

**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

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INTRODUCTION

Information on experts – authors of this Report

The Report is prepared by a group of specialists consisting of:

Ponkin Igor V., doctor of science (Law), professor of the Institute of Public Administration and Management of the Russian Presidential Academy of National Economy and Public Administration; director of the Institute of relations between the State and religious denominations and Law, Professor of the Kutafin Moscow State Law University, State Professor (paragraphs 1–9 of the Report);

Yeremyan Vitaly V., doctor of science (Law), professor of the Institute of Public Administration and Management of the Russian Presidential Academy of National Economy and Public Administration, State Professor (Moscow) (paragraph 2 of the Report);

Kouznetsov Mikhail N., doctor of science (Law) Professor of the Law Department of the Peoples' Friendship University of Russia, State Professor (Moscow) (paragraph 2 of the Report);

Ponkina Alexandra A., PhD (Law), Deputy Director of the Institute of relations between the State and religious denominations and Law, expert of the Consortium of experts on patients' rights (Moscow) (paragraphs 1–9 of the Report).

Bases, Goals and Objectives of the Report

This Report has been prepared due to an appeal of the Russian Orthodox Church Representation in Strasbourg.

This Report:

– **is based on the understanding** of the social importance of legal establishment of well-defined legal status of the child at the stage of prenatal development from conception¹ to birth and the importance of protection of the child at the stage of prenatal development taking into account directions from the **Recommendation of the**

¹ “Conception” (fertilization) is the union of an oocyte and sperm cell (specifically, the fusion of the membranes of an oocyte and spermatozoon upon contact) giving rise to a new and distinct living human organism, the embryo (Notes to article 1) (Footnotes on the San Jose Articles // <http://www.sanjosearticles.com/?page_id=88>).

Parliamentary Assembly of the Council of Europe № 1046 (1986) on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes dated September 24, 1986², that “*this progress has made the legal position of the embryo and foetus particularly precarious, and that their legal status is at present not defined by law*” (paragraph 6), that “*adequate provisions governing the use of living or dead embryos and fetuses do not at present exist*” (paragraph 7), and that “*human embryos and fetuses must be treated in all circumstances with the respect due to human dignity*” (paragraph 10);

– **takes into account** that over the past two decades no significant positive changes have been made in International law and the Russian Federation legislation as to recognition of the legal status of the child at the stage of prenatal development, including guarantees of his (his/her) right to life;

– **is based on the recognition** that inhumane and ignominious treatment of the body of the child who died in utero of mother (disposal on a par with and together with biological materials and other medical waste or usage for cosmetology purposes) is unacceptable in the context of religious and moral feelings and beliefs of people, encroaches on human dignity of the body of the child that died in utero and on human dignity, religious and moral feelings of his parents³, considering that, as a matter of law, personal dignity does not disappear at the moment of death but is legally protected under another procedure;

– **takes into account** the examination of the issue of late-term abortions⁴ in spring 2014 by the Committee of Ministers of the Council of Europe as well as refuse of the European Parliament to recognize the so-called “right to abortion” as one of the fundamental human rights in December 2013;

– **takes into account** that bioethical norms (as an independent regulatory procedure) protecting human dignity and children’s rights at the stage of prenatal

² Recommendation of the Parliamentary Assembly of the Council of Europe № 1046 (1986) of 24.IX.1986 on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes // <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta86/erec1046.htm>>.

³ Bulky disposal of dead bodies of unborn children to landfills, as happened in 2012 in Sverdlovsk Region (Russia), is even more unacceptable.

⁴ Le drame des avortements tardifs / Question écrite № 655 au Comité des Ministres de M. Ángel Pintado, Espagne, Groupe du Parti populaire européen, Doc. 13416, 31 janvier 2014 // <<http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=20509&Language=fr>>.

development gradually become more widely recognized and take stronger regulation effect and that “San Jose Articles” Declaration dated March 25, 2011⁵ is only the first step towards creation of international legal guarantees of termination of inhuman treatment of children at the stage of prenatal development;

– **is based on** the provisions of the following international legal instruments⁶: Convention on the Rights of the Child dated November 20, 1989⁷ (here in after referred to as the Convention on the Rights of the Child), Declaration of the Rights of the Child dated November 20, 1959⁸ (here in after referred to as the Declaration of the Rights of the Child), European Convention for the Protection of Human Rights and Fundamental Freedoms dated April 11, 1950 (as amended by protocols)⁹ (here in after referred to as the European Convention for the Protection of Human Rights and Fundamental Freedoms), European Convention on the Exercise of Children’s Rights dated January 25, 1996¹⁰ (here in after referred to as the European Convention on the Exercise of Children’s Rights).

On the terms used herein

In this Report, the child at the stage of prenatal (before birth) development means alive and successively developing human embryo and human foetus, without division into any periods within this Report¹¹.

⁵ San Jose Articles // <http://www.sanjosearticles.com/?page_id=2>.

⁶ However, we believe it reasonable to take into account not only the provisions of international treaties, including those ratified by the Russian Federation, but also the provisions of other documents, particularly international declarations.

⁷ Convention on the Rights of the Child / Adopted and opened for signature, ratification and accession by General Assembly Resolution № 44/25 of 20.XI.1989 // <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>.

⁸ Declaration of the rights of the child / Proclaimed by General Assembly Resolution № 1386 (XIV) of 20.11.1959 // <<http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf>>.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 04.XI.1950) as amended by Protocols № 11 and № 14 // <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>>.

¹⁰ European Convention on the Exercise of Children's Rights (Strasbourg, 25.I.1996) // <<http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm>>.

¹¹ **The authors of this Report believe it necessary to extend the positions set out in the Report also to human embryos outside the womb, however do not describe this topic in detail in the Report, deeming it necessary to consider it in another separate study.**

MAIN PART

The child's rights to life, health, dignity and development at the stage of prenatal life and development are derived from the natural inalienable human right to life and ensured by the following legal guarantees indicative of the actual legal recognition of the child's right to life, human dignity, the value of his life and health:

1) guarantees of direct legal recognition of the child at the stage of prenatal development as a human individual having human dignity and holding the rights to life and health, as enshrined in international law and national laws of democratic legal states;

2) criminal and legal protection of life and health of the child at the stage of prenatal development:

– establishment of criminal and legal measures enhancing the protection of life and health of a pregnant woman from criminal attacks as well as making it legally possible to recognize the child at the stage of prenatal development as an independent injured person (victim) in case of murder of or personal injury to a pregnant woman;

– establishment of criminal punishment for willful murder of the child directly at the stage of prenatal development;

– prohibition of the death penalty on pregnant women;

– prohibition of concealment of the body of a dead born child or a child who died soon after delivery and concealment of information about his birth;

– guarantees of legal protection of life and health of the child at the stage of prenatal development from actions of his mother intending to kill him;

3) guarantees of legal protection of life and health of the child at the stage of prenatal development from irresponsible behavior of the woman pregnant with him threatening his life and health;

4) guarantees of respect for the body of a dead born child (who died in utero or at delivery) as well as a child who died soon after delivery:

– guarantees of issuance of the birth certificate in the name of a child, after his birth or after his removal as a result of abortion, who showed vitality for a short time before his death, as well as issuance of the death certificate in the name of a dead born child or a child who died soon after delivery or after his removal with vital signs as a result of abortion;

– guarantees of giving out the body of a dead born child (who died in utero of mother or at premature birth) or a child who died soon after delivery to his parents for a decent burial;

5) guarantees of the child's succession rights at the stage of prenatal development as an expression of legal recognition of the specific legal personality, value of life and human dignity of such child by the state;

6) making it legally possible to recognize the child at the stage of prenatal development as an independent injured person (victim) in case of inappropriate medical care provided to the woman pregnant with him;

7) guarantees of protection of life and health of the child at the stage of prenatal development due to medical procedures or researches:

– prohibition of the use of human embryos for industrial and commercial purposes and establishment of legal restrictions on the use of human embryos in scientific researches;

– guarantees of protection of the rights of the child at the stage of prenatal development to life and health protection by restricting clinical drug trials with pregnant women;

– restriction on the use of embryonic tissues in scientific researches as well as prohibition of the use of such tissues for cosmetic, pharmaceutical or therapeutic purposes;

8) guarantees of protection of the child's rights to life and health at the stage of prenatal development in relation to the rights of the woman pregnant with him to life and health;

9) guarantees of health protection of the child at the stage of prenatal development in the course of intrauterine medical surgery to the woman pregnant with him as an evidence of legal recognition of the rights of such child to life and health.

1. Legal bases for legal recognition of the child at the stage of prenatal development as a human individual having human dignity and holding the rights to life and health protection

Human life begins at the moment of conception, and the child at the stage of prenatal development before his birth by the fact of his existence, including the fact of being in physical (biological) relations with his mother, has a specific legal status that gives him the right to protection. However, terms “embryo” and “foetus” are only used to denote the stages of ontogenetic development of a human individual, but in no case shall be the basis for failure to recognize the value of child’s life at the stage of prenatal development. The fact that the human being is at the initial – prenatal – stage of his life and development gives no legal bases to treat him (and, thus, his life) as a subject neither being a human individual nor having the right to life. The right of such child to life, by its legal nature, arises from the natural human right to life and shall be recognized by the state as a **supreme** value that cannot be canceled by law. Therefore, the state shall recognize the need for legal protection of life and health of the child at the stage of prenatal development and establish legal guarantees of the right to life of such child, his right to normal development and protection of his health.

The statement that the child at the stage of prenatal development is a human being is not only a philosophical, moral or ethical belief or assumption but a proven legally relevant fact recognized by international law¹², confirmed by the provisions of national laws of the Russian Federation and foreign states and reasoned by a broad scope of scientific knowledge gained in the area of biology, embryology, genetics, physiology, and other sciences. The legislation of many foreign states establishes standards that guarantee the right to life, health and other rights of the child at the stage of prenatal development. It shall be enshrined in law that the child at the prenatal stage of life has a number of the fundamental rights, including the rights to life, security and protection, the right to proper care and food, to special protection from all forms of negligence, abuse, intentional or unintentional cruel treatment and other actions which may harm his development.

¹² Hereafter it will be shown how this legal recognition is expressed in the Preamble to the **Convention on the Rights of the Child**. – *Author’s note*.

It is obvious that currently the levels and specific measures of legal protection of unborn children and legal protection of the child at the stage of prenatal development vary significantly from state to state; however, it does not mean that the obligation of the state to respect and protect child's rights at the prenatal stage is less important (or that the state has no such obligation at all) and that the child at the prenatal stage is deprived of any legal protection.

