

THE PROBLEM OF DETERMINING THE LEGAL STATUS OF THE FETUS AS A PATIENT

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ABSTRACT

The question of the legal status of a person before birth remains unresolved in both international and Russian law. The existing literature is mainly devoted to the right of an embryo to life. The authors hold different points of view – from the complete denial of a personality during the pre-natal period to the recognition of the absolute right to life of the embryos from the moment of their conception. However, at the moment, taking into account the development of medical science, the problem of determining the legal status of unborn patients (in medical science - "fetus") regarding which medical intervention is being undertaken, becomes topical. Medical care (services) can be provided to the patient during the intrauterine period of development and the delivery period in the form of medicinal support, surgical interventions, diagnostic manipulation. Such a medical intervention can also lead to damage to the health of the fetus, especially during the labor period. In this paper, we proposed two positions regarding the legal status of the fetus based on a comparative analysis of Russian and foreign legislation, international acts and court decisions. The first position suggests that the fetus should be given the independent legal status of the patient to protect its rights. The second in turn gives the status of a patient of a pregnant woman to the fetus as part of the mother's body.

Keywords: Embryo, fetus, right to life and health, legal status of the patient.

INTRODUCTION

The problem of the legal status of the fetus and the embryo is mainly related to the decision of the question about the moment of the emergence of the civil legal personality – either from the birth or from the moment of conception. Even the Roman law knew the principle: *Nasciturus pro iam nato habetur, quotiens de commodis eius agitur* ("A conceived child is deemed born if it is about its benefit").

The literature mainly focuses attention on the study of the legal status of the embryo and fetus from the point of view of the right to life (the permissibility of abortion, the destruction of embryos conceived in vitro) and the moral and ethical aspects (carrying out embryo research) [1, 2, 3, 4, 5, 6, 7].

However, little attention is paid to such aspect of the legal status of the embryo and fetus as providing it with medical care.

Based on the provisions of the Declaration of the Rights of the Child (1959), a child before his/her birth has not only the right to life, but also the right to health and its protection, that is, medical care. The level of modern medical science makes it possible to provide medical care to the unborn child, to heal the child and prevent diseases at the stage of pregnancy. This field of medicine is called "fetal medicine", that is, the medicine of the fetus. Advances in fetal surgery show that doctors do not wait for birth to begin treatment [8]. Whereas, with regard to the fact that the fetus undergoes medical intervention, which can lead to negative results for both the fetus and the woman, it is necessary to ensure the proper legal protection of the unborn child, equal to that of the born one [9].

METHODS

When does a human life begin? Since when should it be protected? The views of modern scholars on this subject are as different as the views of philosophers and theologians of different faiths. Someone believes that the human embryo and the fetus do not have any value, and that before their birth the child is something abstract and therefore can be arbitrarily deprived of life at any time before the birth. Another view recognizes the emergence of the right to life in the embryo from the moment of its implantation into the uterus, according to this opinion, human embryos can be disposed of before the onset of pregnancy. Others believe that the right to life of an embryo arises when a certain level of development is reached (the beginning of the brain functioning, the development of the respiratory system), at a certain period of pregnancy, or at the achievement of at least relative viability.

The Declaration of the Rights of the Child adopted by the UN General Assembly Resolution 1386 (XIV) of November 20, 1959 states that the child needs special protection and care, including adequate legal protection, both before and after birth. Also, according to the fourth principle, "a child must enjoy the benefits of social security. He/she must have the right to healthy growth and development; for this purpose, special care and protection must be provided to him/her and his/her mother, including proper prenatal and postnatal care."

American Convention on Human Rights, 1969, indicates that everyone has the right to respect for his/her life, which is protected by law from the moment of conception.

The United Nations Convention on the Rights of the Child (1989) defines that "a child is every human being before reaching the age of 18". In addition, she repeats the formulation of the Declaration of the Rights of the child on the right of the child to safety, care and legal protection before his/her birth.

The Council of Europe Convention on Human Rights and Biomedicine (1997), declares that: "1. In cases where the law permits in vitro studies on embryos, it must provide adequate protection for embryos. 2. The creation of human embryos for research purposes is prohibited."

The World Medical Association in 1987 adopted the Statement on In-Vitro Fertilization and Embryo Transplantation, which calls on all doctors to act ethically, with due respect to the embryo since the moment of its conception.

