



WOMAN'S CONSENT TO PREGNANCY TERMINATION AS AN ELEMENT OF LEGAL PROTECTION OF THE CHILD BEFORE BIRTH

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Summary

This article describes the mandatory criteria of pregnant woman's consent on the operation (procedure) of artificial unwanted pregnancy termination – awareness, validity, willfulness, voluntariness, and consciousness. It was determined that Ukrainian state does not provide or control that woman's consent meets these specified criteria. Lack of proper woman's consent shall be an element of a qualified corpus delicti of illegal abortion. It is proposed to supplement the Criminal Code with article 1341, «Forcing a woman to conduct the abortion».

Key words: rights of a child, pregnancy termination, woman's consent, rights of unborn, awareness, validity, willfulness, voluntariness, consciousness, abortion.

Аннотация

В статье рассмотрены обязательные признаки согласия беременной женщины на проведение операции (процедуры) искусственного прерывания нежелательной беременности, такие как: действительность, информированность, осознанность, волевой характер и добровольность. Определено, что государством не обеспечивается и не контролируется соответствие согласия женщины указанным признакам. Отсутствие должного согласия женщины должно быть квалифицирующим признаком незаконного искусственного прерывания беременности. Предлагается дополнить Уголовный кодекс Украины статьей 1341 «Принуждение женщины к проведению искусственного прерывания беременности».

Ключевые слова: права ребенка, прерывание беременности, согласие женщины, права нерождённых, информированность, действительность, волевой характер, добровольность, осознанность, аборт.

Introduction. According to the ninth preambular paragraph of the Convention on the Rights of the Child, 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 [1]. The problem of appropriate legal protection of the child before birth deserves special attention in relations concerning artificial pregnancy termination. The obligatory prerequisite of the latter is the woman's informed and voluntary consent according to the form, approved by Order of the Ministry of Health of Ukraine № 423 [2]. Regretfully, in Ukraine procedure of signing the woman's consent for artificial pregnancy termination is just a formality, not aimed at protecting the prenatal life.

Objectives of the paper are to investigate characteristics of the woman's consent for operation (procedure) of pregnancy termination from the standpoint of legal protection of the child before birth according to the p. 9 of the Preamble of the Convention on the rights of the child and to suggest ways of criminal protection of legality of the mentioned consent.

Methodology. The first part of this article is written based on analysis of Ukrainian legislation on artificial pregnancy termination, and the second part uses mostly comparative method,

where legislation of other European countries is taken into consideration to reach a pondered conclusion.

Literature review. In this article, the primary source is legislation, from Ukrainian to international. The focus is given to Ukrainian legislation on artificial pregnancy termination and criminal law of Ukraine and other countries of Europe on the issues of pregnancy termination without proper woman's consent. The works of two Ukrainian authors were also used during preparation of this article: K. Cherevko and O. Dudorov.

Findings. According to the p. 2.3. of the Procedure of providing comprehensive medical care to the pregnant woman during the unwanted pregnancy, approved by the Ministry of Health of Ukraine in 2013, the operation (procedure) of artificial pregnancy termination is carried out after mandatory signing of the *informative and voluntary consent of pregnant woman for carrying out the operation (procedure) of artificial pregnancy termination* (hereinafter – the woman's consent) according to the approved form [4].

At least two characteristics of the woman's consent derive from the official name of this document—1) awareness and 2) voluntariness. K. Cherevko in his dissertation on criminal characteristics of illegal abortion, has noted that the mandatory prerequisite of this crime

is the woman's consent, that should be valid, conscious, volitional, and voluntary [28, p. 170]. Joining this opinion, I would note, that these characteristics are inherent for legal abortion as well. Let us consider each of these characteristics in detail.

The *validity* of the woman's consent means that this consent is obtained from a capable woman. According to the Art. 32, 34 of the Civil Code of Ukraine, fully capable are natural persons from 18 years old, and persons from 14 till 18 are partially capable [3]. Meanwhile, according to the p. 1.8. of the Procedure of providing comprehensive medical care to the pregnant woman during the unwanted pregnancy, in the cases when the age of woman is under 14, or the woman is legally incapable, the operation is carried out at the request of her legal representatives. If the woman's age is over 14 years, the operation is carried out at her own and single request. It should be noted that the expediency and justification of such legislative solutions require a separate study.

