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The Legal Status of the Human Fetus from a Theoretical, Historical and Comparative Legal Perspective with Special Reference to Abortion

Doctoral dissertation

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Abstract
Key words: human rights, person, human nature, human embryo, abortion

The aim of the research was to prove or disprove the personality of the human embryo/fetus and to determine the existence or non-existence of the biological separation of the human embryo/fetus from its personality, as well as to reach a conclusion about its legal protection provided for by European and international documents and the Constitution of the Republic of Croatia, taking into account the existence of other rights and interests, such as the mother's right to privacy, which often conflict with the right to protect the life and health of the human embryo and fetus.

The work used the methods of analysis, synthesis, concretization, generalization, analogy, comparative and partly historical method. The analyzes were descriptive, functional and causal, material and ideal.

The research results indicate that every human being is also a person. Given its *sui generis* legal situation, the human embryo is an emerging legal subject, suitable for conferring legal capacity that encompasses several personality rights. The protection of the personality rights of the human embryo derives from regional and international documents. The rights and interests of other persons, such as the mother's right to privacy, often conflict with the right to protect the life and health of the human embryo and fetus.

In relation to the first mentioned result of the research, we conclude that a person cannot just arise from a biological body at some point in the development of a human embryo and fetus. If a person is defined by a biological ability, it exists in the beginning because the new genome contains everything biologically necessary for the development of that ability. If, on the other hand, we reduce a person to an ontological substrate, which cannot be empirically proven either in the beginning or later, there is no reason why it exists later and not in the beginning.

In relation to the second stated result of the research, we conclude that the human embryo is a human being whose abilities are not required to protect the right of personality, therefore, as a human being with intrinsic dignity, it is suitable for realizing the

personality's right to life, the right to bodily integrity that derives from its biological and personal existence, and the right to health.

In relation to the third mentioned result of the research, we conclude that the human embryo is not excluded from the concept of human being by the international legal framework and that it is the person in accordance with the international legal concept of the person and intrinsic dignity. A woman's interest in abortion based on the argument of autonomy does not affect the status of the human fetus because the status of a human being and its right to life cannot be conditioned, in accordance with the provisions of natural law applied in the most important international trial on human dignity in the broadest sense of the word (Nuremberg Trial). The Nuremberg Trial based the condemnation of Nazi war crimes on disrespect for natural law and the condemnation of legal positivism. The right to life is recognized as a fundamental and natural right and the primacy of its protection is emphasized in numerous international acts.

Summary
Keywords: human rights, person, human nature, human embryo, abortion

The aim of the research

The aim of the research was to prove or disprove the personality of the human embryo and fetus and to determine the existence or non-existence of biological separation of the human embryo and fetus from its personality, as well as to conclude about its legal protection provided by European and international legislation and the Constitution of the Republic of Croatia, by taking into account other interests, such as the right to privacy of the mother, which is often in conflict with the right to life and health of the human embryo and fetus.

The methods used

The methods of analysis, synthesis, concretization, generalization, analogy, comparative and partly historical method were used. The analyzes were descriptive, functional and causal, material and ideal.

The values and legal principles related to the status of women, man, human embryos and fetuses in the context of abortion were elaborated by the axiological method. The dogmatic method was used for linguistic, formal-logical and systematic analysis of normative concepts such as person, legal subject, dignity, autonomy. The sociological method was used to elaborate the question of how abortion from a criminal offense became a legalized procedure in a short period of time of the 20th century and how society and social interests affect the regulation of abortion. The history of abortion, the concept of the person and the legal subject were elaborated by the historical law method. The comparative law method, specifically micro-comparison was used to analyze the international legal framework on embryo status, research on embryos, legal status of embryos, interests and rights of women in the context of abortion, regulation of abortion. Moreover, comparison from an institutional-functional point of view was used to compare the legal status of the fetus, its personhood and its rights and to examine the function of these concepts. The problem oriented-functional comparison was used to find out how different legal systems try to regulate the problems related to the mentioned concepts, such as the rights of the fetus and conflict of these rights with mother interests. For the different types of

comparative method, I have mainly relied on the classic work of Konrad Zweigert and Hein Kötz, as well as Bernd Wieser's handbook on comparative constitutional law - their bibliographical references are listed in the bibliography.

The results of the research

The results of the research indicate that every human being is also a person. The human embryo is, given its *sui generis* legal situation, an emerging legal subject, suitable for granting legal capacity encompassing several personality rights. The protection of the human embryo's personal rights derives from regional and international law. The rights and interests of others, such as the mother's right to privacy, are different from the right to protect the life and health of the human embryo and fetus.

The authors conclusions

In relation to the first stated result of the research, the author concludes that a person cannot simply arise from biological corporeality at some point in the development of the human embryo and fetus. If a person is defined by a biological ability, then that ability exists in the beginning because everything biologically necessary for the development of that ability is present in the new genome, embryo. If, on the other hand, a person is not biological ability, but is reduced to an ontological substrate, which cannot be proved empirically either in the beginning or later, there is no reason why it exists later, and not in the beginning.

The author concludes that modern science is characterized by the naturalization of man, which implies the reduction of man to biological elements, and when researching the question of who man is, as the dominant and even the only methodology, the experimental method stands out. The denial of the ontological substratum of the person is a consequence of contempt for metaphysics and its identification with religion. The author concludes that if we reject non-empirical reality, we also need to reject concepts such as identity, dignity, intrinsic value, and then the equality of human beings. Although the existence of a person cannot be proved empirically, because it is a philosophical concept, it has been proven by the historical law method that any denial of personality to human beings, and consequently of legal status, has led to grave violations of fundamental human rights in the history.

The author concludes that the zygote, the bearer of human nature, is an individual program with a new genetic code, biological and ontological substrate, necessary for further development, and that there is no moment in the development of the human embryo and fetus that would represent a leap from the impersonal to the personal state. There are numerous medical and philosophical criteria of theoreticians with which the subjectivity of the human embryo and fetus is denied from the moment of fertilization, such as the implantation of the human embryo in the uterus, the moment when the mother feels the movement of the child, the appearance of the human embryo and fetus, viability, that is, the possibility of survival outside the womb, aspiration, i.e. desire and hope for the future, possibilities of feeling pain, birth. The results of the research indicate that none of the criteria mentioned above can be taken as crucial for determining the status of a legal subject, that is, the moment that would represent a jump from a biological human being to a personal one, and thus from a thing to a subject, because no single reason represents a justified argument for which certain stages and biological development carried a certain moral and then legal significance. No criteria except for conception, that can be taken as crucial for determining the status of a moral and legal subject, according to which an unborn being would ‘‘jump” from an object into a subject.

In relation to the second result of the research, the author concludes that every human being is a legal entity and a holder of the personality rights, including human embryo and fetus, children and persons with reduced physical or mental abilities. The author concludes that the right to personality is an integral part of legal capacity of the human being, although human beings differ from each other both in the scope of personality rights as in the scope of property rights. However, basic personal rights are recognized to every human being, which prevents the treatment of a person as an object or animal. The author concludes that as human beings we have fundamental rights regardless of the qualities we possess, and we also have them as ‘‘weaker” members of every society. The notion of dignity represents one of the central and key standards of bio - law for the normative presentation of what it means to be a human person and therefore legal subject. People with disabilities, people in a coma, as well as children are bearers of dignity and therefore are legal subjects. Animals and artificial intelligence are not, although they may have the status of value.

The human embryo is a human being, *sui generis* legal subject, whose protection of personality rights does not require abilities. Therefore, as a man with intrinsic dignity he is suitable for exercising the right to life, the right to bodily integrity which stems from its biological existence and the right to health.

The author concludes that human embryo and fetus is treated as legal subject in many branches of Croatian law. Family law protects the mother's emotional state due to pregnancy, and the human embryo and fetus is treated, directly or indirectly, as a subject. In the Criminal law, mother is especially protected from third parties during pregnancy which is because of the human embryo and fetus. Human embryo and fetus is treated as a subject in the medical procedures, especially therapeutical. The Obligatory Relations Act protects the future property rights of the human embryo and fetus. Only in the Abortion law the human embryo and fetus is treated as a *res* until the tenth week of pregnancy.

In relation to the third mentioned research result, the author concludes that the international legal framework does not exclude the human embryo and fetus from the concept of human being and person, which is a conclusion in accordance with the international legal concept of person and intrinsic dignity. The interest of a woman's abortion based on the argument of autonomy does not affect the status of the human embryo and fetus because the legal status of a human being cannot be conditioned, which is a conclusion in accordance with the provisions of natural law applied at the Nuremberg Trials.

