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Legal guarantees for the protection of the rights to life and to health care of the child extracted alive as a result of abortion *

SUMMARY: 1. Problem description - 2. State of Russian Legislation regulating of the legal status of the child extracted alive as a result of abortion - 3. Legal basis for the recognition of human dignity and the right to life of the child extracted alive as a result of abortion - 4. Legal guarantees of recognition of the right to life and human dignity of the child extracted alive as a result of abortion and emergency medical care in foreign legislation - 5. Conclusions.

1 - Problem description¹

Today, the issue of the legal status of human foetuses born alive as a result of abortions during late pregnancy (18 to 20 weeks or more) and left, being alive from a few minutes to a few hours, without any medical care is reasonably of current importance and shall be discussed at the highest international level. This position is supported by many Russian and foreign scientists, public figures and experts², considering this issue to be highly actual and one of the most complex issues of modern medical law and bioethics.

Similarly to any surgical or medical intervention in the human body, unplanned events may occur during abortion, and abortion may lead to the premature expulsion of the foetus or may be accompanied by

¹ The article has been subjected to peer review, and has been prepared in connection with the appeal of the Representation of the Russian Orthodox Church in Strasbourg.

² See, for example: **PUPPINCK G.**, *Abortion and the European Convention on Human Rights*, in *Irish Journal of Legal Studies*, 2013, vol. 3 (2), pp. 142 –193, pp. 175–176; **PUPPINCK G.**, *Avortement tardif et infanticide: le témoignage d'une sage-femme*, (<http://www.libertepolitique.com/Actualite/Decryptage/Avortement-tardif-et-infanticide-le-temoignage-d-une-sage-femme>, 01.12.2014); *Les infanticides néonataux en Europe doivent être condamnés*, (<http://citizengo.org/fr/13818-condamnation-des-infanticides-neonataux>).



surgical removal of an alive and, in many cases, viable child (only with a certain degree of prematurity) from his/her mother's womb.

The alive foetus extracted during such abortion shall be reasonably recognized as a child and considered specifically as such since he/she has all the attributes of an alive human being (child), and the fact that his/her birth was caused by actions taken (by his/her mother or healthcare workers) with no purpose to ensure his/her birth does not deny his/her natural right to life since he/she was born alive and viable.

However, in the vast majority of cases, despite the viability of the foetus during late pregnancy, no therapeutic measures are taken in relation to the child extracted alive as a result of abortion, such children are left to die without any medical care when they are trying to breathe, sometimes for hours. Otherwise, they are killed after birth with lethal injection or asphyxiation and thrown away along with organic medical waste³.

As evidenced by obstetricians, children extracted alive during abortions were mostly trying to breathe for 5 to 15 minutes before they died pain fully⁴. Based on other data (United Kingdom, 2005), children extracted alive as a result of abortion were breathing 55 minutes on average, up to 615 minutes (over 10 hours)⁵.

In some cases, as was proved in the course of criminal investigations in the US, such children were mortified by cutting their necks with scissors (the guilty person was criminally prosecuted)⁶.

This is the daily practice in many countries of the world. And though there are numerous cases when children extracted alive as a result of abortion survived, developed quite healthy and became adults there after⁷, such cases are only exceptions. Many of the survivors still die later or are permanently disabled due to the failure to provide them with timely and adequate medical care during the first minutes after their birth.

³ *Les infanticides néonataux en Europe doivent être condamnés* (<http://citizengo.org/fr/13818-condamnation-des-infanticides-neonataux>).

⁴ Quoted by: **PUPPINCK G.**, *Avortement tardif et infanticide: le témoignage d'une sage-femme* (<http://www.libertepolitique.com/Actualite/Decryptage/Avortement-tardif-et-infanticide-le-temoignage-d-une-sage-femme>, 01.12.2014).

⁵ *Perinatal Mortality 2005 / Confidential Enquiry into Maternal and Child Health*, April 2007, London, 2007, 52 p., p. 28.

⁶ **HARRINGTON E.**, *Gosnell Trial Witness: Baby Abortion Survivor Was 'Swimming' in Toilet 'Trying to Get Out'* (<http://cnsnews.com/news/article/gosnell-trial-witness-baby-abortion-survivor-was-swimming-toilet-trying-get-out>, 18.04.2013).

⁷ See, for example: *Abortion Survivors* (<http://www.infoniac.ru/news/Lyudi-vyzhivshie-posle-abortov.html>, 11.09.2013).