Awareness of the pregnant woman's consent means, that the woman has received all the relevant information, necessary for a pregnant woman before taking a decision on artificial pregnancy termination. Under the provisions of the Order of the Ministry of Health of Ukraine № 423, such information shall include:



1) information on the consequences of the operation (procedure) of artificial pregnancy termination;

2) information about abortion methods, including medication, manual vacuum aspiration, electric vacuum aspiration, expansion of the cervix and curettage (scraping) the uterus;

3) information methods of pain relief.

This is all the information that, in Ukrainian state's opinion, a pregnant woman should know before taking decision of terminating her pregnancy. In fact it is reduced to advising on the procedure of abortion, without aiming at providing information that would help woman to change her mind: about the baby, its heart beating, feelings, about available help, provided by Ukrainian state and non-governmental organisations to pregnant women and women with small children, shelters for pregnant women etc.

In most developed countries the mandatory pre-abortion counselling is a prerequisite for exemption from criminal responsibility for abortion. For example, in Germany such counselling (Schwangerschafts konflikt beratung) is carried out in centers, accredited by the state, with the issuance of certificate of counseling (Beratungsschein). At least three days since the issuance of this certificate should pass until the woman takes the final decision [31]. In Belgium there is an obligatory six days long pre-abortion counselling [30]. The legislation of Luxembourg requires pre-abortion counselling of two doctors, medical- and psycho-social, and a waiting period from three to seven days [32].

The quality of informing and time for thinking form another characteristic of a lawful woman's consent – *consciousness*. The form of woman's consent in Ukraine only includes "I...had plenty of time for reflection and taking decision", throwing all the responsibility onto the woman without creating proper conditions for her conscious decision. Thus, consciousness of woman's consent is not guaranteed and not controlled by the state.

Similarly, no legislative document provides for checking the volitional nature of the woman's consent, or its *willfulness*. The willfulness of the woman's consent means that it should be strong-willed. This characteristic cannot be provided without awareness and consciousness of the woman's consent; moreover, it

implies that procedures, preceding to the operation, should not be too quick and easy, as a woman should demonstrate that her decision is insistent.

An important element of the woman's consent is its *voluntariness*. It means that consent is given without coercion, without force, with the woman's own desire and good will.

The Criminal Code of Ukrainian SSR (1960) included an Article 110 "Forcing a woman to commit abortion", which established criminal responsibility for forcing a woman to commit abortion be the means of physical or mental violence. With the adoption in 2001 of the Criminal Code of Ukraine this offense was decriminalized without any scientific and public debate.

Meanwhile, a number of post-Soviet countries consider forcing woman to abortion as a highly dangerous behavior and establish criminal responsibility for it. These countries include Uzbekistan (art. 115 of the Criminal Code of the Republic of Uzbekistan) [18], Tajikistan (art. 124 of the Criminal Code of Tajikistan) [17] as well as Latvia and Lithuania, which currently belong to the European Union (Art. 136 of the Criminal Code Latvia [12], and Art. 143 of the Criminal Code of Lithuania [13]).

Among other EU countries, which also gave a legal assessment of the criminal abortion without the voluntary consent of the woman, are the Czech Republic, Art. 162 of the Criminal Code, which establishes liability for «soliciting a pregnant woman to abortion» [25], and Spain (Art. 144 of the Criminal Code of Spain) [11], Latvia (Ch. 3, Art. 135 of the Criminal Code of Spain) [12], France (Art. 223- 10 of the Criminal Code of France) [23], Austria (Art. 98 of the Criminal Code of Austria) [6], Greece (Art. 304 of the Criminal Code of Greece) [10], Bulgaria (Ch. 5, Art. 126 of the Criminal Code of Bulgaria) [8], Belgium (Art. 348 of the Criminal Code of Belgium) [7], Hungary (ch. 2, Art. 163 of the Criminal Code of Hungary) [21], Netherlands (Ch. 3, Art. 296 of the Criminal Code of Netherlands) [14], Romania (Ch. 2, Art. 201 of the Criminal Code of Romania) [19], Germany (Ch. 2, Art. 218 of the Criminal Code of Germany) [15], Croatia (ch. 2, Art. 97 of the Criminal Code of Croatia) [24], Slovenia (Ch. 2, Art. 132 of the Criminal Code of Slovenia)

[20], Switzerland (Ch. 2, Art. 118 of the Criminal Code of Switzerland) [26], Finland (p. 2 of Chapter 22 of the Criminal Code of Finland) [22], Estonia (Ch. 4 Art. 120 of the Criminal Code of Estonia) [9] defined abortion against the will of the woman or without her consent as a crime.

