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A Human Right Can Be in Conflict with one or Several Other Human Rights

Un derecho humano puede estar en conflicto con uno o varios otros derechos humanos

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ABSTRACT

The main purpose of the work is to analyze the conflicts between the rights of one person with other rights. To achieve the goal, the authors studied the prevailing norms in the legal field using the comparison method. International and regional legal documents that guarantee the right to life are characterized. It was established that the right to health care occupies a special place. It is determined that in the general complex of rights, women's rights are an integral part of it. Since almost every country does not comply with international standards related to the health of women, which leads to an increased mortality rate.

Keywords: constitutional right; ethical aspects; transplantation; second-generation rights.

RESUMEN

El propósito principal del trabajo es analizar los conflictos entre los derechos de una persona con otros derechos. Para lograr el objetivo, los autores estudiaron las normas vigentes en el campo legal utilizando el método de comparación. Se caracterizan los documentos jurídicos internacionales y regionales que garantizan el derecho a la vida. Se estableció que el derecho a la atención de la salud ocupa un lugar especial. Se determina que, en el conjunto general de derechos, los derechos de la mujer son parte integrante del mismo. Dado que casi todos los países no cumplen con las normas internacionales relativas a la salud de las mujeres, esto lleva a un aumento de la tasa de mortalidad.

Palabras Clave: derecho constitucional; aspectos éticos; trasplante; derechos de segunda generación.

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INTRODUCTION

Historically, human rights arose during certain events as a response to harassment by the state. So, at first there was a so-called “the first generation of human rights”, which today represents the civil and political rights embodied in the ICCPR. These rights are qualified as negative, as the rights to protection from any interference, including the state’s, in the realization of these rights. In turn, the second generation of human rights arose in the struggle of peoples for improving their economic life, increasing cultural status. These are so-called positive rights, for the implementation of which the organizing, planning and other forms of activity of the state are necessary to ensure these rights.

Currently, there is a correlation of these rights, since without the right to health or adequate living standards it is not possible to guarantee the right to life, and so on. However, new direction for studying the human genome, using of human embryos, euthanasia and transplantation and cloning causes the formation of a new fourth generation of human rights and, thus, generates complicated legal issues.

The main problem arises in three directions: 1) how to ensure the protection of rights of all generations that are in conflict with each other, 2) which right should receive the priority over others and 3) whether there will be a responsibility for the violation of such rights.

This and more issues led to the relevance of the proposed research.

It is therefore proposed to formulate **the research question** in the following manner:

Based on the provisions of international human rights law, how the right to life and right to health correlate with each other, to what extent these rights can enter into conflict and which obligations are imposed on States to guarantee these rights?

The research question will be addressed through the special structure of the article. In the first chapter, international legislation concerning right to life and right to health will be analyzed. Special attention is paid to analysis of the possible limitations of these rights.

The second chapter will be dedicated to the analysis of the key features of transplantation and correlation between the right to life and right to health of two recipients on the waiting-list for obtaining the transplant by focusing on controversial and obscure points.

The third paragraph explains the right of the person to die, namely the features of euthanasia and its contradiction with the right to life will be examined.

The last paragraph is devoted to characteristic of the conflict between the right to abortion and the right to life of the fetus.

METHODOLOGY

The methodology of research will pursue a multi-dimensional approach. In particular, it is proposed to depart from “black letter law” research tradition and draw upon a wider selection of views on the topic expressed by specialists in areas of human rights and the rule of law. The sources will therefore include primary sources:

- legislative sources (international, regional and national);
- case-law (the ECHR, national courts’ decisions);
- academic literature.

Conceptually, the research will rely on learning of prevailing norms in the legal field (normative approach) in combination with a comparative method. Combination of such methods will allow answering main research question which is put under the research.

The sources of knowledge on the topic can be divided into several categories.

1. Research analyzing the issues of the Bill of Rights and number of international legal instruments in the human rights sphere. From the outset it is worth mentioning that the research works on right to life are extremely old. Resources available as of today include the works starting from beginning of 20 century and totally new ones, combination of which might be a good starting point for exploring concrete problems of human rights.
2. The body of knowledge on the themes of the right to life, right to death and organ transplantation seems to be well-developed: there is, for instance, framework of universality of human rights and their equal application. Within the international organizations (both – governmental and non-governmental) in this concerned field there are numbers of recommendations, declarations, communications, that help to clarify contradictory questions.