Under the first feminism, abortion was considered the ultimate exploitation of women, while in the second wave of feminism, the abortion is considered as a right of the women which stems from privacy. Author concludes that privacy is not a concept from which the right to abortion can be derived because negative aspect of privacy implies non-interference in private decisions.The author concludes that the right to abortion cannot be inferred from the concept of autonomy because if a woman is absolutely autonomous, then there are no restrictions in her actions towards others, which refers primarily to the father of the human embryo and fetus, the doctor performing the abortion and the human embryo and fetus. Refusing to provide a public abortion service does not imply interfering

with privacy and autonomy, but solely disabling the technique that leads to the end of the subject's life in the mother's womb.

The author concludes that abortion is not a human right because it does not come from a human nature. In circumstances when medicine was not yet so developed, abortion meant death for women. This points to the conclusion that in the natural circumstances and conditions of underdeveloped medicine, abortion is life-threatening. In accordance with author's differentiation between human rights that are based on intrinsic dignity that is part of a human nature and political rights that are based on the interest and wish of the individual or society, the author concludes that abortion can be exclusively latter because it does not stem from the concept of autonomy and privacy, which are human rights that come from a human nature.

In relation to the status of a man when making a decision on abortion, the author concludes that a *raison* that denies a men's rights in relation to the unborn being during a woman's pregnancy is unjustified and discriminates against a men on the basis of biology and violates his rights by imposing only obligations.
The author concludes that abortion is not a mean for establishing a woman's equality with a man because it would imply that a woman's biological possibility of giving birth is treated as a disease and biological man is normative ideal.
The author concludes that abortion is not listed as a woman's right in any binding international or regional treaty. An analysis of European Court of Human Rights judgments shows that the competence and responsibility of Member States to regulate the scope of abortion provisions lies within the national authorities of the Member States. It also shows that Article 8 of the European Convention of Human Rights (ECHR) does not provide the right to abortion and that human embryo and fetus is not excluded from the scope of Article 2 of the ECHR.

From the analyzed judgments of some EU constitutional courts related to abortion, the author concludes that without answering the previous questions related to the status of the human embryo and fetus, as well as the nature of privacy, it is not possible to make a logical decision on abortion. No legal criteria are given in the analyzed decisions of some EU constitutional courts, with the exception of the judgment of the Federal Constitutional

Court of Germany, which explains the balancing of ‘‘right of woman to abortion” and right of the of human embryo and fetus to life. It cannot be concluded from the decisions how it is possible to balance the right to life of human embryo and fetus with interest of mother to have an abortion, without one annulling the other.

The results of the analysis of the decision of the Constitutional Court of the Republic of Croatia indicate that the Constitutional Court of the Republic of Croatia has chosen an activist approach to solving the problem of abortion, guided by the principle of justice to ‘‘reduce conflict” in society, without clarifying previous notions of autonomy and status of human embryo and fetus and without analysis of legal and moral theory. The author concludes that certain provisions of the decision are contradictory and that conclusions about the status of the human embryo and fetus remain unclear in practice.

CONTENT

1. INTRODUCTION

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* of the Council of Europe (hereinafter: ECHR) prescribes in Article 2 that ''*Everyone's right to life shall be protected by law*''. The European Court of Human Rights (hereinafter: ECtHR) in the judgment *Vo. v. France* indicates that there is no consensus at the European level on the nature and status of the human embryo and fetus, and there is no scientific and legal definition of the beginning of life.

In the Croatian legal system, scientific and expert knowledge about the humanity and legal personality of the unborn child is fragmentary and scarce, which indicates several practical consequences:

- an unclear answer to the question of whether the content and scope of the term human being from Article 21 of the *Constitution of the Republic of Croatia* includes a human embryo and fetus;
- uncertainty with regard to Article 21 of the Constitution of the Republic of Croatia: does it refer only to human beings who possess legal personality, i.e. to a born human being?
- discrepancy of constitutional and legal solutions related to the legal status of the human embryo/fetus;
- the unresolved issue of recognition of legal capacity *sui generis* to a human embryo/fetus and the moment of its recognition;
- the indeterminacy of the moment of establishing the existence of individual, specific, human rights that the legal system does not assign, but declares them as intrinsically innate to every human being;
- the inability to determine the relationship between different human rights, in particular, the right to protect the life and health of the human embryo/fetus with other different rights and interests, such as the right to privacy of other persons, especially the mother.

Determining the scientific and legal definition of the beginning of life, as well as determining the content of a number of terms needed to clarify the issue of abortion, such as dignity, the concept of a person, human nature, human rights, personality rights, and

the concept of privacy, requires an interdisciplinary approach. An interdisciplinary approach implies legal analysis, analysis of the data of biology, anthropology, philosophy, psychology and sociology. Considering the diversity of the fields that investigate these questions, it is appropriate to distinguish the methods of social and natural sciences. This scientific research will integrate the methods of natural sciences and social sciences, which include the transcendental method, *apriori* analysis of philosophy, as well as empirical evidence of natural sciences. The application of pluriperspective methodology prevents reduction, that is, absolutist approach and dogmatism from any side, whether natural sciences or social sciences. Preventing the reductive approach is necessary given the lack of competence in the natural sciences to draw conclusions from the social sciences and *vice versa*.

In this scientific research, an effort was made to comprehensively analyze various aspects of the unborn child's personality. The chapter on the concept of a person analyzes the historical aspect of the concept of a person and the parameters of the relationship between human nature and the person. The chapter on the relationship between law and morality analyzes the possibility of knowing the truth about the nature of abortion and abortion as a moral-legal issue. The chapter on human rights analyzes theories that deal with the root, that is, the source and then the holders of human rights. In the chapter on personality rights, personality rights and their holders (i.e. legal subjects) are analyzed. The chapter on the human embryo and fetus analyzes the moral and legal criteria proposed by theorists as relevant for determining the moral and legal status of the human embryo and fetus. Although there are many religious approaches to the theological status of the human embryo and fetus as well as to abortion, the main ones are analyzed in the chapter on the human embryo and fetus. In the chapter on constitutional aspects of the human being, the constitutional legal status of conditionally speaking ‘‘borderline cases’’ such as people in a coma, children, persons with disabilities, and the legal status of the human embryo in the legal branches of Croatian legislation and in international documents are analyzed. The chapter on abortion analyzes the concepts of privacy, autonomy and freedom, while the last chapter analyzes the *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al.* of 21 February 2017 and its impact on future legislation.

In this paper we will use the terms ‘‘human embryo and fetus’’ and ‘‘unborn human’’ because it is about ‘‘something’’ that was not born, and therefore it is unborn, which is unquestionable, and that ‘‘something’’ that is not born is not a thing (*res*), neither a plant nor an animal, but in the living world belongs to the human species. The term ‘‘unborn child’’ will not be used because it represents a semantically condensed phrase that *apriori* points to a final conclusion.

In this paper we will use the term abortion, which is relatively new, originating from the 19th century.[1] Abortion in the Latin version, *abortus*, comes from the word (verb) *aboriri*, which means ‘‘to perish, to die’’. Abortion is the spontaneous or induced termination of pregnancy with the expulsion of the egg before the fetus is capable of life, but, although it is common to talk about termination of pregnancy, according to the Dictionary of the Croatian language, ‘‘termination is the temporary cessation of the duration of something’’ and is therefore legally and medically wrong, considering the fact that with abortion the existing pregnancy never continues.[2]
The issue surrounding the value-based basis of abortion refers to intentional abortion, abortion on demand, which represents abortion based on the ‘‘free decision of the mother’’. Intentional abortion for medical reasons (the term ‘‘therapeutic abortion’’ is common in the literature and refers to an abortion performed with the aim of protecting the life or health of the mother[3]) is a medical issue that will not be analyzed here. Hereinafter abortion is understood to mean induced abortion, unless otherwise indicated.

Since this paper was originally written in Croatian, original text in English refers to names of the legal documents, paragraphs from the judgments of the ECtHR, European Court of Justice, Slovakian Constitutional Court, the Constitutional Council of France, the German Federal Constitutional Court. The rest is exclusively translation of the Author of this paper.

[1] Cf. Lasić, S., *Pravo na rođenje u učenju Crkve/The right to birth in the teachings of the Church*, Tonimir, Zagreb, 2009, p. 18.

[2] Cf. Anić, V., *Rječnik hrvatskoga jezika/Croatian language dictionary*, Novi liber, Zagreb, 1991, p. 529 and cf. Dražančić, A. *et al*., *Porodništvo/Obstetrics*, Školska knjiga, Zagreb, 1994, p. 215.

[3] Pezo, V., *Pravni leksikon/Legal lexicon*, Leksikografski zavod Miroslav Krleža, Zagreb, 2007, 1078 - 1079.

