

Стаття 2 Закону “Про забезпечення прав і свобод внутрішньо переміщених осіб” встановлює, що Україна має вжити всіх можливих заходів, передбачених Конституцією та законами України, міжнародними договорами, згода на обов’язковість яких надана Верховною Радою України, щодо запобігання вимушеного внутрішнього переміщення осіб. Варто зауважити, що як у Кримінальному кодексі України, так і в самому Законі не передбачено санкцій за порушення даної норми. Згідно взятих зобов’язань Україна, проте не ратифікувала Римський статут, що перешкоджає здійсненню ефективного правосуддя щодо захисту від вимушеного переміщення. Питання збору даних про ВПО також потребує правового регулювання.

Закон про ВПО закріплює функціонування Єдиної інформаційної бази даних про внутрішньо переміщених осіб, порядок створення якої має визначатися Кабінетом Міністрів України. Але відповідні врегулювання відсутні, крім цього КМУ має вказати цілі збору персональних даних та їх захист, а також включити в базу потенційно інших ВПО, не обмежуючи перелік ВПО з Криму та Східної України. Важливим питанням залишається також призначення омбудсмана, або відповідальної інституції, яка зможе взяти на себе повноваження щодо моніторингу та інформування про додержання прав людини і громадянина ВПО, проводитиме консультації щодо врегулювання спірних питань з представниками ВПО. Цей перелік питань не є вичерпним, актуальними залишаються також питання усунення дискримінації, возз’єднання сімей, житлові питання тощо, які потребують подальшого врегулювання та відповідності законодавства України міжнародним нормам права.

Наприкінці, після представлення учасниками своїх доповідей, запитань та уточнень журі, було проведене анонімне голосування з метою визначення переможців, авторів кращих доповідей. За підсумками роботи круглого столу "ПРАВА ЛЮДИНИ І ГРОМАДЯНИНА" дипломи І ступеню від «Асоціації Українських правників» отримали студентки Кацевич Тетяна та Мусієнко Катерина, дипломами ІІ ступеню було нагороджено Єсеннікова Кирила та Гончарука Ігоря.

Офіційне вручення дипломів відбувалося на закритті Конференції «Дні науки» в актовій залі Київського Національного університету імені Тараса Шевченка. Переможці отримали почесні нагороди від декана філософського факультету, доктора філософських наук Конверського Анатолія Євгеновича.

Студенти філософського факультету висловлюють подяку Костицькому Василю Васильовичу за можливість проведення такого заходу, здатність проявити особисту ініціативу щодо його організації, за надання змоги висловити власні погляди та міркування, долучившись до жвавої дискусії та обговорення дійсно нагальних питань у сфері захисту прав людини не лише в Україні, але й із залученням аналізу міжнародного законодавства.

LEGAL REGULATION OF THE RIGHT TO LIFE OF UNBORN HUMAN PROTECTION IN INTERNATIONAL AND NATIONAL LEGISLATIONS

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Annotation. This paper provides with a comparison of international human rights acts and national legislations in respect to protection of the right to life of unborn human being. Analysis is done in the light of recent researches in the field of human embryology as well as in historical perspective. The main finding is nonconformity of most national laws with the principle of respect to sanctity of human life and a weak protection of it on international level. However, some positive aspects exist: many international instruments foresee unborn life as worth of protection and many national jurisdictions accompany the principle of respect to human life by strong legal mechanisms from the moment of it beginning.

Анотація. У даній роботі здійснений порівняльний аналіз інтернаціонального та національних законодавств у аспекті захисту права на життя ненародженої дитини. Аналіз здійснений в світлі останніх наукових досліджень у сфері ембріології людини, а також з використанням ретроспективного методу. Було виявлено невідповідність законодавств більшості держав та деяких міжнародно-правових актів до принципу поваги до людського життя. Серед позитивних моментів варто відзначити наявність деяких механізмів захисту ненародженого життя на міжнародному рівні та наявність у багатьох юрисдикціях потужних інструментів захисту життя з моменту його початку.

Keywords: international legislation; national legislation; unborn life; legal protection; embryology; historical perspective; international legal instruments

Introduction. Right to Life is considered the most important, basic right. “If one could be arbitrarily deprived of one’s right to life, all other rights would become illusory.” [1] Right to Life is mentioned in many Constitutions – the main laws of many states. It belongs to the rights of the first generation. Along with other rights of this group, the right to life has the highest value for a person and is a prerequisite for all other rights.

Looking back on the history of humanity for the last 2000 years, it could be confidently confirmed that from the birth of Jesus Christ the value of human life has increased significantly. At the international and continental levels - the value of human life is declared, and almost everywhere - the deprivation of life without a legal basis is strictly forbidden.

