

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 vitandum 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 cards 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 renown 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”².

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 Giubilini and Minerva which they called “academic discourse”³ 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 reality⁴.

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)⁵ established an universal, equal and common standard of human rights for all people. The authors who created it 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 1993⁶, 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*⁷, 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

⁴ S.L. Stadniczeńko, *Człowiek – wartości – prawo*, in: *Urzeczywistnianie praw człowieka w XXI wieku. Prawo i etyka*, ed. P. Morciniec, S.L. Stadniczeńko, Opole: Wydawnictwo Uniwersytetu Opolskiego 2004, p. 61.

⁵ Resolution adopted by General Assembly, [*Part A of General Assembly resolution 217 (III). International Bill of Human Rights*]. 217 A (III). *Universal Declaration of Human Rights*, 10 December 1948, A/Res/3/217 A.

⁶ *Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna on 25 June 1993*, in: <http://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> [on-line: 26.11.2014].

⁷ Resolution adopted by the Assembly General, 2200 (XXI), *International Covenant on Civil and Political Rights*, 16 December 1966, A/Res/21/2200.

November 1989⁸ and – chronologically prior – *Declaration of the Rights of the Child* from 20 November 1959⁹. 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 1953¹¹. 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 citizens¹².

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

⁸ *Convention on the Rights on the Child*, United Nations 1989.

⁹ Resolution adopted by the General Assembly, 1386 (XIV), *Declaration of the Rights of the Child*, 20 November 1959, A/Res/14/1386.

¹⁰ *Convention on the Rights on the Child: Preamble*, paragraph 9; *Declaration of the Rights of the Child: Preamble*, paragraph 3.

¹¹ *Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols No. 11 and 14, Rome, 4.IX.1950. Text amended by the provisions of Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010*, “European Treaty Series” No. 5.

¹² L. Garlicki, *Wprowadzenie*, in: *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1–18*, ed. L. Garlicki, Vol. I, Warszawa: Wydawnictwo C.H. Beck 2010, p. 5.

with regard to the *Application of Biology and Medicine*, or the *Convention on Human Rights and Biomedicine* enacted on 4 April 1997 in Oviedo¹³. 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 Nice¹⁴. 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 José¹⁵. 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 arena¹⁶. Therefore, the study can not be overlooked that it submitted on 22 October 1983 *Charter of Fundamental Rights of the Family*¹⁷. 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

¹³ *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*, “European Treaty Series” No. 164.

¹⁴ *Charter of Fundamental Rights of the European Union* (2010/C 83/02), “Official Journal of the European Union” 30.3.2010, C 83/389-403.

¹⁵ *American Convention on Human Rights adopted at the Inter-American Specialized Conference of Human Rights, San José, Costa Rica, 22 November 1969*, “Refugee Survey Quarterly” Vol. 24 (2005), Issue 2, p. 158–160.

¹⁶ M. Sitarz, *Rodzaje i kompetencje legatów papieskich*, in: *Fides – Veritas – Iustitia. Księga Pamiątkowa dedykowana Księdzu Biskupowi Antoniemu Stankiewiczowi*, ed. P. Stanisz, L. Adamowicz, M. Greszata-Telusiewicz, Lublin: Towarzystwo Wydawnictw Naukowych “Libropolis” 2013, p. 45.

¹⁷ *Carta dei Diritti della Famiglia presentata dalla Sante Sede a tutte le persone, istituzioni ed autorità ed autorità interessate alla missione della famiglia nel mondo di oggi*, 22.10.1983, “Communicationes” 15 (1983), Num. 2, p. 140–152.

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)¹⁸; The Russian Federation (art. 20)¹⁹; Federative Republic of Brazil (art. 5)²⁰; Swiss Federal (art. 10)²¹; Canada (art. 7)²²; Principality of Liechtenstein (art. 27)²³; The Republic of Albania (art. 21)²⁴; The Republic of Bulgaria (art. 28)²⁵; The Republic of Croatia (art. 21)²⁶; The Republic of Cyprus (art. 7)²⁷; The Republic of Latvia (art. 93)²⁸; Republic of Macedonia (art. 10)²⁹; The Portu-

¹⁸ *Eesti Vabariigi põhiseadus Vastu*, võetud 28.06.1992, “Riigi Teataja” 1992, 26, 349 as amended.