It is also obvious that prenatal life of the child is significantly different from his postnatal (after birth) life but, at the same time, the child in utero of mother is a human individual (human being at the embryonic stage of his life and development and the stage of intrauterine foetus) from the moment of conception, with initially inherent human dignity, with inherent natural rights and related legal interests. The fact that an unborn child, just as a newborn one, is unable to assert, express and defend his rights and related legal interests does not mean that there are no such rights and interests or that such rights may only be acquired in the future. Rather, such rights and interests are already actually have effect and exist by virtue of beginning of the child's life and, according to the analysis of national laws of many states, the rights and legal interests of the child are guaranteed by law (e.g., by civil law as to succession relations) long before his birth.

Paragraph 10 of the **Recommendation of the Parliamentary Assembly of the Council of Europe № 1046 (1986) on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes dated September 24, 1986**¹³ emphasizes that “*human embryos and fetuses must be treated in all circumstances with the respect due to human dignity*”. Thus, the fact that the child at the stage of prenatal development has human dignity is recognized at the international level.

Human dignity of the child at the stage of prenatal development is neither determined by nor dependent on and cannot be determined by whatever conditions on the part of any other persons, including the state, or circumstances imposed by the opinion or will of any persons (including parents of the child and healthcare workers). This human dignity is not only intrinsically valuable but also self-referential, i.e. not determined by

¹³ Recommendation of the Parliamentary Assembly of the Council of Europe № 1046 (1986) of 24.IX.1986 on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes // <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta86/erec1046.htm>>.

whatever external (in relation to the child at the stage of prenatal development) legal or actual conditions or subjective attitude or opinion, arises from the intrinsic value of human life and the private autonomy.

According to the position expressed in **the Decision of the Federal Constitutional Court of Germany dated May 28, 1993**¹⁴, “*wherever human life exists, it should be accorded human dignity. The dignity accorded to human life and also that accorded to unborn life exists for its own sake*” (paragraphs 146–147).

It should also be noted that after conception of the child, occurrence of natural child-parent relationships and the rights and duties between the child and parents is no longer dependent on the will and subjective opinion of parents and, all the more, other persons; such relationships cannot be pended, delayed or reduced. Thus, human dignity of the child at the stage of prenatal development shall be reasonably considered a particular form of the personal human dignity.

Denial of human dignity of the child at the stage of prenatal development due to the fact that this is about special physical condition of the human being at the initial (prenatal) stage of his life is unjustified from legal and actual points of view and, to some extent, is comparable to denial of human dignity of the dead person or the person in a state of coma or vegetative state (since those who deny human dignity of such child refer to the fact that he/she lacks self-consciousness at this age). It is clear that in these cases – for the dead person, for the person in a state of coma or vegetative state – human dignity is transformed into special forms, however, it (human dignity) does not disappear and, moreover, cannot be eliminated at anybody’s discretion.

Statements denying human dignity and the very existence of the child’s personality at the stage of prenatal development as well as non-recognition of the embryo and foetus life as equal, by its value, to the born child life are ideologically motivated, based on conceptual substitutions and disregard of obvious scientific facts, indicate an extreme indifference of such persons to the value of human life, disregard the position of the United Nations that the child at the stage of prenatal development, due to his physical and mental immaturity, is in need of special protection and care, including appropriate

¹⁴ Decision of the Federal Constitutional Court, №№ 2 BvF 2/90, 2 BvF 4/92, and 2 BvF 5/92, May 28, 1993 // <http://www.bverfg.de/entscheidungen/fs19930528_2bvff000290en.html>.

legal protection, both before and after birth (the Preamble to the **Declaration of the Rights of the Child** dated November 20, 1959¹⁵).

This provision of the Preamble to the **Declaration of the Rights of the Child** also indicates that the arguments justifying denial of the dignity and rights of the child at the stage of prenatal development based on the linkage of the beginning of recognition of human dignity to the ability of an individual to recognize himself/herself as a human being are inconsistent. Mental immaturity of the child and other characteristics of his development, not only at prenatal stage of the life but also over a certain period after birth, exclude the possibility of application of the criteria applicable to adults to the child.

Legal recognition of the child at the stage of prenatal development (including at any stage of intrauterine development) as a holder of the right to life, legal recognition of the rights of such child to life, health and development as well as to legal protection before his birth is expressed in a number of provisions of international instruments and confirmed by guarantees enshrined in law within legal systems of many foreign states.

The right of the child at the stage of prenatal development to life and to protection from harm to his health and from dangers to his life is primarily guaranteed by a number of international instruments. According to the Preamble to the **Declaration of the Rights of the Child**, “*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*”.

It should be noted that **Declaration of the Rights of the Child** contains only two specific rights of the child arising from the moment of his birth, namely the right to a name and the right to a nationality (Principle 3); however, no indications of any other rights of the child arising only from the moment of his birth are set out in the Declaration, and similar restrictions on other rights of the child do not follow there from. However, child’s parents have the right to give his a name also before his birth.

Thus, this Declaration confirms that the child at the stage of prenatal development has a number of the fundamental natural rights.

The interpretation of Principle 9 of the **Declaration of the Rights of the Child** that “*the child shall be protected against all forms of neglect, cruelty and exploitation.*”

¹⁵ Declaration of the rights of the child / Proclaimed by General Assembly Resolution № 1386 (XIV) of 20.XI.1959 // <<http://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf>>.

He shall not be the subject of traffic, in any form” and the provision of the Preamble there to on appropriate legal protection of the child both before as well as after birth, taken together, allows to reveal their legal meaning recognizing the right of the child to be protected from all forms of neglect, cruelty and exploitation and the need of such protection ensured by the state also before his birth.

The Preamble to the **Convention on the Rights of the Child dated November 20, 1989**¹⁶ states that it was adopted taking into account the above mentioned imperative of the Preamble to the Declaration on the Rights of the Child dated November 20, 1959 on the need for legal protection of the child before his birth. In this regard, likewise the Declaration of the Rights of the Child, the Convention on the Rights of the Child contains well-defined restriction on the beginning of enjoyment of the child’s rights and the beginning of their enforcement by the moment of his birth being the beginning moment of enforcement of the right – only with regard to the child’s right to a name and the child’s right to a nationality and the right to know his parents and the right to parental care (paragraph 1 of article 7). The **Convention on the Rights of the Child** contains no other restrictions on the child’s rights in terms of referencing the beginning of their occurrence and the beginning of their enforcement by the moment of birth of the child, indicating only the upper age limit for recognition of the child as a human being (article 1). It is this provision of the Preamble in relation to which paragraph 1 of Article 6 of this Convention on the obligation of the member states to recognize that “*every child has the inherent right to life*” should be interpreted reasonably extending notion “*every child*” also to the child before his birth.

We believe it critical that, according to paragraph 2 of article 6 of the **Convention on the Rights of the Child**, the member states “*shall ensure to the maximum extent possible the survival... of the child.*” Consideration of this norm in relation to the position of the Preamble to the Convention on appropriate legal protection of the child, both before as well as after birth, allows to reveal its legal meaning according to which states shall ensure the survival of the child both before and after his birth. Therefore, this element of the legal status of the child at the stage of prenatal development – duty of the

¹⁶ Convention on the Rights of the Child / Adopted and opened for signature, ratification and accession by General Assembly Resolution № 44/25 of 20.XI.1989 // <<http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>>.

state to ensure the survival of the child – is included in the guarantees of the right to life of such child.

Thus, the abovementioned international instruments on the rights of the child (basic international instruments on the rights of the child that are most legally significant among international instruments on human rights) guarantee the child's rights to life, health and development also before birth of the child, which is crucially important. However, the minimum (lower) time (age) limit – the moment of occurrence and enforcement of the rights of the child to life, health and human dignity – in these international instruments are not established and cannot be determined based on their positions.

It should be noted that the **International Covenant on Civil and Political Rights dated December 16, 1966**¹⁷, paragraph 1 of Article 6 of which sets out that every human being has the inherent right to life, does not specify the moment of occurrence and enforcement of the human right to life. Similarly, there is no indication of the moment at which a human being acquires the right to life in the provisions of the **European Convention for the Protection of Human Rights and Fundamental Freedoms dated November 4, 1950**¹⁸ that guarantee the right to life (paragraph 1 of article 2).

These and other international instruments **contain no** provisions based on which it would be possible to legally and evidentially interpret the right to life in such a way that the moment of occurrence of this human right would have been recognized no earlier than the moment of his birth.

According to paragraph 6 of article 1 of the **European Convention on the Exercise of Children's Rights dated January 25, 1996**¹⁹, nothing in the Convention prevents the parties from application of more favorable standards for the provision and exercise of children's rights. Proceeding on the fact that, according to the established normal understanding of human life, it begins at conception and human birth is only a

¹⁷ International Covenant on Civil and Political Rights / Adopted by General Assembly of UN Resolution № 2200 A (XXI) of 16 December 1966 // <<http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>>.

¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.XI.1950) as amended by Protocols № 11 and № 14 // <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>>.

¹⁹ European Convention on the Exercise of Children's Rights (Strasbourg, 25.I.1996) // <<http://conventions.coe.int/Treaty/en/Treaties/Html/160.htm>>.

stage of life, and the need to ensure safety and legal protection of human life principally extends also to children at the stage of prenatal development, we believe that states are entitled to take ²⁰ measures to ensure better legal protection of the child compared to that guaranteed at the international level.

National legislation of many states clearly defines declarations on legal protection of the child at the stage of prenatal development ensured by the state. Thus, section 48.01 of Chapter 48 of the **Children's Code of the Wisconsin Statutes (USA)** ²¹ states that protection of children and unborn children is carried out in order to preserve the unity of the family through assisting parents and pregnant women as expectant mothers, whenever appropriate, in fulfilling their responsibilities. According to section 43.1 of the **Civil Code of California (USA)** ²², *“a child conceived, but not yet born, is deemed an existing person, so far as necessary for the child's interests in the event of the child's subsequent birth”*.

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 dated October 18, 2011** ²³ 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, 1998 ²⁴, **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 “c” of paragraph 2 of article 6 of the [above mentioned] Directive”*).

²⁰ According to paragraph 1 of Article 31 “General Rule of Interpretation” of the **Vienna Convention on the Law of Treaties** dated May 23, 1969, *“a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”*.