Art. 144 of the Spanish Penal Code also states that abortion is deemed to be carried out without the consent of the woman, if such consent is obtained through violence, threats or deception [11]. Switzerland in the Part.1, Art. 118 of the Criminal Code equates inciting woman to abortion to assisting her in that [26]. § 2 of the Art. 152 of the Criminal Code of Poland provides for responsibility for persuading woman to terminate her pregnancy in violation with the law, and Art. 153 provides for the criminal responsibility for the using of force against a pregnant woman or by other means, without her consent, terminating the pregnancy or inducing her by force, an illegal threat, or deceit to terminate her pregnancy in a form of imprisonment for a term of between 6 months and 8 years [16].

O. Dudorov, analyzing the Articles 121 and 134 of the Criminal Code of Ukraine, has said, that he does not see any need in clarifying the disposition of the p. 1 of the Art. 134 of the Criminal Code of Ukraine on the consent of a pregnant woman on the artificial termination of pregnancy. As consent of pregnant woman to abortion is obvious anyways. It arises from the legal definition of abortion in the Art. 50 of the Basics of Legislation on Health Care. If there is no such consent, an illegal abortion will become another crime – intentional grievous bodily harm (Art. 121 of the Criminal Code of Ukraine) [27, p. 27].

The above analysis of essential characteristics of the woman's consent to abortion – validity, awareness, consciousness, willfulness and voluntariness – demonstrates that none of them is provided and/or controlled by the Ukrainian state, the refore, the woman's consent to abortion is not obvious at all. In addition, the Unified State Register of court decisions of Ukraine does not include cases of prosecution for interruption of pregnancy without proper consent of a woman under the Article 121 of the Criminal Code of Ukraine [29].

It should be noted, that this problem was successfully solved by a number of countries by the means of establishing



qualified corpus delicti of terminating pregnancy without the woman's consent: Art. 304 of the Criminal Code of Greece [10], p. 348 of the Criminal Code of Belgium [7], p. 159 of the Criminal Code of the Czech Republic [25], p. b) of the Ch. 2, Art. 163 of the Criminal Code of Hungary [21], p. 3. Of the Art.296 of the Criminal Code of Netherlands [14], p. 153 of the Criminal Code of Poland [16], Ch. 2, Art.201 of the Criminal Code of Romania [19], Art.223-10 of the Criminal Code of France [23] and so on.

Conclusions. Lawful consent of the pregnant woman on abortion has the following essential characteristics: validity, awareness, consciousness, willfulness, and voluntariness. In Ukraine, these characteristics are neither guaranteed, nor controlled by the state.

The Art. 134 of the Criminal Code of Ukraine should be supplemented by the qualified corpus delicti on the basis of the lack of woman's consent, and the Criminal Code of Ukraine should be supplemented by the Article 1341:

“Article 1341. Forcing a woman to artificial termination of pregnancy

Forcing a woman to artificial termination of pregnancy by the means of physical or mental violence, or deceit, shall be punishable by limitation of liberty between six month and eight years, or by deprivation of liberty for the same term”.

The further researches are necessary on the following issues: 1) borrowing the foreign experience of pre-abortion counselling in the sake of keeping pregnancy and providing woman with necessary help; 2) providing for validity of the woman's consent on artificial pregnancy termination; 3) providing for the paternal rights in relations on artificial pregnancy termination.

Bibliography:

1. Convention on the Rights of the Child (Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989.

2. The Criminal Code of Ukraine of 05.04.2001 № 2341-III (amended 01.05.2016 p.) // Відомості Верховної Ради України (ВВР). – 2001. – № 25-26. – Ст. 131.

3. The Civil Code of Ukraine of 16.01.2003 № 435-IV (amended

11.06.2016 p.) // Голос України. – 2003. – № 45.

