



INTERNATIONAL AND DOMESTIC LAW INTERACTION ON THE ABORTION REGULATION

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Summary

The article analyzes the main international instruments, national legislation of various states and the decisions of international and national judicial authorities as to the regulation of abortion. It was concluded that international law does not actually regulate the issue and leaves it to the discretion of national law.

Key words: reproductive rights, abortion, embryonic stem cells.

Аннотация

В статье проанализированы основные международно-правовые акты, национальное законодательство различных государств, а также судебная практика международных и национальных судебных органов касательно регулирования осуществления искусственного прерывания беременности. Был сделан вывод о том, что международное право фактически не регулирует данный вопрос, а оставляет его на усмотрение национальным правом.

Ключевые слова: репродуктивные права, искусственное прерывание беременности, эмбриональные стволовые клетки.

Articulation of issue. The question of abortion is not new to society and states. However, the international community has not yet worked out a common approach to regulating this type of public relations.

The main debate is ongoing about the moral and ethical side of the issue. Its roots go deep to individual religious and philosophical world view models, to such questions as life and death, survival of society, the limits of free will of every person.

Background. National or international law doesn't regulate these issues. The task of international law, in our opinion, is to find a common denominator – a compromise, to work out a minimum standard, the minimum threshold of humanity below which each State could not act – and hence to elaborate the system of control and responsibility for the violation of the standard.

As for abortion, we believe that the main conflict exists on the brink of a woman's right to freedom of her own body and dispose of it at her discretion – on the one hand; and the right to life of the unborn child – on the other. Accordingly, an abortion issue will be considered as one of the methods of birth control, or a murder.

One may also ask questions that a woman can protect her somatic and reproductive rights by herself and the unborn child cannot do it to protect on his or her own. Accordingly, society, particularly in the form of religious organizations or the state, protects the right of an unborn child on his or her behalf.

Main points. As to the issue of the possibility of abortion states are divided into several groups:

1. The complete prohibition. Therefore, abortion is considered a crime against fetal life and is equivalent to murder. (in such states as the Vatican, the Dominican Republic, El Salvador, Malta, Nicaragua and Chile). In some countries in this group, such as Ireland, abortion may be permitted only in case of real danger for women. Similar legislation is in Afghanistan, Venezuela, Egypt, Indonesia, Iraq, Iran, Colombia, UAE and others.

2. Abortion is permitted for medical and other exceptional reasons in Algeria, Argentina, Spain, Brazil, Ghana, Israel, Kenya, Morocco, Mexico, Nigeria, Peru, Poland and others.

3. Abortion is permitted for socio-economic indicators. About 1/3 of states have such a view according to the UN, 2013. For example, in the UK, India, Iceland, Japan, abortions are allowed only for medical and socio-economic reasons, as well as in cases of rape. In addition, in most Nordic countries abortion is allowed for women if continuing the pregnancy will cause the «psychological effects», even in the second and third trimester of pregnancy [1].

4. Freedom abortion. It means the right of women to decide the question of pregnancy. The responsibility exists only for carrying out illegal abortions. This group of countries includes Australia, Austria, Belgium, Bulgaria, Germany, Greece, Canada, China, Cuba, Portugal, Russian Federation, Turkey, Ukraine, France and others.

For example, in accordance with the Criminal Code of Belgium abortion is allowed in the first trimester when a woman feels «distress» (grief, grieving), it does not indicate what is meant by this term, but in practice it can be interpreted as one wishes, including a sense of unwillingness of a woman to become a mother. The same provisions are envisaged in legislation of France, Germany and Switzerland.

There are also such «loopholes» in the legislation of Denmark (pregnancy as a «burden» to the mother, resulting in abortion in the second trimester permitted), the Netherlands («distress» as permission to have an abortion in the second trimester), Norway (abortion in the second trimester permitted when «pregnancy, birth and care of a baby will result in difficult conditions for women»), Sweden (there should be a «serious cause» for termination of pregnancy in the second trimester), Switzerland («distress») [1].

