AFTER-BIRTH ABORTION
– CRITICAL ANALYSIS OF THE LEGAL ASPECT

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Summary. Abortion in any form can not be universally accepted. Reason for her to make a human fetus and on the newborn can not be permitted. Abortion and abortion after birth is incompatible with inherent right to life of every human being. The natural law, which is expressed in the warrant bonum et malum vitae et faciendum associated all people and is also the source of the right to life. The right to life is also protected by the recognition of the positive law, enshrined in international declarations, conventions and treaties and constitutional law of modern states. Abortion after birth also can not justify the absence of the child’s life or his lack of moral right to life. If we understand the subject in this way the right to life and also the existence of human rights in general will be contest.

Key words: after-birth abortion, human rights, right to life, human being, newborn

INTRODUCTION

In February 2012, A. Giubilini (Department of Philosophy University of Milan, Centre for Human Bioethics Monash University) and F. Minerva (Centre for Applied Philosophy and Public Ethics University of Melbourne) on-line published in world renowned journal – “Journal of Medical Ethics”, the article under the title After-birth abortion – why should the baby live?1. This publication was met with feedback from readers all over the world: theoreticians and practitioners, doctors, philosophers, and ethicists, who are also published their responses supported by scientific and a substantive arguments on the pages of the same journal, step by step, capturing the authors theorem. The authors of that article put a lot of daring theses based – in their opinion – on specific research hypotheses. For basic research problem have adopted the following statement:

If the death of a newborn is not wrongful to her on the grounds that she cannot have formed any aim that she is prevented from accomplishing, then it should also be permissible to practise an after-birth abortion on a healthy newborn too, given that she has not formed any aim yet.

Conducted to prove this position based on the formulated the thesis:

1 It should be noted that presented by their opinion is neither a original nor new. The similar proposals have already been taken. See: M.A. Warren, The Moral Significances of Birth, “Hypatia” Vol. 4 (1989), No 3, pp. 46–65.
There are two reasons which, taken together, justify this claim: 1. The moral status of an infant is equivalent to that of a fetus, that is, neither can be considered a ‘person’ in a morally relevant sense. 2. It is not possible to damage a newborn by preventing her from developing the potentiality to become a person in the morally relevant sense.

This article, however, will not relate to the claims of the authors mentioned above – A. Giubilini and F. Minerva, as these and many others have already been subjected to a detailed discussion, which showed they committed factual errors. It should be added that the list of errors, which characterized this article, reached its apogee especially in anthropological error sensu lato, through to failure to see, and even ignore the newborn as human being, that is – man, and at the same time raze him to the animal. This text, however, will concern to another error, taking into account the legal aspect of the whole issue, namely, of the first sentence of the article, in which the authors concluded: “Abortion is largely accepted”, and related conclusion that the: "the same reasons which justify abortion should also justify the killing of the potential person when it is at the stage of a newborn”.

This article will be written using the legal dogmatic method, by means of which will be analyzed the basic normative acts including guarantees for the protection of human life, the purpose of reminded them to avoid the next stage, i.e. including the proposed solutions transfer by Giubiliniego and Minerva which they called “academic discourse” on legislative forum, it is often mankind, as in other matters, in the twentieth and twenty-first century has experienced. Therefore, this article is a reminder recognized (not granted) in the legal culture of the human right to life.

RIGHT TO LIFE IN THE DOCUMENTS OF INTERNATIONAL LAW

By joining to remind the basic normative acts, which includes the guarantees for the protection of human rights, in the context of the analyzed issues, especially the disputed right to life, should be made attention of a general nature. Namely, neither legal system can not be fully an axiologically neutral. Catalogue of moral values included in that implicitly or explicitly creates a potential moral rights that exists in European legal culture. Catalogue of moral values included in that implicitly or explicitly, creates a moral potential of law, which occurs in European legal culture. An important part of this potential are human rights that have been included in the declarations, conventions, cards or pacts. In a certain sense they play the role of the International Code, serving evaluation activities,

2 Leek theorem of Warren: "But if infanticide is to be considered, it is better that it be done immediately after birth, before the bonds of love and care between the infant and the mother (and other persons) have grown any stronger than they may already be", ibidem, p. 54.

3 It should be noted that F. Minerva in response to the criticism of her article published article entitled New threats to academic freedom, "Bioethics" 28 (4) 2014, pp. 157–162.
and serve as a reference in making decisions. In this way, there is the institutionalization of international human rights, which – as a process – creates a new reality.