For example, in 2010, in the hospital of Rosarno (Calabria, Italy) the foetus extracted from a woman on the 22nd week of pregnancy (declared reason – fetal malformations) as a result of abortion stayed alive for a few hours after removal from the mother's womb, despite the fact that the foetus was not only deprived of any medical care but, what is more, also placed in a sealed bag. When a hospital chaplain came to the extracted foetus to pray, he noticed that the child was still breathing. After that, the child was immediately taken to the hospital of Cosenza (Calabria, Italy) where doctors attempted to save the child's life taking various measures, but it was too late⁸.

According to the findings published in 2007 in the British Journal of Obstetrics and Gynecology – the International Journal of Obstetrics and Gynecology, during the period from 1995 till 2004, as a result of abortions, 9.7 % of children were born alive on the 23rd week of pregnancy, 6.4% of children – on the 22nd week of pregnancy, and 5.4 % of children – on the 21st week⁹. It should be noted that even the latter value means 54 children per 1,000 abortions on the 21st week of gestational age.

However, on the first day after removal of the child alive as a result of abortion at the gestational age of 23 weeks, chances that such a child will survive are 30 to 47 %¹⁰. Thereafter everything depends on the skills and responsible attitude of healthcare workers and whether it is possible to avoid or reduce complications for the newborn.

Meanwhile, in Italy, according to the prescriptions of the Ministry of Health, in this situation the child can only be given medical care starting from the 22nd week of gestational age¹¹. However, there are known facts of survival of children born on the 21st week and a litter over¹², or even earlier.

⁸ *Aborto a 22 settimane: dopo il feto respirava ancora* (<http://www.pianetamamma.it/il-bambino/notizie-cronaca/aborto-a-22-settimane-dopo-il-feto-respirava-ancora.html>, 26.04.2010).

⁹ **WYLDERS M.P., TONKS A.M.**, *Short communication: Termination of pregnancy for fetal anomaly: a population-based study 1995 to 2004*, in *BJOG: An International Journal of Obstetrics & Gynaecology*, 2007, May, Vol. 114, Issue 5, pp. 639–642, pp. 640–641.

¹⁰ Quoted by *Aborto, documento dei ginecologi «Il feto deve essere rianimato»* (<http://www.repubblica.it/2008/02/sezioni/cronaca/documento-neonati/documento-neonati/documento-neonati.html>, 02.02.2008).

¹¹ **DE BAC M.**, *Se il feto prematuro è vivo va rianimato* (http://www.corriere.it/cronache/08_febbraio_02/feto_vivo_aborto_ff3ea7ac-d1c7-11dc-af66-0003ba99c667.shtml, 02.02.2008).

¹² See: *Cable A. The tiniest survivor: How the 'miracle' baby born two weeks before the legal abortion limit clung to life against all odds*, *Daily Mail* (<http://www.dailymail.co.uk/femail/article-1021034/The-tiniest-survivor-How-miracle-baby-born-weeks-legal-abortion-limit-clung-life-odds.html>, 22.05.2008).



Based on data available for the United Kingdom, during the period under study, the use of modern medical advances helped survive 5 of 247 children born at the gestational age of less than 22 weeks, 11 of 171 children born at the gestational age of 22 weeks, and 76 of 332 children born at the gestational age of 23 weeks, i.e. a total of 92 out of 750 children born before 24th week were survivors¹³.

As reasonable stated by Christopher Keszor, there is no reason to believe that it will be impossible to nurse children born before the 21st week of the gestational age, providing proper development of medical technology¹⁴.

Today, there is no reliable information about how many children extracted alive as a result of abortion at mentioned and later stages die in any countries and generally in the world (including due to a misdiagnosis). This humanitarian issue is reflected in legislations of different states in different ways.

2 - State of Russian Legislation regulating of the legal status of the child extracted alive as a result of abortion

The Russian Federation legislation contains no legal rules directly governing the relations regarding the child extracted alive as a result of abortion.

According to Article 56, part 4 of Federal Law № 323-FZ "On the Fundamentals of health protection in the Russian Federation" dated November 21, 2011, abortion for social reasons can be made up to twenty two weeks of pregnancy and regardless of the gestational age in case of relevant medical indications. This age of 22 weeks is neither legally nor factually justified. Moreover, the lack of clear legislative regulation of the process of making decisions on whether there are medical indications for late-term abortions and regulations of responsibility for abuses in this area actually makes the above rule a legislative 'loophole'.