²¹ Chapter 48 «Children's Code» of Wisconsin Statutes & Annotations // <<https://docs.legis.wisconsin.gov/statutes/statutes/48/III/133>>.

²² Civil Code of California (Sections 43-53.7) // <<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=00001-01000&file=43-53.7>>.

²³ Judgment of the Court (Grand Chamber) of 18 October 2011 in the Case № C-34/10 // <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-34/10>>.

²⁴ 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. – P. 0013–0021. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31998L0044>>.

We now proceed to legal positions of the European Court of Human Rights that address not only legal positions on the issues under consideration but also value (axiological) bases for the decisions made on these issues.

According to the legal position set out in paragraph 82 of the **Judgment of the European Court of Human Rights on the case “Vo v. France” dated July 8, 2004**²⁵ and later in paragraph 107 of the **Judgment of the European Court of Human Rights in the case “Mehmet Şentürk and Bekir Şentürk v. Turkey” dated April 9, 2013 (the final judgment dated July 9, 2013)**²⁶ if there is no European consensus on the scientific and legal definition of the moment of beginning of human life, the state is entitled to decide on the following: *«This has been reflected in the consideration given to the diversity of views on the point at which life begins ... and the State has been left with considerable discretion in the matter»*.

However, the **Judgment of the European Court of Human Rights in the case “Vo v. France” dated July 8, 2004** states that it is unreasonable to unify legislative provisions of different countries on this issue (paragraph 82); furthermore, the Court observes that *“the embryo and/or foetus... are beginning to receive some protection in the light of scientific progress and the potential consequences of research into genetic engineering, medically assisted procreation or embryo experimentation”* (paragraph 84).

According to the **Judgment of the Constitutional Court of Spain № 53/1985 dated April 11, 1985**²⁷, the right to life (as implementation of the fundamental value) is constitutionally guaranteed also for unborn children (subparagraph «c» of paragraph 5 etc.), the state shall guarantee the life, particularly the life of a child not yet born (article 15 of the Constitution), albeit within certain limits determined by the interests of protection of the mother’s rights of life and health (paragraphs 12, 4 and 7); it is recognized that human life is the process of development that begins with pregnancy and ends with death, representing qualitative changes, continuous over time, in somatic and

²⁵ Judgment of the European Court of Human Rights of 08.VII.2004 in the case “Vo v. France” (Application № 53924/00) // <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61887>>.

²⁶ Judgment of the European Court of Human Rights of 09.IV.2013 (Final – 09.VII.2013) in the case “Mehmet Şentürk and BekirŞentürk v. Turkey” (Application № 13423/09) // <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-118722>>.

²⁷ Sentencia del Tribunal Constitucional de España № 53/1985 de 11 de abril de 1985 // <<http://hj.tribunalconstitucional.es/HJ/pt-BR/Resolucion/Show/SENTENCIA/1985/53>>.

mental nature reflected by changes in the status of a human individual in the context of public and private law (subparagraph «a» of paragraph 5).

The Judgment of the Federal Constitutional Court of Germany dated May 28, 1993²⁸ also states that it is necessary to extend the right to life also to children at the stage of prenatal development: *“The Basic Law requires the state to protect human life. Human life includes the life of the unborn. It too is entitled to the protection of the state”* (paragraph 145).

Furthermore, there are numerous examples of regional and international instruments on human rights that directly define or express the recognition of the fact that the human right to life occurs and starts to be protected at the moment of conception.

Paragraph 1 of article 4 of the **American Convention on Human Rights**²⁹ states that *“every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life”*.

Regardless of the fact that, according to the **Judgment of the Inter-American Court of Human Rights in the case “Artavia Murillo and Others v. Costa Rica” dated November 28, 2012**³⁰, the meaning of paragraph 1 of Article 4 of the American Convention on Human Rights for implementation of in vitro fertilization shall be broadly interpreted as defining the need to count the beginning of life from the moment when the embryo becomes implanted in utero and that legal protection of the right to life within this provision is not absolute – to the extent that the embryo used for in vitro fertilization “cannot be understood to be a person for the purposes of paragraph 1 of article 4” (paragraph 264); in the above-mentioned Judgment neither legal validity of this provision in general nor human dignity and specific legal personality of the child at the stage of prenatal life and development are denied.

According to article 18 **“Researches on embryos in vitro”** of the **Convention for the Protection of Human Rights and Dignity of the Human Being with regard to**

²⁸ Decision of the Federal Constitutional Court, №№ 2 BvF 2/90, 2 BvF 4/92, and 2 BvF 5/92, May 28, 1993 // <http://www.bverfg.de/entscheidungen/fs19930528_2bvf000290en.html>.

²⁹ American Convention on Human Rights // <http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.pdf>.

³⁰ Caso “Artavia Murillo y otros (“Fecundación in vitro”) vs. Costa Rica” / Sentencia de la Corte Interamericana de Derechos Humanos, 28.XI.2012. <http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_esp.pdf>; <http://www.corteidh.or.cr/docs/casos/articulos/seriec_257_ing.pdf>.

the Application of Biology and Medicine – the Convention on Human Rights and Biomedicine dated April 4, 1997 (Oviedo)³¹, “*where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo. The creation of human embryos for research purposes is prohibited.*”

A number of documents of international organizations (documents of so-called “soft” international law) doctrinally validate this approach and set out its value bases.

Particularly, articles 1–4 of “**San Jose Articles**” **Declaration dated March 25, 2011**³² state that a beginning of a new human life at conception is a scientific fact and that “*Each human life is a continuum that begins at conception and advances in stages until death. Science gives different names to these stages, including zygote, blastocyst, embryo, fetus, infant, child, adolescent and adult. This does not change the scientific consensus that at all points of development each individual is a living member of the human species. From conception each unborn child is by nature a human being. All human beings, as members of the human family, are entitled to recognition of their inherent dignity and to protection of their inalienable human rights. This is recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and other international instruments*”.

Paragraph 5 of the **Recommendation of the Parliamentary Assembly of the Council of Europe № 1046 (1986) on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes, dated September 24, 1986**³³, recognizes the objective fact that “*from the moment of fertilization of the ovule, human life develops in a continuous pattern*”, i.e. it recognizes that the beginning of **human** life shall be counted from the moment of fertilization.

The need for protection of the rights and human dignity of embryos, the need to respect human dignity of human embryos and the need for specific legal protection of the human embryo from the moment of fertilization of the ovule are stated in paragraphs 1, 3 and 6 of the **Recommendation of the Parliamentary Assembly of the Council of**

³¹ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo, 04.IV.1997) // <<http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm>>.

³² San Jose Articles // <http://www.sanjosearticles.com/?page_id=2>.

³³ Recommendation of the Parliamentary Assembly of the Council of Europe № 1046 of 24.IX.1986 on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes // <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta86/erec1046.htm>>.

Europe № 1100 (1989) on the use of human embryos and fetuses in scientific research, dated February 2, 1989 ³⁴.

Constitutional guarantees of protection of the rights and dignity of children at the stage of prenatal development are enshrined in a number of national constitutions where they are reasonably included in the sections on human rights.

Paragraph 3 of article 40 of the **Constitution of Ireland** ³⁵ sets out that “*the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right*”.

According to paragraph 1 of article 19 of the **Constitution of the Republic of Chile** ³⁶, “*the law protects the life of those about to be born*”. The **Judgment of the Constitutional Court of Chile dated April 18, 2008** ³⁷ generally confirmed the importance of this constitutional provision and the need to recognize the child at the stage of prenatal development as a human being.

Specific guarantees of the rights of the unborn are set out in article 67 of the **Constitution of the Republic of Honduras** ³⁸.

Article II of section “Freedom and Responsibility” of the **Constitution of Hungary dated April 25, 2011** ³⁹ states that “*human dignity shall be inviolable. Every human being shall have the right to life and human dignity; embryonic and foetal life shall be subject to protection from the moment of conception*”. Subparagraph 1 of § 3 of the **Act of Hungary “On the Protection of Families” dated December 23, 2011** ⁴⁰ establishes guarantees of protection and respect of the child’s life from the moment of conception. According to the Preamble to the **Act of Hungary “On the Protection of**

³⁴ Recommendation of the Parliamentary Assembly of the Council of Europe № 1100 (1989) on the use of human embryos and fetuses in scientific research of 02.II.1989 // <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta89/EREC1100.htm>>.

³⁵ Constitution of Ireland // <http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2012/Bunrecht_na_h%C3%89ireann-March2012.pdf>.

³⁶ Constitución política de la República de Chile // <http://www.camara.cl/camara/media/docs/constitucion_politica.pdf>.

³⁷ <http://www.camara.cl/camara/camara_tc3.aspx?prmART=19&prmROL=740&prmIDA=2623>.

³⁸ Constitución de la República de Honduras, 1982, con las reformas desde 1982 hasta 2004 // <sg.unah.edu.hn/gestordocumentos/25>.

³⁹ Magyarország Alaptörvénye // <http://www.njt.hu/cgi_bin/njt_doc.cgi?docid=140968>.

⁴⁰ 2011. évi CCXI. törvény a családok védelméről // <http://njt.hu/cgi_bin/njt_doc.cgi?docid=143096.245265>.

the Life of the Foetus” (as amended) dated December 17, 1992⁴¹, “*the life of the human fetus deserves respect and protection from the moment of conception*”. According to part “c” of subparagraph 3 of § 2 of this Act of Hungary it follows that the state promotes protection of life of the human fetus.

The **Constitution of the Slovak Republic**⁴² says that “*everyone has the right to life. Human life is worthy of protection already before birth*” (paragraph 1 of article 15).

Paragraph 1 of article 6 of the Charter of Fundamental Rights and Basic Freedoms⁴³ included, as per paragraph 1 of article 112 of the **Constitution of the Czech Republic**⁴⁴, in its constitutional system states that “*Everyone has the right to life. Human life is worthy of protection even before birth*”.

According to paragraph 22 of the **Austrian Civil Code dated 1811 (as amended 2014)**⁴⁵, “*unborn children are protected by the law from the time of their conception. Insofar as concerns their individual rights, and not the rights of a third person, they are to be considered as born*”.

According to paragraph “d” of article 1841 of Chapter 90A “Protection of Unborn Children” of Title 18 of the **United States Code**⁴⁶, “*as used in this section, the term “unborn child” means a child in utero, and the term “child in utero” or “child, who is in utero” means a member of the species homo sapiens, at any stage of development, who is carried in the womb*”.