Similar regulations that protect the child's right to life are enshrined in the constitutions of a number of states and specified in national legislation at lower levels. For example, in the United States, a child is defined as an individual under the age of 19, including the period from conception to birth. Thus, even unborn children are considered to be citizens who have the right to health insurance and medical care.

For example, the Constitution of the Slovak Republic in Art. 15 proclaims: "Human life is worthy of protection even before birth." Article 6 of the Constitution of the Czech Republic contains a similar expression. Article 40 of the Constitution of Ireland declares: "The state recognizes the right of the unborn to life..."

Germany has an operating principle: a person's life begins from the moment of fertilization. In connection with the reform of the Health Care Code in France in January 2000, it was proclaimed that the life of a human being must be protected from the moment of its first signs of manifestation [10].

The courts of Great Britain are also concerned about the embryo's status and strive to make the latter as an individual. A proof can be the tendency to establish responsibility for causing harm to the embryo through negligence, disputes on the recognition of the embryo as defendant in court (Re F (in utero), D (a minor) v

Berkshire County Council), and litigation regarding the existence of absolute interests in the embryo (Re A C) [11]. In the Scottish Road Traffic Act 1972, the embryo is recognized as a legal person.

In Australia, the principle is that the embryo has the right to file a claim for compensation for harm caused to it through negligence during the period of its pre-natal development. The California law establishes the responsibility for killing an embryo. In 1988 the court of Tennessee decided the following in the dispute of Davis v. Davis:

- human life begins from the moment of conception;
- embryo tissue possesses such qualities as individuality, uniqueness and the ability to development;
- a human embryo is not an item of property [12].

Thus, an important precedent in legal practice was established: the human embryo cannot be an item of property, since it represents the beginning of a new human life. Embryos cannot be a part of the general division of property of spouses, and they are not subject to general rules on the division of property.

Hence, it is recognized at the international level that the child is entitled to rights, including the right to protection before his/her birth [13].

Part 2 of Article 17 of the Constitution of the Russian Federation proclaims that fundamental human rights and freedoms are inalienable and are rested in everyone from birth, thus the Basic Law of the state denies the existence of a legal personality before the birth of a person. Birth is defined as the moment of separation of the fetus from the mother through delivery. Apparently, the Russian Constitution has turned back from these provisions of the Declaration and other international acts.

However, some rights are recognized for the child even before his/her birth in the Russian legislation too.

According to paragraph 1 of Art. 1116 of the Civil Code of the Russian Federation, citizens who were conceived during the life of the testator and born alive after the commencement of succession may be called for inheritance.

Art. 56 of the federal law "On the fundamentals of protecting the health of the citizens" limits the possibility of artificial termination of pregnancy by the gestation period. Thus, at the request of the woman, an artificial termination of pregnancy is carried out only at the gestational age of up to 12 weeks, and at a later time pregnancy can be terminated only on special grounds: social – at the gestation period up to 22 weeks, medical – regardless of the gestation period.

Federal Law No. 125-FZ of 24.07.1998 "On Compulsory Social Insurance Against Occupational Accidents and Occupational Diseases" stipulates the right of children conceived during the life of the victim to insurance benefits.

Federal Law No. 4180-1 of 22.12.1992 "On Transplantation of Human Organs and/or Tissues" does not apply to human embryos, thereby indirectly confirming that the embryo (fetus) is not part of the maternal organism.

The Labor Code of the Russian Federation establishes special rules for working pregnant women in order to preserve the health of the mother and her child, prevent the negative impact of unfavorable working conditions on the health of the fetus. For example, Article 254 provides that, on application from a pregnant woman who has an appropriate medical report, productivity and performance standards are to be

lowered, or she may be transferred to other, non-hazardous work, while retaining the average wage from her previous work.

In the Criminal Code of the Russian Federation, the pregnancy of a woman in respect of which a criminal act is committed, is an aggravating circumstance and entails an increased responsibility of the offender, since the object of such infringement is not only the life and health of the woman, but the life and health of her unborn child [14, 15]. Termination of pregnancy as a result of a criminal act is considered causing serious harm to health.

Thus, the Russian legislation, although it does not recognize the embryo (fetus) as an independent legal personality, still has legal norms ensuring the recognition and protection of certain property rights, as well as the life and health of unborn children in individual cases.

RESULTS AND DISCUSSION

However, despite the above, Russian legislation does not provide for proper legal regulation in cases of medical assistance in relation to the embryo (fetus).