The legal foundation that makes it possible to perform an abortion for social reasons, as specified in Article 56, part 5 of the Federal Law

¹³ **SMITH R.**, *One in ten babies born under abortion limit survives. More than one in ten babies born before the abortion limit lives to see their first birthday, official figures have revealed*, *The Telegraph* (<http://www.telegraph.co.uk/news/health/news/9598649/One-in-ten-babies-born-under-abortion-limit-survives.html>, 11.10.2012).

¹⁴ **KACZOR C.**, *The Ethics of Abortion. Women's Rights, Human Life, and the Question of Justice*, New York, Routledge, 2011, p. 246 and p. 66.



№ 323-FZ “On the Fundamentals of health protection in the Russian Federation”, Regulation No. 98 of the Government of the Russian Federation “On the Social Reason for Abortion” dated February 6, 2012, is the pregnancy that occurred as a result of the commission of a crime according to Article 131 of the Criminal Code of the Russian Federation (rape).

As for medical indications, the list of which is approved by Order No. 736 of the Ministry of Health and Social Development of the Russian Federation “On Approval of the List of Medical Indications for Abortion” dated December 3, 2007 (as amended on December 27, 2011) and upon availability of which an abortion can be performed regardless of the gestational age, considering a huge number of medical errors annually committed in Russia and even a greater number of medical care defects¹⁵, it shall be reasonably stated that special codes of behavior (rules of conduct) for health care workers in case of removal of the child alive as a result of abortion is highly relevant and shall be governed by regulatory legal acts and introduced into practice as soon as possible.

Today, such provisions are contained neither in federal laws nor in by-laws of the Russian Federation, particularly they are not provided by Order No. 590n of the Ministry of Health of the Russian Federation “On Approval of the Standard of Specialized Medical Care in case of Spontaneous Abortion” dated November 7, 2012, by Order No. 572n of the Ministry of Health of the Russian Federation “On Approval of the Medical Care Procedure in Obstetrics and Gynecology (Except the Use of Assisted Reproductive Technology)” dated November 1, 2012 (as amended on January 17, 2014), by Order No. 736 of the Ministry of Health and Social Development of the Russian Federation “On Approval of the List of Medical Indications for Abortion” dated December 3, 2007 (as amended on December 27, 2011). Order No. 921n of the Ministry of Health of the Russian Federation “On Approval of the Medical Care Procedure in Neonatology” dated November 15, 2012 contains no legal provisions governing medical actions in relation to the child extracted alive as a result of abortion; such situations are not covered by this document at all.

Moreover, Article 53, part 1 of Federal Law № 323-FZ “On the Fundamentals of health protection in the Russian Federation” dated November 21, 2011 (as amended on December 31, 2014) contains extremely ambiguous statement that “the moment of birth of the child is

¹⁵ See: **PONKINA A.A.**, *Erreur médicale dans le contexte de la protection des droits des patients en Russie*, *Revue générale de droit médical*, 2013, septembre, № 48, pp. 255–267.



the moment when the foetus is separated from the mother's body **through delivery**", which can be formally interpreted as creating legal barriers for the provision of necessary resuscitation and other medical care to the child extracted alive as a result of abortion.

3 - Legal basis for the recognition of human dignity and the right to life of the child extracted alive as a result of abortion

The child extracted alive as a result of abortion shall be definitely considered as a human being, and his/her right to life and right to get proper medical care (even in extremely risky conditions and, likely, with relatively low chances of survival) shall be recognized regardless of the unwillingness expressed by his/her parents regarding his/her birth.

The following are legal bases for recognition of the right to life of the child extracted alive as a result of abortion, recognition and enforcement of legal guarantees for the protection of human dignity and the rights of such a child, recognition of his/her legal personality as being equal (identical) to the personality of the newborn child (not subjected to abortion):

1. The fact of birth – in a natural way (including in case of premature delivery as a result of spontaneous miscarriage) or via a cesarean section – does not actually differ (regarding changes in the state of the child) from the consequences (for the child itself) of removal of the child alive as a result of abortion (except differences in the degree of development and the availability of high threats to life and health of the child, specifics of manipulations carried out with such a child and his/her mother is this case, etc.); the main thing is that in all these cases the child leaves his/her mother's womb and starts living independently, giving signs of life and vitality recognized in medicine.