Subparagraph 3 of paragraph “a” of section 13A-6-1 of the **Code of Alabama (USA)**⁴⁷ sets out: “*Person. The term, when referring to the victim of a criminal homicide or assault, means a human being, including an unborn child in utero at any stage of development, regardless of viability*”.

⁴¹ 1992. évi LXXIX. törvény a magzati élet védelméről // <http://njt.hu/cgi_bin/njt_doc.cgi?docid=17433.244667>.

⁴² Ústava Slovenskej Republiky // <[http://www.mzv.sk/App/wcm/media.nsf/vw_ByID/ID_F38FE30121A6A4BAC1257648004A9230_SK/\\$File/ustava.pdf](http://www.mzv.sk/App/wcm/media.nsf/vw_ByID/ID_F38FE30121A6A4BAC1257648004A9230_SK/$File/ustava.pdf)>.

⁴³ Listina základních práv a svobod // <<http://www.psp.cz/docs/laws/listina.html>>.

⁴⁴ Ústava České Republiky // <<http://www.psp.cz/docs/laws/constitution.html>>.

⁴⁵ Allgemeines Bürgerliches Gesetzbuch (ABGB) // <[http://www.jusline.at/Allgemeines_Buergerliches_Gesetzbuch_\(ABGB\).html](http://www.jusline.at/Allgemeines_Buergerliches_Gesetzbuch_(ABGB).html)>.

⁴⁶ The Unborn Victims of Violence Act // <<http://www.nrlc.org/uploads/unbornvictims/UVVAEnrolled.pdf>>.

⁴⁷ The Code of Alabama 1975 // <<http://alisondb.legislature.state.al.us/acas/codeofalabama/1975/coatoc.htm>>, <<http://www.legislature.state.al.us/codeofalabama/1975/13A-6-1.htm>>.

The Preamble to the **New Zealand Contraception, Sterilization and Abortion Act 1977 № 112** ⁴⁸ provides for the rights of the unborn.

According to **Judgment № 2000-02306 of the Constitutional Chamber of the Costa Rica Supreme Court of Justice dated March 15, 2000** ⁴⁹, the human embryo has dignity and fundamental rights intrinsic to human beings, *“the embryos are human individuals and independently have the inherent right to life without any legitimation of the acquisition of this right; no law, regulation or agreement can take away or reduce their right to life... The right to life is the essence of human rights, because humanity cannot exist without life...The human embryo is a person from the time of conception; hence it cannot be treated as an object for investigation purposes, be submitted to selection processes, kept frozen”*.

Paragraph 2 of article 17 of the Constitution of the Russian Federation states that *“fundamental human rights and freedoms are inalienable and shall be enjoyed by everyone since the day of birth”*. However, in view of the provisions of paragraph 1 of article 55 that *“the listing in the Constitution of the Russian Federation of the fundamental rights and freedoms shall not be interpreted as a rejection or derogation of other universally recognized human rights and freedoms”* and paragraph 4 of article 15 concerning the meaning of the universally-recognized norms of international law and international treaties and agreements of the Russian Federation as a component part of its legal system as well as the guarantees of legal recognition and protection of the child’s rights at the stage of prenatal development to life and health enshrined in the Russian Federation legislation, it can be reasonably stated that the constitutional and legal meaning of paragraph 2 of article 17 cannot imply the restrictive understanding of the occurrence of the right to life from the moment of birth and does not give reasons to claim that it is impossible to recognize the right of the child to life at the stage of prenatal development.

⁴⁸ Contraception, Sterilisation, and Abortion Act № 112 of 1977 // <<http://www.legislation.govt.nz/act/public/1977/0112/latest/whole.html>>.

⁴⁹ Sentencia de Corte Suprema de Justicia de la República de Costa Rica № 2000-02306 de 15 de marzo de 2000 emitida por la Sala Constitucional de la Corte Suprema de Justicia, Expediente № 95-001734-007-CO // <http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/>; <http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_indice_despachos_x_anno.aspx?param1=IA&cmbDespacho=0007&strNomDespacho=Sala%20Constitucional¶m01=Sentencias%20por%20Despacho&txtRelevante=0>.

2. Criminal and legal protection of life and health of the child at the stage of prenatal development as an evidence of legal recognition of the value of life, rights to life and health of the child

Legal recognition of the value of life and human dignity of the child at the stage of prenatal development by the state is expressed, particularly, in the law of the Russian Federation and national laws of other democratic legal states enshrining sets of legal provisions aimed at criminal-legal protection of life and health of the child at the stage of prenatal development and other child's rights the most important of which are described below.

2.1. Criminal and legal measures enhancing the protection of life and health of a pregnant woman from criminal attacks as well as making it legally possible to recognize the child at the stage of prenatal development as an independent injured person (victim) in case of murder of or personal injury to a pregnant woman

Many states provide, in their legislation, the measures for protection of the right of the child at the stage of prenatal development to life and health, including special measures for protection of pregnant women. Special criminal and legal protection of the child at the stage of prenatal development is primarily established by enshrining, in the criminal law, the legal measures aimed at enhanced protection of life and health of a pregnant woman from criminal attacks. Particularly, the criminal law defines the murder of a pregnant woman as an aggravating factor for the crime.

Special criminal and legal protection of the child at the stage of prenatal development is also established by making it legally possible to recognize the unborn child as an independent injured person (victim) in case of murder of the woman pregnant with him or personal injury to the pregnant woman to the extent that the child in her uterus also gets injured or dies (in utero or as a result of induced abortion with miscarriage or after early delivery). However, it can be recognized that the child in utero actually has the same right to life as the born child and is an independent victim. Therefore, such conducts, in case of physical harm to a pregnant woman with the above mentioned adverse consequences for the child in utero, are qualified as separate crimes.

The Criminal Code of the Russian Federation defines “*commission of a crime against a woman who is obviously in a state of pregnancy*” for the convicted personas

aggravating factors (subparagraph «3» (h) of paragraph 1 of article 63); however, for the purpose of further security and legal protection of life and health of a pregnant woman as well as life and health of the child in her uterus, the Criminal Code of the Russian Federation qualifies 6 crimes with the qualifying aggravating circumstance – commission of a crime against “*a woman who is known by the killer to be in a state of pregnancy*” – and provides for such crimes higher criminal penalties than for similar crimes against a woman who is not in a state of pregnancy (for example, subparagraph «Г» (d) of paragraph 2 of article 105, subparagraph «В» (c) of paragraph 2 of article 117 of the Criminal Code of the Russian Federation). Furthermore, paragraph 1 of article 111 of the Criminal Code of the Russian Federation qualifies intentional infliction of an injury to health of a pregnant woman leading to abortion as “*infliction of a grave injury*”. All of these are also special measures of protection of pregnant woman and child at the stage of prenatal development.

For protection of life and health of the child at the stage of prenatal development, national legislation of many foreign states provides the effective measures of criminal punishment for commission of crimes causing harm to life and health of such child, which is unparalleled in the Russian law.

Article 170 “Killing unborn child” of the **Criminal Code of the Northern Territory (Australia)**⁵⁰ states that “*any person who, when a woman or girl is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed the child, is guilty of a crime and is liable to imprisonment for life*”.

Moreover, according to article 208B of the **Criminal Code of the Northern Territory (Australia)**⁵¹, a person is guilty of an offense if the person, in order to cause miscarriage in a pregnant women, uses an instrument or other thing on a woman or administers a drug to a woman or causes a drug to be taken by a woman. It is specific that

⁵⁰ Criminal Code Act of Northern Territory of Australia // <http://www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/legis/nt/consol_act/ccal15.pdf>.

Here in after the exact title of the act is referred to as Schedule 1 “Criminal Code of the Northern Territory (Australia)” to the Criminal Code Act of the Northern Territory (Australia); for short, we will use “Criminal Code of the Northern Territory (Australia).” – *Author’s note*.

⁵¹ Criminal Code Act of Northern Territory of Australia // <http://www.austlii.edu.au/cgi-bin/download.cgi/cgi-bin/download.cgi/download/au/legis/nt/consol_act/ccal15.pdf>.

paragraph 2 of article 208B of this Act does not say that the actual state of pregnancy of a woman is a necessary factor (element) of the crime. It means that the intention to cause miscarriage is enough to find the person who committed these acts guilty of the crime, even if there were no such consequences of his acts.

According to paragraph 1 of article 313 of the **Criminal Code Act 1899 of Queensland (Australia) (as amended)**⁵², *“any person who, when a female is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, the person would be deemed to have unlawfully killed the child, is guilty of a crime, and is liable to imprisonment for life”*. According to paragraph 2 of article 313 of the **Criminal Code Act of Queensland (Australia)**, *“any person who unlawfully assaults a female pregnant with a child and destroys the life of, or does grievous bodily harm to, or transmits a serious disease to, the child before its birth, commits a crime”*.

In the USA, the measures of criminal punishment aimed at protection of the child’s life at the stage of prenatal development are to be taken both at the federal level and at the state level.

The United States in 2004 federal criminal law was amended by the **Unborn Victims of Violence Act**⁵³, thus legally recognizing the human embryo and foetus at any stage of intrauterine development as a holder of the right to life and as an independent victim of the crime committed against a pregnant woman. The provisions of the above mentioned Act also provide for the use of so-called legal institution of strict liability according to which, in the described case, in order to find a person guilty of a crime against an unborn child it is not necessary for the person to know that the main victim of his acts was pregnant.

For example, paragraph “a” of article 2 of the **Unborn Victims of Violence Act** is complementary to Chapter 90A “Protection of Unborn Children” of Title 18 of the **United States Code**⁵⁴, article 1841 of which states that:

“(a) (1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in

⁵² Criminal Code Act 1899 of Queensland // <<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf>>.

⁵³ The Unborn Victims of Violence Act // <<http://www.nrlc.org/uploads/unbornvictims/UVVAEnrolled.pdf>>.

⁵⁴ The Unborn Victims of Violence Act // <<http://www.nrlc.org/uploads/unbornvictims/UVVAEnrolled.pdf>>.

section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

(2) (A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.

(B) An offense under this section does not require proof that—

(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child.

(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being”⁵⁵.

2.2. Measures of criminal punishment for willful murder of the child at the stage of prenatal development

It is obvious that the measures of criminal punishment for willful murder of the child directly at the stage of prenatal development enshrined in national legislation of a number of states indicate specific recognition of the value of life of such child and his right to life by the state.

