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### **LIFE AND HEALTH OF A PERSON AS INDEPENDENT OBJECTS OF CRIMINAL AND LAW PROTECTION AND TERMS OF THEIR SECURITY**

*The author of the article examines the terms of criminal and law protection of life and health of a person: the moments of their beginning and ending. The author moved proposals concerning strengthening criminal and law security of life and health of a person towards the moment of his or her birth.*

**Keywords:** life; health an object; a crime; a murder; a death; a birth.

*Досліджено часові межі кримінально-правової охорони життя та здоров'я особи, зокрема, момент їх початку та закінчення. Сформульовано пропозиції щодо посилення кримінально-правової охорони життя та здоров'я особи ще до її народження.*

**Ключові слова:** життя; здоров'я; об'єкт; злочин; убивство; смерть; народження.

*Исследованы временные рамки уголовно-правовой охраны жизни и здоровья человека: момент их начала и окончания. Сформулированы предложения по усилению уголовно-правовой охраны жизни и здоровья человека еще до его рождения.*

**Ключевые слова:** жизнь; здоровье; объект; преступление; убийство; смерть; рождение.

The Article 3 of the Constitution of Ukraine states that a person, her life and health, honor and dignity, safety and security are

recognized in Ukraine as the highest social value. So, in this norm, but man, named and such primary, initial conditions of her vital activity, like life and health, safety and security. In the same Article 3 of the Constitution of Ukraine is stated that human rights and freedoms and their guarantees determine the essence and orientation of the state, and their approval and support are the primary responsibility of the state. Among the areas of state activity to ensure the person's rights and freedoms, the measures of protecting the rights and freedoms play an important role, including, the bringing to juridical responsibility those culprits, who are guilty of attempt on the life and health. According to the Article 21 of the Constitution of Ukraine all men are free and equal in their dignity and rights, that the government equally concerns about protecting the person's life and health, regardless of the race, the color of the skin, the political, religious or other beliefs, the sex and economic status, etc. According to the Article 6 of the Law of Ukraine «On Protection of Childhood» every child has the right to life from the determination of his birth and viable by the criteria of the World Health Organization.

Therefore, the individual's life and health, as independent objects of criminal-law protecting require a separate study, because the timeframe of these inalienable, natural rights remain unclear. Exploring a person's life and health, can not avoid attention to the definition of the «object of crime». It should be noted that the definition of the «object of crime» is not in the current Criminal Code (then CC) of Ukraine. In this regard, there is not an uniform approach to the concept of the object of crime and the formulation of this definition in the nonfiction.

For example, some scientists believe that the object of crime is «the social relations on which the crime infringes, inflicting some damage to its and which are placed under the protection of the law on the criminal responsibility» [3, p. 101]. Others suppose, that «the object of crime is the legitimate values, which are directed against the criminal act, and which are caused or may be harmed» [4, p. 234]. Arguing against the definition of the object of the crime through public relation claims, that the traditional definition of an object as a set of social relations is ideological and does not correspond to modern views on the assessment of social values, which are under protection of the criminal law [5, p. 75].

It is difficult to accept with this point of view, because, as Y Alexandrov and V. Klimenko rightly pointed, that the object of the crime is the public relations because those most important social values, interests of good, (as other scholars suppose, is the object of the crime), are in these relations and reflect through them [6, p. 69].

At one time even V. A. Nawrocki noted, that «the direct object of the crime is the social relations that arise about another person's integrity» [7, p. 8]. Therefore, we support scientists who «traditionally» determine the object of the crime as the social relations. The life as the object of the criminal-law protection, in M. I. Korzhansky opinion, «is certain social relations that exist for the protection of the biological basis of life. Just because the object of attack in the murder is the specific set of social relations that ensure the protection of the biological entity, the criminal law contains a number of the criminal-law norms, that protect the relationship» [8, p. 179]. At the same time, the life and health can not be regarded as the social relations, therefore, in our opinion, they should be seen as the social values.

The person's life and health as independent objects of the criminal-law protection have certain features which need to focus. First of all, it should be noted, that currently there is no an official definition, interpretation of the concept of «life». Depending on where the field is used, this category becomes the relevant content (staining) of the definition of «life».