2. HUMAN BEING AND PERSON

2.1. Human being

Philosophical anthropology or philosophical discourse about human being deals with human being in all dimensions, which include spiritual, mental and physical. The question about the nature of human being is present throughout history, since Socrates and Plato. In *The Human Place in the Cosmos*, Scheler states that ''no time has known so much about man as today, and so little about who man really is and what he should be.''[4] The question of who human being is and whether he contains an inner unity or is a set of elements also requires an answer to the complex question of the relationship between spirit and matter, which has been discussed throughout history. Some of the famous philosophers who dealt with the problem of the relationship between body, mind and spirit in human being are Descartes, Hobbes, Locke, Spinoza, Leibniz, Hume, Kant, James, Russell, Wittgenstein, Ryle, Strawson, Parfit.[5] Discussions about the understanding of the relationship between spirit and matter have historically been divided into two groups: physicalists, on the one hand, argue that living organisms can be reduced to the laws of chemistry and physics, and vitalists, on the other hand, believe that living organisms have properties that cannot be found in immovable substance.[6]

Modern science is characterized by the naturalization of human being, which implies the reduction of human being to biological and social elements, and when researching the question of who is human being, the dominant and even the only methodology is the experimental method. However, the chain of mathematics-physics-chemistry-biochemistry-physiology reduction leaves open the question of whether they can explain

[4] As cited in Skledar, N., *Bioetika, etika i antropologija/Bioethics, Ethics and Anthropology*, in: Skupina autora/Group of authors, *Bioetika u teoriji i praksi/Bioethics in theory and practice*, Globus, Zagreb, 2001, p. 103.

[5] From the Pythagoreans and the idea of the power of the soul as the most important part of man, to the scholastics and the Orphic teaching about the mystical duality of soul and body, through the scholastic reconciliation of ancient philosophy with Christian theology, all the way to the rationalist Descartes, the empiricist Locke, who mark the beginning of modern philosophy.

[6] Cf. Marinić, M., *Matematika ljudskog života/The mathematics of human life*, Institut društvenih znanosti Ivo Pilar, Zagreb, 2017, p. 21.

and cover all human processes.[7] Natural sciences are limited in answering the question of what it means to be human. As Haeffner points out, ‘‘what man is, can and should be, cannot be reduced to an empirical theory of the natural sciences’’.[8] Similarly, Matulić claims that ‘‘the methods of science have caused everything that does not belong to reality to be denied, so metarealities, which are not subject to new methods, have been declared unknowable and progressively marginalized.’’[9]

Can the analysis of human life exclusively by physical, chemical and biological methods be a successful strategy for discovering the answer to the question of who human being is and what consequences does this have on the understanding of human nature?

2.2. On human nature as an unchanging reality or construct

The question of whether human nature can be explained exclusively by physical, chemical and biological methods, and whether human nature is a philosophical-anthropological concept or construction at all, is especially significant today in the time of accelerated biotechnological development, within which man is often the subject of experiment. The concept of human nature has changed throughout history, and in different periods it has excluded or included the view of its immutability and universality and the innate dignity that distinguishes the human being from other living beings.[10] In today's postmodern era, the understanding of human nature in accordance with philosophical anthropology has been questioned. Theorists like Pinker argue that ‘‘we cannot interpret human nature as a natural phenomenon because the history of human nature sets limits to naturalistic explanations of what it means to be human.’’[11] Allen Buchanan similarly believes that ‘‘an

[7] Cf. Jerusalem, W., *Uvod u filozofiju/Introduction to Philosophy*, CID, Zagreb, 1996, p. 238. For more details see: Matulić, T., *Život u ljudskim rukama/Life in Human Hands*, Glas Koncila, Zagreb, 2006, p. 104.

[8] Cf. Haeffner, G., *Filozofska antropologija/A Philosophical Anthropology*, Naklada Breza, Zagreb, 2003, p. 23.

[9] Matulić, T., *Bioetika/Bioethics*, Glas Koncila, Zagreb, 2012, p. 238.

[10] Cf. Selak, M., *Ljudska priroda i nova epoha/Human rights and new era*, Naklada Breza, Zagreb, 2013, p. 15.

[11] As cited in Malik, K., *What science can and cannot tell us about human nature*, in: Headlam-Wells R.; Mcfadden, J. (Ed.), *Human nature: fact and Fiction, Literature, Science and Human nature*, Continuum, London, 2006, p. 130 and 131. Malik explains naturalism as a concept developed during the 17th and 18th centuries by which phenomena are explained by natural laws, and over time it began to mean liberation from the dogmas of religion.

essentialist view of human nature, as a fixed essence created by God, leads to various limitations of human progress", for which he blames conservatism, in which he includes theorists such as Leon Kass, Francis Fukuyama and Michael Sandel.[12] The theses of Pinker and Buchanan are in line with the Marxist thesis on the untenable assumption of eternal human nature. It is similar with post-structuralists Foucault, Derrida, Lytorad, Irigaray, who deny that reality consists of natural categories that need to be explored, but consider that nature, including human nature, arises as a result of material and historical forces.[13] They advocate an *aposteriori* rather than an *apriori* determination of human nature, with an emphasis on deconstruction. The concept of human nature as a variable construction calls into question not only the metaphysical dimension of human nature, but also biological-genetic facts, which is significant for all human beings, including for determining the status of human embryo and fetus. By denying the foundations of philosophical anthropology, we deny the determinants of man with regard to his essence and being, which have their roots in the pre-Socratics. If human nature is a construction, which means it is not universal and consistent, then it contains nothing that would make us claim that the human being deserves the protections inherent in intrinsic dignity. Also, then there is no reason why man would be on a higher value level than animals and plants. Then any determination of the nature of things, and then the status of the human embryo and fetus, as well as the nature of abortion, becomes unnecessary. We will conclude with Salman Rushdie that ''thereby any idea of universals, such as human rights and moral principles, would not be legitimate.''[14]

2.3. Human nature and dignity

[12] Cf. Selak, *op. cit.* note 10, p. 107. Likewise Van Beers, B., *The Changing Nature of Law's Natural Person: The Impact of Emerging Technologies on the Legal Concept of the Person*, German Law Journal, 18, 2017, 3, p. 593 and 596.

[13] Cf. Houle, K., *Responsibility, Complexity, and Abortion: Toward a New Image of Ethical Thought*, Lexington books, Lanham, 2014, p. 17, 29 and 60.

[14] As cited in Malik, *op. cit.* note 11, p. 128.

The term ‘‘dignity’’ is the subject of deep philosophical reflections. It comes from the Latin word *dignitas*, which means worthy. Its concept in public speech has been reshaped since the French Revolution and has become a creation of different anthropological options.[15] Scholars differ in their approach to dignity, and the differences in approach stem from a different understanding of human nature. Intrinsic dignity implies equality in the fundamental value of every human being (can be found in Cicero, Kant and papal encyclicals such as *Divini Redemptoris*). Extrinsic dignity, on the other hand, means that moral value is attributed to some human beings based on their political status, which is extrinsic to human nature, and is based on accidental characteristics.[16] If human nature is understood as universal and unchanging, then dignity is also understood as intrinsic. If it is understood as a construction, then dignity will also be considered extrinsic, so whether a human being has it, will be decided by the community.

In Kant's axiology dignity in the intrinsic sense is presented according to which people should not be treated as things and no accidental abilities or external criteria should affect its existence. It is precisely on the basis of the dignity of man who exists as a person that Kant finds the difference between a human being and other things and animals.[17] Spaemann concludes similarly, that intrinsic dignity implies the unconditional value of every human being by the fact of humanity, it is included in the constitutive or essential character of something permanent, and is not an accidental quality of some human beings or a value obtained from special personal characteristics.[18] ‘‘Human dignity is inherent to every human being, it is inscribed in the human code and a supreme natural principle’’,

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[15] Cf. Schockenhoff, E., *Koliko je nedodirljivo ljudsko dostojanstvo? Veza između ljudskoga dostojanstva, osobe i naravi na području bioetike/How untouchable is human dignity? The connection between human dignity, the person and nature in Bioethics*, Bogoslovska smotra, 77, 2007, 1, p. 7. One of the most important scholars of the Enlightenment, Immanuel Kant, emphasized the duty to respect the dignity of man as a rational and free being.

[16] Cf. Finegan, T., *A Matter of Consistency: Dignity and Personhood in Human Rights*, Medical Law International, 14, 2014, 12, p. 82. More on the term ‘‘dignity’’ in: Lebech, M., *On the Problem of Human Dignity: A Hermeneutical and Phenomenological Investigation*, Konigshausen and Neumann, Blaufelden, 2009.