Therefore, among fundamental international documents which provisions relate to human rights to life, however, due to volume limitations of this article, mention should be first and foremost: the *Universal Declaration of Human Rights*, the *Convention for the Protection of Human Rights and Fundamental Freedoms*, the *International Covenant on Civil and Political Rights*, Declaration of the Rights of the Child, the *Convention on the Rights of the Child*, the *Charter of Fundamental Rights of the European Union*, the *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine*, the *American Convention on Human Rights*, the *Charter of Fundamental Rights of the Family*. The human right to life is guaranteed in each of these acts.

The United Nations *Universal Declaration of Human Rights* which was adopted on 10 December 1948 in Paris from a Resolution 217 A (III) established an universal, equal and common standard of human rights for all people. The authors who created its directly entered into the right to life, which was worded as follows: “Everyone has the right to life” (art. 3). The statements which were contained in this Declaration have been confirmed in the Vienna Declaration from 25 June 1993, which proclaimed: “The universal nature of these rights and freedoms is beyond question” because “Human rights and fundamental freedoms are the birthright of all human beings” (I. 1.).

In turn, the *International Covenant on Civil and Political Rights*, enacted on 16 December 1966 in New York, formulated the right to life as follows: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life” (art. 6). It is worth noting that the document in question, uses the expression “human being”, and not, as in the 1948 Declaration or the 1950 Convention word – “everyone”. This points to a clear specification of the term.

The fundamental importance also have: the *Convention on the Rights of the Child*, enacted in New York by the United Nations General Assembly on 20

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November 1989\(^8\) and – chronologically prior – Declaration of the Rights of the Child from 20 November 1959\(^9\). The authors in the Preamble reminded the statements of Declaration stating 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”\(^10\). Importantly, the Convention also contains a definition of “child”: “[…] [a] child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier” (art. 1). Although this definition does not resolve the matter that the phrase “every human being” also refers to the time of life before birth, or just after birth, however, any doubts in this regard solves the wording of the Preamble of the passage cited above, relating to the legal protection before and after birth.

In the subject of that analysis – apart from the documents of the United Nations – also important are the provisions of normative acts of the Council of Europe and the Organization of American States.

The best example of this is the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November 1950 in Rome and effective from 3 September 1953\(^11\). It is saying about that: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law” (art. 2).

Taking into account normative character of the Convention should be noted that it is an international agreement in respect of which – after ratification – the interpretation and application shall be held under the Vienna Convention on the Law of Treaties from 23 May 1969. Furthermore, in the protection of human rights its importance is invaluable, because the same provisions of the Convention are outside the traditional reference to international law only states and also directly confer rights on the individual. This is quite revolutionary, because it makes the unite (citizen) a subject of entitlements a legal-international character, and is not limited to the traditional understanding of sovereignty as the exclusive power of states over their citizens\(^12\).

Quite general, but no less important, has formulator disposition of the Convention for the Protection of Human Rights and Dignity of the Human Being

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\(^10\) Convention on the Rights on the Child: Preamble, paragraph 9; Declaration of the Rights of the Child: Preamble, paragraph 3.


with regard to the Application of Biology and Medicine, or the Convention on Human Rights and Biomedicine enacted on 4 April 1997 in Oviedo. According to it: “Parties […] shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine” (art. 1). The creators of the Convention also proclaimed “Primacy of the human being” in the following way: “The interests and welfare of the human being shall prevail over the sole interest of society or science” (art. 2). Although the Convention explicitly not mentioned the right to life, a phrase such as: the dignity and identity of the human being, its integrity, fundamental rights, or a human being, allow to read in it also implicitly a legally protected right to life. Furthermore, recognition of this right were also reflected in the provisions of the Charter of Fundamental Rights of the European Union adopted on 7 December 2000 in Nice. The Council of Europe has formulated it as follows: “1. Everyone has the right to life. 2. No one shall be condemned to the death penalty, or executed” (art. 2).

Human life is also protected under the American Convention on Human Rights, signed on 22 November 1969 in San José. The fourth article of the Convention was entitled: “Right to Life”. According to its content: “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” (art. 4, paragraph 1).

The international community recognized the public law personality of the Holy See on the international arena. Therefore, the study can not be overlooked that it submitted on 22 October 1983 Charter of Fundamental Rights of the Family. In accordance with its provisions: “Human life must be respected and protected absolutely from the moment of conception. a) Abortion is a direct violation of the fundamental right to life of the human being” (art. 4 a).

It should be noted that the wording of mentioned documents are different, not necessarily compatible, often even different, which also results in different

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methods for their interpretation. Undoubtedly, however, common to them is that they all protect human life and none of these normative acts does not give consent for abortion – regardless of whether before or after birth.