As to international law, only the Additional Protocol on the Rights of Women in Africa to the African Charter on Human and Peoples of 2003 in paragraph 2 (c) of Art. 14 establishes the actual «right» to abortion. This article requires States to take appropriate measures to protect the reproductive rights of women by legalizing abortion in cases of sexual abuse, rape, incest and where continued pregnancy threatens the mental and physical health of the mother or fetus [2]. However, implementation of these compromise standards in public policy and practice is quite slow.



Supporters and opponents of abortion have different views as to the date from which the embryo becomes a child, and therefore his or her rights are protected. In our view, this is the key issue.

In fact, the only international instrument that regulates the status of the embryo, is the Convention on Human Rights and Biomedicine of 1997, but it also does not specify whether the embryo is a person or not. In Art.18 Member States refer to embryo research «in vitro», namely «in cases where the law allowed research on embryos in vitro, adequate protection of the embryo should be provided» [3]. Additionally, «the creation of human embryos for research purposes is prohibited» [3]. However, Convention does not impose any criteria for such «adequate protection».

In other international human rights instruments the issue is also not resolved. Art.1 of the Convention on the Rights of the Child of 1989 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» [4]. Thus, it is not determined the moment at which the human being begins to be a child (and therefore the human person as such). In addition, the Convention limits the definition only to the specified objectives of the Convention.

Art. 6 of the International Covenant on Civil and Political Rights of 1966 states the inalienable right of every person to life, which cannot be arbitrarily deprived of. It is worth to point out that the right to life under Article 6 is not absolute, because you cannot just arbitrarily deprive another person of life [1].

Even during the negotiations on the development of the Covenant by a group of states, which included Belgium, Brazil, El Salvador, Mexico and Morocco, it was proposed to envisage the provisions of article 6, according to which human life would be protected from the moment of conception. However, this proposal was rejected by other states. The same happened during the adoption of the Convention in 1989 concerning the definition of «a child».

The only attempt to effectively establish a similar provision in practice was not realized. The American Convention on Human Rights of 1969 in Art.4 provides the protection of human rights from the human conception. However,

in the case of Baby Boy in 1981 the Inter-American Human Rights Commission said that this right is not absolute, because developers of Convention didn't aim to question the legality of national acts that are recognized or will recognize abortion. That means that the developers of these international legal instruments do not intend to give equal protection to persons born and unborn [5].

In many countries some steps are made to create a legislative regulation of embryo researches. Thus, the 18 EU Member States allow research involving embryonic stem cells, but under their control and with prejudice to certain requirements. The three states prohibit such research, and other states do not have specific legislation on this issue [11].

In Germany, it is forbidden to conduct research on human embryos. In addition, the creation of human embryos outside the human body for purposes other than pregnancy is prohibited and punishable by three years in prison [6]. However, in Germany the Stem cells Act was amended in 2007 and now embryonic stem cells can be used for research only if they are vital in developing new medical and scientific knowledge [7].

In Sweden, the 2005 Act on Genetic Integrity «allows the creation of human embryos for research, using somatic cell nuclear transfer, or so-called «therapeutic cloning». However, this technique can be used only after obtaining permission from the ethics committee and by donors [8].

In 2011, the EU forbade to patent human embryonic stem cells because each fertilized egg is a human embryo, which can develop life.

In its judgment of 18 October 2011 in the case of «Oliver Brüstle v. Greenpeace e.V.» Grand Chamber of the Court of Justice stated that a scientific invention cannot be patented if it was followed by the destruction of a fertilized egg, or use it as material for the production of a drug. This also applies to cases where the patent documents don't use human embryos [9].

Similar decisions were taken even before this case in Germany, and these patents were revoked.

According to this decision the European Patent Office amended section G-II, 5.3 of the Guidelines relating to examination of European applications concerning the patentability of inventions using human embryos [10].