Article 157 of the **Criminal Code of the Spain**⁵⁶ states that whoever, by any means or procedure, were to cause a foetus an injury or disease that seriously damages the normal development thereof or causes such foetus a serious physical or mental handicap, shall be punished with a prison sentence of one to four years and special barring from practising any health profession for a term of two to eight years.

The criminal legislation of most US states contains separate crimes and provides for criminal punishment for commission of murder or causing physical harm to children at the stage of prenatal development. In the state legislation, likewise in the United States

⁵⁵ The Unborn Victims of Violence Act // <<http://www.nrlc.org/uploads/unbornvictims/UVVAEnrolled.pdf>>.

⁵⁶ Ley Orgánica № 10/1995, de 23 de noviembre de 1995, del Código Penal // Boletín Oficial del Estado. – 24.XI.1995. – № 281. <<https://www.boe.es/buscar/pdf/1995/BOE-A-1995-25444-consolidado.pdf>>.

federal law, a human embryo and, later, the human foetus **at any stage of its development** is usually understood under the unborn child. However, despite the fact that the legislation of US states establishing such liability contains provisions that exempt persons practicing legal abortions with consent of pregnant women, particularly for medical reasons, from this liability, such exceptions are subject to legal provisions that impose abortion restrictions.

The **Alaska Statutes (USA)**⁵⁷ contain provisions that establish separate crimes providing for the liability for commission of murder of the unborn child. Thus, sections 11.41.150 – 11.41.170 of this Code establish the liability for willful murder, manslaughter and negligent homicide of the unborn child.

Section 11.41.150 “Murder of an unborn child” of the **Alaska Statutes** sets out:

“(a) A person commits the crime of murder of an unborn child if the person

(1) with intent to cause the death of an unborn child or of another person, causes the death of an unborn child;

(2) with intent to cause serious physical injury to an unborn child or to another person or knowing that the conduct is substantially certain to cause death or serious physical injury to an unborn child or to another person, causes the death of an unborn child; ...

(4) knowingly engages in conduct that results in the death of an unborn child under circumstances manifesting an extreme indifference to the value of human life; ...

(c) Murder of an unborn child is an unclassified felony”.

Section 18-4001 of the **Idaho Statutes (USA)**⁵⁸ defines murder as the “*killing of a human being including, but not limited to, a human embryo or fetus*”.

As already mentioned above, subparagraph 3 of paragraph “a” of section 13A-6-1 of the **Code of Alabama**⁵⁹ sets out: “*Person. The term, when referring to the victim of a criminal homicide or assault, means a human being, including an unborn child in utero at any stage of development, regardless of viability*”.

⁵⁷ The Alaska Statutes – 2013 // <<http://www.legis.state.ak.us/basis/folio.asp>>.

⁵⁸ Idaho Statutes // <<http://legislature.idaho.gov/idstat/idstat.htm>>.

⁵⁹ The Code of Alabama 1975 // <<http://alisondb.legislature.state.al.us/acas/codeofalabama/1975/coatoc.htm>>, <<http://www.legislature.state.al.us/codeofalabama/1975/13A-6-1.htm>>.

In a similar way, subparagraph 26 of paragraph «a» of section 1.07 of the **Texas Penal Code (USA)**⁶⁰ defines an individual against whom a crime can be committed as a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.

Articles 215 and 216 of the **Penal Code of Japan**⁶¹ provide for criminal punishment for abortion made without consent of the pregnant woman and for attempts to commit this act as well as for causing death or grievous bodily harm as a result of abortion without consent of the pregnant woman.

2.3. Prohibition of the death penalty on pregnant women

Prohibition of the death penalty on pregnant women certainly and convincingly confirms and proves recognition of the right to life of the child in utero, expresses *de jure* and *de facto* recognition of the value of life, human dignity and rights of the child by the state.

This is affirmed by **Judgment № 2000-02306 of the Constitutional Chamber of the Costa Rica Supreme Court of Justice dated March 15, 2000**⁶² that emphasizes that prohibition of the death penalty on pregnant women is definitely motivated by the concern about the child in utero.

Such prohibition is contained in criminal laws of the vast majority of countries of the world where death penalty is applied. This can be exemplified by article 49 of the **Criminal Act of the People's Republic of China**⁶³.

According to some criminal laws, such as the **Russian Federation Criminal Code** (paragraph 2 of article 59), the death penalty cannot be applied to women in general. It should also be noted that the European member states of the Council of Europe do not use the death penalty.

⁶⁰ Penal Code // <<http://www.statutes.legis.state.tx.us/Docs/PE/htm/PE.1.htm#1.07>>.

⁶¹ 刑法// <<http://law.e-gov.go.jp/htmldata/M40/M40HO045.html>>; Penal Code (Act № 45 of 1907) // <<http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf>>.

⁶² Sentencia de Corte Suprema de Justicia de la República de Costa Rica № 2000-02306 de 15 de marzo de 2000 emitida por la Sala Constitucional de la Corte Suprema de Justicia, Expediente № 95-001734-007-CO // <http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/>; <http://jurisprudencia.poder-judicial.go.cr/SCIJ_PJ/busqueda/jurisprudencia/jur_indice_despachos_x_anno.aspx?param1=IA&cmbDespacho=0007&strNomDespacho=Sala%20Constitucional¶m01=Sentencias%20por%20Despacho&txtRelevante=0>.

⁶³ Criminal Law of the People's Republic of China // <<http://www.asianlii.org/cn/legis/cen/laws/clotproc361/>>.

2.4. Prohibition of concealment of the body of a dead born child or a child who died soon after delivery and concealment of information about his birth

Some states enshrine, in their law, the responsibility for concealment of information about the birth of the child who died in utero, was dead born or died soon after delivery.

Thus, according to article 314 of the **Criminal Code Act of Queensland (Australia)**⁶⁴, *“any person who, when a woman is delivered of a child, endeavours, by any secret disposition of the dead body of the child, to conceal the birth, whether the child died before, at, or after, its birth, is guilty of a misdemeanor, and is liable to imprisonment for 2 years”*.

2.5. Guarantees of legal protection of life and health of the child at the stage of prenatal development from actions of his mother intending to kill him

A self-induced abortion is to be punished under the laws of many countries of the world.

Thus, article 106 of the **Russian Federation Criminal Code** establishes criminal punishment for the killing by a mother of her newborn child during or immediately after childbirth.

Article 225 of the **Criminal Code Act of Queensland (Australia)**⁶⁵ states that *“any woman who, with intent to procure her own miscarriage, ... unlawfully administers to herself any poison or other noxious thing, or uses any force of any kind, or uses any other means whatever, or permits any such thing or means to be administered or used to her, is guilty of a crime, and is liable to imprisonment for 7 years”*.

According to article 212 of the **Penal Code of Japan**⁶⁶, *“when a pregnant woman causes her own abortion by drugs or any other means”* such a woman shall bear criminal liability.

⁶⁴ Criminal Code Act 1899 of Queensland // <<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf>>.

⁶⁵ Criminal Code Act 1899 of Queensland // <<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CriminCode.pdf>>.

⁶⁶ 刑法 // <<http://law.e-gov.go.jp/htmldata/M40/M40HO045.html>>; Penal Code (Act № 45 of 1907) // <<http://www.cas.go.jp/jp/seisaku/hourei/data/PC.pdf>>.

3. Guarantees of legal protection of life and health of the child at the stage of prenatal development from irresponsible behavior of the woman pregnant with him threatening his life and health

This is about the right of the child in utero to proper care and to protection from exposure, due to the fault of his mother, to substances that adversely affect his health and development.

The laws of a number of USA states contain provisions that recognize that the child in utero has the right to protection from consumption, by his mother, of alcohol or drugs during pregnancy⁶⁷. Such provisions protect the right of the child to normal conditions of development and normal nutrition according to his age and the right to life and to health.

Thus, section 48.01 of Chapter 48 of the **Children's Code of the Wisconsin Statutes & Annotations (USA)**⁶⁸ recognizes that “unborn child has certain basic needs which must be provided for, in particular, such child has got a right to develop physically to his potential and the right to be free from physical harm due to the habitual lack of self-control of his mother in the use of alcohol beverages, controlled substances or controlled substance analogs” which may adversely affect the state, development and health of the child at the stage of prenatal development.

Certain provisions of Chapter 48 of **the Wisconsin Statutes** provide for the possibility of compulsory admission, by judicial procedure, of a pregnant woman to hospital if she causes harm to her child in utero by her actions.

⁶⁷ Substance Abuse During Pregnancy / Guttmacher Institute // State Policies in Brief. – 01.12.2013.<http://www.guttmacher.org/statecenter/spibs/spib_SADP.pdf>.

⁶⁸ Chapter 48 «Children's Code» of Wisconsin Statutes & Annotations // <<https://docs.legis.wisconsin.gov/statutes/statutes/48/III/133>>.

4. Guarantees of respect for the body of a dead born child (who died in utero or at delivery) as well as a child who died soon after delivery as an evidence of legal recognition of human dignity of the child

4.1. Guarantees of issuance of the birth certificate in the name of a child, after his birth or after his removal as a result of abortion, who showed vitality for a short time before his death, as well as issuance of the death certificate in the name of a dead born child or a child who died soon after delivery or after his removal with vital signs as a result of abortion

A number of states legislatively provide guarantees of issuance of the birth certificate (birth registration act) in the name of a child who was born and showed vitality thereafter for some time as well as issuance of the death certificate in the name of a dead born child (who died in utero or at delivery) or a child who died soon after delivery and in the name of the child who was removed as a result of abortion with vital signs and died thereafter.

In order to demonstrate that a number of states recognize human dignity of the child in utero, below there are examples of the legislative procedure for issuance, in some US states, of birth certificates in the name of the child at the stage of prenatal development removed from the mother's body as a result of abortion at any gestational age, if the child shows certain signs, and death certificates in case of death of fetuses. Such legal provisions indicate legal recognition of the specific legal personality of the child at the stage of prenatal development.

Thus, section 48 of Title 40 of **Louisiana Laws Revised Statutes (USA)**⁶⁹ contains the provision according to which if 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. There is in that section a definition of a *live birth*, according to which a live birth, 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... In the event death does ensue after a short time, a death certificate shall be issued”.

⁶⁹ Title 40 «Public health and safety» of the Louisiana Laws Revised Statutes // <<http://www.legis.state.la.us/lss/lss.asp?folder=114>>; <<http://www.legis.state.la.us/lss/lss.asp?doc=98527>>.