GENERAL PROVISIONS OF THE RIGHT TO LIFE AND THE RIGHT TO HEALTH CARE

Right to life is guaranteed by number of international and regional legal instruments, namely: art. 3 of the Universal Declaration on Human Rights (UDHR), art. 6 of the International Covenant on Civil and Political Rights (ICCPR), art. 4 of the American Convention on Human Rights, art. 4 of the African Charter on Human and Peoples' Rights, art. 6 of the Convention on the Rights of the Child, art. 9 of the Convention on the Protection of the Rights of Migrant Workers and Members of their Families, art. 1 of the American Declaration of the Rights and Duties of Man, art.2 of the European Convention on Human Rights (ECHR) and in number of Protocols to these instruments (for example, Second Optional Protocol to the ICCPR aiming the abolition of the death penalty or Protocol 13 to the ECHR concerning the abolition of the death penalty in all circumstances).

Under these legally binding documents everyone has the right to life that has to be protected by law. Art. 6 of the ICCPR states that *"No one shall be arbitrarily deprived of his life"* (International Covenant on Civil and Political Rights..., 1966) However, there are some exceptions, under which the right to life can be derogated. Art. 15 of the ECHR allows to derogate from international obligations in time of emergency, and in its para.2 indicates, that *"No derogation from Article 2, except in respect of deaths resulting from lawful acts of war"*. (European Convention on Human Rights..., 1950)

The right to health care in the system of fundamental social rights occupies a special place. In recent years, interest of a human as the highest social value and especially to his personal rights increased. Human health is one of the highest values, which person can own. It is the first vital requirement, condition and integral feature of life.

According with the art. 25 of the UDHR *"...everyone has the right to a standard of living adequate to for the health and well-being of himself and his family..."* (The Universal Declaration of Human Rights..., 1948)

Article 11 of the ICESCR provides *"...the right of everyone to the enjoyment of the highest attainable standard of physical and mental health... States shall take steps that will provide creation of conditions which would assure to all medical service and medical attention in the event of sickness"*. (International Covenant on Economic..., 1966)

Similar issues are included in the art. 11 and 13 of the European Social Charter. (The European Social Charter..., 1996)

European Parliament in 1999 in its working paper "Fundamental social rights in Europe" gave the definition of it: "Fundamental social rights in this context mean rights to which the individual citizen is entitled, which he can exercise only in his relationship with other human beings as a member of a group and which can be made effective only if the State acts to safeguard the individual's environment. Social rights

are a necessary complement to civil rights and liberties, since the latter cannot be enjoyed without a minimum of social security". (Brutt *et al.*, 1999)

Take into account provisions of international treaties it can be concluded that in the sphere of health care States must take all measures to guarantee access of their citizens to the highest standard of health, to available and accessible health services of adequate quality.

Right to health care as fundamental social right of citizens can include such components as: the right to eliminate the danger to life and health, the right to protection of life and health from unlawful acts, the right to medical care, the right to information about their health status, the right to privacy on the state of health, the right to donation.

Following chapters will demonstrate how the right to life and right to health of one person may be in the conflict with each other or with the same rights of other persons.

RIGHT TO LIFE OF RECIPIENTS WAITING FOR ORGAN TRANSPLANTATION

Basic features of the transplantation

The key process in formation of transplantation as a medical science lies in its interaction with the legal sciences, the mutual influence of medicine and law. Modern law scholars draw special interest from legal questions involving transplants. These questions are primarily concerned with problems of clear definition of the concept of death, which has a direct impact on the possibility of removing an organ or tissue, problems of the complexity of surgery; and the need to avoid the possibility of rejection of the organ. The second group is formed on problems relating to providing and obtaining consent for organ removal and transplantation from both donor and recipient, as well as the patient's consent for posthumous removal of their organs for transplant, and the consent of relatives or legal representatives. Another group consists of issues of payment or charity for transplantation, along with ethical and economic aspects of it. Clearly, the need for legal regulation of organ transplants and tissues is particularly acute at the stage of clinical transplantation, when the rise of medicine and jurisprudence was grounded idea on the necessity for legal protection of all participants of transplantation: donor, recipient, and health professionals.