The legal meaning of the term 'birth' of a human being, in principle, is expressed in the legally relevant fact of the complete expulsion (stimulated passing out through the birth canal) of the child or his/her removal from his/her mother's body (including, but not limited to, via a caesarean section), and therefore, can be fully applied to the situation of removal of the child alive from his/her mother's womb as a result of abortion.

In this context, the approach implemented in the definition of the term 'human', as enshrined in the US federal legislation, is highly humane, according to which the words 'person', 'human being', 'child' and



'individual' used in any regulatory legal acts issued by the US government authorities, have the meaning that includes any newborn infant who was born alive at any stage of his/her development (Title 1, Chapter 1, § 8, paragraph «a» of the United States Code¹⁶). However, with respect to any member of the species *homo sapiens*, 'born alive' means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion (Title 1, Chapter 1, § 8, paragraph «b» of the **United States Code**).

According to the State Legislature of Idaho (USA), "'unborn child' or 'foetus' means human, an individual organism of the species *homo sapiens* **from fertilization until live birth**" (Article 18-502, paragraph 9 of the **Statutes of Idaho (USA) "Pain-Capable Unborn Child Protection Act"** (Title 18, Chapter 5 of the Idaho Statutes)¹⁷).

2. In any approaches to question on which extent and from which moment the child at the stage of prenatal development has the right to life and, therefore, the right to the protection of his/her life and health, the child already born (as referred to in paragraph 1 above) shall be recognized as a human being from the moment he/she was born alive. Therefore, conscious mortification of the child extracted alive as a result of abortion, including by leaving him/her without proper medical care, i. e. living to die, is actually the act of killing of the child.

If the human foetus (the child at the stage of prenatal development) developed to such a level that he/she is able (if proper and principally possible medical care is provided) to survive outside the mother's womb, he/she shall be definitely recognized as a human individual who has the inalienable right to life (actually, the child at the stage of prenatal development already has this right, but this issue is not under consideration now). Healthcare workers shall take all necessary actions to make the child survive. The child shall neither be left to die nor be mortified. And there shall be relevant criminal and legal consequences for the person who committed such actions against the child.

¹⁶ U.S. Code (<http://www.law.cornell.edu/uscode/text/1/8>).

¹⁷ Idaho Statutes, Title 18 «Crimes and punishments», Chapter 5 «Pain-capable unborn child Protection Act» (<http://legislature.idaho.gov/idstat/Title18/T18CH5SECT18-502.htm>).



3. Both the newborn child and the foetus have, in essence, the same moral status, the same individual and personal and social value since the fact of birth does not mean that a human individual gets (acquires) a drastically specific, completely new moral status, which would be potentially absent in the foetus, in terms of human dignity and the value the child would not have in the mother's womb¹⁸. Therefore, a legal personality that is in specific development and expansion, of the newborn child shall be recognized as compared to the child at the stage of prenatal development. The child at the stage of prenatal development has a specific moral and value status and, thus, a social and legal status (which can be expressed by the attitude towards the child and his/her mother, particularly in the form of social guarantees for pregnant women enshrined in law). However, the external expression of this status, including in the legislation of a particular state, greatly depends on historical and cultural specifics of a particular society and state and varies in a wide range, e.g. from the clear enshrinement of the right to life of the child from the moment of conception to the ignorance of this right, except rarely mentioning it, i.e. in the inheritance legislation. The development of national legislation in this area greatly depends on the official recognition of traditional spiritual and moral values and principles as an essential element of public order.

According to the **Judgment of the Grand Chamber of the European Court of Justice (Court of Justice of the European Union) in the case № C-34/10 «Oliver Brüstle v. Greenpeace e.V.» dated October 18, 2011**¹⁹ dedicated to interpretation subparagraph "c" of paragraph 2 of article 6 of Directive № 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions dated July 6, 1998²⁰, **a human ovum shall be considered as a "human embryo" from the moment of fertilization** (paragraph 53, subparagraph 1 and paragraph 35; here – *"in the context of and for the purposes of subparagraph*

¹⁸ See: **PONKIN I.V., YEREMYAN V.V., KOUZNETSOV M.N., PONKINA A.A.**, *On Legal Bases for Legal Recognition of the Value of Life, Human Dignity, and the Right to Life of a Child at the Stage of Prenatal Development*. Report dated July 1, 2014 (<http://www.state-religion.ru/files/Life-of-a-Child-at-Prenatal.pdf>).