The right to life was identified by ancient Greeks and Romans with reasonable laws of nature and not separated from morality. Representatives of the Renaissance for the first time under the influence of the natural-legal concept formulated the concept of "human rights", which was an integral part of the right to life[2]. Protection of born human life (at least “innocent” one) was a kind of clear through history, nevertheless with some exceptions (assumption of possibilities to “abort” 5 years old child in some ancient countries) [3].

Historically, however, approaches to the protection of unborn life varies according to a region and to a time. In the ancient Rome, there was a practice of abortion, usually when it was about danger to mother’s life, but with exception of ban when it was done without *paterfamilias* allowance. There was a trend to give more rights to a fetus through years which finished with first anti-abortion laws in second century[4]. “Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father’s right to his offspring. Ancient religion did not bar abortion.” [5] Most Greek thinkers accepted abortion. For the Pythagoreans, on the other hand, it was a dogma, because for them was animate at the moment of conception. Hippocratic Oath which is known as classical ethical principle of physicians prevented harm to anyone, **including an unborn child**. With the end of antiquity, a change of views of majority has taken and the prevalence of prohibition of abortion has taken place in conformity with Christian church’s teaching. Nearly all European states condemned abortion practices throughout the development of humanity. However, not only theological reasons led to the conclusion that abortion should be illegal. There were a number of factors that led to this change in opinions about abortion in the early 19th century. In the United States, where physicians were the leading proponents of abortion criminalization laws, shifts in medical knowledge played a crucial role in influencing anti-abortion opinion. Science had discovered that conception covered a more or less continuous process of development, which would create a new human being if uninterrupted. Moreover, quickening was found to be neither more nor less important step in the process of gestation than any other one. On a logical basis, many physicians concluded that if society considered it unthinkable to terminate pregnancy after the fetus had quickened, and if quickening was a relatively unimportant step in the gestation process, then it was just similarly wrong to terminate a pregnancy before quickening as after quickening. [6]

In France, abortion was illegal up to 1975 with exclusion of French revolution, when it was de-criminalized. One of the most famous documents punishing abortion was 1810 Napoleonic Code, which punished any person who performed abortion with imprisonment[7].

France legalized abortion in Law 75-17 of 18 January 1975, which accepted to perform an abortion on request before the end of tenth week of pregnancy. In England, laws were strict in regards to abortion until 1967, when liberalization occurred[8].

Thus, it could be confidentially stated, that wide acceptance of abortion practices is a new phenomenon which could testify the descending of global respect to human life. We proclaim, that this is not fair vector of human morality development and that this situation should be corrected.

Level of exploration of the topic. Right to life as a legal category was earlier investigated by different scholars. Medical, biological, philosophical fundament for right to life could be found in scientific works of Lyudmila Hrydkovets[9], Erich Blyehshmidt[10], Roger Brownsword, Guido de Wert, Christine Mummery[11]; problematic aspects of abortion was investigated by scholars: Sunanda Bharti, Michael Boylan[12]; problematic aspects of right to life of unborn human was investigated by scholars: Volha Parfenchyk, Alexander Flos, Weininger Alexandria. Despite of the fact, that many researches in the sphere of guarantees of right to life exist, especially in comparative analysis of right to life[13], especially of the unborn ones [14], problems of abortions, the most often approach is to compare 2 or 3 legal systems[15], while the wide comparison and analysis including case law is in lack. Within Ukrainian scientific literature there is a lack of researches, comparing more than 3 national legislations on the topic of protection of unborn life and providing a scope of international legal instruments protecting it. Moreover, it was not possible to find works that provide recent researches in science about the moment of the beginning of human life and compares its findings to the level of protection of life in global jurisdictions.

Necessity of the research. Despite the contradictions, the current development of science confirms that human life exists from the moment of fertilization. It is well-known, that at the moment fertilization, it is possible to explore who was created - man or woman, and also all information about the structure of the body[16] hair color, temperament of future person and other personal characteristics[17]. If some years before it was seen as only a heap of cells, now it is seen as a sensual creature, fool participant of mother's life[18]. Emotions of the mother, her experiences, excitement and stress can sometimes lead to health disorders at an adulthood[19]. It is proved that positive events in the life of the mother lead to a better disclosure of abilities and talents, personal potential and vice versa. The unwillingness of mother to have a child reflects the attitude of the child to herself[20]. Scientific evidence confirms the ability of the child to record events from the outside world while still in the womb, in the early and late stages of development. It is not just a simple over-cell in the eyes of many scholars today, but - a living child, that exists in conjunction with environment. Thus, unborn child is worth protection of its life equally to the born child as there are no significant difference between the essence of them – both are human from the beginning.

That is why it is so important to underline and highlight which international and national legal instruments exist in the sphere of protection of unborn life as to have a full picture of the stage of development of human life protection and in order to achieve a better understanding of necessary vector of Ukrainian legislation development.