However, existing legislation does not meet the objective needs of patients' rights in the context of rapid scientific and technological progress and needs improvement in terms of legislative technique.

Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010 "On standards of quality and safety of human organs intended for transplantation" defines transplantation as "...a process intended to restore certain functions of the human body by transferring an organ from a donor to a recipient." (Directive 2010/45/EU)

After conduction of a study in this sphere, transplantation should be defined as a special type of medical services, which facilitates the realization of the constitutional right to protection of life and health, lies in the conduct of operations to transplant organs and tissues performed with the consent of the recipient by healthcare facility under strict state control and entails certain legal consequences for participants. For successful development and dissemination of using the transplantation as the method of treatment it is important to follow principle of respect for observance of human patient; respect for the order according to the "waiting list"; non-commercialization of organ transplants and human tissue.

Problems for ensuring recipients with transplants

One of the most crucial ethical aspects, which necessarily occur during organ transplantation is the necessity to determine the criteria of distribution of donor organs and tissues. In accordance with accepted international standards, the main criterion that affects the decisions of a doctor, is the degree of immunological compatibility of couple donor - recipient. According to this criterion organ is given not to the

person that has higher or lower social status, not because one has more or less income, but because he is more suited to immunological parameters. This approach is similar to the blood transfusion. Immunological and biological data of the person who needs an organ transplant are entered into a database, which is called "waiting list." Another criterion is the degree of severity of the recipient. This criterion applies in cases where a body suited to multiple recipients. But there is a third criterion that should be considered by the doctor in the case of allocation of an organ. It is used in cases where two organ recipients almost equally suitable, and both of them are in critical condition. In this case, the decision is made on the basis of the length of staying of the recipient in the "waiting list". Preference is given to those who previously were in the "waiting list".

It is a well-known fact that organs should be allocated due to special so called "waiting list" of the recipients. Persons that need organ for transplantation must be confident that they have equal opportunities to be tapped into the system of allocation of organs: "[i]n selecting a system of allocation, it would be wise to choose one that favored those most likely to benefit from a transplant. Rational planners [behind the veil of ignorance], ignorant as to whether or not they will ever need a transplant or retransplant, would increase their own chances of benefiting from a transplant by setting up a system that, all else equal, distributed scarce organs to those most likely to gain long-term survival from a transplant". (Williams, 2003)

However, such a distribution does not stand up to criticism, since there are cases when recipients have the same health indicators or the length of stay in the "waiting list". That is why there is a State's obligation to ensure the transparency of the formation of such lists, which often fails.

Taking into account the above mentioned, transplantation as a way to ensure the right to life and health of the patient has not developed a practical solution to the conflicting issues regarding the provision of the organs to two or more recipients, and thus leaves an open question on how to ensure their right to life and health.

RIGHT TO DIE V. RIGHT TO DEATH

Main characteristics of the right to life were discussed above, so the following chapter will deal with the legal and moral issues of the euthanasia or in other words the right "to die in dignity".

The starting point for the discussion in the present chapter is the need to define the "euthanasia". The term derives from the Greek *eu* and *thanatós* and has been translated as «good death» or «easy and gentle death» or «dying well». It is clear that in modern debate euthanasia is a term employed in a medical context, with usual reference to a terminally or incurably ill patient who is in a severe and unbearable pain or in some kind of incapacitating condition and is limited to the role of physicians. (Besirevic, 2008)

Although the popular term "right to die" has been used as a label to describe the debate over end-of-life decisions, the underlying issues include a variety of legal concepts, some distinct and some overlapping. For instance, "right to die" could include issues of suicide, passive euthanasia (allowing a person to die by refusal or withdrawal of medical intervention), assisted suicide (providing a person the means of committing suicide), active euthanasia (killing another), and palliative care (providing comfort care which accelerates the death process). ("Right to Die")

Internationally, States and international organizations have produced quite strict practice with regards of legal regulation of right to euthanasia. ECtHR in its case *Pretty v. the United Kingdom* held that there had been no violation of Article 2 (right to life) of the Convention, finding that the right to life could not, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die. The Court accordingly finds that no right to die, whether at the hands of a third person or with the assistance of a

public authority, can be derived from Article 2 of the Convention (EChHR, *Pretty v. the United Kingdom*, 2002).