Medical assistance is provided to the fetus at two stages – in the prenatal state (during the pregnancy of its mother) and during the delivery (until the complete expulsion of the fetus from the mother's body the person is considered unborn).

In the prenatal state, medical assistance is provided in the following areas: diagnosis of the fetus, prevention of complications and fetal diseases, treatment of the fetus.

Diagnosis is performed using various methods, which can be classified as non-invasive for the fetus (ultrasound, blood tests) and invasive (chorionic biopsy, amniocentesis, cordocentesis, as they increase the risk of complications).

Prevention of complications and fetal diseases in a broad sense can be described as a whole system of measures aimed at preparing a woman and a man for pregnancy (complete diagnosis of both future parents, treatment of existing diseases, intake of vitamin and mineral complexes, etc.) and ensuring a certain mode of life for a pregnant woman (safe working conditions, adequate nutrition, sleep and rest, medical care, etc.). In the narrow sense, this is the rendering of medical services to prevent the existing threat of a particular disease.

Such actions are performed to prevent Rhesus-sensitization (Rhesus conflict) and hemolytic disease in the fetus (after the birth of the newborn): at 28 weeks of gestation, all unimmunized pregnant women with Rh-negative blood, provided that the fetus' father is Rh-positive, should receive preventive 300 µg of human immunoglobulin anti-rhesus Rho[D]. Also during the intrauterine period and during labor (and immediately afterwards), prevention of mother-to-child transmission of HIV infection is carried out.

Fetal treatment is carried out by two methods: medicinal and invasive. The medicinal method of treatment is used to accelerate the development of the lungs, correct fetal heart failure or prolong pregnancy (if there is a fear that the child may be born before week 34). Medicines can be taken by the mother or administered by the cordocentesis method directly into the umbilical cord. This method is also used to improve the fetal condition during hypoxia and intrauterine growth retardation by taking appropriate medications. Intrauterine infections are mainly treated after the birth of the fetus (in the newborn period).

Invasive methods of fetal treatment refer to the section of fetal surgery and are high-tech medical care. Fetal surgery treats diseases that can be and are best eliminated during pregnancy (in the prenatal state). The same diseases (defects) that cannot be eliminated before birth or do not affect the fetus (do not lead to

death or disability after childbirth) are treated after the birth of the fetus (immediately after birth or electively). The diseases, eliminated by means of fetal surgery, are as follows:

1. Problems with the brain – hydrocephalus, Dandy-Walker syndrome;
2. Intra-uterine growth retardation, grade I-III;
3. Spina bifida defect (defect of the vertebral spines, where there is incomplete close of the spinal cord by the bone plate);
4. Congenital cardiac defects – various hypoplasia (underdevelopment), stenosis (constriction), atresia (underdevelopment) of the aortic orifice;
5. Lung malformations – hypoplasia of the pulmonary valve, edematous syndrome (fluid in the lungs);
6. Congenital diaphragmatic hernia (aperture in the diaphragm, which leads to the transfer of the abdominal organs into the thoracic cavity);
7. Cysts;
8. Malformations of the genitourinary system;
9. Isoimmune diseases (incompatibility of maternal and fetal blood groups, including hemolytic disease);
10. Blood diseases – anemia of different genesis;
11. Feto-fetal transfusion syndrome, which occurs in multiple pregnancies, when one of the embryos becomes a "donor" for the second, which leads to the retarded development, neurological problems and often (70% of cases) to premature death of both fetuses.

The listed diseases are eliminated in various ways: by blood transfusion through the umbilical cord of the fetus; installation of special devices such as shunts, catheters, stents, cylinders; by pumping out fluid through special needles; laser coagulation of placental vessels. All these manipulations are carried out either through an open access (with dissection of the abdominal wall and uterus), or fetoscopy (access to the organs of the fetus by means of an endoscope).

During delivery, from the onset of labor and to the complete separation of the fetus from the mother's body, the medical services are aimed at monitoring the state of the mother and the child, assisting in the delivery process, and intervening in case of various complications (from medication to operative). Often at this stage, a variety of adverse effects occurs for both the woman and her child as a result of the manipulations performed during childbirth. These can be various kinds of trauma (soft and bone tissue, internal organs, nervous system, various hemorrhages). In case of surgical interventions, various trauma from surgical instruments are added. Sometimes the injuries require immediate surgical intervention or resuscitation to save the life and health of the child.