¹⁹ Judgment of the Court (Grand Chamber) of 18 October 2011 in the Case № C-34/10 «Oliver Brüstle v. Greenpeace e.V.» (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-34/10>).

²⁰ Directive № 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, *Official Journal*, 30.VII.1998, № L 213, pp. 0013–0021 (<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31998L0044>).



“c” of paragraph 2 of article 6 of the [above mentioned] Directive”). It also shall be concluded from that decision that the principle of human dignity must be applied not only to an existing human person - to a child who was born, but also in relation to a human organism from the first stage in its development, i.e. from the moment of conception.

It shall also be noted that the heads of clinics of obstetrics, gynecology and perinatology of four medical faculties of Roman universities La Sapienza, Tor Vergata, Cattolica and Campus Biomedico expressed their common position in 2008 that

“the newborn child, even at the stage of extreme prematurity, shall be considered as any other human being who is at a high risk, i.e. requires proper care ... From the moment of birth, the law ensures the completeness of the right to life and, thus, to medical care ... Emergency resuscitation measures taken at birth allow to gain time needed to better assess the clinical condition of the child in order to take response measures in the intensive care unit and to increase the likelihood of survival of the child, allow to discuss the situation with other healthcare personnel and parents of the child”²¹.

Therefore, it is very important to immediately and unconditionally provide resuscitation medical assistance to such child.

4. The fact that, from a biomedical point of view, both the child extracted alive as a result of abortion and giving signs of life and (at least minimal) viability and the newborn premature child are almost identical has a substantial legal significance. The difference may consist in the degree of foetus maturity (which may affect the weight of the child) and in the availability of more significant threats to life and health of the child extracted alive as a result of abortion, but these differences do not result in any legally relevant differences in the statuses of such children since they have the same right to life, the recognition of which has a fundamental basis – their live itself²²,

²¹ Quoted by: *Aborto, documento dei ginecologi «Il feto deve essere rianimato»* (<http://www.repubblica.it/2008/02/sezioni/cronaca/documento-neonati/documento-neonati-documento-neonati.html>, 02.02.2008).

²² It shall also be noted that national constitutions of many states proclaim a human being and, thus, the human life as the supreme value.



5. The question from which level of development of the child (indicated, particularly, by his/her weight) prematurely born alive or extracted as a result of abortion the modern health care system is actually able to implement a set of resuscitation and/or other emergency medical measures to save such child (in view of the current advances in medical technology, competence of healthcare personnel, financial capacity of the healthcare system in a particular state) – is not legally relevant as to whether the existence of the right to life of the child extracted alive and giving (at least minimal) viability as a result of abortion shall be recognized.

If the child extracted alive as a result of abortion can potentially survive and be cared for through reasonable and possible (applicable) measures, then any requirements to the gestational age of the child cannot and shall not form conditions for the recognition of his/her specific legal personality (including his/her right to life and, thus, relevant duties of healthcare workers) and considered as a prerequisite for the provision of resuscitation and other necessary medical assistance and necessary medical care to him/her. This age may and shall be legally connected only with the likelihood of survival of the child if such assistance is provided to him/her, and with certain differences in the codes of behavior of healthcare workers in such situations.

6. If the child extracted alive as a result of abortion is left to die for a long time in terrible pain (from suffocation, dehydration, etc.), such actions shall be considered as deliberate tortures of the child and an extremely cruel treatment of him/her.

The child feels the suffering he/she was doomed to.

According to **Louisiana Revised Statutes (USA) “Pain-Capable Unborn Child Protection Act”**, pain receptors can be found throughout the body of the unborn child, and nerves connect these receptors to the thalamus and subcortical structures not later than by the 20th week. An 8 weeks old child already responds to touching. After the 20th week, the unborn child responds to stimuli that would be reasonably defined as painful if they were applied to an adult. The unborn child may feel pain at this age, despite the fact that his/her brain is still not functioning adequately. Thus, there are necessary and sufficient medical evidence that the unborn child is able to feel pain from the age of 20 weeks after conception (§ 1299.30.1, paragraph B, subparagraphs «a», «b», «f» and



«k», of the **Louisiana Revised Statutes**²³). The same provision is contained in the **Act of Idaho (USA) “Pain-Capable Unborn Child Protection Act”** (Title 18, Chapter 5, Article 18-503, paragraphs 1, 2, 6 and 10 of the **Idaho Statutes**²⁴). Even the titles of these laws are specific.