Main material.

International legislation. Despite of attempts to protect human life from undue influences throughout the history, Right to Life as a concept is found to be used for the first time only in 1444 in the Poljica Statute, where it was proclaimed as “for nothing existed forever” [21]. United States Declaration of Independence of 1776 states that “all men are created equal, they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness”, giving one of the first precedents of protecting Human Life in the declaration of independence of a state. In 1950, the European Convention on Human Rights (ECHR of Convention – hereafter) was adopted, protecting in Article 2 Right to Life. the American Convention on Human Rights of 1969, the Canadian Charter of Rights and Freedoms

of 1982, following ECHR, protected the Right to Life. The long-term tradition of protecting unborn from abortion, that was investigated to be in various of cultures, including England, America, France etc, in 20th century, long-lasting Church's condemnation of abortion naturally led to international recognition of right to life of unborn. The International Covenant on Civil and Political Rights (ICCPR - hereafter) of 1966 protects the right to life of a person. Article 6(5) states, that a death sentence "shall not be carried out on pregnant women". The ICCPR's prohibition of the death penalty for pregnant women explicitly provides for the right to life of unborn. As the *travaux préparatoires*[22] of the ICCPR implicitly state, "*The principal reason for providing in paragraph 4 [now Article 6(5) – author] of the original text that the death sentence should not be carried out on pregnant women was to save the life of an innocent child.*" [23] In the same way, the Secretary-General's 1955 report mentions that the intention of the paragraph "*was inspired by humanitarian considerations and by consideration for the interest of unborn child.*" [24] In the same way, the Preamble of the 1989 Convention on the Right of the Child (CRC – hereafter) replicated a provision of the Declaration of the Rights of the Child of 1959, declaring that the child "needs special safeguards and care, including appropriate legal protection, before as well after birth." [25] Article 1 of The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, also known as the Convention on Human Rights and Biomedicine, which was opened for signature on 4 April 1997 in Oviedo states that '*human dignity and the identity of the human being had to be respected as soon as life began.*' "*The ECtHR has consistently viewed the protection in law of the right to life of a child before birth by state as compatible with the provisions of the ECHR.*" [26] – stated in research on the case law of ECtHR. In *Vo v. France*, court recognized, that the child before birth "belongs to human race" [27]. American Convention on Human Rights[28] explicitly mentions the right to life of unborn from the moment of conception. Article 4(1) states, '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.' Not singling out the unborn into a separate group, Charter of Fundamental Rights of the European Union still concentrate attention on the protection of unborn lives, which have some invalidities. Article [3(1) and 3(2b)] states, that, '*Everyone has the right to respect for his or her physical and mental integrity...In the fields of medicine and biology, the following must be respected in particular the prohibition of eugenic practices, in particular those aiming at the selection of persons,*' which obviously could be interpreted as prohibiting abortions due to a fetus' disease.

National legislations. Despite of universal recognition of everyone's right to life, still, national legislations often discriminates some humans on the ground of age. This is related to the possibility of performing of induced abortion of a child. In the worst case of it grants a possibility to kill on request. It is right to say, that no single guarantee to the right to life of unborn human exists when abortion laws permit termination of pregnancy simply on request. **In the process of fetal development, there are no significant changes that could testify to the appearance of a human.** "What is a human from the beginning, can't become it a second time." [29].

Those countries which listen to the conclusions of new researches in medicine and psychology create another way of legislation – protecting embryo as a human form beginning of its life, namely from conception, or fertilization. This way of legislation occurs in many countries today. Examples of these countries are Guatemala, Chili, Poland, Philippines, Ireland, Dominican Republic and others. Some countries adopt provisions for protection of unborn life in their constitutions, others – in lower-level legislations, such as laws. Guatemala[30] and Chile[31] explicitly recognize a right to life before birth, together with Dominican Republic[32], which in 2010 adopted a new constitution with a provision of protection of life from conception. Since 2008, 16 Mexican states have adopted changes to their constitutions to protect life from fertilization of conception[33]. The Ireland and Philippines equally protect life of pregnant