[17] Cf. Tomašević, L., *Ontološko i funkcionalističko shvaćanje osobe: bioetička rasprava/Ontological and functionalist understanding of the person: bioethical discussion*, Crkva u svijetu, 46, 2011, 2, p. 153.

[18] Cf. Spaemann, R., *Is Every Human Being a Person?*, The Thomist: A Speculative Quarterly Review, 60, 1996, 3, p. 463.

states Hrabar.[19] Meilaender claims that ''human dignity is recognized and respected in all members of the *homo sapiens* species, and to conclude otherwise would mean to deny the constitutive element of our humanity.''[20] Northcutt starts from a theological approach claiming that ''the meaning of dignity and the human person is found in relation to God.''[21]

But on the other side, there are theoreticians who deny the concept of intrinsic dignity, that is, the existence of the unchanging nature of the species *homo sapiens*, which would carry intrinsic dignity as a permanent characteristic. Among the theoreticians who advocate such a concept are Pinker, Green, Kateb. For Pinker, human dignity is a religious term that is used to advance conservative attitudes that reject enlightenment achievements. Green holds a similar view in *Babies By Design* and states that the term dignity is a dangerous term against the progress of science.[22] Kateb in *Human Dignity* argues that humanity is not entirely natural, and that dignity resides in the unknown, rather than in any universal or permanent characteristics.[23] In dignity, Singer and Engelhardt find a secular formula that hides the Christian idea of man as the image of God, so they consider it an unimportant concept for use in the legal framework.

That such a conception of human nature and dignity is problematic is also addressed by liberal theorists such as Sandel, who believes that the liberal understanding of philosophical anthropology makes it impossible to critically oppose the progress of neo-eugenics, which destroys social solidarity towards weaker members of society because it refuses to accept the limitations of human nature.[24] Fukuyama claims similarly. He believes that ''biotechnological development is so powerful that it affects the human essence, and then also human rights and human dignity in which people are unique.''[25]

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[19] Hrabar, D., *Postmoderno doba kao predvorje negacije dječjih prava/Postmodern era as a forerunner to negation of children's rights*, Zbornik radova Pravnog fakulteta u Splitu, 57, 2020, 3, p. 678.

[20] As cited in Zachary R. C., *Human Dignity and Health Law: Personhood in Recent Bioethical Debates*, Notre Dame Journal of Law, 26, 2012, 2, 485 - 486.

[21] Cf. *ibid.*

[22] Cf. *ibid.*, 477 - 484.

[23] Cf. *ibid.*

[24] Cf. *ibid.,* 491 - 497.

[25] As cited in Selak, *op. cit.* note 10, 111 - 112.

Habermas, who denies a metaphysical or religious approach to human dignity, believes that modern liberal societies are no longer able to respond to new threats.[26] Since today's foundation of human dignity is not represented by an objective vision of man as a person, but by a mathematical and technical vision according to which human dignity is measured by *apriori* and *aposteriori* criteria, according to which some human beings possess and some do not possess inviolable human dignity, human dignity is therefore being conditioned by some qualities.[27]

Regardless of whether our starting point is natural, legal or theological, we can conclude that intrinsic dignity is the foundation that precedes everything because we are called to the human community, but not by the will of other members.[28] Dignity is not granted to us by others because as human beings we either have it or we don't, therefore the condition of its respect cannot be belonging to a community. That is why only intrinsic and not extrinsic dignity can mean the possession of normative authority over the essential aspects of one's own life, that is, respect for the life of every human being, which implies the exclusion of others in case of non-respect.[29] Acknowledging the intrinsic dignity of the human being means also acknowledging that human beings are not reducible to biochemical processes, much less that human nature is a changing construct.

It is worth asking the question whether all people are the same, whether human nature is unique or shared, and whether the individual is different.

2.4. Human nature and person

Ever since the time of Cicero, people have been considered to have a common, rational nature on the one hand, and their own nature as individuals on the other.[30] Human being

[26] Cf. Zachary, *op. cit.* note 20, 491 - 497.

[27] Cf. Matulić, *op. cit.* note 9, p. 251.

[28] Likewise Schockenhoff, *op. cit*. note 15, 5 - 12.

[29] Likewise Griffin, J., *Human rights: questions of aim and approach*, in: Gerhard, E.; Heilinger, J. C., (Ed.), *The Philosophy of Human Rights Contemporary Controversies*, De Gruyter, Stuttgart, 2012, p. 70.

[30] Cf. Scola, A.; Marengo, G.; Prades Lopez, J., *Čovjek kao osoba – teološka antropologija/Man as a person-Theological Anthropology*, Kršćanska sadašnjost, Zagreb, 2003, p. 166. Seneca distinguishes between the general concept of humanity - *homo* and the term *persona*, to denote an individual human individual.

is a general term that denotes all members of the species *homo sapiens*, and then also belonging to human nature, while an individual biological organism represents a unique specimen of the human species.[31] A person belongs to the common human nature, but as an individual. She is a single human specimen.[32] The humanity of people is equal, but there are different ways of its realization. Every subject that exists as a person is different. ''Personality is not found in abstract purity, but in an individual, a concrete, special man, and where there is a being belonging to the human species, there is also a person.''[33]

The answer to the question of who is a person requires a preliminary determination of what the term means and what the content of the term person is.

2.5. Person

2.5.1. Concept

When Confucius was asked where he would start if he had to take over the duties of a ruler, he replied that he would first put the language in order, because if there is no order in the language, then what is said no longer corresponds to what was meant, and words do not suffer arbitrariness.[34] A concept is a uniquely determined content of thought that represents a definition, serves reality, strives for clarity.[35] By methods of induction and deduction, Socrates searched for general concepts independent of circumstances and tried

[31] Likewise Dadić, B.; Knežić, I., *Metafizička istraživanja o osobi/Metaphysical enquiries concerning the human person*, Riječki teološki časopis, 34, 2009, 2, 561 - 562. Man as an individual of human nature shares common characteristics with other members of the human species, while man as a person is a concrete entity that has all the characteristics of human nature, but present in a unique way because if a person were not an individual and concrete reality, it would not be a problem to destroy one individual and replace it with another.

[32] Cf. Kosman, L. A., *Aktivnost bitka u Aristotelovoj metafizici/The activity of being in Aristotle's metaphysics*, in: Gregorić, P.; Grgić, F. (Ed.), *Aristotelova Metafizika: Zbirka rasprava/Aristotle's Metaphysics: A Collection of Essays,* Kruzak, Zagreb, 2003, p. 313.

[33] Matulić, *op. cit.* note 9, p. 81.

[34] Cf. Laun, A., *Pitanje moralne teologije danas/The question of moral teology today*, Herder and CO, Beč, 1992, p. 106.

[35] Cf. Weissmahr, B., *Ontologija/Ontology*, Filozofsko-teološki institut Družbe Isusove, Zagreb, 2013, p. 71.

to express them by definition.[36] The term explains the characteristics of an object that will provide necessary and sufficient conditions for its proper application, although it is possible that it will not include all essential characteristics, as well as the possibility that theoreticians who think they have some knowledge about common criteria are either completely or partially wrong.[37] However, although it is difficult to specify the constituent elements and the content of the term, the lack of precision does not mean the term is arbitrary. In law, a social branch that is a human artefact, but also regulates issues of the nature of things, definition plays an important role. Philosophical concepts are also practical, which is especially important in the context of open bioethical issues. Lawyers, especially when dealing with natural matters, should be careful with their language. In particular, concepts such as legal subject, human dignity, person should strive for monosemic, precise and clear meaning, due to their importance and the fact that they are concepts that belong to the group of basic concepts in the legal structure. Questions of life and death are regulated by basic terms, therefore it is necessary to avoid their vagueness in any case. In order for the concept of a person to be clear, it is necessary to analyze the very content of the concept and its boundaries. The answer to the question about the content of the concept and its limits will clarify the doubts that exist about whether the concept of a person is subject to interpretation or is a matter of definition. If the concept of a person is independent of human discretion, it means that a person is what it is, regardless of our characterization of it as such, and there is no room for arbitrage, that is, for excluding some human beings from the concept of person. On the other hand, if the concept of person is not independent of human discretion, then it remains to be defined, and will imply that someone may or may not be a person, depending on the dominant social interpretation of that term. Such a concept of a person will be an extension of the dominant ideology of a community.

2.5.2. The concept of a person through a metaphysical reasoning

[36] Cf. Belić, M., *Ontologija. Biti a ne ne-biti – što to znači?/Ontology. To be and not – not to be: what does it mean?,* Filozofsko – teološki institut Družbe Isusove, Zagreb, 2007, p. 30.

