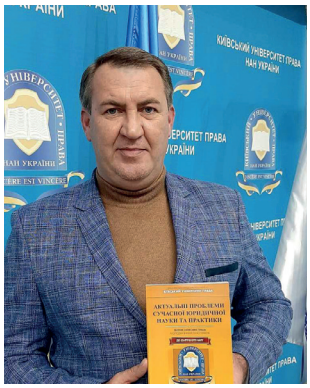

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Child Life Protection: Prospects For Improving Ukrainian Legislation

Abstract. *Based on the analysis of both scientific works dedicated to the issues of maternal infanticide and specific provisions of criminal legislation in foreign countries aimed at protecting children's lives, a set of new insights has been obtained. These insights enable the development of a comprehensive set of measures aimed at protecting the lives of children.*

The methodological foundations that formed the basis of this research were created by the work of leading scientists such as M.I. Bazhanov, Yu. V. Baulin, V. I. Borysov, V. K. Hryshchuk, M. I. Melnyk, V. O. Navrotskyi, V. V. Stashys, V. Ya. Tatsii, etc. Attention was paid to the problems of improving legislation related to the murder of a mother of her newborn child by: Antonian Yu.M., Borovitinov M.M. Borysov V.I., Hernet M.M. Liubavskyi A.D., Naumov A.V., Nekliudov N.A., Ostapenko L.A., Sainchyn O.S., Semeniuk I.S., Sosnina O.V., Stratonov V.M., Pashchenko O.Iu., Tsybulenko T.D., including foreign scientists: Rikhard fon Kraft-Ebinh, Iohan Zakharii Platner, etc. At the level of dissertation research, this problem was addressed by L. A. Ostapenko (2003), O. L. Starko (2007), I. S. Semeniuk (2011) O. V. Shevchenko (2016).

As the analysis has shown, in recent years, a number of publications have been published aimed specifically at improving criminal legislation, namely Article 117 of the Criminal Code of Ukraine, including the following works: "Criminal liability for the murder of a newborn child: a comparative legal aspect" (Musychenko O. M., Verbytskyi O. S., 2019), "Current problems of qualification of the murder of a mother of her newborn child" (Zhmur Yu. M., Hotsuliak O. O., 2020), Intentional murder by a mother of her newborn child: controversial issues of qualification. Marysiuk K., Druk S., 2020).

However, many problems remained unresolved, primarily regarding the qualification criteria, the moment of determining the beginning of a child's life, the age limit at which criminal liability for this type of crime arises, and other issues.

Preventive measures that will prevent the murder of children are an important area, as they are the most vulnerable part of people. Since human life, including the life of an unborn and newborn child, is realized through the system of criminal law, we consider it necessary, based on the studied foreign legislation, to develop a set of regulations that will allow for the proper protection of the life of a child and bring to justice all persons who facilitate the commission of this type of crime or encourage the mother to commit criminal acts.

Given the experience of protecting the life of a child in foreign countries, it is important to remember that the path of persuasion is not the path of prohibition, but the path of persuasion. Of course, persuasion plays an important role in a person's life, but it is not always effective. As practice shows, if a woman decides to get rid of her unborn child, she will actively do so, both during pregnancy and after birth. Such women will do everything possible to get rid of their newborn child. Therefore, we consider it necessary to

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take into account the German legislation, which regulates at the legislative level the issues that provide for a number of measures aimed at counseling pregnant women in difficult conflict situations and in need of social support. Also, to increase responsibility for crimes aimed at taking the life of a child.

Analyzing the draft of Criminal Code of Ukraine, we came to the generalized conclusion that the beginning of human life does not begin at the moment of physical birth, but much earlier. This conclusion is confirmed by a number of provisions of foreign countries, even those where the murder of a newborn child is a privileged crime.

Therefore, the comparative legal analysis of the criminal laws of foreign countries that provide for liability for taking a child's life allows us to actualize the issues which, in our opinion, will form the basis for further research and improvement of legislation, and thus will improve the activities of judicial, investigative and other bodies, which will generally lead to better protection of human rights.

Keywords: *infanticide, abortion, child's life, criminal liability.*

Introduction. The analysis of Ukrainian criminal law shows that the death of a child can occur as a result of various offenses (crimes).

Thus, the Criminal Code of Ukraine states that both minor children and the fetus of a pregnant woman can be the object of encroachment: Part. 1, Clause 2, Art. 115 "Intentional murder", murder of a newborn child (Art. 117); grievous bodily harm resulting in the termination of pregnancy (Art. 121): illegal abortion or sterilization (Art. 134); leaving in danger (Art. 135)1, i.e., the consequences of criminal acts are the death of a child and Article 136 of the Criminal Code of Ukraine[1].

For the specific grouping of norms aimed at protecting the life of a child, it is necessary to pay attention to the recognition by the legislator of the "beginning of life", and hence the definition of the time limits when it begins and from which moment it will be the object of criminal encroachment.

There are states in which abortion is recognized as infanticide (Vatican[2], Nicaragua[3], Poland[4], Philippines[5]).

According to the criminal legislation of these countries, criminal liability is incurred for "intrauterine murder", namely the killing of the child in the womb. There is a group of countries that allows abortion in cases where there is a threat to the life of a pregnant woman. In Liechtenstein[6], Spain[7] along with the protection of a woman's life and the pretext of state care, abortion is allowed "provided the physical and mental health of the person is not impaired, and if the person has been raped and become pregnant by the rapist, or if there is an abnormal development of the fetus or incest".

Oleksandr Kovtun

CHILD LIFE PROTECTION: PROSPECTS FOR IMPROVING UKRAINIAN LEGISLATION

Based on the analysis of both scientific works dedicated to the issues of maternal infanticide and specific provisions of criminal legislation in foreign countries aimed at protecting children's lives, a set of new insights has been obtained. These insights enable the development of a comprehensive set of measures aimed at protecting the lives of children.