The Council of Europe in its Recommendation 1418 (1999) in para.9 "...recommends that the Committee of Ministers encourage the member states of the Council of Europe to respect and protect the dignity of terminally ill or dying persons in all respects:...by upholding the prohibition against intentionally taking the life of terminally ill or dying persons." (Recommendation of the Parliament Assemble...1999) More detailed question of euthanasia were raised in the Recommendation 1859 (2012) in para. 5 in accordance to which "*Euthanasia, in the sense of the intentional killing by act or omission of a dependent human being for his or her alleged benefit, must always be prohibited*". (Recommendation of the Parliament Assemble..., 2012)

WMA Declaration on euthanasia adopted by the 38th World Medical Assembly in October 1987 stated that "*Euthanasia, that is the act of deliberately ending the life of a patient, even at the patient's own request or at the request of close relatives, is unethical*". (Declaration on euthanasia adopted by the 38th..., 1987) Physician-assisted suicide, like euthanasia, is unethical and must be condemned by the medical profession. (World Medical Association Statement on Physician-Assisted Suicide, 1992)

Bill of rights and other human rights treaties keep silence about the right of the person to die in dignity. The documents cited above are formed in the form of recommendations, thus, leaving the right of the State to determine its own policy on this issue. Nowadays only the Netherlands (Termination of Life on Request and Assisted Suicide, 2002), Belgium (The Belgium Act on Euthanasia, 2002), Luxemburg (National Commission for Control and Assessment..., 2009) and Canada (Legislative Summary of Bill C-14...) legalized euthanasia in their national legislations.

To sum up, international instruments do not give a single answer to the right to die in dignity, leaving the field for maneuver to States. They also do not establish the right to freely decide human's own fate and the opportunity to choose violation of the right to life by choosing death.

THE RIGHT TO WOMENS' HEALTH AND THE RIGHT OF FETUS TO LIFE

A special place in the complex of human rights is dedicated to women's rights. As an integral part of human rights, they are not fully realized in any state. Nowadays this problem becomes especially urgent in connection with the non-compliance with international standards concerning the health of women, which as the result has a high level of maternal and infant mortality.

The following chapter will analyze woman's right to health care and thus, right to abortion and its ratio with the right to life of the fetus.

The right to abortion as a mean of providing health care

As was mentioned in the chapter II, definition of the right to health includes both physical and mental health. The category of health is a complex concept and can include many components, one of which is reproductive health. The concept of "reproductive health" was first introduced into international legal practice by the International Convention on Population and Development dated 1994. It was proposed to understand the rights of spouses and individuals to decide freely on the number of their children, the intervals between birth, time for their birth, the right to be informed and to have access to all safe, effective and affordable family planning methods of their choice, as well as other ways of regulating births that do not contradict the law. (Program on Action, adopted at the International Conference..., 1994) Art. 12 of The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) clarifies the right to family planning and provides that "*States Parties shall take all appropriate measures to eliminate discrimination against women*

in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning." (Convention on the Elimination of all Forms..., 1979)

In the European context there is no absolute prohibition on abortion. ECtHR has applied the concept of the "margin of appreciation" in order to allow individual states some degree of control over the time limit within which an abortion can legally be carried out (Bantekas and Oette, 2016). The denial of information about the possibility of obtaining an abortion constituted a breach of the protection of woman's right to life. (Bantekas and Oette, 2016)

States parties should take all appropriate measures to protect the reproductive rights of women by authorizing medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy engages the mental and physical health of the mother or the life of the mother or the foetus. (Protocol to the African Charter on Human..., 2003) The UN Human Rights Committee in *K.L. v. Peru*, recognized that the failure of the Peruvian government to ensure legal abortion services for a 17-year old girl carrying an anencephalic fetus violated her rights to privacy and freedom from cruel, inhuman or degrading treatment, among others. (Committee on the Elimination of Discrimination against Women, 2011)

The main obligation of Governments and all international organization is to strengthen their commitments to women's health, to deal with the health impact of unsafe abortion. (Report o the International Conference on Population and Development)

Nonetheless, existing statistics show the inability of the state to provide the necessary level of safe abortion, the availability of appropriate clinics. For example, while Africa accounts for 27% of global births annually and for only 14% of the women aged 15–49 years in the world, its share of global unsafe abortions was 29% and, more seriously, 62% of all deaths related to unsafe abortion occurred in Africa in 2008. The risk of death due to unsafe abortion varies among developing regions. The case–fatality rate for unsafe abortion is 460 per 100 000 unsafe abortion procedures in Africa and 520 per 100 000 in sub-Saharan Africa, compared with 30 per 100 000 in Latin America and the Caribbean and 160 per 100 000 in Asia. (World Health Organization...)