[37] Cf. Finnis, J., *Philosophy of Law*, Oxford University Press, Oxford, 2011, p. 265.

The concept of a person is a concept of conceptual jurisprudence.[38] Person is one of the concepts, like human rights, human being and man, whose content determination is a methodological problem of normative and naturalized jurisprudence. The disagreement between these two jurisprudences exists over the question of whether conceptual analysis is metaphysical in character. According to the normative, conceptual truths have a metaphysical character. Naturalized jurisprudence, on the other hand, reduces conceptual analysis to empirical sciences, in contrast to the normative one whose postulate is a philosophical approach, which implies ''open mental observation''.[39] And that is why the question arises as to whether we should limit ourselves to one of those two approaches to conceptual analysis.

Metaphysics, which is beyond the possibility of empirical knowledge, opens the complex question of the limits of our knowledge and the existence of a reality that is empirically unprovable. Metaphysics takes as its starting point the possibility of arriving at unconditionally valid statements about reality that cannot be known empirically. The claim that it is not possible to demonstrate that there are true statements about reality that is empirically inaccessible, expresses knowledge about what is empirically inaccessible, knowledge about the principle reach of metaphysical knowledge.[40] Denying metaphysics also implies that being cannot be known because what is knowable, legitimate and possible are only empirical facts, not things as they are in themselves and their value.[41] And can we claim that reality is only empirical? If nature is only empiricism, then philosophy, theology, art and all other non-empirical dimensions of reality are unnecessary. If we reject

[38] Cf. Himma, Einar, K., *The nature of Law: Philosophical Issues in Conceptual Jurisprudence and Legal Theory*, Foundation Press, New York, 2011, p. 2.

[39] Cf. Burazin, L., *Brian Leiter i naturaliziranje filozofije prava/Brian Leiter and the naturalization of the philosophy of law*, in: Spaić, B.; Banović, D. (Ed.), *Suvremeni problemi pravne i političke filozofije/Contemporary problems of legal and political philosophy*, Šahinpašić, Sarajevo, 2016, p. 55, and Skledar, N., *Filozofija i život: filozofijske i metodologijske rasprave/Philosophy and Life: Philosophical and Methodological Discussions*, Hrvatsko filozofsko društvo, Zagreb, 2007, p. 105.

[40] Cf. Weissmahr, *op. cit*. note 35, 30 – 31 and p. 35. Weissmahr states that the claim that we are unable to determine the true statements of the metaphysical can only be true under the tacit assumption of an empirically never reached knowledge about the limits of what can be asserted. Likewise Belić, *op. cit*. note 36, p. 149.

[41] Cf. Sgreccia, E., *Manuale di Bioetica – Fondamenti ed etica biomedica*, Vita e Pensiero, Milano, 1994, 72 - 73.

non-empirical reality, we also need to reject concepts such as identity, dignity, intrinsic value, and then the equality of human beings. That is why any reductionism that would limit conceptual analysis either to *apriori* truth or to exclusive empiricism, is not satisfactory in revealing the definition of a human being and has practical consequences for dealing with bioethically sensitive issues.

Reductionism is also problematic when determining the content of the concept of a person. Biology and genetics study the empirical dimension of the person, not the person as a philosophical concept. Not even logic itself, the science of the correctness of thinking, can solve the ontological mystery contained in the concept of a person (human rights and dignity), relevant to legal philosophy.[42] The bioempirical method is not able to answer the question of being a person because the scientist does not find evidence in experiments about the beginning of the individuality of human life, which is a meta-empirical determinant.[43] ''The descriptive, empirical approach to a person, according to the laws of semantics, remains at the level of external manifestations, while the metaphysical, ontological and ethical character, which practically means normative, pervades in the intrinsic structure of a person.''[44] That is why the concept of a person is, as one of the fundamental concepts in the legal structure and necessary for determining the legal status of every human being, the subject of both naturalized and conceptual jurisprudence.

2.5.3. Historical development of the concept of person

The Latin name for the noun person is *persona*. In ancient Greek dramaturgy, a person meant a mask, a *prosopon*, which ancient actors used in theatrical performances. Subsequently, complex, deep-minded philosophical-speculative templates emerged, based on which the Western-civilizational understanding of the person was shaped.[45] Boethius,

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[42] Cf. Matulić, T., *Je li ljudski embrij osoba ili jež (2)/Is human embryo a person or hedgehog (2)?*, Vladavina prava, 4, 2000, 2, 16 - 17.

[43] Cf. Matulić, T., *Je li ljudski embrij osoba ili jež/Is human embryo a person or hedgehog?*, Vladavina prava, 3, 1999, 6, p. 18.

[44] Matulić, *op. cit.* note 9, p. 237, 246 and 255.

[45] Cf. *ibid*., p. 249. Likwise Lucas, Lucas, R., *Antropološki status ljudskog embrija/The anthropological status of the human embryo*, in: Volarić - Mršić, A. (Ed.), *Status ljudskog embrija/Status of the human embryo*, Centar za bioetiku, Zagreb, 2001, p. 70. Lucas states that in theological discussions it lost the ancient meaning of the

a writer of the Western intellectual circle, defined a person as an individual substance of a rational nature.[46] English empiricism fragmented the ontological consistency of the human person, claiming that consciousness does not possess substantiality (J. Locke) and unity (D. Hume), which reduces the person to reason, as a set of experiences and ideas, in which the roots of Anglo-Saxon bioethics are found.[47] Marxism, Nietzsche's anti-humanist philosophy, structuralism, various behaviorist theories and some currents of analytical philosophy, contributed to the strengthening of the anti-personalist orientation of contemporary philosophy.[48] Attempts to reconceptualize the person through dialogic personalism, came at the end of the First World War with M. Buber and F. Rosenzweig (along with the predecessors of B. Pascal and S. Kierkegaard), and in the Catholic area with F. Ebner, R. Guardini, E. Mounier, G. Marcel and J. Mouroux.[49] The advancement of various personalisms did not help to resolve the crisis of the concept of person, embedded in the general crisis of the subject, as well as the crisis of reason itself, which characterizes contemporary philosophy.[50] Postmodern philosophy breaks with the previous vision of the unitary subject and with the teleological view of history, in such a way that the unitary vision of the subject does not coincide with the rational subject, but the subject is a dynamic concept.[51] Ever since the Enlightenment, there has been a clear disdain for metaphysics and the concept of the human being as one with an ontological substrate, but the denial of the biological essence of man comes only with the postmodern theories of the 20th century, and that is confirmed in the gender theory. Gender theory is an example of deviation from the anthropological understanding of man.[52]

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mask and was identified with the Greek term *hypostasis*, which is translated directly into the Latin word *substantia.*

[46] Matulić, *loc. cit.* note 9. The reason for reaching for this term was interpreted by Boethius in the way that the Latins had to use the Greek term for person due to the lack of their own suitable term.

[47] Scola, Marengo, Prades Lopez, *op. cit.* note 30, p. 170.

[48] Cf. Aramini, M., *Uvod u bioetiku/Introduction to Bioethics*, Kršćanska sadašnjost, Zagreb, 2009, p. 172.

[49] Cf. Scola, Marengo, Prades Lopez, *loc. cit.* note 30.

[50] Cf. *ibid.*

[51] Cf. Braidotti, R., *Of Poststructuralist Ethics and Nomadic Subjects*, in: Duwell, M.; Rehmann – Sutter, C.; Mieth, D. (Ed.), *The Contigent Nature of Life*, Springer, Berlin, 2008, 25 - 27.

[52] Cf. Hrabar D., *What is Local and What is Global in the Legal Regulation on Human Reproduction?*, Donald School Journal of Ultrasound In Obstetrics and Gynecology, 14, 2020, 3, p. 273.

2.5.4. Boethius' definition of a person

Boethius' definition of a person contains elements of ontological and biological individuality, substantiality and rational nature.[53] These are philosophical categories developed by Aristotle.[54] According to Boethius' definition, a person would be a being in itself (*ens in se*), by itself (*ens per se*), whole (*integralis*), rational (*rationalis*), free (*libera*) and responsible (*responsabilis*).[55] Further in the text follows the elaboration of some elements of Boethius' definition based on modern thinkers.