As the analysis has shown, in recent years, a number of publications have been published aimed specifically at improving criminal legislation, namely Article 117 of the Criminal Code of Ukraine, including the following works: "Criminal liability for the murder of a newborn child: a comparative legal aspect" (Musychenko O. M., Verbytskyi O. S., 2019), "Current problems of qualification of the murder of a mother of her newborn child" (Zhmur Yu. M., Hotsuliak O. O., 2020), Intentional murder by a mother of her newborn child: controversial issues of qualification. Marysiuk K., Druk S., 2020).

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Preventive measures that will prevent the murder of children are an important area, as they are the most vulnerable part of people. Since human life, including the life of an unborn and newborn child, is realized through the system

1 Кримінальний кодекс України: офіційний текст. Київ.: Юрінком Інтер, 2001. 240 с.

2 Канонічне кримінальне право. URL: https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=5652ffd34

3 Кримінальний кодекс Нікарагуа. URL: http://legislacion.asamblea. gob.ni/Normaweb.nsf/%28$All%29/1F5B59264A8F00F906257540005EF77E?OpenDocument

4 Кримінальний кодекс Республіки Польща / пер. на укр. мову В.С.Станіч. Київ : ОВК, 2017. 138 с.

5 Кримінальний кодекс Філіппін. ACT NO. 3815 AN ACT REVISING THE PENAL CODE AND OTHER PENAL LAWS (December 8, 1930). URL: https://www.wipo.int/wipolex/ru/text/225305

6 Кримінальний кодекс Ліхтенштейн. URL: https://www.wipo.int/wip olex /ru/text/234957

7 Станевич В.С. Кримінальний кодекс Королівства Іспанія / під ред. В.Л. Менчинського. Переклад на укр. мову О.В. Лішевської. К. : ОВК, 2016. 244 с.

of criminal law, we consider it necessary, based on the studied foreign legislation, to develop a set of regulations that will allow for the proper protection of the life of a child and bring to justice all persons who facilitate the commission of this type of crime or encourage the mother to commit criminal acts.

Given the experience of protecting the life of a child in foreign countries, it is important to remember that the path of persuasion is not the path of prohibition, but the path of persuasion. Of course, persuasion plays an important role in a person's life, but it is not always effective. As practice shows, if a woman decides to get rid of her unborn child, she will actively do so, both during pregnancy and after birth. Such women will do everything possible to get rid of their newborn child. Therefore, we consider it necessary to take into account the German legislation, which regulates at the legislative level the issues that provide for a number of measures aimed at counseling pregnant women in difficult conflict situations and in need of social support. Also, to increase responsibility for crimes aimed at taking the life of a child.

Analyzing the draft of Criminal Code of Ukraine, we came to the generalized conclusion that the beginning of human life does not begin at the moment of physical birth, but much earlier. This conclusion is confirmed by a number of provisions of foreign countries, even those where the murder of a newborn child is a privileged crime.

Therefore, the comparative legal analysis of the criminal laws of foreign countries that provide for liability for taking a child's life allows us to actualize the issues which, in our opinion, will form the basis for further research and improvement of legislation, and thus will improve the activities of judicial, investigative and other bodies, which will generally lead to better protection of human rights.

Keywords: infanticide, abortion, child's life, criminal liability.

Oleksandr Kovtun

PROTECTION DE VIE ENFANTINE : PERSPECTIVES D'AMÉLIORATION DE LA LÉGISLATION UKRAINIENNE

Sur la base de l'analyse des travaux scientifiques consacrés aux problèmes de la mère tuant son nouveau-né, ainsi que de certaines normes de la législation pénale des pays étrangers visant à protéger la

In countries where the mother's murder of a newborn child is classified as simple murder or as qualified murder, it is punished very severely (France[8], Germany[9], China[10]). Thus, in France, up to life imprisonment for the intentional murder of a minor who has not reached the age of fifteen (Paragraph 1 of Article 221-4 of the French Criminal Code dated 1992) or a person who is particularly vulnerable due to their age, illness, disability, physical or mental disability or pregnancy is obvious or known to the executor (Clause 3 of Article 221-4 of the French Criminal Code dated 1992). In some countries, it is not a question of a newborn at all, but the murder of a minor under the age of 15 is emphasized.

In some countries, there is a privileged composition of the murder of a newborn child, even more so with quite similar interpretations of the disposition "Intentional murder by a mother of her newborn child during or immediately after childbirth". The Republic of Azerbaijan (Art. 121)[11], Criminal Code of Albania (Art. 81)[12], Criminal Code of Georgia (Art. 112)[13], Criminal Code of the People's Republic of Bulgaria (Art. 120)[14], Criminal Code of Poland (Art. 139)[15], Criminal Code of the Republic of Uzbekistan (Art. 99)[16], Criminal Code of Ukraine (Art. 117)[17].

In Sweden, the only privileged type of murder is infanticide (Article 3 of Chapter 3 of the Swedish Penal Code of 1962). A woman who takes the life of her child at the time of birth or during childbirth, when her state of mind is disturbed or if she is in extreme need, shall be sentenced to imprisonment for a term not exceeding 6 years for infanticide[18]. An interesting fact is that there is no lower limit to the sanction.

There is no uniformity in the legislation on determining the age of criminal liability. No country provides for liability for the repeated murder of a child, including a newborn, of two or more children as a qualifying feature. Unfortunately, there is no separate definition of a surrogate mother. In Ukraine, the institution of surrogacy is legalized at the legislative level, but within the framework of civil law relations. At the same time, some countries have banned surrogacy, including: Austria, Germany, France, Norway, Iceland, Italy, Japan, Hungary, Pakistan, Saudi Arabia, Serbia, Switzerland, France, and Switzerland.