THE RIGHT TO A LIFE IN THE CONSTITUTIONAL LEGAL ORDER

Above reminder the dispositions of the most important documents of international law was to identify safe guards to protect the right to life at the international level. Through the prism of these guarantees protection of life should be shown in the constitutional legal order. Regardless of whether or not abortion is allowed in some countries on the basis of other normative acts than constitutions, however, constitutions protect the right to life of every human being.

It is impossible in this article quote nearly 200 constitutional normative acts, to indicate in which countries human life is a constitutional value. For example, however, should be made to some of them. The right to life of every human being has been recognized among in the following constitutions: Estonia (art. 16); The Russian Federation (art. 20); Federative Republic of Brazil (art. 5); Swiss Federal (art. 10); Canada (art. 7); Principality of Liechtenstein (art. 27); The Republic of Albania (art. 21); The Republic of Bulgaria (art. 28); The Republic of Croatia (art. 21); The Republic of Cyprus (art. 7); The Republic of Latvia (art. 93); Republic of Macedonia (art. 10); The Portu-

23 Verfassung des Fürstentums Lichtenstein vom 5. Oktober 1921. Art. 27 ter was added of 27th November 2005 (LGBl. 2005 No 267).
28 Latvijas Republikas Satversme, “Valdības Vestsnesis” 1922 nr 141.
guese Republic (art. 24); The Republic of Slovenia (art. 17); Republic of Turkey (art. 17); Romania (art. 22); Republic of Poland (art. 38); Ukraine (art. 27).

Guarantees the protection of human life before birth explicitly include constitutional provisions of the Republic of Chile (art. 19); Czech Republic (art. 6); Slovak Republic (art. 15); The Republic of Poland (art. 38); Ukraine (art. 27).

Although the Constitution of the United States from 17 September 1787 does not formulate explicitly the right to life, but only, enacted Amendments to this act include references to this law, it must be read in this regard through the prism of the earlier Declaration of Independence from 4 July 1776, according to which all men are endowed by their Creator unalienable rights, among which the first is the right to life. Undoubtedly, for this interpretation argues text of IX Amendment: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people”. Therefore, it is reasonable to recalled in this moment the Proclamation of the President of the United States from 17 January 1988. In this act the President said:

All medical and scientific evidence increasingly affirms that children before birth share all the basic attributes of human personality – that they are in fact persons. Modern medicine treats unborn children as patients. […] Now, therefore, I, Ronald Reagan, President of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of every American, from the moment of conception until natural death, and I do proclaim, order, and declare that I will take care that Constitution and laws of the United States are faithfully executed for the protection of America’s
unborn children. Upon this act, sincerely believed to be an act of justice, warranted by the Constitution, I invoke the considerate judgment of mankind and the gracious favor of Almighty God\textsuperscript{44}.

CONCLUSION

Before the formulation of conclusions summarizing the undertaken analysis, have to refer to the statement of R. Reagan, dating from before the date cited above \textit{Proclamation} of the President. In his book, he concluded a very important word:

Abraham Lincoln recognized that we could not survive as a free land when some men could decide that others were not fit to be free and should therefore be slaves. Likewise, we cannot survive as a free nation when some men decide that others are not fit to live and should be abandoned to abortion or infanticide. […] there is no cause more important for preserving that freedom than affirming the transcendent right to life of all human beings, the right without which no other rights have any meaning\textsuperscript{45}.

With a view to these words, as well as the undertaken analysis the aim of which was to remind the recognition of the right to life, indicate the following conclusions \textit{de lege lata}:

1) Law axiology demands a clear statement that every human being, including a child, has not only a moral right to life, but his moral right is also protected in the plane of the normative. But does not authorize to distinguish between the right to life for the moral and any other, because this law is one – it is innate.

2) Due to the innate trait – the law can not be interpreted freely, because it is integrally joined with every human being. The other hand, laws which are not universal and innate are no longer a human rights\textsuperscript{46}, so the dispute over the recognition of the right to life is a dispute over the recognition of human rights in general.

3) Abortion is not universally accepted, and killing the newborn due to the alleged lack of purpose in life is murder and can be never acceptable. The so-called. \text quotation mark Academic discourse\text quotation mark, which proclaims the universality of the acceptance of abortion, in one form or another, elevating it to the status of law, can not constitute grounds to any discourse. In this regard any discussion is pointless because you can not contest the right of natural law, and even more it is protected by the recognition of the positive law.

\textsuperscript{44} Ibidem, p. 93.


ABORCJA PO URODZENIU – ANALIZA KRYTYCZNA W ASPEKCIE PRAWNYM


Słowa kluczowe: aborcja po urodzeniu, prawa człowieka, prawo do życia, istota ludzka, noworodek