In May, the European Commission provided communication on funding of researches using embryonic stem cells under the «Horizon 2020» program, which aims to combat diseases such as cancer, diabetes, Alzheimer's disease, Parkinson's disease. In addition, the Commission points out that the use of embryonic stem cells is strictly regulated by legislation and such studies should be completed under several conditions:

1. Compliance with national law – EU projects must follow the laws of the State in which the research is carried out.

2. All projects must be approved by scientific experts and undergo a thorough ethical review.

3. The EU funds may not be used for derivation of new stem cell lines, or research that destroys an embryo – including for procurement of new stem cells [11].

In February 2015 the European Medicines Agency approved the first drug made using stem cells – Holoklar [12].

The analysis of US case law indicates that the embryo is seen as a set of biological cells and is the property of his or her parents (donors). The case of *Roe v. Wade*, considered by the US Supreme Court in 1973, was important in the context of legalization of abortion and the use of embryonic stem cells, in which it was proclaimed: «the embryo is not a legal person protected by the Constitution of the United States» [13], that is not guaranteed by the supreme law of the country of the right to life [1].

In his numerous decisions the ECHR made clear that abortion is not a right protected under the Convention on Human Rights and Fundamental Freedoms of 1950 (hereinafter – the Convention), that there is no right to abortion (*Silva Monteiro Martins Ribeiro v. Portugal*) or right to perform an abortion (*Jean-Jacques Amy v. Belgium*). The prohibition of abortion per se does not violate the Convention (*Silva Monteiro Martins Ribeiro v. Portugal*). However, Member States may permit abortion in order to protect the rights guaranteed under the Convention, such as the right to life and health of pregnant women [1].

As for Ukraine, in accordance with Art.6 of the Family Code of Ukraine a child is a person under the age of 18 [14]. According to Art.25 of the Civil Code of Ukraine in cases specified by law interests



of a conceived but unborn child are protected [15].

Art. 281 of the Civil Code of Ukraine provides for the mother the right to abortion if it does not exceed twelve weeks [15]. The Cabinet of Ministers of Ukraine Regulation «On the implementation of Article 281 of the Civil Code of Ukraine» № 144 determines medical indications for abortion, the term of which is 12 to 22 weeks [16].

According to the Law of Ukraine «On the prohibition of reproductive human cloning» an embryo is considered a human embryo at the stage of development to eight weeks [17]. However, there is no definition when the embryo becomes «a child».

It is easy to see that for 4 weeks – from the eighth to the twelfth – it is possible to make abortion as to the fetus, which is no longer an embryo.

Art. 134 of the Criminal Code of Ukraine establishes liability for the two types of illegal abortion: 1) carried out by a person who has no special medical education; 2) that caused a lasting health disorder, sterility or death of the victim. [18]

Accordingly, the subjects of this crime are individuals who have higher medical education (nurses, midwives, paramedics and others with high medical education), regardless of where they had made abortions and individuals who do not have any medical training – for qualified abortion (i.e. one that caused a lasting health disorder, sterility or death of the victim).

Art. 134 of the Criminal Code of Ukraine does not provide for the responsibility of the person who has a special medical education in the case of illegal abortion, if it didn't cause significant harm to the victim. It concerns such criminal abortion cases: 1) not in institutions eligible for such activity (e.g. by a retired gynecologist at home); 2) violation of the procedure of obtaining an approval by pregnant woman or her legal representative to such transaction; 3) the absence of medical indications where the pregnancy is from 12 to 22 weeks; 4) in the period over 22 weeks [1].

However, the issue of abortion has other ethical components, especially if we take into account the international community as a whole – namely Africa, as well as those countries where the woman

is in a dependent and less secure position compared with Europe and America.