8 Кримінальний кодекс Франції (на 1 липня 2000) URL: https://yurist-online.org/laws/foreign/criminalcode_fr/_doc-5-.pdf

9 Уголовное уложение Федеративной Республики Германия Strafgesetzbuch (StGB) URL : https://www.unipotsdam.de/fileadmin/projects/lshellmann/Forschungsstelle_Russisches_Recht/Neuauflage_der_kommentierten_StGB-%C3%9Cbersetzung_von_Pavel_Golovnenkov.pdf

10 Кримінальний кодекс Франції. URL: https://yurist-online.org/laws/foreign /criminalcode_fr/_doc-5-.pdf

11 Кримінальний кодекс Азербайджанської Республіки (затверджений Законом Азербайджанської Республіки від 30 грудня 1999 р. №787 – IQ) URL: https://continent-online.com/Document/?doc _id=30420353

12 Кримінальний кодекс республіки Албанія (Kodi Penal i Republikës së Shqipërisë) (затверджений Законом №7895 від 27 січня 1995 із змінами внесеними Законом №8733 від 24.01. 2001 року. URL: https://www.wipo.int /wipolex/ru/text/238253

13 Кримінальний кодекс Грузії від 22 липня 1999 р. № 2287-вс (з послідуючими змінами та доповненнями) / Законодавчий вісник Грузії. URL: https://matsne.gov.ge/ka/document/download/16426/143/ru/pdf

14 Кримінальний кодекс Народної Республіки Болгарія. URL: https://books.google.bg/books/ about/%D0%A3%D0%B3%D0%BE%D0%BB%D0%BE%D0%B2%D0%BD%D1%8B%D0%B9_%D0%BA%D0%BE%D0%B4%D0%B5%D0%BA%D1%81_%D0%9D%D0%B0%D1%80%D0%BE.html?id=gsY0AQAAIAAJ&redir_esc=y

15 Кримінальний кодекс Республіки Польща / пер. на укр. мову В.С. Станіч. Київ : ОВК, 2017. 138 с.

16 Кримінальний закон Республіки Узбекистан із змінами і доповненнями 01.01.2019 р./ В.С. Станіч О.В. Іванов. Вид-во ОВК, Київ. 2019. 194 с.

17 Науково-практичний коментар Кримінального кодексу України від 05.04.2001 р. / За заг. ред. М.І. Мельника, М.І. Хавронюка. К., Каннон, А.С.К, 2013. 1104 с.

18 Уголовнуій кодекс Швеции / Науч. ред.: Н.Ф.Кузнецова, С.С.Беляев; Пер. С.С.Беляева. – СПб.: Юридический центр Пресс, 2001 URL :https://sr.1lib.to/book/2449929/c42404.

In other countries (Turkey, Korea, Tajikistan), it is stated that such murder of a newborn child is associated with a mental health disorder of the mother as a result of birth control, which is explicitly stated in the law. In Denmark (§ 238), these signs are somewhat expanded and are related not only to the psychophysiological state but also to the predicament, fear or panic of the woman in labor[19]. The time period in this case is also not clearly defined. But unlike in Ukraine, if the offense was committed without harming the child, the punishment would be canceled. In Ukraine, such actions are qualified as attempted murder.

There is no unanimity in determining the age of criminal liability for the murder of a newborn child, there are multiple variants of the lower age limit for criminal liability for this crime: from 12 years (China)[20], from 13 years in France[21], Ukraine, Georgia, Lithuania from 14 years, 15 years according to the Swedish law[22] and 18 years in Spain[23], Bulgaria[24].

Some scholars, relying on quantitative characteristics, insisted on raising this age in Ukraine from 14 to 18 years. However, in our opinion, quantitative characteristics cannot be the basis for lowering the age of criminal liability. Perhaps it is the fear of being held accountable that holds minors back from committing such crimes, as the Institution of Motherhood shows that the number of births of children at the age of 14 has increased significantly. There are also cases of earlier births. On average, about 26 thousand babies were born over the past three years. Our research has shown that women who already have children also commit murder.

The legislation infrequently designates the father or other relatives as accomplices in the murder of a newborn child alongside the mother. The critical matter of implementing preventative measures to safeguard children's lives demands attention.

The normative base of the study: the Constitution of Ukraine, the Criminal Code of Ukraine, and other laws of Ukraine. Criminal codes of different legal families. The author familiarized themselves (in translations) with foreign criminal legislation on encroachment on a person's (child's) life.

The Research Aims and Objectives. Given the above issues and other circumstances, with a view to determining the prospects for improving the criminal legislation of Ukraine, the author clarifies the essential legal features of such a crime as taking a child's life, including the murder of a mother's newborn child, with the subsequent determination of the degree of liability for these types of crimes. On the basis of the analysis of the criminal codes of foreign countries for similar types of crimes, the author proposes to amend the current criminal legislation of Ukraine.

Results of the Study. The historical path of forming a mother's liability for killing her own child after birth has come a long way, taking into account the opinion of scientists, the influence of religion, and the imprint of judicial practice, etc. In the end, it so happened that the construction of this norm is quite different, and accordingly, it is possible to divide the countries into

vie de l'enfant, un certain nombre de nouvelles connaissances ont été acquises, qui permettent de développer un ensemble de mesures visant à protéger la vie de l'enfant.