Thus, in terms of philosophy under the definition of «life» is understood «a way of the life that has the internal activity of entities, unlike those in need of external source of movement and evolution of inanimate objects» [9, p. 370]. In the medical science «life» is one of the highest of movement and organization of matter, which is based on the progressive development of carbon compounds, organic substances, formed on the basis of their supramolecular systems [10, p. 253–258]. In the scientific comment to the Criminal Code of Ukraine, «life» is defined as «a dynamic state of the human body, which is the continuity of the exchange matter and energy with the environment» [11, p. 249]. It should agree with I. Mitrofanov's opinion, who claims that «life» in its nature is a complex concept and consists of two main aspects: 1) the biological human existence, and 2) its social development as a rational being in time and space [12, p. 10]. Right to life is a natural, inalienable

right of every person, regardless of her physical, social status, quality and length of life, as «criminal law equally protect the life of a young boy and terminally ill or old man, celebrity, hero or a villain or a persistent offender» [8, p.179].

However, the determination of the initial and final moments of life has extremely great scientific and practical importance, especially for distinguishing the murder from the related attacks.

If we talk about the final moment of life, there is no contradiction with this subject in a scientific doctrine, namely a natural death is «a state of the human body when the heart stops working, resulting in an irreversible process of disintegration of cells of the central nervous system» [13, p. 274]. That is, for determining a person's death, need to establish the brain death. According to the diagnostic criteria of the brain death and the procedure for finding the death of a person approved by the Ministry of Health of Ukraine from 23.09.2013, № 821 «brain death is the total and irreversible loss of all the major functions of the human brain, recorded against a background of working heart and forced ventilation. After finding the death of a person on the basis of diagnostic criteria for brain death person is dead» [14]. The clinical death is also distinguished in the scientific literature, that it is a condition that is accompanied by stopping the heart from which person can be derived, following resuscitation. This classification has a great criminal-law value, as for example, in the case of causing injuries incompatible with life to a person who is in a state of clinical death - the act is classified as murder, if after biological death occurred – attempted murder (attempted useless object).

About the beginning of life and the moment of its criminal-law protection there is no unambiguous approach among scientists today. As the beginning of life is a common position now – the top of physiological childbirth (A. F. Bantyshev, V. Kartavtsev, A. Kerimov, M. I. Korzhanskyy, O. Litvin, M. I. Miller). For example, three periods of maternity are distinguished in medical science: the first period is the opening of the cervix (in those women giving birth for the first time last 13–18 hours, while those for the second time - 6-9 hours); the second period is the expulsion of the fetus (1–2 hours in those who giving birth for the first time, 5 minutes – 1 hour – who gives birth for the second time); the third

period is the postpartum (average 20–30 minutes in all women), during which the placenta tearing away is passed from the uterine wall and the separation of placenta (placenta, fetal membrane, umbilical cord). The total duration of labor in those, who give the birth for the first time is 15–20 hours, and those, who gives the birth for the second time – 6–10 hours [15, p. 271]. Thus, it is necessary to state that physiological childbirth is a process that can take several hours, so the question is: at what stage of the physiological childbirth does begin the life? In our opinion, this theory is not acceptable, as it does not set the clear boundaries in the beginning of life in case of attack at the onset of labor on the fetus, which is in a woman's womb, we can not speak about the presence of life. T. V. Kondrashova quietly suggests an interesting example: «On March 30, 1996 Canadian 28-year-old Drummond birthed to a boy. In the next day his condition worsened. He was taken to hospital where a lead bullet was removed from his head. The woman confessed, that she had made the shot, two days before giving birth, putting the barrel of a pneumatic gun into her vagina. But the boy stayed alive» [16, p. 10]. Thus, the question arises: how can qualify the assault on the fetus, which is in the woman's womb? This question can be answered by setting the start of criminal-law protection of life.

It should be noted that the discussions are going on today about the moment of the criminal-law protection of life among the scholars. That is actively debated since when the person's life should be subjected to the criminal-law protection. The problem is that the pregnancy is interrupted by operation in the later terms and these actions are not recognized as an encroachment on life. As T. Volkova rightly noted that «many of these operations contradict to all medical requirements or are justified by fictitious, often trumped doctors indicators of the need for surgery, and babies born in such way have already reached the required level of sustainability and in fact, it is not about abortion, but about the murder» [17, p. 7].