4. Наказ Міністерства охорони здоров'я України від 31.12.2010 № 1177 «Про затвердження клінічного протоколу «Комплексна допомога під час небажаної вагітності» [Electronic source]. – Retrieved from : <http://zakon5.rada.gov.ua/rada/show/v1177282-10>.

5. Наказ Міністерства охорони здоров'я України від 24.05.2013 № 423 «Про затвердження Порядку надання комплексної медичної допомоги вагітній жінці під час небажаної вагітності, форм первинної облікової документації та інструкцій щодо їх заповнення» // Офіційний вісник України. – 2013. – № 57. – Ст. 114.

6. The Criminal Code of Austria of 23.01.1974 [Electronic source]. – Retrieved from : <https://www.hsph.harvard.edu/population/abortion/Austria.abo.htm>.

7. The Criminal Code of Belgium of 08.06.1867 (amended 01.01.2012) [Electronic source]. – Retrieved from : http://www.wipo.int/wipolex/en/text.jsp?file_id=262695.

8. The Criminal Code of Bulgaria of 01.05.1968 (amended 28.05.2010) [Electronic source]. – Retrieved from : <http://www.legislationline.org/documents/action/popup/id/8881/>

9. The Criminal Code of Estonia of 06.06.2001 (amended 15.07.2013) [Electronic source]. – Retrieved from : http://www.legislationline.org/download/action/download/id/4707/file/Estonia_Penal%20Code_am2013_en.pdf.

10. The Criminal Code of Greece [Electronic source]. – Retrieved from : <https://cyber.law.harvard.edu/population/abortion/Greece.abo.html>.

11. The Criminal Code of Spain of 01.07.2015 [Electronic source]. – Retrieved from : <http://www.wipo.int/wipolex/en/details.jsp?id=15759>.

12. The Criminal Code of the Republic of Latvia of 08.07.1998 [Electronic source]. – Retrieved from : <http://law.edu.ru/norm/norm.asp?normID=1243424>.

13. The Criminal Code of the Republic of Lithuania of 26.09.2000 (amended 12.02.2007) [Electronic source]. – Retrieved from : <http://law.edu.ru/norm/norm.asp?normID=1243877&subID=100107735,100107738,100107757,100107828#text>.

14. The Criminal Code of Netherlands of 03.03.1881 (amended 01.10.2012) [Electronic source]. – Retrieved from : http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf.

15. The Criminal Code of Germany of 13.11.1998 (amended 10.10.2013) [Electronic source]. – Retrieved from : https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1816.

16. The Penal Code of Poland of 06.06.1997 [Electronic source]. – Retrieved from : https://www.imolin.org/doc/amlid/Poland_Penal_Code1.pdf.

17. The Criminal Code of the Republic of Tajikistan of 21.05.1998 (amended 23.07.2016) [Electronic source]. – Retrieved from : http://online.zakon.kz/Document/?doc_id=30397325.

18. The Criminal Code of the Republic of Uzbekistan of 22.09.1994 (amended 20.08.2015) [Electronic source]. – Retrieved from : http://fmc.uz/legisl.php?id=k_ug.

19. The Criminal Code of Romania of 17.07.2009 (amended 12.11.2012) [Electronic source]. – Retrieved from : http://www.legislationline.org/download/action/download/id/5895/file/Romania_Criminal_Code_am2012_EN.pdf.

20. The Criminal Code of Slovenia [Electronic source]. – Retrieved from : http://www.legislationline.org/download/action/download/id/3773/file/Slovenia_CC_2008_en.pdf.

21. The Criminal Code of Hungary of 2012 [Electronic source]. – Retrieved from : http://www.legislationline.org/download/action/download/id/5619/file/Hungary_Criminal_Code_of_2012_en.pdf.

22. The Criminal Code of Finland of 1889(amended2012)[Electronic source]. – Retrieved from : [file:///C:/Users/User/Downloads/Finland_CC_1889am2012_en%20\(4\).pdf](file:///C:/Users/User/Downloads/Finland_CC_1889am2012_en%20(4).pdf).

23. The Criminal Code of France of 01.01.1992 (amended 22.07.2016) [Electronic source]. – Retrieved from : <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070719>.

24. The Criminal Code of Croatia of 21.10.1997 (amended 15.07.2003 p.) [Electronic source]. – Retrieved from : <http://www.legislationline.org/download/>