Comme l'a démontré l'analyse, ces dernières années, un certain nombre de publications ont été publiées visant spécifiquement à améliorer la législation pénale, notamment l'article 117 du Code pénal de l'Ukraine, parmi ces ouvrages : « La responsabilité pénale pour le meurtre d'un nouveau-né : un aspect juridique comparé » (Musychenko O. M. Verbytskyi O.S., 2019), « Problèmes réels de qualification de la mère de son nouveau-né » (Zhmur Yu.M., Hotsulyak O. O., 2020), Meurtre intentionnel de la mère de son nouveau-né : questions controversées de qualification. Marisyuk K. Druk S., 2020).

Cependant, de nombreux problèmes restaient non résolus, notamment en ce qui concerne les caractéristiques, le moment de déterminer le début de la vie d'un enfant, la limite d'âge à partir de laquelle commence la responsabilité pénale pour ce type de crime et d'autres questions.

Les mesures préventives visant à prévenir le meurtre d'enfants constituent la direction la plus importante, car il s'agit de la partie la plus vulnérable de la personne. Étant donné que la vie d'une personne, y compris l'enfant à naître et le nouveau-né, est réalisée à travers le système de normes de droit pénal, nous considérons qu'il est nécessaire d'élaborer un ensemble d'actes juridiques normatifs sur la base de la législation étrangère étudiée qui permettront de mettre en œuvre la protection adéquate de la vie de l'enfant et traduire en justice toutes les personnes qui contribuent à la commission de ce type de délits ou encouragent la mère à commettre des actes criminels.

Compte tenu de l'expérience de la protection de la vie d'un enfant dans des pays étrangers, il est nécessaire de rappeler que la voie efficace n'est pas la voie des interdictions, mais la voie de la persuasion. Bien sûr, la conviction joue un rôle important dans la vie d'une personne, mais elle n'est pas toujours efficace. Comme le montre la pratique, si une femme décide de se débarrasser même d'un enfant à naître, elle le fera activement, à la fois pendant la grossesse et après l'accouchement. Ces femmes feront tout leur possible pour se débarrasser de leur nouveau-né. Par conséquent, nous considérons qu'il est nécessaire de prendre en compte la législation allemande,

[19] Кримінальний Кодекс Данії. URL: https://www.twirpx.com /file/239219/

[20] Кримінальний кодекс Китайської Народної Республіки / Переклад на українську мову – А. О. Воінова, В. С. Станіч / під ред. Коротюк О. В., К.: ОВК, 2021. 196 с.

[21] Кримінальний кодекс Франції (на 1 липня 2000) URL: https://yurist-online.org/laws/foreign/criminalcode_fr/_doc-5-.pdf

[22] Ковтун О.О. Компаративістичні аспекти вбивства матір'ю своєї новонародженої дитини деяких зарубіжних держав. // Актуальні проблеми сучасної юридичної науки та практики. Випуск 2: матеріали круглого столу (м. Київ, 7 жовтня 2021 року), Київ, Видавництво Ліра-К, 2021. С.68-73.

[23] Станевич В.С. Кримінальний кодекс Королівства Іспанія / під ред. В.Л. Менчинського. Переклад на укр. мову О.В. Лішевської. К. : ОВК, 2016. 244 с.

[24] Кримінальний кодекс Народної Республіки Болгарія. URL: https://books.google.bg/books/ about/%D0%A3%D0%B3%D0%BE%D0%BB%D0%BE%D0%B2%D0%BD%D1%8B%D0%B9_%D0%BA%D0%BE%D0%B4%D0%B5%D0%BA%D1%81_%D0%9D%D0%B0%D1%80%D0%BE.html?id=gsY0AQAAIAAJ&redir_esc=y

qui réglemente au niveau législatif les questions qui prévoient la mise en œuvre d'un certain nombre de mesures visant à conseiller les femmes enceintes qui se trouvent dans une situation de conflit grave et ont besoin d'un soutien social. Renforcer également la responsabilité pour les crimes visant à ôter la vie à un enfant.

En analysant le projet de Code pénal ukrainien, nous sommes arrivés à la conclusion générale que le début de la vie d'une personne n'est pas établi à partir du moment de sa naissance physique, mais bien avant. Cette conclusion est confirmée par un certain nombre de normes de pays étrangers, même dans ceux où le meurtre d'un nouveau-né constitue un crime privilégié.

Par conséquent, l'analyse juridique comparée des normes de la législation pénale des pays étrangers dans lesquels la responsabilité du meurtre d'un enfant est prévue nous permet d'actualiser des questions qui, à notre avis, deviendront la base de recherches scientifiques ultérieures et d'amélioration de la législation et améliorera donc les activités des organes judiciaires, d'enquête et autres, ce qui conduira généralement à une amélioration de la protection des droits de l'homme.

Mots-clés : infanticide, avortement, vie d'enfant, responsabilité pénale.

Oleksandr Kovtun

LEBENSSCHUTZ VON KINDERN: PERSPEKTIVEN ZUR VERBESSERUNG DER GESETZGEBUNG DER UKRAINE

Auf der Grundlage der Analyse sowohl wissenschaftlicher Arbeiten, die sich mit der Problematik der Tötung ihres neugeborenen Kindes durch eine Mutter befassen, als auch bestimmter Normen der Strafgesetzgebung ausländischer Staaten, die auf den Schutz des Lebens des Kindes abzielen, wurden eine Reihe neuer Erkenntnisse gewonnen die es ermöglichen, eine Reihe von Maßnahmen zum Schutz des Lebens des Kindes zu entwickeln.

Wie die Analyse ergab, wurden in den letzten Jahren eine Reihe von Veröffentlichungen veröffentlicht, die speziell auf die Verbesserung der Strafgesetzgebung abzielten, darunter Artikel 117 des Strafgesetzbuchs der Ukraine, darunter: „Strafrechtliche Verantwortung für die Ermordung eines Neugeborenen: ein

certain groups: those that have a separate privileged type of intentional murder — the murder of a mother of her newborn child (Austria, Bulgaria, Latvia, the Netherlands, Switzerland, Sweden), those that do not contain this privileged part of the crime, namely the states that had historical experience of applying the norm that provided responsibility for infanticide, changed the criminal law assessment of the analyzed crime, abandoned the special norm on infanticide and transferred it from a privileged one to a simple or even a qualified type of murder (Germany, Spain, France, Denmark, Hungary).