¹⁹ *The Constitution of the Russian Federation (was Adopted at National Voting on December 12, 1993)*. The text of the Constitution was published in “Rossiiskaya Gazeta” newspaper as of December 25, 1993, in: <http://www.constitution.ru/en/10003000-03.htm> [on-line: 5.10.2016].

²⁰ *Constituição da República Federativa do Brasil: promulgada em 5 de outubro de 1988*.

²¹ *Bundesbeschluss ü ber eine neue Bundesverfassung vom 18. dezember 1998*, “Bundesblatt der Schweizerischen Eidgenossenschaft” (BBl) 1997 I 1.

²² Department of Justice Canada, *A Consolidation of the Constitution Acts 1867 to 1982*, Ottawa 2013.

²³ *Verfassung des Fürstentums Lichtenstein vom 5. Oktober 1921*. Art. 27 ter was added of 27th November 2005 (LGBI. 2005 No 267).

²⁴ *Kushtetuta e Republikës së Shqipërisë (Ndryshuar me ligjin nr.9675, datë 13.1.2007; ligjin nr.9904, datë 21.4.2008; me ligjin nr.88/2012, datë 18.9.2012)*, “Botim i Qendrës së Publikimeve Zyrtar”, nëntor, 2012.

²⁵ *Constitution Republic of Bulgaria*, in: <http://www.online.bg/law/const/const2.htm> [28.11.2014].

²⁶ *Constitution of the Republic of Croatia (consolidated text)*, “Narodne Novine” No 58/1990 as amended, in: <http://www.sabor.hr/Default.aspx?art=2405&sec=729> [on-line: 28.11.2014].

²⁷ *Σύνταγμα της Κυπριακής Δημοκρατίας*, 1960, in: [http://www.law.gov.cy/law/lawoffice.nsf/all-7C380EEC7AD244F6C225744A0034F3E7/\\$file/To%20Σύνταγμα%20της%20Κυπριακής%20Δημοκρατίας.pdf](http://www.law.gov.cy/law/lawoffice.nsf/all-7C380EEC7AD244F6C225744A0034F3E7/$file/To%20Σύνταγμα%20της%20Κυπριακής%20Δημοκρατίας.pdf) [on-line: 5.10.2016].

²⁸ *Latvijas Republikas Satversme*, “Valdības Vestnesis” 1922 nr 141.

²⁹ *Ustav na Republika Makedonija*, “Služben Vesnik na Republika Makedonija” 52/1991.

guese Republic (art. 24)³⁰; The Republic of Slovenia (art. 17)³¹; Republic of Turkey (art. 17)³²; Romania (art. 22)³³; Republic of Poland (art. 38)³⁴; Ukraine (art. 27)³⁵. Guarantees the protection of human life before-birth explicitly include constitutional provisions of the Republic of Chile (art. 19)³⁶; Czech Republic (art. 6)³⁷; Slovak Republic (art. 15)³⁸; The Republic of Hungary (art. II)³⁹.

Although the Constitution of the United States from 17 September 1787⁴⁰ does not formulate explicitly the right to life, but only, enacted Amendments to this act include references to this law⁴¹, it must be read in this regard through the prism of the earlier *Declaration of Independence* from 4 July 1776⁴², 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 1988⁴³. 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 Regan, 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, ordain, and declare that I will take care that Constitution and laws of the United States are faithfully executed for the protection of America’s

³⁰ *Constituição da República Portuguesa: 4 revisão nos termos da Lei Constitucional n.1/97, 20 de Setembro*. Introd. Jorge Miranda. Lisboa: Principia, 1997.

³¹ *Ustav Republike Slovenije*, “Uradni List Republike Slovenije” št. 33/1991, 28. decembra 1991.