Various international human rights agencies agree that the state should provide access to abortion, at least when there is a threat to life or health of a woman or where the pregnancy was the result of rape or incest. For example, in its general recommendation No 24 (1999) the Committee on the Elimination of Discrimination against Women noted «that if possible, legislation criminalizing abortion should be amended so as to exclude the provisions for penalties against women who perform abortion» [19]. The Beijing Action Plan contains similar provisions on abortion decriminalization, and recommends reviewing laws that include penalties against women who commit illegal abortion [20].

In any case, the issue of a permit or prohibition of abortions rather sharp and is vital for the society. As an example a total ban for abortion was attempted in Poland in autumn 2016, which sparked a wave of protests and raised the level of social tension in the country.

An important condition for reducing social tensions in the context of abortion is to avoid unplanned pregnancy, which is the cause of abortion. In our opinion, one of the most important human rights is the right to access to information about sexual health and modern methods of contraception. This view is confirmed by the Committee on the Elimination of Discrimination against Women in its general recommendation No 21 (1994), which explains that «in order to make an informed decision about the use of reliable contraceptives, a woman should have information about contraceptives and their use, and guaranteed access to sex education and family planning services, as provided in Art.10 (h) of the Convention» [21].

The Committee on the Rights of the Child in its comments on the development of adolescent health stated that «Member States shall ensure that [young people] have access to the necessary information [concerning sexual and reproductive issues, including family planning, contraception and prevention of diseases, sexually transmitted diseases], regardless of marital status and consent of parents and guardians» [22].

Sexual education is one of the preconditions for the conscious family

planning and an indicator of maturity and consciousness of society. However, access to contraception and other family planning methods does not reduce the risk of unplanned pregnancy to hundred percent.

So we can question not only reproductive rights but also reproductive obligations, for violation of which a person would bore responsible.

Conclusions. Thus, international law does not actually regulate the issue of abortion (with the exception of the African Protocol on the Rights of Human and Peoples) and leaves it to the discretion of national law. The laws of different countries decide in different ways whether to permit or prohibit abortion, due to different cultural, religious and socio-economic conditions that exist in the country.

ECHR case-law is generally based on articles about protection of the right to life, protection of privacy, which are in conflict with each other. In such cases as *Paton v. United Kingdom 1980 r.*, *R.H. v. Norway 1992 r.*, *Boso v. Italy 2002 r.*, *Vo v. France in 2004*, the European Court of Human Rights has not provided a clear explanation as to whether the unborn baby (fetus) has the right to life in the sense of Art.2 of the Convention of 1950. It does not clearly guarantee the right to abortion, although it supported national laws that allow voluntary abortion in the early stages.

Bibliography:

1. Maryna Medvedeva. The place of bioethical and environmental standards in international legal mechanism for protecting human rights. – The scientific report. – K., IMO, 2015. – 52 p.
2. Additional Protocol to the African Convention on Human and Peoples' Rights on the Rights of Women in Africa [Electronic resource] // African Union. – 2003. – Access : http://www.achpr.org/files/instruments/women-protocol/achpr_instr_proto_women_eng.pdf/
3. Convention on Protection of Human Rights and Dignity with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine [Electronic resource] // the Council of Europe. – 1997. – Access : <http://conventions.coe.int/Treaty/rus/Treaties/Html/164.htm/>