An example is the French Criminal Code, where the murder of a newborn and the mother's responsibility for its commission are placed on par with other types of qualified murder against certain groups of victims.

In Denmark, there is no privileged composition of murder. In Chapter 25 "Violent Crimes Against the Person", § 237 states that "any person who kills another person is guilty of murder and may be liable to imprisonment for any term ranging from five years to the rest of life"[25].

There are states in which abortion is recognized as infanticide (Vatican, Malta, Nicaragua, Philippines, Poland). That is, in these countries, criminal responsibility is imposed for "intrauterine murder", namely the killing of a child who is in the mother's womb. Thus, we can state that there are two types of responsibility for infanticide. Killing a child that is in the mother's womb ("intrauterine murder") and killing after its birth.

But along with criminal liability for intrauterine murder, there is liability for the qualified murder of close relatives, both one's own and male (female) relatives on the descending or ascending line (Philippines, Japan, Argentina, Colombia).

There is also criminal liability for leaving in danger, but this provision is not entirely clear in Japan, where it is not specified that such persons are children.

However, as the analysis has shown, in some countries, such as Israel, there is a clear definition of the age to which a newborn child belongs, which is 12 months. However, this circumstance may not be taken into account by the court, which may qualify these actions as premeditated murder or concealment of childbirth, or declare a person insane in accordance with Article 19 of the Israeli Criminal Law[26].

In the Brazilian Criminal Code, in the section "Crimes against life" in Article 121 § 4, the objects of this criminal offense are persons under 14 years of age and over 60 years[27].

Article 117 of the Criminal Code of Ukraine states "Intentional murder by a mother of her newborn child during childbirth or immediately after childbirth" [28] does not fully take into account the current needs of legal practice, because there are at least three criteria for determining the certainty of newborn, and judicial practice follows the path of not taking the medical criterion, which is also subdivided into types, as a basis, but sets this period at 24 hours. According to doctors, the beginning of life is considered to be the beginning of physical labor, when the fetus is completely separated from the mother's body and the umbilical cord is disconnected. Death is the moment of physiological death, when, as a result of complete cardiac arrest and cessation of oxygen supply to cells, an irreversible process of decay of cells of the central nervous system and brain death occurs. The second point of view on the question of life's beginning is that the beginning of human existence

[25] Кримінальний Кодекс Данії. URL: https://www.twirpx.com /file/239219/

[26] Закон об уголовном праве Израиля / Предисл., пер. с иврита: магистр права (LL M) М. Дорфман; науч. ред. канд. юрид. наук Н. И. Мацнев. СПб.: Изд-во Р. Асланова «Юридический центр Пресс», 2005. 412 с.

[27] Кримінальний кодекс Бразилії (Derekto-Lei №2.848 від 01.12.1940). URL:https://www.wipo.int/wipolex/ru/text/332216

[28] Кримінальний кодекс України. Науково-практичний коментар : у 2-х томах/за заг. ред. В.Я. Тація, В.П. Пшонки, В.І. Борисова, В.І. Тютюгіна. 5–те вид., допов. Х.: Право, 2013. С.47.

is considered to be the moment of its complete separation from the womb (this opinion was expressed by M. D. Sharhorodskyi)[29]. In other words, the beginning of a person's life is the beginning of physical childbirth, including premature and artificial birth. The position of identifying the beginning of human life with the beginning of breathing leads to dubious questions: the question of the moment of the beginning of criminal legal protection of human life and the question of the medical criteria for the child's viability. The answer to the first of these is the basis for criminal liability of persons guilty of killing a child during the period of its birth, while the solution to the second question depends only on the qualification of the act as a completed crime or only an attempt. Therefore, we propose to supplement the Criminal Code with a new Article, namely 117-1 "The Moment of Conditional Beginning of Human Life and Death" and to set it out in the following wording: "1. From the moment a living newborn is completely separated from the womb, it is considered a human being, regardless of whether the newborn is breathing or not, whether it has blood circulation or not, and whether the umbilical cord is cut or not.

2. Death is considered as an action or omission related to the death of another person, even if these actions were not the sole cause of their death, namely, committed by causing physical harm to the victim's health that caused the death of a person or leaving a person in danger, as a result of which the person died".

Regarding 117 Article of the Criminal Code of Ukraine, taking into account all existing practices, this norm must be set out in the following version: "Murder by the mother of her newborn child both during the birth and the following period, committed in the conditions of a psycho-traumatic situation or a psychological disorder of the health of the mother, not excluding sanity, but no later than 28 days from the moment of birth — is punishable by imprisonment for a term of 5 to 6 years.

The same acts committed repeatedly, with particular cruelty, or the murder of two or more newborn children are punishable by imprisonment from 6 to 10 years.

A surrogate mother who is not a mother by law, but is recognized as the subject of this offense upon the birth of a child".

The idea arises that in addition to the guilt of the person in the act, there is also the "guilt" of other factors of influence. One of these factors is a social nature, which leads to a personal conflict, at the end of which we see violence against another person, which sooner or later will lead to its external manifestation, namely, violence against another person.

In order to ensure a more effective protection of the child's life, we propose to make additions to Article 134, namely: to include paragraph 6 in the following wording: "A man who knows that a woman has become pregnant by him, plans some crime against the fetus or life of a child, or who endangers his life does not take any action to prevent the crime, shall be punished in the form of restriction of freedom for a term of up to 3 years".

