryo or fetus can not match the human dignity.

The Recommendation expressed the idea of the embryo as the beginning of a new life, not part of the mother's body, for man as a new creature (the biological individual) occurs immediately after the merger of parental germ cells.

Legal recognition of the child in the prenatal stage of development (including - at any stage of fetal development) as a subject of the right to life, the legal recognition of the rights of this child to life, to health and to development, to a remedy before his birth is expressed in a number of provisions international legal acts, as well as confirmed legislatively enshrined guarantees in the legal systems of many foreign states.

In this context, it is necessary to pay attention to the fundamental documents in this sphere. The Preamble of the Declaration of the Rights of the Child, proclaimed by General Assembly Resolution 1386(XIV) of 20 November 1959 [2], states: "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 Principle 4 of this document declares: "The child shall

enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care” [2]. This establishes the right to receive appropriate medical care before birth.

The Declaration of the Rights of the Child was the basis of the basis of the Convention on the Rights of the Child adopted by the UN General Assembly 30 years later on 20 November 1989. In the article 1 it is stated that: “a child means every human being below the age of eighteen years” [3]. It can be assumed that this definition refers to unborn child. In addition, the document contains a quote from the Declaration of Rights of the Child on the right of the child to protection, care and legal protection, before as well as after birth.

It is essential that, in accordance with paragraph 2 of Article 6 of the Convention on the Rights of the Child, “States Parties shall ensure to the maximum extent possible the survival and development of the child”. This provision should be read in conjunction with the position of the Preamble of the Convention on the provision of adequate legal protection of the child, both before and after birth. The point is that states are obliged to ensure the survival of a child before birth and after birth. In other words, the state’s duty to ensure the survival of the child is an element of the legal status of the child in the prenatal stage of development.

Article 4 “Right to Life” of American Convention on Human Rights (was adopted at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969) declares: “Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life” [4].

To assist physicians in recognizing and following their ethical obligations, the The World Medicine Association (WMA) has promulgated “WMA Statement on In-Vitro Fertilization and Embryo Transplantation” [5]. The document was adopted by the 39th World Medical Assembly Madrid, Spain, October 1987.

The World Medicine Association urges physicians to act ethically and with appropriate respect for the health of the prospective mother and for the embryo from the beginning of life. Any commercialization by which ova, sperm, or embryo are offered for purchase or sale is expressly condemned by the World Medical Association.

The important document in the sphere of this research is also Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo, 4.IV.1997) [6]. The Convention is the first legally-binding international text designed to preserve human dignity, rights and freedoms,

through a series of principles and prohibitions against the misuse of biological and medical advances. The Convention's starting point is that the interests of human beings must come before the interests of science or society. It lays down a series of principles and prohibitions concerning bioethics, medical research, consent, rights to private life and information, organ transplantation, public debate etc. Article 18 "Research on embryos in vitro" of the Convention says: Where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo. The creation of human embryos for research purposes is prohibited [7].

The rights and legal interests of a child are guaranteed before his birth in constitutions of many European countries. The principle of right to life is truly powerful foundation for state building and closely connected with constitutional proclamation of human dignity value.

In this regard the Fundamental Law of Hungary deserves particular attention. This is the most recent and the most conservative Constitution among the European Union's member states. Constitution of Hungary was adopted on 18 April 2011, promulgated a week later and entered into force on 1 January 2012. The document succeeded the 1949 Constitution, originally adopted at the creation of the Hungarian People's Republic on 20 August 1949 and heavily amended on 23 October 1989.

Human life is respected in this document and special security is given to the right to life. Thus, the Article II of Chapter "Freedom and Responsibility" declares that "Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception" [8].

In the first point of Article L noted that Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation's survival. In the next points proclaimed that Hungary shall encourage the commitment to have children, the protection of families shall be regulated by a cardinal Act. These statements indicate the striving for providing security of family and heterosexual marriage.

Prohibition of eugenics activity sets in the Article III of "Freedom and Responsibility" part: All practices aimed at eugenics, any use of the human body or any of its parts for financial gain, and human cloning shall be prohibited.

Constitutional principles concerning attitude to family and religion which have reflected in the new Hungarian Fundamental Law can be characterized in this way: the revival of Christian values; cooperation between the Church and the State; the protection of human dignity and right to life from moment of conception; the protection of family and heterosexual marriage; the prohibition

of eugenics activity. These statements defend traditional family and religious values of Hungarian people and represent the orientation toward national interests of Hungary.