There are also the cases in the medical practice of the so-called post-mortem Caesarean section, which is taken to save the life of the fetus, when a pregnant woman is in agony or has already died.

In addition, the practice of emergency care has a presumption of a woman's pregnancy: in the case of providing assistance to a woman of childbearing age without obvious signs of pregnancy (unconscious), the medical worker must assume that she can be pregnant and provide medical care subject to possible contraindications (for example, to choose medicines without any damaging effect on the fetus).

On the other hand, the obstetric practice uses the presumption of the priority of the life of the mother rather than the child.

Subject to the foregoing, as well as understanding that virtually any medical service in principle has the risk of causing harm by the medical intervention itself, it should be concluded that it is necessary to protect the interests of the unborn child as a patient. Especially it concerns invasive methods of diagnostics and treatment, as well as application of medical products.

On the one hand, we recognize that the medical services provided to a woman during pregnancy are aimed at helping two subjects – a woman and her child, and therefore we deal with two patients simultaneously [16].

On the other hand, the legislation does not recognize the independent legal personality of the fetus, moreover, it provides the woman with a solution to the issue of continuation (preservation) of pregnancy, thereby treating the fetus as part of the mother's body.

It should be noted that the provision of medical services to the fetus, its recognition as a patient occurs only by the decision of a pregnant woman. The realization of the fetus' right to life and health, and therefore to medical care, depends entirely on its mother. The Russian medical legislation has no legal opportunity to provide medical assistance to the fetus in addition to the consent of its mother. According to Art. 20 of the Federal Law "On the Fundamentals of Protecting the Health of Citizens" a citizen has the right to either refuse medical intervention or demand its termination.

In our opinion, it is necessary to adopt the concept according to which the fetus is a patient and has an independent legal status, and its mother (and, possibly, father) is obliged to proceed from its interests (as is manifested in relation to the born children). In this case, the fetus' parents (mother) can be obliged to accept the provision of medical care, drug therapy, etc.

Foreign practice uses such enforcement procedures. For example, in some cases, the courts ordered a cesarean section during delivery to protect the interests of the fetus, and there were also cases of bringing pregnant women to responsibility for alcohol and drug abuse [17, 18, 19].

However, such compulsion to accept medical care generates a conflict between the interests of the mother and her fetus [20].

Yet it must be emphasized that the fetus does not have autonomy [21], and the realization of its rights depends entirely on the will of its mother.

SUMMARY

Thus, there is every reason to believe that the fetus has some legal capacity, and the Russian legislator indirectly confirms this (in the Civil, Criminal, Labor Codes, the Transplantation Act, etc.). The fetus is not part of the body, the mother's body – it is genetically "alien" to the mother's body, which can even cause a rhesus-conflict. At the same time, it is quite difficult to decide on the legal status of the fetus as a patient, since the medical services rendered to it directly affect its mother's body (that is, without intervention in the mother's body, it is impossible to provide care to the fetus). From this perspective, it may be sufficient to extend the status of the pregnant woman as a patient to the fetus as part of the mother's body (as the first stage of recognizing the fetus' legal capacity). This approach, at least, will not support the tendency of fetal autonomy from the mother, which is indicated in the literature [22]. On the other hand, recognition of legal capacity for an embryo/fetus will require, as a minimum, a review of legislation on abortion.

As the fetus becomes more and more noticeable in the field of medicine and scientific research, and its status of a patient manifests itself earlier and earlier during pregnancy, it becomes increasingly difficult for the law to maintain its "invisibility" before birth [8].

This paper only attempted to briefly outline the problem of the legal status of the fetus from the point of view of giving it some legal personality. However, a lot of questions remained outside the scope of this study. In particular, it is necessary to consider the problem of competing interests of the mother and the fetus in the provision of medical care, the issues of compensation for harm caused to the fetus during medical interventions, including those not associated with providing medical care to it. Whose interests should be given priority, to what extent can the life and health of the fetus depend on the will of its mother, how much can the interests of the fetal patient suppress the autonomy of its mother? It seems that the answers to these and other questions should be carefully discussed and substantiated before they are fixed in legislative acts and/or international conventions.

ACKNOWLEDGEMENTS

The work is performed according to the Russian Government Program of Competitive Growth of Kazan Federal University.

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