Taking into account the experience of protecting the child's life in foreign countries, it is necessary to remember that it is not necessary to act by prohibitions, but by persuasion. Therefore, in Europe, psychologists and social workers work with women, and in some countries, this issue is regulated at the legislative level. An example is the German criminal law, namely § 219 "Counseling of pregnant women in difficult and conflict situations"[30]. We propose that the state take measures to prevent the killing of unborn children at the legislative level. We propose to add to the Criminal Code of Ukraine

rechtsvergleichender Aspekt." " (Musychenko O.M.Verbytskyi O.S., 2019), „Aktuelle Probleme der Qualifikation der Mutter ihres neugeborenen Kindes" (Zhmur Y.M., Hotsulyak O.O., 2020), Vorsätzlicher Mord an der Mutter ihres neugeborenen Kindes: umstrittene Fragen der Qualifikation. Marisyuk K. Druk S., 2020).

Allerdings blieben viele Probleme ungelöst, vor allem hinsichtlich der Qualifikationsmerkmale, des Zeitpunkts der Bestimmung des Lebensbeginns eines Kindes, der Altersgrenze, ab der die strafrechtliche Verantwortlichkeit für diese Art von Straftat beginnt, und anderen Fragen.

Vorbeugende Maßnahmen, die die Ermordung von Kindern verhindern, sind die wichtigste Richtung, da dies der am stärksten gefährdete Teil der Menschen ist. Da das Leben eines Menschen, einschließlich des ungeborenen und neugeborenen Kindes, durch das Normensystem des Strafrechts verwirklicht wird, halten wir es für notwendig, auf der Grundlage der untersuchten ausländischen Rechtsvorschriften einen Komplex normativer Rechtsakte zu entwickeln, der die Umsetzung ermöglicht das Leben des Kindes angemessen zu schützen und alle Personen vor Gericht zu stellen, die zur Begehung dieser Art von Straftaten beitragen oder die Mutter zur Begehung krimineller Handlungen ermutigen.

Unter Berücksichtigung der Erfahrung, das Leben eines Kindes im Ausland zu schützen, muss man bedenken, dass der wirksame Weg nicht der Weg von Verboten, sondern der Weg der Überzeugung ist. Natürlich spielt Überzeugung eine große Rolle im Leben eines Menschen, aber sie ist nicht immer effektiv. Wie die Praxis zeigt, wird eine Frau, wenn sie beschließt, auch nur ein ungeborenes Kind loszuwerden, dies aktiv tun, sowohl während der Schwangerschaft als auch nach der Geburt. Solche Frauen werden alles tun, um ihr neugeborenes Kind loszuwerden. Daher halten wir es für notwendig, die deutsche Gesetzgebung zu berücksichtigen, die auf Gesetzesebene Fragen regelt, die die Umsetzung einer Reihe von Maßnahmen zur Beratung schwangerer Frauen vorsehen, die sich in einer ernsthaften Konfliktsituation befinden und soziale Unterstützung benötigen. Stärken Sie außerdem die Verantwortung für Straftaten, die darauf abzielen, einem Kind das Leben zu nehmen.

[29] Шаргородський М. Злочини проти особи.
URL: URL: ttps://library.nlu.edu.ua/POLN_TEXT/KNIGI-013/SHargorodskiy_1947.pdf

[30] Уголовное уложение Федеративной Республики Германия Strafgesetzbuch (StGB) URL : https://www.unipotsdam.de/fileadmin/projects/lshellmann/Forschungsstelle_Russisches_Recht/Neuauflage_der_kommentierten_StGB-%C3%9Cbersetzung_von_Pavel_Golovnenkov.pdf

Bei der Analyse des Entwurfs des Strafgesetzbuches der Ukraine kamen wir zu dem allgemeinen Schluss, dass der Beginn des Lebens eines Menschen nicht mit seiner körperlichen Geburt beginnt, sondern viel früher. Diese Schlussfolgerung wird durch eine Reihe von Normen im Ausland bestätigt, auch in solchen, in denen die Tötung eines Neugeborenen ein privilegiertes Verbrechen ist.

Daher ermöglicht uns die rechtsvergleichende Analyse der Normen der Strafgesetzgebung ausländischer Staaten, in denen die Verantwortung für die Tötung eines Kindes vorgesehen ist, die Aktualisierung von Fragen, die unserer Meinung nach die Grundlage für weitere wissenschaftliche Forschung und Verbesserung bilden werden die Gesetzgebung und wird daher die Aktivitäten von Justiz-, Ermittlungs- und anderen Stellen verbessern, was im Allgemeinen zu einer Verbesserung des Schutzes der Menschenrechte führen wird.

Schlüsselwörter: Kindsmord, Abtreibung, Kinderleben, strafrechtliche Verantwortlichkeit.

Oleksandr Kovtun

OCHRONA ŻYCIA DZIECKA: PERSPEKTYWY POPRAWY PRAWODAWSTWA UKRAINY

Na podstawie analizy zarówno prac naukowych poświęconych problematyce zabójstwa matki przez nowo narodzone dziecko, jak i niektórych norm ustawodawstwa karnego obcych krajów, mających na celu ochronę życia dziecka, uzyskano szereg nowej wiedzy które pozwalają na opracowanie zestawu środków mających na celu ochronę życia dziecka.

Jak wykazała analiza, w ostatnich latach opublikowano szereg publikacji mających na celu konkretnie poprawę ustawodawstwa karnego, a wśród nich art. 117 Kodeksu karnego Ukrainy, a wśród nich: „Odpowiedzialność karna za zabójstwo noworodka: porównawczy aspekt prawny ” (Musychenko O.M.Verbytskyi O.S., 2019), „Rzeczywiste problemy kwalifikacji matki jej nowo narodzonego dziecka” (Zhmur Y.M., Hotsulyak O.O., 2020), Umyślne zabójstwo matki jej nowo narodzonego dziecka: kontrowersyjne kwestie kwalifikacji. Marisyuk K. Druk S., 2020).