The constitutions of some other countries are also provided such rules. For example, Article 40 of Ireland Constitution (enacted 1st July, 1937) proclaims: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right" [9].

In Constitution of the Slovak Republic the first part of Article 15 (Section Two "Fundamental Human Rights and Freedoms") says: "Everyone has the right to life. Human life is worth protection even before birth" [10].

Adequate principles are represented in the normative documents of the other European states, and also in the international law.

According to the position that expressed in the Decision of the Federal Constitutional Court (Germany), unborn human life - and not just human life after birth or an established personality - is accorded human dignity. "Irrespective of how the different phases of prenatal development can be assessed from the biological, philosophical, even theological standpoint and irrespective of how they have been judged historically, in any case what is involved are the indispensable stages of development of individual human life. Wherever human life exists, it should be accorded human dignity... The dignity accorded to human life and also that accorded to unborn life exists for its own sake" (146-147 paragraphs) [11]. Thus, we may assume that human dignity of the child in the prenatal stage of development is a particular form of human dignity.

San Jose Articles [12] is considered to be the main document in the protection of life. This document was presented October 6, 2011 at a press briefing in United Nations Press Center in New York, and consists of 9 articles that summarize the attitude of the international legal treaties and customary law on abortions. The San Jose Articles were prepared by a group of 31 experts in international law, international relations, international organizations, public health, science, medicine and government. The signers include law professors, philosophers, Parliamentarians, Ambassadors, human rights lawyers, and delegates to the UN General Assembly.

The paper concludes that there is no "right to abortion" in the modern international legislation. «The San José Articles» the document appeared to help governments and civil society to protect human rights through a proper understanding how the unborn child's rights are protected by international law. This document should be used in the fight against false claims, such as the misconception that abortion refers to human rights.

So then in articles 1-4 of document said that the scientifically established fact is the beginning of a new human life at conception, and also that “Each human life is a continuum that begins at conception and advances in stages until death. Science gives different names to these stages, including zygote, blastocyst, embryo, fetus, infant, child, adolescent and adult. This does not change the scientific consensus that at all points of development each individual is a living member of the human species. From conception each unborn child is by nature a human being. All human beings, as members of the human family, are entitled to recognition of their inherent dignity and to protection of their inalienable human rights. This is recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other international instruments” [12].

The document clearly and truthfully states that governments and members of society should ensure that national laws and policies protect the human right to life from conception. They should also reject and condemn pressure to adopt laws that legalize or depenalize abortion. When such pressures exerted, member states should demand accountability from the United Nations system.

Providers of development aid should not promote or fund abortions. They should not make aid conditional on a recipient’s acceptance of abortion.

International maternal and child health care funding and programs should ensure a healthy outcome of pregnancy for both mother and child and should help mothers welcome new life in all circumstances.

The contents of the above document suggests that bioethical standards which protect human dignity and the rights of the child in the prenatal stage of development, are becoming more widely accepted and gain more and more normative force, and “Articles of San José” is only the first step towards the creation of international legal guarantees of termination of inhuman treatment to children in the prenatal stage of development.

These standards are reflected in the national legislation at lower levels. For example, in the United States in accordance with the State Children’s Health Insurance Program (SCHIP) in 2002 a child defines as “an individual under the age of 19 including the period from conception to birth” [13]. Accordingly, unborn children are regarded as citizens with the right to health insurance and medical care, in contrast, by the way, from their mothers, if they do not have these rights (for example, illegal immigrants).

Accordingly to Judgment of the Grand Chamber of European Court of Justice of 18 October 2011 in the case of N C-34/10 of 18.10.2011 [14] dedicated to the interpretation of paragraph «c» of paragraph 2 of Article 6 of Directive N 98/44 / EC of the European Parliament and of the Council of 06.07.1998 “Legal

protection of biotechnological inventions”: “any human ovum must, as soon as fertilised, be regarded as a ‘human embryo’ within the meaning and for the purposes of the application of Article 6(2)(c) of the Directive, since that fertilisation is such as to commence the process of development of a human being” [14].