At the time Z. A. Ashytov spoke about the need of the criminal-law protection of a baby's life to the time of his birth, who argued that «five or six months fetus becomes viable as the result of necessary conditions... the beginning of life should be assessed

against on the actual maturity of the fetus. To be qualified you must know in which month of pregnancy the occurrence occurred and whether the subject was aware that destroyed not fetus, but killed a living person that could prolong the life» [18, p. 10]. A. Popov also noted that «the attempt on the baby's life that is in the woman's womb, with the term of pregnancy over 22 weeks should be recognized as the murder, because the child's location of at the time of attack on her life in the present case has not fundamental significance» [19, p. 11–12].

It should be noted that the definition of «sustainability» is not in the legislation. The viability is the opportunity of a newborn to extend the life outside the woman's womb in the forensic medicine [20, p. 358].

It should be guided by the Regulations on criteria perinatal period, newborn and stillborn of 29.03.2006 that to determine the viability [21], indicating that a newborn from 22nd full week of pregnancy is considered as the viable in medicine, because of the concept of the preterm labor, and concept of newborn, or even stillbirth concept are associated with achieving of full 22nd week of pregnancy. Moreover, M. I. Korzhansky also noted that a viable fetus is recognized after 6 months of pregnancy [8, p.180].

More and more scientists speak out about the need for the criminal-law protection of fetal life from 22 weeks pregnancy in nowadays (Y. F. Ivanov, A. I. Zolotova, A. Orleans, R. Sharapov, O. V. Shevchenko). For example, some scientists propose to equate the attempt on the fetus of 22 weeks gestation, which is outside the woman's womb to the murder (O. V. Shevchenko) [22, p. 73]. Other scientists offer to equate the attempt on the fetus of 22 weeks gestation to the murder, regardless of whether it is outside or in the woman's womb. So A. G. Orleans insists that «the attempt on the life of the fetus that became the signs of viability should be considered as a crime against the life, regardless of whether the maternity process started or not started, it is freed or not freed from the mother's womb» [23, p. 307]. We agree with this author's position that an encroachment on a viable fetus should be classified as the murder, regardless of whether it is carried in the mother's womb or outside the womb. However, the current version of the Criminal Code of Ukraine does not include the responsibility for the killing of a viable fetus. Based on the above, we consider that it is necessary to provide

in Part 1 Art. 117 of the Criminal Code of Ukraine, that the responsibility for the assault of a viable fetus that is done by a mother (if the offense is committed by a special subject – by the mother), the calculated murder of the newborn child by the mother provide in Part 2 of the Criminal Code st.117 (following the general rules of the location of articles, parts of articles - from less serious to more serious acts). If an act is committed by a common offender, then amend to the Clause 2 of Part 2 of Article 115 of the Criminal Code of Ukraine and put it as follows: «a viable fetus of a minor child or woman who deliberately for the culprit was pregnant". Moreover, in each case, we will conduct a forensic examination on the subject of establishing the viability of the fetus.

Regarding of the person's health as the object of a crime, it should be noted that the definition of the concept is not also in the legal acts. A definition of health is only in the preamble to the Constitution of the World Health Organization (WHO): «a state of complete physical, mental and social well being, but not merely the absence of disease or infirmity» [24]. However, this definition can not be considered as universal, since there are some inconsistencies, including the social welfare is a subjective category, based on this definition, you can not find a healthy person.

There is a significant number of definitions of «health» in the scientific literature (both legal and medical), proposed by the authors of scientific works. So, consider some of them. So, N. S. Chefranova determines that «the health as a private good is one of the most important conditions for a normal human life of all of its parts, organs and systems, it is the human condition, which provides the performance of all kinds of biological and social functions» [25, p. 7].

A. A. Piontkovskiy defines the person's health as bodily integrity and normal functioning of the human body [26]. L. I. Gurevich believed that the health is the normal functioning of the whole body [27]. In our opinion, M. G. Manayenkov gave the most complete definition of the «health», namely, «the integrity, the proper functioning of the most important organs and systems of the human body, without which it is impossible to ensure its normal» [28, p. 11].