Nierozwiązanych pozostało jednak wiele problemów, przede wszystkim dotyczących cech kwalifikacyjnych, momentu ustalenia początku życia

Art. 134-1 “Counseling of a pregnant woman in a difficult or conflict situation and to state this provision in the following wording”: “We propose to add to the Criminal Code of Ukraine Article 134-1 Counseling of a pregnant woman in a difficult or conflict situation and to state this provision in the following wording: “Counseling is carried out to protect unborn life, its task should be aimed at explaining the prospects of the life with a child and the consequences that may arise as a result of artificial termination of pregnancy”. Consultations should help resolve conflicts arising from pregnancy and other issues related to the preservation of the life of the unborn child. Such consultations are held in medical institutions with the presence of a psychologist, after which a certificate is issued, without which an abortion cannot be performed. If a doctor performs an abortion without a certificate, he or she shall be punished by imprisonment for up to 3 years and deprived of the right to engage in professional activities for the same period”.

As we have already noted above, the norms related to the murder of a child: Art. 117 Murder by a mother of her newborn child during childbirth or immediately after childbirth[31], Art. 135 Leaving in danger, where in part 2 “.... actions committed by a mother against a newborn child, if the mother was not in a condition caused by childbirth”, and part 3 provides for “.... as a result of these actions causing death or other serious consequences”[32]. Even in this case, it is unclear why the evaluative concept of “grave consequences” is placed after death, which can be more serious than death. As well as Art. 134 Illegal abortion, i.e. artificial termination of pregnancy by means of unauthorized interference with a woman’s body[33]. That is, active actions are aimed at terminating a pregnancy by a person who does not have a medical education. Abortion is allowed in our country, in the comments we come across the evaluative term “under certain conditions”[34], however, this condition is not specified, there are known cases when, for selfish reasons, doctors suggest an abortion when a woman is in the 7th month of pregnancy. At most, if a person files a complaint and proves his or her guilt to the doctor, namely, for actions that result in a long-term health disorder, the person will be held liable. At the same time, we have advertisements for induced abortion at different stages (terms) of pregnancy, so we believe that this is unacceptable and may provoke a woman in labor to terminate her pregnancy, so we propose to use the experience of Germany to introduce a rule prohibiting campaigning for abortion. We propose the following wording: Article 134-2 “Campaigning for the termination of pregnancy”: “Anyone who publicly, through the use of mass media, social networks or in any other open way, for their own benefit, offers, advertises, imposes institutions that carry out or facilitate artificial termination of pregnancy or means, objects or methods by which pregnancy is terminated, shall be punished by restraint of liberty for up to 3 years or imprisonment for the same term”. Appropriately to foresee and regulate the sale of drugs that cause artificial termination of pregnancy.

But there are norms in which the consequences of criminal actions are the death of a child: Article 136 “Failure to provide assistance to a person who is in a life-threatening condition” where part 2 indicates failure to provide assistance to a minor who is known to be in a life-threatening condition, if possible to provide such assistance or failure to report such a condition of the child to the appropriate institutions or persons...”, in part 3 of the actions provided for by parts one or two of this article, if they caused the death of the victim....”[35]; Art. 137 “Improper performance of duties to protect the life

[31] Кримінальний кодекс України. Науково-практичний коментар : у 2-х томах/за заг. ред. В.Я. Тація, В.П. Пшонки, В.І. Борисова, В.І. Тютюгіна. 5–те вид., допов. Х.: Право, 2013. С.47.

[32] Там само. С. 87.

[33] Там само. С. 47.

[34] Там само. С. 85.

[35] Там само. С. 89.

and health of children" in part 2 states that such actions result in the death of a minor[36]. Most likely, the liability of the subjects of liability needs to be significantly increased, especially if the doctor's selfish motive is established.

Conclusions: Summarizing, we can come to a number of conclusions: based on these definitions, we can state that "infanticide" is the deprivation of a human life. In the Criminal Code of Ukraine, such norms include the following Articles and Parts: Art. 115, part 2, clause 2 "…murder of a minor child or a pregnant woman"; Art. 117 "…murder by the mother of her newborn child"; Art. 121, part 1 "Intentional serious bodily injury resulting in termination of pregnancy"; Art. 135 "Leaving in danger"; Art. 134 "Illegal abortion, i.e. artificial termination of pregnancy through external intervention in the woman's body, in which the consequences of criminal actions are the death of the child"; Art. 136 Failure to provide assistance to a person who is in a life-threatening condition", where in part 3 the actions are provided for by parts one or two of this article if they caused the death of the victim…", Art. 137 "Improper performance of duties regarding the protection of children's life and health", in part 2 states that the death of a minor occurs as a result of such actions. The killing of a newborn child is the deprivation of life by the mother of the infant. Although we believe that this definition of the concept needs to be expanded.

Since the analysis showed that the time period that determines the time of a child's birth in some countries begins with 72 hours, and in some, it is 12 months, and in most normative legal acts this is not defined at all, therefore we believe that the formalization of the time criterion, namely the beginning of the child's birth and its death is expedient to define in the legal norms. In addition, the existence of medical and forensic criteria introduces some confusion in law enforcement practice. We offer revisions of the relevant norms, which have been cited above. As we can see, many countries, including Ukraine, only regulate legal relations regarding surrogacy at a surface level leading to issues with the functioning of this institution. Therefore, it is urgent to make appropriate amendments to certain regulatory documents, taking into account the Universal Declaration of Human Rights[37], since the relationship between the parties to the contract is rather formal, and there are no proper tools to protect the rights of both the parties to this process and the child. Therefore, a surrogate mother should be recognized as a subject of a crime that provides for liability under Article 117 of the Criminal Code of Ukraine. Genetic engineering does not stand still and there are already cases when a man gave birth to a child[38], so what to do in such cases, of course, physiologically it is a woman, but legally it is a man. Thus, it is crucial to address this emerging issue.