In that way, the presence of human dignity in unborn child is recognized on the international level. In other words, the human dignity of the child doesn’t depend and cannot depend on any conditions by any other persons, including the state, or circumstances. This dignity is self-worth, is not determined by legal or factual conditions or subjective attitude (in relation to the child in the prenatal stage of development), proceeds from the intrinsic value of human life and personal autonomy.

The allegation that the child in the prenatal stage of development of a human being, is not only a philosophical, moral or ethical belief or assumption. Firstly, it is justified by the huge volume of scientific knowledge acquired in the fields of biology, embryology, genetics, physiology and other sciences. Secondly, this statement is a set of legally significant fact, recognized by international law, reaffirms the provisions of international and national laws.

The laws of many foreign states fix rules that guarantee the right to life, health and other rights of the child at the prenatal stage of development. For a child in the prenatal stage of life should be legally recognized by a number of fundamental rights, including the rights to life, security and protection of the right to receive proper care and nutrition, to receive special protection from all forms of neglect, abuse, intentional and unintentional maltreatment and other acts which may be harmed its development. It is obvious that the levels and specific measures of legal protection of the child in the prenatal period of development vary considerably in different countries. But that does not mean that the duty of the state to protect the rights of the child in the prenatal period is less important, or that the child in the prenatal period deprived of any legal protection.

Occurring in certain situations the conflict between the rights of the child in the prenatal stage life and the same rights of his mother does not discount the human dignity of the child in the prenatal stage of life and development, does not negate or reduce the significance of his fundamental rights to life, to health, to development and to human dignity.

The provisions of the right to life are reflected in national legislation. The Constitution of Ukraine in the article 27 states: “Every person shall have the inalienable right to life. No one shall be arbitrarily deprived of life. Protection of human life shall be the duty of the State. Everyone shall have the right to protect his life and health, and lives and health of other people against unlawful

encroachments” [16]. However, the Constitution does not point at the time of occurrence of the human rights to life and other rights.

According to part 2, Article 25 of the Civil Code of Ukraine capacity of an individual occurs at birth and ceases with death. This means that the domestic legislator recognize the beginning of life at birth. But biology (embryology, genetics) provide compelling evidence that the development of a new human organism begins with the fusion of gametes (sex cells - female (oocyte) and male (sperm)) to form a zygote (fertilized egg) that begins to divide and form a blastocyst (formed a human in 5-6 days after fertilization), which is implanted in the uterine endometrium. From this moment begins the prenatal period of life of the human individual [15]. Prenatal period of life is a necessary stage of human development and should be protected by law as well as human life after birth at any stage.

Therefore, we can fully support the idea of that it is necessary to initiate changes in current legislation so that Article 27 of the Constitution of Ukraine, which states that every person has the inalienable right to life, looked like this: “Every person has the inalienable right to life from conception to natural death”.

It is known that the human foetus is a part of its host body (the mother’s body), because it is genetically different from the mother and can even have a different blood group. All it requires to treat him as an independent human being. This means that abortion at any stage of pregnancy is the intentional termination of the life of man as a biological individual - the murder of an unborn baby.

The national basic law - Constitution should express the idea (as in many other countries) that life - is a gift of God, which begins with conception, so abortion is the infanticide, the killing of children, that God has given us.

A logical extension of this proper legal norm should be to develop detailed legal positions that are based on the recognition of the fundamental value of human life and aimed at establishing a well-defined legal status of the child, who is at the prenatal stage of development.

Conclusions

The right to life is the possibility of security and privacy protection which is a natural, inseparable from the person and guaranteed by international and national legislation. This right belongs to the individual, and led the entire system of human rights. Its legal consolidation and the actual implementation is one of the most important exponents of social and legal state.

The most reasonable (with scientific, ethical, social and legal point of view) is the legal approach implemented in the legislation of a number of states (the legal acts which are discussed above), is expressed in the recognition of the

beginning of the action of the right to human life and the protection of this right from the moment of conception.

The comparative analysis of the Ukrainian provisions and the laws of other countries shows that the child's right to life (including the right of birth) is not regulated by the Ukrainian legislation. The Ukrainian Constitution should contain a provision according to which the right to life applies to those children who have been born as a result of their independent and continuous development.

Legal recognition of the right to give birth to the possibility of legal solutions to problems of artificial fertilization, human cloning, abortion or scientific experiments on human embryos.

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