Substance

The substance appears as a permanent, absolutely unchanging primary basis of all physical and mental occurences, it is the bearer of every appearance that bears permanent, unchanging marks in the change of appearances.[56] ''Substantial status cannot be gradually acquired or diminished, but is an immediate event, therefore there is no human being who is more or less a person, that is, there is no *pre*-person, *post*-person or *sub*-person, but a person is or is not.''[57] A human being is a substance, and his biological characteristics, accidents (height, age, skin color) depend on the substance itself, the human being, and do not exist independently. Aristotle explained accidentality as that ''which is valid for something, but not necessary for that something.'' A man can acquire and lose traits, but he remains a man with his own identity.[58] In identity, which in the ''biological-ontological binomial'' explains the person, there is the idea of respecting the dignity of man, whereby

[53] Cf. Boethius, *The Theological Tractates and the Consolation of Philosophy*, Harvard University Press, Cambridge, 1918, p. 85.

[54] Cf. Aramini, *op. cit*. note 48, p. 46.

[55] Cf. Tomašević, *op. cit*. note 17, p. 44. Tomašević states that J.F. Donceel, who considers a person to be an individual who possesses a spiritual nature, gives a definition similar to that of Boetius. Boethius was a Roman writer, mathematician, theoretician, philosopher, music theorist and saint. He was born in 480 in Rome.

[56] Cf. Jerusalem, *op. cit*. note 7, 142 - 143. Likewise Aramini, *loc. cit.* note 54.

[57] Matulić, *op. cit*. note 43, p. 27.

[58] Cf. Belić, *op. cit*. note 36, p. 81.

biological identity and personal identity are not two identities, but one and unique, but each expresses one of the dimensions of the person in its own way.[59]

The rational nature of the human being

A person is a rational being based on his human nature. The adjective ''rational'' means the possibility of knowledge, sensibility, creation of thoughts, responsibility and freedom. Persons are mental beings and therefore as long as human beings can be expected or associated with the use of the mind, every human being should be recognized as a person.[60] Rational nature does not imply the effective performance of intellectual and other acts, but only the constitutive ability to perform them. Man is a member of the human species even when he does not have knowledge of his actions and thoughts, and when he knows that he can act, this does not necessarily mean that he is immediately capable of performing the action. A person is not equal to his changing demonstrative, phenomenological features. Gerhard states that if ''human personality was mistakenly recognized only by individuals who currently meet the criteria according to which they should exercise certain abilities, by analogy they should deny the animal nature of a caught shark because if you cut off its fin, it would no longer be a swimming being, and thus an animal.''[61] Likewise, a lion is not a lion because it roars, but a lion would remain what it is even if it could not roar. We do not need to conclude that an animal is a lion, because this will be independent of whether we call it a pansy. The nature of things remains as they are, so we cannot conclude that a human embryo, if we prove that it is a human being, is not a person because it does not manifest its innate abilities. It is clear that when people are asleep or in a coma, they do not manifest their personality, but they are still persons. People exist

[59] Cf. Matulić, *op. cit.* note 9, p. 230 and 252. Matulić states that all processes take place within a unique personal development, as personal identity in the evolutionary process and the role of being, and as the reality of biological nature explained by the phrase biological identity in the fundamental role of emergence. Biological nature connotes a common basis that is essentially focused on personal uniqueness, individuality. Matulić, *op. cit.* note 7, p. 220 states that personal identity has two fundamental levels: the macrocosm, the whole of the world known to man in which man discovers himself in similarity with other people and realizes that all people regardless of race, class, nation, religion, culture and society inherits the common welfare of humanity and the microcosm, man's awareness of himself as a unique and unrepeatable being.

[60] Cf. Gerhardt, V., *Samoodređenje: princip individualnosti/Self-Determination: the principle of individuality*, Demetra, Zagreb, 2003, p. 229.

[61] *Ibid*., p. 230.

and are constantly being created.[62] Being precedes action (agere sequitur esse), action follows from being (existence), which means that a person must first b*e* in order to act, and not the other way around. In the *actus personae*, not only the individual mind-endowed nature is actualized, but also the unrepeatable unique person, and the act as a conscious action can never be separated from the concrete human *self* that initiates it.[63] The above means that if there was no *self* previously, action could not even occur.

Relational structure of a person

Our rational nature refers to the relational structure of the person because the being is constituted as relational.[64] We meet a person in her body, which expresses the person's subjectivity. Hegel claimed that ''I am my body for others because I exist as a body in the real world.''[65] When we see someone's body, we notice the person's existence. Nowadays, there are two attitudes towards the body: the anthropological-scientific one, according to which the body is a complex of biological tissue and processes, organs and functions, and the anthropological-metaphysical, as well as theological attitude, according to which the human body is typically a personal reality, a place of relationships with others.[66] J. Maritain, E. Gilson emphasize that a person's relationships take place in the body and through the body, although this does not mean that they are only physical, but also personal.[67] Physicality is the objective place of manifestation of subjectivity as the realization of the possibility inscribed in human nature.[68]

2.5.5. Modern and postmodern definition of a person

[62] Cf. Matulić, *op. cit.* note 9, p. 246 and 251.

[63] Cf. Tićac, I., *Aktualnost i originalnost Wojtylinih analiza personalne strukture samoodređenja/Currentness and originality of Wojtyla's analysis of the personal structure of self-determination*, Bogoslovska smotra, 77, 2007, 4, 764 - 765.

[64] Cf. Matulić, *op. cit* note 9, p. 259. It is about the dialogic personalism of Ebner and Buber, according to which a person would be constituted on the basis of relationships with other persons.

[65] Cf. Schockenhoff, *op. cit*. note 15, 9 - 10.

[66] Cf. Scola, Marengo, Prades Lopez, *op. cit.* note 30, 119 - 120.

[67] Cf. Aramini, *op. cit.* note 48, p. 80, 166 - 167.

[68] Cf. Aramini, *loc. cit.* note 48.

The constituent parts of Boethius' concept of a person are analyzed. Boethius' definition of a person includes all human beings, which means that it precludes the definition of some human beings as non-persons. But the term person is a source of widespread social disagreement. Today's interpretations of the concept of person are philosophical, but also sociological and ideological. In the modern and postmodern era, the person is most often understood either in the Lockean way, as a capacity for self-awareness, or in the postmodern way, as a matter of construction. The modern notion of the person denies substance as a constitutive element of the person, which is consistent with the disdain for metaphysics encouraged by the Enlightenment.

In modern philosophy, self-awareness becomes a key component of the concept of a person, in accordance with Locke's definition. For Locke, consciousness is the key criterion of a person, so an individual who has not yet developed consciousness or has lost it, is not a person. The above implies that whether a human being is a person depends on the state in which he is.[69] According to Locke's dualistic understanding, two different persons could exist in one person, one during the day, the other during the night.[70] A person can lose consciousness in various circumstances during life, permanently or for a longer or shorter period, therefore Locke's definition deprives a number of human beings of the status of a person. By mentioned criterion, a number of human beings in different stages of development and life circumstances who lose or have no consciousness, such as human embryos and fetuses, but also people in a coma, all people when they are asleep, human beings under opiates, mentally retarded human beings as well as newborns, can remain outside of legal and perhaps moral protection.[71] Philosophers who, directly or indirectly, promote Locke's definition of a person, and then consciousness as a key criterion of a person, are P. Singer, M. Tooley and H.T. Engelhardt, D. Dennet, S. Veca, S. Maffettone.

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[69] Cf. Rupčić, D., *Status ljudskog embrija pod vidom bioetičkog pluriperspektivizma / The status of the human embryo under the view of bioethical pluriperspectivism*, Pergamena, Zagreb, 2013, p. 244.

[70] Cf. Koprek, I., *Treba li u bioetici govoriti o čovjeku ili osobi / Should we talk about man or person in Bioethics?*, Socijalna ekologija: časopis za ekološku misao i sociologijska istraživanja okoline, 16, 1997, 4, p. 395.

[71] Likewise Finegan, *op. cit*. note 16, p. 84. Likewise Marquis, D., *Why Abortion is Immoral*, The Journal of Philosophy, 86, 1989, 4, 186 - 187. Marquis concludes that the definition of a person according to psychological characteristics called into question the protection of a number of mentally ill and temporarily unconscious people.

Today, there are also many theoreticians who state their own ‘‘set of criteria’’ for the concept of a person.[72] Thus, the concept of a person becomes a matter of interpretation and subjective criteria that can lead to arbitraging the right to life of a human being. The concept of a person thus depends on the circumstances and the one who decides on the concept, based on arbitrary qualitative and quantitative criteria. Only Boethius' definition of a person makes it impossible to understand some human beings as non-persons. It would be worth trying to determine which of the above is true.