³² *Türkiye Cumhuriyeti Anayasası*, „Resmi Gazete” No. 17863/1982.

³³ *Constituția României din 21 noiembrie 1991. Modificată și completată prin Legea de revizuire a Constituției României nr. 429/2003*, “Monitorul Oficial al României”, Partea I, nr. 758.

³⁴ *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, „Dziennik Ustaw Rzeczypospolitej Polskiej” 1997, Nr 78, poz. 483 as amended.

³⁵ *Конституція України*, “Відомості Верховної Ради України” (ВВР), 1996, № 30, ст. 141 as amended.

³⁶ *Constitución Política de la República de Chile. Decreto Supremo*, “Diario Oficial de la República de Chile” No. 30.798 el 24 de octubre de 1980.

³⁷ *Usnesení předsednictva České národní rady ze dne 16. prosince 1992 o vyhlášení Listiny Základních Práv a Svobod jako součásti ústavního pořádku České republiky*, “Sbírka Zákonů České Republiky” č. 2/1993, Částka 1.

³⁸ *Ústava Slovenskej republiky z 1. septembra 1992*, “Zbierka zákonov” č. 460/1992, Čiastka 92.

³⁹ *Magyarország Alaptörvénye (2011. április 25.)*, “Magyar Közlöny” 2011. évi 43. szám.

⁴⁰ *The Constitution of the United States of America. Analysis and interpretation*. Washington: US Government Printing Office 1987, p. 1–44.

⁴¹ Amendments: V, IX and XIV.

⁴² *In Congress, July 4, 1776. The unanimous Declaration of the thirteen united States of America*, in: http://www.archives.gov/exhibits/charters/declaration_zoom_2.html [on-line: 30.11.2014].

⁴³ R. Reagan, *A Proclamation by the President of the United States of America*, 17.01.1988, “The Human Life Review” vol. XIV (1988), No. 1, p. 92–93.

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 God⁴⁴.

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 *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 meaning⁴⁵.

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 *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 rights⁴⁶, 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. “Academic discourse”, 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.

⁴⁴ *Ibidem*, p. 93.

⁴⁵ R. Reagan, *Abortion and the Conscience of the Nation*, Nashville, Camden, New York: Thomas Nelson Publishers 1984, p. 38.

⁴⁶ M. Piechowiak, *Status dziecka poczętego. Czy Konwencja o Prawach Dziecka jest neutralna w sprawie prawa do życia nienarodzonych?*, in: *Prawa rodziny – prawa w rodzinie w świetle standardów międzynarodowych. materiały krajowej konferencji naukowej. Toruń, 22–23 X 1998 r.*, ed. T. Jasudowicz, Toruń: Towarzystwo Naukowe Organizacji i Kierownictwa “Dom Organizatora” 1999, p. 265.

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ABORCJA PO URODZENIU – ANALIZA KRYTYCZNA W ASPEKCIE PRAWNYM

Streszczenie. Aborcja w żadnej formie nie jest powszechnie akceptowana. Uzasadnienie jej dokonywania na płodzie ludzkim ani na noworodku, nie może być dopuszczalne. Aborcja oraz aborcja po urodzeniu jest sprzeczna z wrodzonym prawem do życia każdego człowieka. Prawo naturalne, które wyraża się w nakazie *bonum faciendum et malum vitandum* wiąże wszystkich ludzi i stanowi jednocześnie źródło prawa do życia. Z kolei prawo do życia chronione jest dodatkowo poprzez uznanie w prawie pozytywnym, zagwarantowanym w międzynarodowych deklaracjach, konwencjach, kartach czy paktach oraz w prawie konstytucyjnym współczesnych państw. Aborcji po urodzeniu nie można także uzasadniać brakiem celu życia dziecka ani brakiem jego moralnego prawa do życia. Gdyby tak było, zakwestionowane by zostało nie tylko prawo do życia, ale także istnienie praw człowieka w ogóle.

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