Euthanasia is a topic of growing discussion in scientific literature that has received attention since the turn of the 21st century. Several countries, including Belgium, Luxembourg, the Netherlands, Portugal, Switzerland, Germany, and Spain[39], have already established some degree of regulation regarding this issue. However, in our view, these regulations only partially address the concerns, particularly with regard to individuals of full age. Euthanasia for newborns suffering from severe illness, incurable diseases, and unbearable pain may be permitted upon request from parents with

dziecka, granicy wieku, od której rozpoczyna się odpowiedzialność karna za tego rodzaju przestępstwo, i innych kwestii.

Najważniejszym kierunkiem są działania profilaktyczne, które zapobiegną mordowaniu dzieci, ponieważ jest to najbardziej bezbronna część człowieka. Ponieważ życie człowieka, w tym nienarodzonego i noworodka, realizowane jest poprzez system norm prawa karnego, uważamy za konieczne opracowanie na podstawie zbadanego ustawodawstwa zagranicznego zespołu normatywnych aktów prawnych, które pozwolą na wdrożenie należytą ochronę życia dziecka i pociągnięcie do odpowiedzialności wszystkich osób, które przyczyniają się do popełnienia tego typu przestępstw lub namawiają matkę do popełniania czynów przestępczych.

Biorąc pod uwagę doświadczenia ochrony życia dziecka za granicą, należy pamiętać, że skutecznym sposobem nie jest metoda zakazu, ale metoda perswazji. Oczywiście przekonanie odgrywa dużą rolę w życiu człowieka, ale nie zawsze jest skuteczne. Jak pokazuje praktyka, jeśli kobieta zdecyduje się pozbyć nawet nienarodzonego dziecka, będzie to aktywnie robić zarówno w czasie ciąży, jak i po porodzie. Takie kobiety zrobią wszystko, co w ich mocy, aby pozbyć się nowo narodzonego dziecka.Dlatego też uważamy za konieczne uwzględnienie ustawodawstwa niemieckiego, które na poziomie legislacyjnym reguluje kwestie przewidujące wdrożenie szeregu działań mających na celu poradnictwo dla kobiet w ciąży, które znajdują się w poważnej sytuacji konfliktowej i potrzebują wsparcia społecznego. Wzmocnić także odpowiedzialność za przestępstwa mające na celu odebranie życia dziecku.

Analizując projekt Kodeksu karnego Ukrainy, doszliśmy do ogólnego wniosku, że początek życia człowieka nie wyznacza się od chwili jego fizycznych narodzin, ale znacznie wcześniej. Wniosek ten potwierdzają szereg norm obcych krajów, nawet tych, w których zabicie noworodka jest przestępstwem uprzywilejowanym.

Dlatego też porównawcza analiza prawna norm ustawodawstwa karnego obcych państw, w których przewidziana jest odpowiedzialność za odebranie życia dziecku, pozwala na aktualizację zagadnień, które w naszej ocenie staną się podstawą do dalszych badań naukowych i doskonalenia ustawodawstwa, a tym samym usprawni

[36] Там само. С. 90.

[37] Загальна декларація прав людини. Прийнята і проголошена резолюцією 217 А (III) Генеральної Асамблеї ООН від 10 грудня 1948 року. URL: https://zakon.rada.gov.ua/laws/show/995_015#Text

[38] У Фінляндії чоловік вперше народив дитину. Європейська правда. Міжнародна безпека та євроінтеграція України. URL: https://www.eurointegration.com.ua/news/2018/04/5/7079983/

[39] Іспанія стала шостою країною яка легалізувала евтаназію. URL: https://www.radiosvoboda.org/a/news-evtanaziya-ispaniya-zakon/31158124.html

działalność organów sądowych, dochodzeniowych i innych, co ogólnie doprowadzi do poprawy ochrony praw człowieka.

Słowa kluczowe: dzieciobójstwo, aborcja, życie dziecka, odpowiedzialność karna.

medical assistance. In cases where bureaucratic procedures cause delay, a mother may choose to end the life of her newborn to alleviate its suffering.

Ukrainian law lacks clarity regarding the specific time frame when a mother may be charged with the murder of her newborn child, which is currently stated as "immediately after childbirth". However, the analysis of the draft Criminal Code of Ukraine reveals that criminal law scholars are aiming to incorporate the question of the beginning of human life into the elements of infanticide, instead of focusing solely on the concept of "human life". It is in Art. 4.1.11. Causing the death of a human fetus is stated: "A person who causes the death of a human fetus after the beginning of the 22nd week of pregnancy commits a crime of the 7th degree"[40]. The draft Criminal Code of Ukraine makes significant changes to the regulation of murder and the overall concept of this crime, affecting both the responsibility for committing it and the associated penalties. However, we believe that the new approach presents several issues that may complicate both the qualification of these actions and the imposition of punishment. Therefore, we propose discussing a set of measures that guarantee safeguarding the lives of both fetuses and infants in the existing criminal law.

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Kryminalnyi kodeks Hruzii vid 22 lypnia 1999 r. № 2287-vs (z posliduiuchymy zminamy ta dopovnenniamy) / Zakonodavchyi visnyk Hruzii. URL: https://matsne.gov.ge/ka/document/download/16426/143/ru/pdf

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[40] Текст проекту Кримінального кодексу України URL: https://newcriminalcode.org.ua/criminal-code

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