2.6. Summary

The chapter Human being and person represents a philosophical-anthropological analysis of human being and his nature. The historical analysis of ancient philosophers (primarly Socrates and Plato) and their experience of human being is presented through famous philosophers who dealt with the relationship of body, mind and spirit in man (e.g. Descartes, Hobbes, Locke, Spinoza, Kant, etc.). The changes in the modern, postmodern age is analyzed, by showing how modern science is characterized by the naturalization of human being, which implies the reduction of human being to biological and social elements and makes a departure from the possible interpretation of human nature as

[72] Daniel Dennett finds that conditions for a person are: rationality, awareness, respect, perception of others as persons, possibility of communication, and concludes that those who lack any of the determinants are not persons. As cited in Rivard, M. D., *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, UCLA Law Review, 39, 1992, 5, p. 1486.
English argues that the concept of personhood includes biological, psychological, rational, social and legal factors, and although people are usually rational, one who is irrational could not be considered a person. English, J., *Pobačaj i pojam osobe/Abortion and the concept of a person,* in: Prijić-Samaržija, S. (Ed.), *Pobačaj – za i protiv/Abortion - for and against*, Analytica Adriatica, Rijeka, 1995, p. 74. Berg lists the following characteristics of a person: biological life, genetic code, development of the brain, the ability to feel pain, awareness, the ability to communicate, the ability to form relationships, rationality. Berg, J., *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, Hastings Law Journal, 59, 2007, 2, p. 375. Anne Warren excludes human embryos and fetuses from the moral community by defining a moral person through a number of factors such as: consciousness, opinions, self-initiated action, ability to communicate, self-awareness. Anne Warren, M., *O moralnom i zakonskom statusu pobačaja/On the moral and legal status of abortion*, in: Prijić, S. (Ed.), *Pobačaj – za i protiv/Abortion - for and against*, Analytica Adriatica, Rijeka, 1995, p. 54.

universal and unchanging, defining the concept of human nature as a ‘‘construction’’. The relationship between human nature and dignity is analyzed, starting from Kant's axiology, through a theological approach (Northcutt et al.), in order to contrast their interpretation with theorists (e.g. Pinkler, Green, Kateb, Singer and Engelhardt) who consider human dignity to be an ‘‘irrelevant concept’’, i.e. an obstacle to scientific development.

In further considerations in this chapter, the relation between human nature and person is explored, through the presentation of historical views (Confucius, Socrates) while highlighting the basic problem, which is the inconsistency and ambiguity of certain concepts and their content. The concept of a person is approached through metaphysical and empirical perspective and the importance of a plural approach in analysis is emphasized. It is concluded that any reductionism that would limit conceptual analysis either to *apriori* truth or to exclusive empiricism, is not satisfactory in revealing the definition of a human being and has practical consequences in dealing with bioethically sensitive issues.

The importance of the concept of person as a prerequisite for determining the legal status of every human being is emphasized. The historical development of the concept of a person is presented through the most important philosophical currents and their representatives. The definition of a person given by the Roman writer Boethius is analyzed. The modern and postmodern definition of a person is explored, showing different philosophical trends in which the concept of a person becomes a matter of interpretation and subjective criteria that can lead to arbitraging the right to life of a human being. The concept of a person thus depends on the circumstances and on the one who decides on the concept, based on arbitrary qualitative and quantitative criteria.

It is concluded that only Boethius' definition of a person makes it impossible to understand some human beings as non-persons and leaves open the question how to find out the truth about who a person is.

3. LAW, MORALITY AND TRUTH

3.1. Searching for the truth

''Amicus Plato, sed magis amica veritas'' [73], says Aristotle. Determining the criteria of truth in law is a complex philosophical and legal issue that builds on the general philosophical issues of ways of knowing, acquiring knowledge and awareness about the subject.[74] The question of arriving to the truth is one of the disputed questions of philosophy. It includes the questions of whether there is one truth or more, subjective or objective, abstract or concrete, as well as a number of related theories.[75] What factors determine whether a statement is true or false? How to get to the truth about the concept of a person and solve the question of the nature of abortion? Dworkin asks ''can any statement be true unless there is some procedure for proving its truth, in such a way that every rational person must admit that it is true?''[76]

Man's first encounter with truth is the achievement of logical truth, which is found in everything real as *veritas logica*.[77] According to the classic definition of truth ''*adaequatio rei et intellectus*'', truth belongs primarily to expressions, judgments and assertions that express the objective state of affairs.[78] Human cognition is a synthesis of experience and belief, whereby experience is an *aposteriori* moment and belief is an *apriori* moment in the structure of cognition.[79] Therefore, we can conclude that experience and belief demonstrate the truth, which objectively exists as *veritas logica*. Truth exists independently of our recognition and knowledge. Truth is not a mysterious abstract entity, but with truth we confirm or deny propositions. Aristotle considered a proposition to be true if all the facts are in accordance with it, and if the proposition is false, disagreement soon arises.[80]

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[73] This is a paraphrase of a passage from the Nicomachean Ethics (1096a11-15).

[74] Cf. Vrban, D., *Metodologija prava i pravna tehnika/Legal methodology and legal technique*, Pravni fakultet Osijek, Osijek, 2013, p. 21.

[75] Cf. *ibid.*, p. 15.

[76] Dworkin, R., *Shvaćanje prava ozbiljno/Taking Rights Seriously*, Kruzak, Zagreb, 2003, p. 8.

[77] Cf. Belić, *op. cit.* note 36, 149 - 150. *Adaequatio intellectus ad rem* is the definition of truth from 9th century.

[78] Cf. *ibid*., p. 149. Belić states that an object can coincide with reason in two senses: the first is *per se*, which means according to that reason on which the existence of beings depends, and the second is *per accidens seu secundum quid*, which means according to recognition and acceptance.

[79] Cf. Weissmahr, *op. cit.* note 35, 51 – 55 and p. 65. Weissmahr states that metaphysics is not possible without experience, and knowledge in metaphysical statements comes through the experience of the self-presence of our self, a transcendental experience.

[80] Cf. Aristotel, *Nikomahova etika/Nicomachean Ethics*, Biblioteka ''Politička misao'', Zagreb, 1982, p. 12.

Aristotle argued that it is impossible for the same thing to belong to the same thing and not belong at the same time, because what is, cannot, if it is a certain being, not be, or what is, given that it is a uniquely determined something, not be.[81] Everything that does not involve a contradiction is metaphysically possible, that's why not a single case of a contradiction that exists in reality is known.[82] If there are no paradoxical phenomena, then even abortion cannot be simultaneously good and bad, and a human embryo/fetus both be and not be a human being, that is, a person. They exist as such independently of our knowledge. The above conclusion is in accordance with the theory of moral realism, which is based on the understanding that the world possesses good and bad, mind-independent moral properties.[83] According to moral realism, abortion, if it is evil, is evil not because someone thinks or prefers it, but because of the objective determinants of the act of abortion. Mathematics is two plus two, according to Dworkin, so it does not depend on one's interpretation whether abortion is an intrinsically evil act[84], nor whether every human being is also a person. ''Killing an innocent person is bad because of the characteristics of that act, taken in light of the underlying moral principle that justifies that moral judgment.''[85] How do we know that killing a human being is objectively determined to be intrinsically evil? According to Kant's theory of morality, the mind plays a significant role in moral judgment, so moral evil is defined as objective evil in the judgment of the mind and as subjective evil in the sphere of sensibility.[86] In this way, we realize that it is not good to kill a human being.

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[81] Cf. Lukasiewicz, J., *O stavu protuslovlja kod Aristotela / On the position of contradiction of Aristotle*, in: Gregorić, P.; Grgić, F. (Ed.), *Aristotelova Metafizika: Zbirka rasprava / Aristotle's Metaphysics: A Collection of Essays*, Kruzak, Zagreb, 2003, 128 - 137.

[82] Cf. Belić, *op. cit.* note 36, p. 79, and Weissmahr, *op. cit.* note 35, p. 145.

[83] Cf. Himma, Einar, *op. cit.* note 38, p. 433.

[84] Cf. Dworkin, *op. cit.* note 76, p. 27.

[85] Boyle, J., *On the most fundamental principle*, in: Keown, J.; George, R. P. (Ed*.), Reason, morality and the law: The Philosophy of John Finnis*, Oxford University Press, Oxford, 2013, p. 56.

[86] Čović, A., *Etika i bioetika / Ethics and Bioethics,* Pergamena, Zagreb, 2004, p. 111. Kant's two levels of moral value: the first is legality, which means that the action is objectively aligned with the moral law, while the second level of action is not only objectively determined by the moral law, but also subjectively done out of a sense of respect for the moral law.