Three Judgments of the First Chamber of the French Civil Court of Cassation dated February 6, 2008 in the same type of cases ⁷⁰ confirm the right of parents of a dead born child or a child who died as a result of early delivery, regardless of the weight and development of the foetus and gestational age, to receive the death certificate in the name of the dead child as per Article 79.1 of the French Civil Code.

According to article 79.1 of the **French Civil Code**, “*where a child is dead before his birth was declared to the civil registry, the officer of civil status shall draw up a record of birth and a record of death upon exhibition of a medical certificate stating that the child was born alive and viable and specifying the days and times of his birth and death. In the absence of the medical certificate provided for in the preceding paragraph, the officer of civil status shall draw up a record of a lifeless child. That record shall be entered at its date in the registers of death and shall state the day, time, and place of the delivery, the first names and names, dates and places of birth, occupations and domiciles of the father and mother and, if there is occasion, those of the declarant. The record drawn up shall be without prejudice to knowing whether the child has lived or not; any party concerned may refer the matter to the judgment of the tribunal de grande instance*” ⁷¹.

The **Judgments of the First Chamber of the French Civil Court of Cassation** in the three above cases also state that a birth certificate and a death certificate shall be drawn up even if the child ⁷² was alive only for a few minutes. The right to receive a certificate of death of the child is essential for parents and plays an important symbolic role evidencing the existence of the child and his identity. Furthermore, it allows them to give a name to the child. It is particularly important that drawing up of a death certificate for the child allows parents to apply at hospital within 10 days from the date of child’s death and take the child’s body to arrange, at their discretion, his funeral. It was noted that, by the time when these decisions were delivered, many French municipalities had

⁷⁰ Arrêt de la Cour de cassation (Première chambre civile) N° 128 du 6 février 2008 (N° 06-16.498) // <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_n_11163.html>. Arrêt de la Cour de cassation (Première chambre civile) N° 129 du 6 février 2008 (N° 06-16.499) // <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_n_11164.html>. Arrêt de la Cour de cassation (Première chambre civile) N° 130 du 6 février 2008 (N° 06-16500) // <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_n_11165.html>.

⁷¹ Code civil // <<http://legifrance.gouv.fr>>;

<www.legifrance.gouv.fr/content/download/1950/13681/.../Code_22.pdf>.

⁷² In cases subjected to judicial inquiry it refers to prematurely born children. – *Author’s note.*

already allowed, by virtue of legal acts, to bury dead born children (who died in utero or at delivery) and children who died soon after birth ⁷³.

4.2. Guarantees of giving out the body of a dead born child (who died in utero or at early delivery) or a child who died soon after delivery to his parents for a decent burial

Improper treatment of the body of the child who died in utero (disposal on a par with and together with biological materials and other medical waste or, moreover, usage for cosmetology purpose, etc.) ⁷⁴ is unacceptable in the context of public morality and bioethics and definitely encroaches on human dignity of the body of the child who died in utero and on human dignity, religious and moral feelings of his parents. It is important to note that, **as a matter of law, personal dignity does not disappear at the moment of death but is legally protected under another procedure.** That is why in a number of European states medical institutions give out the bodies of children who died in utero to their parents not only without undue delay but also assist funeral (burial or cremation) of the body of the child who died in utero ⁷⁵.

The **Judgment of the European Court of Human Rights dated June 12, 2014 in the case “Marić v. Croatia”** ⁷⁶ refers to the situation when the applicant’s child who died in utero was disposed by the personnel of the Clinical Hospital Center in Split at their discretion together with other “clinical waste”, and later attempts of the applicant and his wife (mother of the dead child) to find out what happened to the dead child’s body (to find the burial place) were unsuccessful. The Court took the applicants’ side and found that the parental right to bury remains of the child who died in utero or at least the right and legal capacity of parents of the dead child to know the place of burial of the child fall within the area of private and family life, and the right to respect for private and family life is guaranteed and protected by Article 8 of the Convention for the Protection

⁷³ Rapport de M^{me} Trapero, conseiller rapporteur // <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/trapero_conseiller_11186.html>.

⁷⁴ **The correlation of proper and improper treatment of human embryos outside the womb is not considered in this Report and requires a separate study.**

⁷⁵ See in this matter: *Ponkin I.V., Ponkina A.A.* About a decent respect to the body of a child who died in the womb of his mother // Head physician (Moscow). – 2013. – № 10. – P. 44–48.

⁷⁶ Judgment of the European Court of Human Rights of 12.VI.2014 in the case «Marić v. Croatia» (Application № 50132/12) // <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-144681>>.

of Human Rights and Fundamental Freedoms dated November 4, 1950⁷⁷ (paragraphs 59–60). The Court decided that despite the fact that “*the birth of a stillborn child must have been extremely emotionally disturbing for the applicant and his wife*” (paragraph 63) hospital workers ignored high prudence and caution required in situations of bereavement and disposed the child’s body together with other clinical waste without making a record of the place of burial of remains (paragraphs 64–65). Thus, the Court found that there had been a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms⁷⁸ (paragraph 72).

Thus, the European Court of Human Rights recognized that the body of the child who died in utero shall be respected and recognized the parental right to a decent burial of the child.

Three of the above **Judgments of the First Chamber of the French Civil Court of Cassation dated February 6, 2008** in the same type of cases⁷⁹ confirm the rights of parents of a dead born child or a child who died as a result of early delivery, regardless of the weight and development of the foetus and gestational age, to give a name to the child and bury the child in a decent manner.

5. Guarantees of the child’s succession rights at the stage of prenatal development as an expression of legal recognition of the specific legal personality, value of life and human dignity of such child by the state

The rights of the child at the stage of prenatal development are also protected by regulatory legal acts that govern the procedure for assumption of the succession right and exercise of the succession right.

In civil law there is the term “posthumous child” meaning a child conceived before the death of the parent but born after it. In this case the “posthumous child”

⁷⁷ Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4.XI.1950) as amended by Protocols № 11 and № 14 // <<http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>>.

⁷⁸ Article 8 guarantees the right for respect of private and family life. – *Author’s note*.

⁷⁹ Arrêt de la Cour de cassation (Première chambre civile) № 128 du 6 février 2008 (№ 06-16.498) // <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_n_11163.html>. Arrêt de la Cour de cassation (Première chambre civile) № 129 du 6 février 2008 (№ 06-16.499) // <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_n_11164.html>. Arrêt de la Cour de cassation (Première chambre civile) № 130 du 6 février 2008 (№ 06-16500) // <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_n_11165.html>.

inherits the property in the same way as if the child had been born before the opening of the inheritance, i.e. during the lifetime of the deceased parent who left a legacy.

According to paragraph 72 of the **Judgment of the European Court of Human Rights in the case “Vo v. France” dated July 8, 2004**⁸⁰ in that case “the unborn could be deemed to be *“born”* or *“persons in being”* whenever his interests so demanded”. And, according to paragraph 84 of the Judgment, *“the potentiality of that being and its capacity to become a person... in the context of inheritance and gifts ... require protection in the name of human dignity”*.

The applicable legislation of almost all legal states recognizes the legal interests of the unborn child in the civil context of succession.

According to paragraph 1 of article 1116 of the **Russian Federation Civil Code** (Part 3) dated November 26, 2001 (as amended on May 5, 2014), *“persons conceived during the lifetime of the deceased and born after the opening of the inheritance can be called upon to inherit”*.

Section 43-8-47 of the **Code of Alabama (USA)**⁸¹ sets out that “relative of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent”.

According to article 310 of the **Delaware Code (USA)**⁸², *“posthumous children or children in the mother's womb, if born alive ... shall take any estate or property, real or personal, by descent, transmission, gift, devise ... or otherwise in the same manner as if absolutely born at the decease of its parent. If such child is not born alive, the effect shall be the same, to all intents and purposes, as if no such child had ever existed”*.

According to the above section 43.1 of the **California Civil Code (USA)**⁸³, *“a child conceived, but not yet born, is deemed an existing person, so far as necessary for the child's interests in the event of the child's subsequent birth”*.

⁸⁰ Judgment of the European Court of Human Rights of 08.VII.2004 on the case «Vo v. France» (Application № 53924/00) // <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61887>>.

⁸¹ Code of Alabama (Title 43 «Wills and decedents' estates», Chapter 8 «Probate Code») // <<https://fp.auburn.edu/sfws/tufts/Probate%20Code.pdf>>.

⁸² Delaware Code (Title 12 «Decedents' Estates and Fiduciary Relations, Wills», Chapter 3 «After-born children; marriage after will», Subchapter I «After-Born Children») // <<http://delcode.delaware.gov/title12/c003/sc01/index.shtml>>.

⁸³ Civil Code of California (Sections 43-53) // <<http://www.leginfo.ca.gov/cgi-bin/displaycode?section=civ&group=00001-01000&file=43-53>>.

According to section 13 “Transfer for benefit of unborn person” of the **Indian Transfer of Property Act 1882**⁸⁴, property can be transferred in favor of the unborn child being in utero as of the date of transmission.

According to paragraph 1 of article 2:2 of the **Civil Code of the Republic of Hungary**⁸⁵ that entered into force on March 15, 2014, “legal capacity shall be due each person, if born alive, from the day of conception”.

According to paragraph 2 of article 1923 of the **German Civil Code**⁸⁶, “*a person who is not yet alive at the time of the devolution of an inheritance, but has already been conceived, is deemed to have been born before the devolution of an inheritance*”.

As per paragraph 269 of the **Austrian Civil Code dated 1811 (as amended on 2014)**⁸⁷, the unborn child – either the offspring in general or the existing foetus – is given a curator. In the first case the curator shall ensure that specific succession rights of the offspring are not restricted; in the second case the curator shall ensure that the rights of the unborn child are respected. According to paragraph 22 of the **Austrian Civil Code**, “*unborn children are protected by the law from the time of their conception. Insofar as concerns their individual rights, and not the rights of a third person, they are to be considered as born; however, a stillborn child is to be considered as if it had never been conceived for the purpose of rights to which it would have been entitled had it lived*”.

The legal provisions discussed above show that, when the child born after the testator’s death inherits the property, one of the legally relevant fact is the time of conception of the child who, under the above circumstances, shall be recognized as one of the successors. Thus, the state protects the succession rights of the child at the stage of prenatal development **from the moment of conception** thereby recognizing his right to life from the moment of conception. It is obvious that it would be illogical to recognize the succession right of the child at the stage of prenatal development and, at the same time, deny his right to life.