7. Failure to recognize the right to life of a living human individual (child) cannot be justified and substantiated by the essential circumstance of his/her birth, namely by the performance of abortion in order to prevent his/her birth.

8. If the child is extracted alive as a result of abortion, any conflicts between the right to life of such child and the rights of his/her mother are completely revoked and excluded for the future since the legitimate interests of the child as to preserving his/her life and caring of him/her have unconditional and absolute priority over the interests of his/her mother in this situation. From the moment of removal of the child from the mother’s womb, the health of his/her mother, thereafter supported separately from the child’s health, cannot affect the mandatory implementation of necessary actions to preserve life of the child.

Thus, neonatologist shall immediately intervene and take a set of proper resuscitation and/or medical care activities in order to maintain viability of such child and ensure his/her survival, even if his/her mother disagrees with such an outcome for the child.

9. The intention of a pregnant woman to perform an abortion is aimed at getting rid of pregnancy, and she takes actions and makes requests when applying to a medical officers in view of this intention. The fact that the child will be killed by that is not articulated as the main goal. Thus, if the child is extracted alive as a result of abortion, it means that the woman’ request for an abortion is essentially satisfied since she is not pregnant anymore. The fact that the child was not dead has no relation to her request for an abortion at the time when the child extracted as a result of abortion is able to survive, because this woman has no right to make such a request, i.e. to mortify the child who turned to be alive. She simply does not and cannot have this right. Discussions on the legal admissibility or inadmissibility are always related to the legal right of women to

²³ Louisiana Revised Statutes (<http://www.legis.state.la.us/lss/lss.asp?doc=814249>).

²⁴ Idaho Statutes, Title 18 «Crimes and punishments», Chapter 5 «Pain-capable unborn child Protection Act» (<http://legislature.idaho.gov/idstat/Title18/T18CH5.htm>).



freedom of discretion about induced abortion (the ideological motivation, falseness and legal invalidity of the 'right to abortion' are not discussed in this paper), but not to kill the child already been born alive (or very likely to be born alive) as a result of abortion.

Many women seeking an abortion, probably, do so because they want the foetus they have in their womb to be killed. However, it cannot be allowed to them, because there are no legal and factual grounds for that at all.

4 - Legal guarantees of recognition of the right to life and human dignity of the child extracted alive as a result of abortion and emergency medical care in foreign legislation

In foreign legislation, guarantees of the protection of the right to life, human dignity, and the right to health care of the child extracted alive as a result of abortion, are the most widely represented in the US law.

In addition to already mentioned above Title 1, Chapter 1, § 8 of the US Code²⁵ (as amended by the "Federal Born-Alive Infants Protection Act" from 2002²⁶), sets of corresponding provisions are enshrined at the regional level in many state laws.

Regulatory legal acts of a number of US states on abortions contain provisions that require from doctors who perform abortions in respect to viable foetuses during late pregnancy (usually, on the 20th to 24th weeks) to take proper measures in order to preserve their lives and also set a number of other guarantees. However, the possibility of abortion during this period is only provided in exceptional cases, and the care for the child in respect to whom an abortion is performed shall not [significantly] increase the risks to life or health of his/her mother.

Section 16-34-2-3 of **the Indiana Code (USA)**²⁷ is titled "Conditions for abortion after viability or 20 weeks; attendance of physician for preservation of life and health of viable unborn child; certificates of birth or death; offense for violation; ward" and governs the relations during performance of abortions (in the aspects discussed above). However, all

²⁵ U.S. Code (<http://www.law.cornell.edu/uscode/text/1/8>).

²⁶ Born-Alive Infants Protection Act of 2002 (<http://www.gpo.gov/fdsys/pkg/PLAW-107publ207/html/PLAW-107publ207.htm>; <<http://www.gpo.gov/fdsys/pkg/STATUTE-116/pdf/STATUTE-116-Pg926.pdf>>).