With regard to the children's health at the time M. I. Zahorodnykov noted that the injury to a man can be from the conception, from the inception of the fetus in the mother's womb.

However, the criminal-law protection of the health begins with the child's birth [29, p. 18]. Also today the current Criminal Code of Ukraine shall similarly decide the issues in case of injury to the fetus in the woman's womb – the woman will be found as the injured person, but not the fetus and acts will be qualified as the infliction of injury.

Therefore, in consideration of the unfavorable demographic situation in Ukraine and the need to strengthen the criminal-law protection of life and health of unborn children (the fetus, which is in the woman's womb), propose to amend the existing Criminal Code of Ukraine, providing at Article 117 CC of Ukraine responsibility for the assault on a viable fetus, (committing a crime with a special subject – by mother), to provide for additional aggravating circumstance in paragraph 2 of Part 2 of Article 115 of the Criminal Code – the murder of a viable fetus (in the case of common crime subject). Under the "viability" need to understand the possibility of newborn to continue his life outside the mother's womb, and in each case it will be necessary to conduct a forensic examination on the subject of determining the viability of the fetus. For bodily injury of varying severity to the viable fetus in the mother's womb – to provide for this aggravating circumstance in the relevant articles of the Criminal Code of Ukraine.

### **REFERENCES**

1. Конституція України від 28 черв. 1996 р. № 254к/96-ВР.
2. Про охорону дитинства [Електронний ресурс] : Закон України від 26 квіт. 2001 р. № 2402-III. – Режим доступу : <http://zakon1.rada.gov.ua/laws/show>.
3. Кримінальне право України. Загальна частина : підруч. / [Бажанов М. І., Баулін Ю. В., Борисов В. І. та ін.]; за ред. М. І. Бажанова та ін. – [2-ге вид., переробл. та допов.]. – К. : Юрінком Інтер, 2005. – 479 с.
4. Фесенко Є. В. Проблеми структури об'єкта як елемента складу злочину / Є. В. Фесенко // Вісник Академії адвокатури України. – 2009. – № 1 (14). – С. 234–236.
5. Фесенко Є. В. Цінності як об'єкт злочину / Є. В. Фесенко // Право України. – 1999. – № 6. – С. 73–75.



6. Александров Ю. В. Кримінальне право України. Загальна частина : [підруч.] / Ю. В. Александров, В. А. Клименко. – К. : МАУП, 2004. – 328 с.

7. Навроцький В. О. Злочини проти особи : лекції [для студ. юрид. ф-ту]. – Львів : Львів. держ. ун-т ім. І. Франка. – 1997. – 48 с.

8. Коржанський М. Й. Науковий коментар Кримінального кодексу України / М. Й. Коржанський. – К. : Атіка ; Академія ; Ельга-Н, 2001. – 656 с.

9. Жизнь // Новейший философский словарь [Электронный ресурс]. – Режим доступа : [http://www.gumer.info/bogoslov\\_Buks/Philos/fil\\_dict/257.php](http://www.gumer.info/bogoslov_Buks/Philos/fil_dict/257.php).

10. Опарим А. Й. Жизнь / А. Й. Опарим // Большая медицинская энциклопедия / [гл. ред. акад. Б. В. Петровский]. – М. : Сов. энцикл., 1978. – . –

Т. 8 : Евгеника–Зыбление. – 1978. – С. 253–258.

11. Науково-практичний коментар Кримінального кодексу України / за ред. М. І. Мельника, М. І. Хавронюка. – [3-ге вид., переробл. та допов.]. – К. : Атіка, 2005. – 1064 с.

12. Митрофанов І. І. Тілесні ушкодження (кримінально-правові та медичні аспекти) : [навч. посіб.] / І. І. Митрофанов, В. М. Лінов. – Кременчук : Щербатих О. В., 2010. – 255 с.

13. Науково-практичний коментар до Кримінального кодексу України / за заг. ред. П. П. Андрушка, В. Г. Гончаренка, Є. В. Фесенка. – [2-ге вид., переробл. та допов.]. – К. : Дакор, 2008. – 1428 с.

14. Про встановлення діагностичних критеріїв смерті мозку та процедури констатації моменту смерті людини [Електронний ресурс] : наказ Міністерства охорони здоров'я України від 23 верес. 2013 р. № 821. – Режим доступу :

<http://zakon1.rada.gov.ua/laws/show/z1757-13>.