4. Convention on the Rights of the Child [Electronic resource] // UN. – 1989 – Access : http://zakon2.rada.gov.ua/laws/show/995_021.
5. Petersen N. The legal status of the human embryo in vitro: General human rights instruments / N. Petersen // Heidelberg Journal of International Law. – 2005. – Vol. 65. – P. 447–466.
6. Embryos Protection Act [Electronic resource] // Germany. – 13.12.1990 – Access : <http://www.gesetze-im-internet.de/eschb/BJNR027460990.html>.
7. Kate Doherty. Regulation of research using stem cells in Germany [Electronic resource] // Euro Stem Cell. – 01.03.2012 – Access : <http://www.eurostemcell.org/regulations/regulation-stem-cell-research-germany>.
8. Regulation of research using stem cells in Sweden [Electronic resource] // Euro Stem Cell. – 01.03.2012. – Access : <http://www.eurostemcell.org/regulations/regulation-stem-cell-research-sweden>
9. Case «Oliver Brüstle vs. Greenpeace e.V.» : Judgment of the Grand Chamber of the Court Justice (Complaint C 34/10) [Electronic resource] // European Union. – 18.10.2011 Access : <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d5fe2f3b852946430aa909a9dcdc228829.e34KaxiLc3qMb40Rch0SaxyKah90?text=&docid=111402&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=1520704>.
10. Gabrielle Faure-Andre. Human Embryonic Stem Cell Patentability in Europe and the United States [Electronic resource] // Paris. – 06.24.2015 – Access : http://www.regimbeau.eu/REGIMBEAU/GST/COM/PUBLICATIONS/2015-04-hESCs-GFA_EN.pdf.
11. Communication from the Commission on the European Citizens' Initiative «One of us» (COM (2014) 355 final) [Electronic resource] // European Commission. – Brussels. – 05.28.2014 – Access : <http://ec.europa.eu/transparency/regdoc/rep/1/2014/EN/1-2014-355-EN-F1-1.Pdf>.
12. EPAR Summary for the public [Electronic resource] // European Medicine Agency (EMA / 6865/2015, EMEA / H / C / 002450). – Access : http://www.ema.europa.eu/docs/en_GB/document_library/EPAR_-_Summary_for_the_public/human/002450/WC500183406.pdf.
13. Case «Roe vs. Wade» : The Supreme Court of the United States (Complaint No. 70-18) [Electronic resource] // 22.01.1973 – Access : <http://caselaw.findlaw.com/us-supreme-court/410/113.html>.
14. The Family Code of Ukraine, as of October 7, 2016 / Verkhovna Rada of Ukraine. – 2002. – № 21-22. – P.135 [Electronic resource] – Access : <http://zakon2.rada.gov.ua/laws/show/2947-14>.
15. The Civil Code of Ukraine, as of October 7, 2016 / Supreme Council of Ukraine. – 2003. – №№ 40-44, P. 356 [Electronic resource] – Access : <http://zakon4.rada.gov.ua/laws/show/435-15/page6>.
16. On the implementation of Article 281 of the Civil Code of Ukraine / Cabinet of Ministers of Ukraine. – 15.02.2006 – № 144 [Electronic resource]. – Access : <http://zakon2.rada.gov.ua/laws/show/144-2006-%D0%BF>.
17. On the prohibition of reproductive cloning of human beings: as of October 7, 2016 / Verkhovna Rada of Ukraine. – 2005. – № 5 – P.111 [electronic resource] – Access : <http://zakon2.rada.gov.ua/laws/show/2231-iv>.
18. The Criminal Code of Ukraine, as of October 7, 2016 / Verkhovna Rada of Ukraine. – 2001. – № 25-26. – P.131 [Electronic resource] – Access : <http://zakon3.rada.gov.ua/laws/show/2341-14>.
19. The general recommendation of the Committee on the Elimination of Discrimination against Women No. 24 [Electronic resource] // Committee on the Elimination of Discrimination against Women. – 1999. – Access : <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.
20. Beijing Platform for Action [Electronic resource] // 4th Conference on Women. – 1995. – Access : <http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf>.
21. The general recommendation of the Committee on the Elimination of Discrimination against Women No. 21 [Electronic resource] // Committee on the Elimination of Discrimination against Women. – 1994. – Access : <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.
22. Adolescent Health and Development in the Context of the Convention on the Rights of the Child (CRC/GC/2003/4) [Electronic resource] // Committee on the Rights of the Child. – 33d Session. – 1.07.2003 – Access : <http://www.ohchr.org/Documents/Issues/Women/WRGS/Health/GC4.pdf>.