²⁷ Indiana Code (<https://iga.in.gov/legislative/laws/2014/ic/>>; <https://iga.in.gov/legislative/laws/<2014/ic/titles/016/>>).



abortions in respect to foetuses after they become viable or when the gestational age is not less than twenty weeks shall be performed in hospitals with an intensive care units for premature deliveries (unless the satisfaction of this requirement leads to a [significant] increase in the risk to life and health of the mother) and in the presence of the assistant doctor. According to Article 16-34-2-3, paragraph «b» of **the Indiana Code (USA)**, «an abortion may be performed after the earlier of the time a fetus is viable or the time the postfertilization age of the fetus is at least twenty (20) weeks only if there is in attendance a physician, other than the physician performing the abortion, who shall take control of and provide immediate care for a child born alive as a result of the abortion. During the performance of the abortion, the physician performing the abortion, and after the abortion, the physician required by this subsection to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the viable unborn child. However, this subsection does not apply if compliance would result in an increased risk to the life or health of the mother». According to Article 16-34-2-3, subparagraph «c» of **the Indiana Code**, «any fetus born alive shall be treated as a person under the law, and a birth certificate shall be issued certifying the child's birth even though the child may subsequently die, in which event a death certificate shall be issued. Failure to take all reasonable steps, in keeping with good medical practice, to preserve the life and health of the live born person shall subject the responsible persons to Indiana laws governing homicide, manslaughter, and civil liability for wrongful death and medical malpractice»

According to Title 40, § 48, paragraph «a» of **the Revised Statutes of Louisiana (USA)**²⁸, «whenever an abortion procedure results in a live birth, a birth certificate shall be issued certifying the birth of said born human being even though said human being may thereafter die. For the purposes of this Section a human being is live born, or there is a live birth, whenever there is the complete expulsion or extraction from its mother of a human embryo or fetus, irrespective of the duration of pregnancy, which after such separation, breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or movement of the voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached». According to § 1299.35.4, paragraph «b» of **the Revised Statutes of Louisiana (USA)**, «any physician who performs an

²⁸ Louisiana Revised Statutes (<http://www.legis.state.la.us/lss/lss.asp?folder=75>).



abortion upon a woman carrying a viable unborn child shall utilize the available method or technique of abortion most likely to preserve the life and health of the unborn child. In cases where the method or technique of abortion which would most likely preserve the life and health of the unborn child would present a greater risk to the life and health of the woman than another available method or technique, the physician may utilize such other method or technique». Moreover, the § 1299.35.4, paragraph «c» of **the Revised Statutes of Louisiana (USA)** sets the requirement that during such an abortion the assistant doctor shall be present, not directly involved in the performance of abortion, who shall take control over the state of the child extracted alive as a result of abortion and take all necessary measures to provide medical care to such child.

As set out in Article 188.030 of **the Revised Statutes of Missouri (USA)**²⁹, it is prohibited to perform an abortion in respect to a viable foetus at the gestational age of 20 weeks or more, but this is possible in exceptional cases when it is necessary to preserve life and health of the child's mother (if continued pregnancy poses serious risks of significant and irreversible deprivations of the basic functions of the woman's body) (part 1 et al. of the Article). However, according to part 2, paragraph 4, subparagraph «d» of this Article, «any physician who performs or induces an abortion upon a woman when it has been determined that the unborn child is viable shall utilize the available method or technique of abortion most likely to preserve the life or health of the unborn child. In cases where the method or technique of abortion most likely to preserve the life or health of the unborn child would present a greater risk to the life or health of the woman than another legally permitted and available method or technique, the physician may utilize such other method or technique». In Article 188.030, part 2, paragraph 4, subparagraph «e» of **the Revised Statutes of Missouri (USA)** it is also set out that «no physician shall perform or induce an abortion upon a woman when it has been determined that the unborn child is viable unless there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for a child born as a result of the abortion. During the performance of the abortion, the physician performing it, and subsequent to the abortion, the physician required to be in attendance, shall take all reasonable steps in keeping

²⁹ Missouri Revised Statutes (<http://www.moga.mo.gov/mostatutes/statutesAna.html>; <http://www.moga.mo.gov/mostatutes/stathtml/18800000302.html>; valid until 30.XII.2016).



with good medical practice, consistent with the procedure used, to preserve the life or health of the viable unborn child; provided that it does not pose an increased risk to the life of the woman or does not pose an increased risk of substantial and irreversible physical impairment of a major bodily function of the woman». According to Article 188.035 of **the Revised Statutes of Missouri (USA)**, a person who deliberately deprives the child extracted alive as a result of abortion of life is recognized guilty of murder in the first degree.