15. Гришук В. К. Умисні вбивства за кримінальним правом України та Республіки Польща: юридичний аналіз складів злочинів / В. К. Гришук, Н. Є. Маковецька. – Хмельницький : Хмельниц. ун-т упр. та права, 2012. – 368 с.

16. Кондрашова Т. В. Проблемы уголовной ответственности за преступления против жизни, здоровья, половой свободы и половой неприкосновенности / Т. В. Кондрашова. – Екатеринбург, 2000. – 436 с.

17. Волкова Т. Правовая защита права на жизнь новорожденного / Т. Волкова // Законность. – 2004. – № 4. – С. 6–7.

18. Ашитов З. О. Квалификация некоторых тяжких преступлений против жизни и здоровья граждан : (по УК КазССР) : [учеб. пособие] / З. О. Ашитов. – Караганда : Изд-во Караганд. высш. шк. МВД СССР, 1978. – 66 с.

19. Попов А. Н. Убийство матерью новорожденного ребенка (ст. 106 УК РФ) / А. Н. Попов. – СПб. : Изд-во С.-петерб. юрид. ин-та Генеральной прокуратуры РФ, 2001. – 68 с.

20. Лісовий А. С. Судова медицина : [підруч.] / Лісовий А. С., Голубович Л. Л., Голубович П. Л. – [2-ге вид., переробл. і допов.]. – К. : Атіка, 2003. – 512 с.

21. Інструкція з визначення критеріїв перинатального періоду, живонародженості та мертвонародженості, Порядку реєстрації живонароджених і мертвонароджених : затв. наказом МОЗ України від 29 берез. 2006 р. № 179.

22. Шевченко О. В. Проблеми визначення поняття початку життя як об'єкта кримінально-правової охорони [Електронний ресурс] / О. В. Шевченко // Європейські перспективи. – 2011. – № 1. – Ч. 2. – С. 69–74. – Режим доступу : [http://archive.nbuv.gov.ua/portal/Soc\\_Gum/Evp/2011\\_1\\_2/Shevchen.pdf](http://archive.nbuv.gov.ua/portal/Soc_Gum/Evp/2011_1_2/Shevchen.pdf).

23. Орлеан А. Початок кримінально-правової охорони життя людини [Електронний ресурс] / А. Орлеан. – Режим доступу :

[http://archive.nbuv.gov.ua/portal/soc\\_gum/vapnu/2012\\_4/299.pdf](http://archive.nbuv.gov.ua/portal/soc_gum/vapnu/2012_4/299.pdf).

24. Статут (Конституція) Всесвітньої організації охорони здоров'я від 22 лип. 1946 р. [Електронний ресурс]. – Режим доступу :

[http://zakon2.rada.gov.ua/laws/show/995\\_599](http://zakon2.rada.gov.ua/laws/show/995_599).

25. Чефранова Н. С. Изучение и предупреждение преступлений, связанных с распространением венерических заболеваний (на материалах преступности несовершеннолетних) : автореф. дис. на соискание ученой степени канд. юрид. наук : спец. 12.00.07 «Криминология» / Н. С. Чефранова. – Харьков, 1975. – 21 с.

26. Курс советского уголовного права : в 6 т. – М. : Наука, 1971. – . –

Т. 5. – 1971. – 572 с.

27. Гуревич Л. И. Борьба с телесными повреждениями по советскому уголовному праву : автореф. дис. на соискание

ученой степени канд. юрид. наук : спец. 12.00.08 «Уголовное право и криминология; исправительно-трудовое право» / Л. И. Гуревич. – М., 1950. – 16 с.

28. Манаенков В. Г. Уголовно-правовая, криминологическая характеристика и предупреждение умышленных тяжких телесных повреждений : автореф. дис. на соискание ученой степени канд. юрид. наук : спец. 12.00.08 «Уголовное право и криминология; исправительно-трудовое право» / В. Г. Манаенков. – М., 1991. – 21 с.

29. Загородников Н. И. Преступления против здоровья / Н. И. Загородников. – М. : Юрид. лит., 1969. – 168 с.