woman and unborn human in their constitutions[34]. Article II of the 1987 Philippine Constitution states, “*The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution. It shall equally protect the life of the mother and the life of the unborn from conception.*” Article 40.3.3° of Ireland states, “*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.*” Worth highlighting, that *recognition of right to life of unborn human being in constitution is a first and the most step before guaranteeing it.* On the other hand, such countries as Poland protect life of unborn ones by a separate legislative act. In France, The Voluntary Termination of Pregnancy Act of 17 January 1975 provides: ‘The law guarantees respect of every human being from the beginning of life...this principle may only be derogated from in the event of necessity and in accordance with the conditions set out in this statute.’ Thus possibility to make abortion is regarded mostly as an exception for the rule of respect to human life. The Law of 29 July 1994 (Article 16 of the Civil Code) provides: ‘The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life’. Section III entitled “Protection of the human embryo” of Chapter I (“Offences against biomedical ethics”) of Part I (“Public-health offences”) of Book V (“Other serious crimes (crimes) and other major offences (délits)”) prohibits various types of conduct on grounds of medical ethics (Articles 511-15 to 511-25), including the conception of human embryos in vitro for research or experimental purposes (Article 511-18). In some countries, like Malta, protection of unborn is performed in the Criminal Code. German Constitutional Court in 1975 held that the right to life, as guaranteed by Article 2, Paragraph 2 of the Basic Law, must include the life of the unborn in the light of the guarantee of human dignity written in Article 1 of the Basic Law.

One of the most widespread way to protect an unborn life is a prohibition of induced abortion. These prohibitions are most often provided by a separate legislative act. However, countries differ in their way and strictness of anti-abortion legislation. *The strictest jurisdictions prohibit abortion in all cases, including rape, incest, danger to the mother’s life, physical impairment of a child, danger to mental or physical health etc.* Such laws are presented in El Salvador, Malta, the Vatican, Chile, the Dominican Republic, and Nicaragua. These countries prohibit practicing of induced abortion under any circumstances – regardless of circumstances of abortion. In some countries, f.e. Malta, ‘morning after pills’, are also prohibited, because there could be possibility that egg cell of woman had already been fertilized[35]. *Countries with strict abortion-related legislation, allow induced abortion under some extreme circumstances.* In this group, abortion is allowed in cases of: (1) danger to mother’s life, (2) if existence of embryo is a consequence of criminal act, (3) if serious impairments of a child exist. Examples are Poland, Ireland, Andorra, San Marino, Portugal, Spain, Monaco, Dominican Republic, Grenada, Saint Lucia, Guatemala, Argentina, Bolivia, Brazil, Colombia, New Zealand, Fiji, Nauru and others.

Andorra, San Marino and Monaco ban abortion in all cases and do not have explicit provisions which allow abortion when is necessary to save the mother’s life, however, but general principles of criminal legislation accept abortions in this case when necessary. Ireland, Guatemala, Dominican Republic prohibit abortions in all cases save when it is necessary in order to save mother’s life. Brazil grants abortion right to save mother’s life and in case of rape. Grenada, Nauru and Fiji allow abortion in order to save mother’s life or health but does not – when the existence of embryo is a result of rape or where serious impairments of a child exist. Saint Lucia, Bolivia and Argentina allow abortions to save mother life or health and in case of rape but do not grant this right when foetal impairment occurs[36]. In Poland women could only have abortion if there is a danger to mothers’s/ foetus life, if a pregnancy is a result of criminal act, and if serious impairments of foetus/embryo exist[37]. However, even now there are existing view of many Poles, that abortion should be prohibited in case of fetus’ malformation[38]. In Portugal, Colombia, New Zealand and Spain abortions are fully banned, except for cases where:

1. The woman's life or health is in danger if the pregnancy continued,
2. When the pregnancy is a result of a criminal act, or
3. When the fetus has serious impairments[39].

Conclusions. To date, we cannot say that everywhere the right to life before birth is guaranteed. In order to assert that there are guarantees of the right to life before birth, it is necessary that this right is recognized and guaranteed through legal mechanisms. Countries where such safeguards exist include Ireland, Poland, the Dominican Republic, Guatemala, Malta, and others. In these countries, the right to life before birth and the impossibility of abortion on demand are recognized. This is a guarantee that life before birth will not be arbitrarily taken, although some strict permissions exist. In addition, in these countries, public actions are held regularly on the support of value of life before birth, there is legislation that promotes good pregnancy and responsibility for illegal abortion exist. Thus, it can be argued that there is a good level of guaranteeing of the right to life before birth. In countries where abortion can be done psychologically or on demand, no guarantee of the right to life before birth cannot be said to exist, since it can be arbitrarily taken at the beginning. In countries where the guarantees of the right to life before birth does not exist in principle, include countries of the most of the world.

A number of international acts stipulate that the right to life of a human belongs to it from the moment of conception. These acts include American Convention on Human Rights of 1969, International Covenant on Civil and Political Rights and Convention on the Right of the Child. International human rights law is a powerful means of stimulating countries to respect human rights. Nevertheless, not all international legislation can be recognized as guaranteeing the right to life of unborn, since most of them do not have mechanisms that force the state to comply with its provisions or provide for liability for non-compliance.

Global legislation needs to develop the level of protection of human life. It provides with double standards for protection of born and unborn life. This approach does not comply the principle of respect to sanctity of human life, stated in most international human rights agreements, nor with the last scientific data on prenatal human development.

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