According to § 63-1-732, subparagraph «e» of **the Oklahoma Statutes (USA)**³⁰, abortion in respect to a viable child (at the age of 24 weeks calculated from the beginning of the last menstrual period of the mother³¹) may only be performed or induced when there is in attendance a physician other than the physician performing or inducing the abortion who shall take control of and provide immediate medical care for the child. During the performance or inducing of the abortion, the physician performing it, and subsequent to it, the physician required by this section to be in attendance, shall take all reasonable steps in keeping with good medical practice, consistent with the procedure used, to preserve the life and health of the child, in the same manner as if the child had been born naturally or spontaneously.

§ 29.35 of **the Pennsylvania Code (USA)**³² states that abortion in respect to a viable child is possible after the first trimester of pregnancy, if otherwise life or health of his/her mother is threatened. Person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care, and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted; and the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to

³⁰ Oklahoma Statutes (<http://www.oklegislature.gov/osstatuestitle.html>).

³¹ Obstetrical age (as opposed to the gestational age); Author's note.

³² The Pennsylvania Code (<http://www.pacode.com/secure/browse.asp>; <<http://www.pacode.com/secure/data/028/chapter29/s29.35.html>>).

The United States Supreme Court Decision in the case "Thornburgh v. American College of Obstetricians and Gynecologists" No. 476 U.S. 747 from 1986 about the need to abolish some provisions of the Pennsylvania state law on the use of abortion techniques that maximized chances of the foetus to survive, even if such techniques increased medical risks to life or health of the pregnant woman, did not refer to abolish Article 29.35 of the Pennsylvania Code in its current form.



the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment. The potential psychological or emotional impact on the mother of the unborn child's survival shall not be deemed a medical risk to the mother. Person who intends to perform an abortion the method chosen for which, in his good faith judgment, does not preclude the possibility of the child surviving the abortion, shall arrange for the attendance, in the same room in which the abortion is to be completed, of a second physician. Immediately after the complete expulsion or extraction of the child, the second physician shall take control of the child and shall provide immediate medical care for the child, taking all reasonable steps necessary, in his judgment, to preserve the child's life and health. All physicians and medical personnel attending a child who is born alive during the course of an abortion or premature delivery or after being carried to term, shall provide such child that type and degree of care and treatment which, in the good faith judgment of the physician, is commonly and customarily provided to any other person under similar conditions and circumstances (according to provisions of § 29.35 of the State Legislature of Pennsylvania).

Article 311.790 of **the Revised Statutes of Kentucky (USA)**³³ states that any child born alive as a result of abortion shall be recognized in full as a human individual, person under law, and the birth certificate shall be issued in his/her name certifying a live birth, even if such child dies thereafter. In case of death, the death certificate shall also be issued.

The above mentioned State Legislature of Louisiana (USA) "Pain-Capable Unborn Child Protection Act" (§ 1299.30.1 of the Revised Statutes of Louisiana)³⁴ and the State Legislature of Idaho (USA) "Pain-Capable Unborn Child Protection Act" (Title 18, Chapter 5 of the State Legislature of Idaho)³⁵ are also significant.

5 - Conclusions

1. The child extracted alive as a result of abortion, according to his/her legal personality (including the right to life), is not significantly different from the newborn child who was prematurely born in a natural way

³³ Kentucky Revised Statutes (<http://www.lrc.ky.gov/statutes/>).

³⁴ Louisiana Revised Statutes (<http://www.legis.state.la.us/lss/lss.asp?doc=814249>).

³⁵ Idaho Statutes, Title 18 «Crimes and punishments», Chapter 5 «Pain-capable unborn child Protection Act» (<http://legislature.idaho.gov/idstat/Title18/T18CH5.htm>).



(including as a result of miscarriage) or extracted via a caesarean section and has natural inalienable rights to life and health from the moment of his/her extraction from the mother's womb (transformed from similar rights the child had at the stage of prenatal development). Thus, the child extracted alive as a result of abortion has the inherent right to emergency resuscitation and/or other medical assistance and medical care based on his/her actual state of health, actual and anticipated viability of such child, which shall be assessed after the start of taking proper medical resuscitation measures with regard to him/her and medical care for him/her, according to the special rules of conduct of healthcare personnel in such situations, to be enshrined in legal regulations.

2. Guarantees of the right to life of the child extracted alive as a result of abortion and guarantees of the right to proper emergency resuscitation and/or other medical assistance and medical care shall be enshrined in legislation.