Thus abortion can be justified as a method to provide proper level of health, and in some cases, to save the life of a woman.

Right to life of fetus

The question of the legalization of abortions always raises ethical, moral and legal issues regarding the legal status of the embryo. Several countries have adopted various legal frameworks for protecting life before birth:

- Explicit recognition of a constitutional right to life before birth (national constitutions of Guatemala and Chile);
- Constitutional protections that confer equal protection for the life of both the pregnant woman and the "unborn," (constitutions of Ireland and the Philippines);
- Legislation establishing that the right to life is subject to protection prenatally (Poland) (Center for reproductive rights).

For example, in 2010, the Dominican Republic adopted a new constitution, which recognized a right to life from conception. In 2008 and 2010, the United States (U.S.) state of Colorado, and in 2011, the U.S. state of Mississippi rejected initiatives to amend the constitutions of these states to recognize that 'life begins at conception' and that from the moment of fertilization, zygotes, embryos, and fetuses are people with all the rights guaranteed to persons under their state constitutions (Center for reproductive rights).

Since 2008, at least 16 Mexican states have amended their constitutions to protect the right to life from either fertilization or conception. In 2007, members of the Slovak Parliament challenged the constitutionality of the country's abortion law, arguing that the constitution protects the right to life before birth. However, the Slovak Constitutional Court found that granting the right to life to a fetus would directly contradict women's constitutional rights to health and privacy and upheld the constitutionality of the abortion law. (Center for reproductive rights)

International human rights documents say nothing about the right to life of the embryo, referring to the right to a child's life. However, the preamble for the Declaration of the Rights of the Child 1959 refers, 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"*. (Declaration of the Rights of the Child 1959) At the same time the Convention on the right of the Child 1989 in art.1 defines that the *"child means every human being below the age of eighteen years..."*, and art. 6 fixes the State's obligation to *"...recognize that every child has the inherent right to life"* (Convention on the Right of the Child...,1989).

Among regional human rights instruments only art. 4 of the American Convention on Human Rights protects life before birth: *"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"*. (American Convention on Human Rights...)

A clearer response to these issues can be found in the jurisprudence and practice of international human rights institutions. European Commission of Human rights stated that *"...the view that [Article 2] does not include the unborn"* and *"The right to life is guaranteed to every one who 'lives'; in this context no distinction can be made between the various stages of developing life before birth or between born and unborn children"*. (Case of Paton v. United Kingdom European..., 1981) ECtHR affirmed that *"the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention and that if the unborn do have a "right" to "life", it is implicitly limited by the mother's rights and interests"*. (ECtHR, VO v. France..., 2004)

The lack of a single policy on the definition of beginning of the right to life leaves States the power of choice for their own policies, which in turn creates a lot of complaints and precedents before the judicial authorities. A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature. (Grand Chamber ..., 2010)

CONCLUSIONS

It is very possible that the exercise of a fundamental right cannot be plenary, without limitation of another fundamental right. Conflicts between different generations of subjective rights and fundamental rights are explained by the fact that they come from different social interests, protected by different rights and from the rivalry between the values that are protected by various fundamental rights to protect their "existence of second-generation rights (economical, social, cultural) an involves massive state legislature, are endangering the first generation of human rights (political and civil rights). (Cornescu, 2009)

Mostly the article indirectly describes the rights of the new generation of human rights. These rights, caused by scientific and technological progress, arose in connection with the development of science and the implementation of its development. Organ transplantation, cloning, euthanasia are the components of a list of basic rights of the fourth generation.

This article as its main aim had a basic analysis of existing conflicts between civil and political rights (namely the right to life) on the one hand and social, economic and cultural rights (namely the right to health) on the other. The state has no right to interfere with the private life of a person, but it is obliged to implement its internal policy in such a way as to guarantee and ensure the realization of humans' rights.

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