⁸⁴ Transfer of Property Act, 1882 // <[http://dolr.nic.in/Acts&Rules%5CTransferOfPropertyAct\(1882\).htm](http://dolr.nic.in/Acts&Rules%5CTransferOfPropertyAct(1882).htm)>.

⁸⁵ Polgári Törvénykönyvről // <<http://www.parlament.hu/irom39/07971/07971.pdf>>.

⁸⁶ Bürgerliches Gesetzbuch (BGB) // <<http://www.buergerliches-gesetzbuch.info/>>.

⁸⁷ Allgemeines Bürgerliches Gesetzbuch (ABGB) // <[http://www.jusline.at/Allgemeines_Buergerliches_Gesetzbuch_\(ABGB\).html](http://www.jusline.at/Allgemeines_Buergerliches_Gesetzbuch_(ABGB).html)>.

Statements of different authors presented in the literature that the succession rights of the child at the stage of prenatal development discussed above belong to a sort of “future rights” are not, as a matter of law, convincing at all since these rights are applicable and taken into account in actual legal relationships even before the child’s birth.

6. Making it legally possible to recognize the child at the stage of prenatal development as an independent injured person (victim) in case of inappropriate medical care provided to the woman pregnant with him

Many states make it legally possible to file civil actions against health personnel whose actions caused the death of the child in utero (his death in utero or as a result of induced abortion with miscarriage or after early delivery) or caused severe harm to health of the child in case of inappropriate medical care provided to the woman pregnant with him. Thus, in such situations the child in utero may be recognized as an independent victim.

7. Guarantees of protection of life and health of the child at the stage of prenatal development due to medical procedures or researches

7.1. Prohibition of the use of human embryos for industrial and commercial purposes and establishment of legal restrictions on the use of human embryos in scientific researches

Paragraph 42 of the Preamble to and of 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, 1998**⁸⁸ state that *“uses of human embryos for industrial or commercial purposes must also be excluded from patentability; whereas in any case such exclusion does not affect inventions for therapeutic or diagnostic purposes which are applied to the human embryo and are useful to it”*.

⁸⁸ 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. – P. 0013–0021. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:31998L0044>>.

The Judgment of the Grand Chamber of the European Court of Justice in the case № C-34/10 dated October 18, 2011 ⁸⁹ on interpretation of 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, 1998 confirmed that prohibition of the use of human embryos for industrial or commercial purposes and, thus, patent and legal protection of such use are reasonable and only allowed (in this regard) to perform medical procedures with human embryos *“for therapeutic or diagnostic purposes which are applied to the human embryo and are useful to it”* (subparagraph 2 of paragraph 53 etc.).

In the **Recommendation of the Parliamentary Assembly of the Council of Europe № 1046 (1986) on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes dated September 24, 1986** ⁹⁰, it was highly recommended for the member states of the Council of Europe to limit the use of human embryos and fetuses in an industrial context (paragraph 14.1.2) and to forbid the following: any creation of human embryos by fertilisation in vitro for the purposes of research during their life or after death as a goal itself (paragraph 14.1.3); creation of identical human beings by cloning or any other method, whether for race selection purposes or not; implantation of a human embryo in the uterus of another biological species or the reverse; fusion of human gametes with those of another biological species; creation of embryos from the sperm of different individuals; fusion of embryos or any other operation which might produce hybrids (“chimeras”); ectogenesis, or the production of an individual and autonomous human being outside the uterus of a female, that is, in a laboratory; creation of children from people of the same sex; choice of sex (by genetic manipulation for non-therapeutic purposes); experimentation on living human embryos, whether viable or not (paragraph 14.1.4).

The Rules governing the use of human embryos or fetuses and the removal of their tissues for diagnostic and therapeutic purposes (Appendix 1 to the above

⁸⁹ Judgment of the Court (Grand Chamber) of 18 October 2011 in the Case № C-34/10 // <<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-34/10>>.

⁹⁰ Recommendation of the Parliamentary Assembly of the Council of Europe № 1046 (1986) of 24.IX.1986 on the use of human embryos and fetuses for diagnostic, therapeutic, scientific, industrial and commercial purposes // <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta86/erec1046.htm>>.

Recommendation)⁹¹ states that “*no intervention on the living embryo in vitro or in utero or on the foetus whether inside or outside the uterus shall be permitted unless its object is the well-being of the child to be born, that is, to facilitate its development and birth*” (paragraph I of section “B” “Therapeutic purposes”), “*it shall be forbidden to keep embryos or foetuses alive artificially for the purpose of removing usable material*” (paragraph III of section “B” “Therapeutic purposes”) and “*the use of dead embryos or foetuses must be an exceptional measure*” (paragraph IV of section “B” “Therapeutic purposes”).

According to **the Recommendation of the Parliamentary Assembly of the Council of Europe № 1100 (1989) on the use of human embryos and foetuses in scientific research, dated February 2, 1989**⁹², researches on human embryos shall have limits defined by human rights, human dignity and other ethical values (part “i” of subparagraph B of paragraph 9). The need to set distinct limits of genetic manipulations of human embryos is established in **the Recommendation of the Parliamentary Assembly of the Council of Europe № 934 (1982) dated January 26, 1982 “On Genetic Engineering”**⁹³ (paragraph 4), **the Recommendation of the Parliamentary Assembly of the Council of Europe № 1160 (1991) on the preparation of a convention on bioethics dated June 28, 1991**⁹⁴ (subparagraph “ii” of paragraph 7).

The legislation of the Russian Federation governs the manipulations of human embryos and foetuses partially and fragmentarily, with large legal gaps; yet, specific restrictions were established.

Thus, according to **the Federal Law № 323-FZ “On the Fundamentals of health protection in the Russian Federation” dated November 21, 2011**, “*human embryos cannot be used for industrial purposes*” (paragraph 6 of Article 55). However, it

⁹¹ Appendix «Rules governing the use of human embryos or foetuses and the removal of their tissues for diagnostic and therapeutic purposes» // <<http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta86/erec1046.htm>>.

⁹² Recommendation of the Parliamentary Assembly of the Council of Europe № 1100 (1989) on the use of human embryos and foetuses in scientific research of 02.II.1989 // <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta89/EREC1100.htm>>.

⁹³ Recommendation of the Parliamentary Assembly of the Council of Europe № 934 (1982) of 26.I.1982 «On Genetic Engineering» // <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta82/EREC934.htm>>.

⁹⁴ Recommendation of the Parliamentary Assembly of the Council of Europe № 1160 (1991) of 28.VI.1991 on the preparation of a convention on bioethics // <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta91/EREC1160.htm>>.

should be recognized that the current legislation of the Russian Federation that governs the application of assisted reproductive technology using germ cells, tissues of reproductive organs and embryos does not ensure the appropriate protection of the rights of the child at the stage of prenatal development as well as the rights of children born using such technologies.

Thus, as shown by analysis of the above documents of international organizations, public authorities of democratic legal states have the duty to recognize human dignity and the value of life of the child at the stage of prenatal development, including the child at the stage of embryonic development, and to ensure legal protection of the right to life and the right to health from any manipulations that can cause harm to the child.

7.2. Guarantees of protection of the rights of the child at the stage of prenatal development to life and health protection by restricting clinical drug trials with pregnant women

The provisions of paragraph 34 of the Preamble to and of paragraphs «a» and «b» of article 33 “Clinical trials on pregnant or breastfeeding women” of the **Regulation (EU) № 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC**⁹⁵ restrict the involvement of pregnant women in clinical trials on medical products “*if such clinical trial has no direct benefit for the pregnant or breastfeeding woman concerned, or her embryo, foetus or child after birth*”, thereby protecting the child in the womb from adverse effects on him and adverse consequences for him of such clinical trials. However, it is not just about the human foetus but also about the earlier stage – the human embryo.

⁹⁵ Regulation (EU) № 536/2014 of the European Parliament and of the Council of 16 April 2014 on clinical trials on medicinal products for human use, and repealing Directive 2001/20/EC // <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.158.01.0001.01.ENG>.

7.3. Restriction on the use of embryonic tissues in scientific researches as well as prohibition of the use of such tissues for cosmetic, pharmaceutical or medical purposes

Restrictions on the use of embryonic tissues are one of the guarantees of the right of the child at the prenatal stage of life not to be subjected to inhumane scientific experiments and researches and not to be at risk for his life and health.

The use of remains, organs, tissues and cells of the human foetus (human embryo) obtained as a result of early abortion, including induced abortion, and materials based on or using these matters for cosmetic, pharmaceutical or medical purposes contradicts with the public interests and public order, principles of humanity and morality and, therefore, shall be prohibited.

In the Russian Federation this range of issues is not satisfactorily addressed.

The USA state Acts on the transfer of embryonic tissues primarily govern the relations concerning the following two questions: 1) who can give consent to the transfer of such tissues; 2) which actions are allowed to be performed regarding such tissues ⁹⁶.

In the United States **Uniform Anatomical Gift Act (2006)** ⁹⁷ has been developed which is recommended for adoption in every state and is advisory for states during adoption of laws and makes it possible for parents to be vested with the right to transfer the dead foetus (body of a child who died in utero or a dead born child) as the so-called “anatomical gift”. This Act contains no provisions on making it possible to transfer embryonic tissues, such as for treatment of infertility; however, there are some legal loopholes in it ⁹⁸. Thus, paragraph 4 of section 2 of the **Uniform Anatomical Gift Act (2006)** defines the term “decedent” as a deceased individual whose body or body part is or may be the source or subject of an anatomical gift, and this definition also includes the foetus. Thus, the foetus is a subject protected by the law in a certain manner. However,

⁹⁶ *Meeker H.J.* Issues of Property, Ethics and Consent in the Transplantation of Fetal Reproductive Tissue // Berkeley Technology Law Journal. – 1994. – № 9 (2). – P. 185–210. <<http://www.law.berkeley.edu/journals/btlj/articles/vol9/Meeker.pdf>>.

⁹⁷ Revised Uniform Anatomical Gift Act (2006) // <http://www.uniformlaws.org/shared/docs/anatomical_gift/uaga_final_aug09.pdf>.

⁹⁸ *Meeker H.J.* Issues of Property, Ethics and Consent in the Transplantation of Fetal Reproductive Tissue // Berkeley Technology Law Journal. – 1994. – № 9 (2). – P. 185–210. <<http://www.law.berkeley.edu/journals/btlj/articles/vol9/Meeker.pdf>>.

the foetus and the human embryo are differentiated in this Act, and, therefore, the provisions of this Act do not allow to give the embryo as an anatomical gift.⁹⁹

Section 12J of Chapter 112 of Title XVI of Part I of the **General Laws of the Commonwealth of Massachusetts (USA)**¹⁰⁰ states: “(a) I. No person shall use any live human fetus whether before or after expulsion from its mother’s womb, for scientific, laboratory, research or other experimentation. This section shall not prohibit procedures incident to the study of a human fetus while it is in its mother’s womb or a neonate; provided that in the best medical judgment of the physician, made at the time of the study, the procedures do not substantially jeopardize the life or health of the fetus or neonate...”. Furthermore, according to this Section, it is prohibited to make abortion or offer to make abortion if it provides for, as agreed between the parties, the transfer of remains of the foetus as a “reward” for the person who performed the abortion, for the purpose of experiments and other researchers.

Paragraph 1 of section 188.036 of the **Missouri Revised Statutes (USA)**¹⁰¹ prohibits physician from performing an abortion on a woman if the physician knows that the woman conceived the unborn child for the purpose of providing fetal organs or tissue for medical transplantation to herself or another, and the physician knows that the woman intends to procure the abortion to utilize those organs or tissue for such use for herself or another.

8. Guarantees of protection of the child’s rights to life and health at the stage of prenatal development in relation to the rights of the woman pregnant with him to life and health

The state shall ensure protection of the right to life and health of the mother and the related rights to life and health of the conceived child. It should be recognized that the content of legal rights and obligations between the child at the stage of prenatal development and his parents depends largely on the approach legalized in a particular

⁹⁹ Revised Uniform Anatomical Gift Act (2006) // <http://www.uniformlaws.org/shared/docs/anatomical_gift/uaga_final_aug09.pdf>.

¹⁰⁰ General Laws // <<https://malegislature.gov/Laws/GeneralLaws/Search>>; <<https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXVI/Chapter112/Section12j>>.

¹⁰¹ Missouri Revised Statutes (Chapter 188 «Regulation of Abortions», Section 188.036) // <<http://www.moga.mo.gov/statutes/c100-199/1880000036.htm>>.

state. Most states, by their regulations on human life and rights, use “the highest value” as the term not identical to “the absolute value” in its meaning.

A conflict between the rights to life and health of the child at the stage of prenatal development and the same rights of his mother that may arise in certain circumstances – in case of danger to life of the child’s mother due to critical medical problems related to the condition and health of the foetus and due to health of the mother during pregnancy – leads to a number of complex issues.

According to the **Constitution of Ireland**¹⁰², “*the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right*” (paragraph 3 of Article 40).

According to the Preamble to the **Spanish Draft Organic Law “On the Protection of the Life of the Unborn and the Rights of the Pregnant Woman”**¹⁰³ approved on December 20, 2013 by the Council of Ministers at the suggestion of the Minister of Justice, “*the protection of the life of the unborn child does not have an absolute nature and shall be afforded to the extent determined by the existing rights of others, also recognized by the Constitution, which shall be carefully considered in exceptional circumstances of the conflict. Such is the case when the life of the unborn child, as a constitutionally protected right, conflicts with rights relating to constitutional values which are extremely relevant, such as the life and dignity of women, in a situation which has no comparison with any other given the special relation of the foetus in respect of the mother, and the confluence of constitutional rights at play*”.

The conflict of the rights in question neither depreciates human dignity nor diminishes fundamental rights of the child at the stage of prenatal life and development.

The Preamble to the above **Spanish Draft Organic Law «On the Protection of the Life of the Unborn and the Rights of the Pregnant Woman»** states that ‘*these conflicts are extremely serious and of a particularly singular nature and they cannot be*

¹⁰² Constitution of Ireland // <http://www.taoiseach.gov.ie/eng/Publications/Publications_Archive/Publications_2012/Bunrecht_na_h%C3%89ireann-March2012.pdf>.

¹⁰³ Anteproyecto de Ley Orgánica de protección de la vida del concebido y derechos de la mujer embarazada // <http://www.mjusticia.gob.es/cs/Satellite/1292426890214?blobheader=application%2Fpdf&blobheadername1=Content-Disposition&blobheadervalue1=attachment%3B+filename%3DAPLO_ABORTO_23-12-13_WEB.PDF.PDF>.

considered simply from the perspective of women's rights or from that of protection of the life of the unborn child. Even this cannot prevail unconditionally over those, nor may women's rights prevail absolutely over the life of the foetus”.

First of all, these restrictions on the right to life of the child and the right to life of the mother interrelated in this context are determined by the fact that the child at the stage of prenatal development has the specific autonomy intrinsic to a human being and the right to life both recognized by the state. Therefore, the child’s parents have no absolutely unlimited rights that would allow them, on the basis of their own interests, to determine the life and destiny of the unborn child.

The **Judgment of the European Court of Human Rights in the case “R.R. (R.R.) v. Poland” dated May 26, 2011**¹⁰⁴ states that *“during pregnancy the foetus’ condition and health constitute an element of the pregnant woman’s health”* (paragraph 197). However, this position of the Court does not deny that the child at the stage of prenatal development has the specific autonomy of an individual.

This legal argumentation is also confirmed by the positions of the supreme authorities of constitutional justice of foreign states.

According to the **Judgment № 53/1985 of the Constitutional Court of Spain dated April 11, 1985**¹⁰⁵, *“gestation has generated a tertium which is existentially distinct from the mother although it is she who accommodates it”* (subparagraph “b” of paragraph 5).

The **Judgment of the Federal Constitutional Court of Germany dated May 28, 1993**¹⁰⁶ clearly expresses the following position: *“In any case, during the duration of pregnancy what we are dealing with in the case of the unborn is an individual life, with a genetically determined identity, which is thus unique, unmistakable and inseparable”* (paragraph 146).

¹⁰⁴ Judgment of the European Court of Human Rights of 26.V.2011 (Final – 28.XI.2011) in the case “R.R. v. Poland” (Application № 27617/04) // <<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-104911>>.

¹⁰⁵ Sentencia del Tribunal Constitucional de España № 53/1985 de 11 de abril de 1985 // <<http://hj.tribunalconstitucional.es/HJ/pt-BR/Resolucion/Show/SENTENCIA/1985/53>>.

¹⁰⁶ Decision of the Federal Constitutional Court, №№ 2 BvF 2/90, 2 BvF 4/92, and 2 BvF 5/92, May 28, 1993 // <http://www.bverfg.de/entscheidungen/fs19930528_2bvf000290en.html>.

According to the **Judgment of the European Court of Human Rights in the case “R.R. (R.R.) v. Poland” dated May 26, 2011**¹⁰⁷, since the rights of the child at the stage of prenatal development and those of the mother are inextricably interconnected, the balance shall be found between these rights if they are in conflict (paragraph 186).

According to the position expressed in the **Decision of the Colombian Constitutional Court № C-133/94 dated March 17, 1994**¹⁰⁸, “*pregnancy creates a third individual who is existentially different from the mother and whose survival and development cannot be left a town discretion of the pregnant woman*” (paragraph 5.2). The Court emphasized that “*possible conflicts between the fundamental rights of the pregnant woman and the rights of the unborn child cannot be excluded; however, ... this is the area of legislative policy with regard to adoption of legal provisions facilitating the resolution of such conflicts*” (Ibid). At the same time, the Court found that the restriction on abortions did not violate the rights of couples to decide, in a free and responsible manner, how many children they want to have (Ibid).

It shall also be noted that the prohibition to perform an abortion on a woman, at her request, enshrined in national legislation of a number of states, after 12 weeks of pregnancy (see, e.g., paragraph 3 of article 56 of the **Federal Law № 323-FZ “On the Fundamentals of health protection in the Russian Federation”** dated November 21, 2011) is not legally substantiated with anything but a limited legal recognition of the value of life of the child at the stage of prenatal development starting from the 13th week of pregnancy. There is no other legal argument, except the limited (from the 13th week) recognition of the value of life of the child at the stage of prenatal development, that would substantiate this legislative decision.

¹⁰⁷ Judgment of the European Court of Human Rights of 26.V.2011 (Final – 28.XI.2011) in the case «R.R. v. Poland» (Application № 27617/04) // <<http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-104911>>.

¹⁰⁸ Sentencia № C-133/94 / Corte Constitucional de Colombia // <<http://www.corteconstitucional.gov.co/relatoria/1994/c-133-94.htm>>.

9. Guarantees of health protection of the child at the stage of prenatal development in the course of intrauterine medical surgery to the woman pregnant with him as an evidence of legal recognition of the rights of such child to life and health

Specific guarantees of health protection of the child at the stage of prenatal development are based on the requirements for intrauterine medical surgeries to pregnant women. These requirements are established by regulatory legal acts of almost all legal states. During such surgeries the human foetus is considered as a live person and treated, during diagnosis, as a live person despite the fact that the child is not yet born.

And all the provide further evidence of legal recognition of the rights to life and health of the child at the stage of prenatal development.

Conclusions

1. International law and national legislation of democratic legal states establish and enforce, in different legal forms and with different content, depending on the particular legal system, historical and cultural development of the states, legal guarantees and mechanisms governing the relations in connection with treatment of the human embryo and the human foetus, indicating legal recognition and protection of the right to life and human dignity of the child at the stage of prenatal development. However, differences in conceptual approaches, that form the basis for legal guarantees of the right to life of the child at the stage of prenatal development, lead to differences in identification of the stage of development of the embryo starting from which the right to life of the child is recognized and its protection begins.

2. The legal approach implemented in national legislation of a number of states (legal acts of which are discussed above) and expressed in recognition of the beginning of enforcement of the human right to life and protection of this right from the moment of conception is the most reasonable (in scientific, ethical, social and legal context).

3. A conflict between the rights to life and health of the child at the stage of prenatal development and the same rights of his mother that may arise in certain circumstances – in case of danger to life of the child's mother due to critical medical problems related to the condition and health of the foetus and due to health of the mother during pregnancy – neither depreciates human dignity nor diminishes or impairs the

meaning of the fundamental rights to life, health, development and human dignity of the child at the stage of prenatal life and development.

4. Detailed legal positions based on recognition of the fundamental value of human life and aimed at establishment of well-defined legal status of the child at the stage of prenatal development shall be elaborated.

<http://www.state-religion.ru/files/Life-of-a-Child-at-Prenatal.pdf>