The relativistic conception of morality, on the other hand, implies that the content of moral values is not in their objective validity, but in believing in them and accepting them.[87] On a relativistic basis, Posner concludes that moral theory cannot solve the issue of abortion because moral relativism means that some believe that a human embryo/fetus is a human being, while others believe that laws that criminalize abortion reduce a woman to a slave, so the solution to abortion does not depend only on arguments but also on previous beliefs.[88] But if what Posner claims is true, then the understanding of a person during slavery and Nazism would depend on previous beliefs, which we cannot consider correct. If there is no truth in morality, then even intolerant demands are legitimate because there is no basis for them to be considered wrong. One of the most famous meta-ethical arguments against moral realism, originally called the ''argument from queerness'', was given by Mackie, who claims that ''moral properties are not like others and we have in principle no way to discover them'', so he concludes that objective truth does not exist.[89] But Mackie's claim implies that we do not have criteria that would prohibit or allow certain human actions, so murder, theft and similar criminal acts could be allowed. How exactly is Mackie's claim true, that is, how exactly is he privileged in knowing the truth that he claims cannot be known? [90] If there is no objective truth, then moral relativism is not true either.[91] Furthermore, if slavery is unjust, then it is unjust because of a moral fact, and it does not depend on popular belief or moral sentiments whether or not it is unjust. Otherwise, we will question the fact that Mother Teresa is better than Hitler, and that rape and cannibalism are always the wrong choice.[92]

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[87] Likewise: Bach-Golecka, D., *To be or not to be – a parent? Abortion and the right to life within the european legal system context?* in: Stepkowski, A. (Ed.), *Protection of human life in its early stage*, Peter Lang, Frankfurt na Majni, 2014, p. 206. See also: Gerhard, E., *Universal human rights and moral diversity*, *op. cit.* note 28, 238 - 239.

[88] Cf. Posner, R., *The Problematics of Moral and Legal Theory*, The Belknap Press, London, 2002, p. 50 and 67.

[89] Mackie, J. L., *Skeptical and non-skeptical theories of objectivity in morality*, in: Himma, Einar, K., (Ed.), *The nature of Law: Philosophical Issues in Conceptual Jurisprudence and Legal Theory*, Foundation Press, New York, 2011, p. 417.

[90] Likewise Dworkin, R., *Legal objectivity*, *op. cit.* note 37, p. 393. In his criticism of Mackie, Dworkin points out that complete skepticism about morality is impossible because the claim that there are no objective moral values is a substantive moral claim.

[91] Likewise Beckwith, F. J., *Defending life – a moral and legal case against abortion choice*, Cambridge University Press, Cambridge, 2007, p. 7.

[92] *Ibid.*, 9–10.

In all civilized societies and cultures, goods such as life and health are recognized as intrinsically valuable and their justification by relativistic demands is not allowed. Therefore, if it is established that a human embryo/fetus is a human being, i.e. a person with the right to life, then it is an objective fact.

3.2. Law and morality

The abortion debate is intrinsically linked to the question of the human person. An important question regarding abortion is whether the legal issues are essentially questions of moral principles or legal strategy.[93] Theoretical disagreement about the basis of law, the question of what law is or should be, whether it includes morality or not, leads to disagreement about issues like abortion or racial segregation.[94]

The positive legal framework is based on previously established philosophical guidelines. Legal theory cannot exist without a reminder of ethics or political philosophy in general, where ethical philosophy expands into political philosophy.[95] Is political philosophy, which finds its expression in law, an expression of objective morality or a construct that comes from a completely independent argument that Dworkin derives from political theory?[96] Dworkin advocates the concept of law as an integrative system in which cases are resolved by interpreting the political structure and finding the best justification in the principles of political morality.[97] But how to find the best political justification? The fact is that the inspiration for Hitler's Nazi legal system came from the philosophy of Fichte and Nietzsche.[98] The above in itself points to the importance of finding an answer to the

[93] Cf. Dworkin, *op. cit.* note 76, 12 - 17.

[94] Cf. Dworkin, R., *The Semantic Sting*, in: Himma, Einar, K., (Ed.), *The nature of Law: Philosophical Issues in Conceptual Jurisprudence and Legal Theory*, Foundation Press, New York, 2011, p. 242.

[95] Cf. Finnis, *op. cit*. note 37, p. 111.

[96] Cf. Soper, P., *Why an Unjust Law is not Law at all*, in: Himma, Einar, K., (Ed.), *The nature of Law: Philosophical Issues in Conceptual Jurisprudence and Legal Theory*, Foundation Press, New York, 2011, p. 122.

[97] See Dworkin, *op. cit.* note 76, 127 – 132.

[98] Sluga, H., *Heidegger's Crisis: Philosophy and Politics in Nazi Germany*, Harvard University Press, Cambridge, 1993, 30 - 31, p. 42 and 75. Sluga states that Nietzsche was said to be the philosophical and political hero of

question of which ethical theory is correct for application in a positive legal framework. To answer that question, it is necessary to study the factors and mechanisms by which a certain ethical and then political theory is imposed as dominant in a society. The relationship between the legal framework and ethical theory is determined by the decisions of political structures on moral and ethical issues and is a complex issue of pluralism within which different value-system exist, but this is not ‘‘an insurmountable obstacle to the fact that there is an argument between good and evil.’’[99]

3.2.1. Natural law theory

The idea of natural law goes back to Greek antiquity; the series of theories of natural law goes from antiquity through the Christian Middle Ages and the Enlightenment to the present day. It is beyond the scope of this essay to go into their content in detail, but a detailed overview of natural law thought can be found, for example, in Crowe 1977, Haakonssen 1992, Finnis 2011. I use the following sense in the essay: Classical Natural Law Theory according to which the notion of law cannot be fully articulated without some reference to moral notions. I am also close to the conception of Wolgang Waldstein, who says that ‘‘Knowing natural law is not a question of some more or less reliable philosophical theories, but a reality in the legal culture not only of Europe, but of the entire world.’’[100] ‘‘Since antiquity, man has been seen as capable of knowing natural law.’’[101]Natural law theory dictates that positive law (which refers to the nature of things) derives from the very nature of things. The theory of natural law brings the objectivity of morality into legal objectivity, in contrast to the positive - legal theory, which starts from the fact that the legal content is created by social practice and therefore represents an expression of social, political interests and circumstances.

In natural law theory, natural is used to designate criteria or standards that are normative before all political choices, *apriori* standards that are not the product of collective choice, and are revealed by human reason and cannot be revoked. Instead, these standards

Adolf Hitler. Nietzsche was considered an important critic of Judeo-Christian values and morality in general. The army took over the rhetoric of the aforementioned German philosophers.

[99] Aramini, *op. cit.* note 48, p. 54.

[100] https://www.avemarialaw.edu/wp-content/uploads/2024/07/Waldstein.pdf, p. 189.

[101] *Ibid*.

confirm the requirements of logic, and therefore law must harmonize with them in order to be valid.[102] Some of the prominent natural law theoreticians are, among others, Aquinas, Moore, Soper, Finnis and Fuller. Although the term natural law is generally associated with the teachings of the Roman Catholic Church, not all advocates of natural law are theists, and therefore neither Christians nor Catholics, which is very important in the context of the concept of the person, and then of abortion, because the arguments which are based on natural law theory and which speak in favor of the personality of the human embryo and fetus, and reveal the nature of abortion, are often characterized as religious.[103]

3.2.2. Positive legal theory, legal realism and postmodernism

Positivism is the dominant legal theory in the second half of the 19th century. It is characterized by the separation of law and morality as two different philosophies. For positivists, subjective rights cannot depend on moral facts, nor do moral arguments establish subjective rights.[104] Positivism finds the conditions for the legal validity of norms in social facts related to human actions, beliefs and activities. Famous positivists are theoreticians such as Austin, Kelsen and Hart.

In the second part of the 20th century, legal realism appeared, according to which the law is a set of standards originating from conventions, orders or other social facts.[105] Famous legal realists are Jerome Frank, Alf Ross, Vilhelm Lundstedt.

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[102] Cf. Finnis, *op. cit*. note 37, p. 52, 91 - 93. The idea of the existence of natural law originated from antiquity, lived in the Middle Ages as Catholic natural law, and during the Reformation and Counter-Reformation it was the subject of the modern philosophy of law and the basis of the teachings of the rationalists. Likewise Hart, H. L. A., *The Concept of Law*, Oxford University Press, Oxford, 2012, (originally published in 1961) 155 - 158. Hart speaks of two constants in the natural law tradition: the Thomistic, which discovers the principles of morality and justice through human reason and its source is God, and another, according to which human laws that are against these principles are not legally valid according to ''*lex iniusta non est lex*''.

[103] See Haldane, J., *Faithful reason: Essays catholic and philosophical*, Routledge, New York, 2004, 131 – 133. Some of the greatest theoreticians of natural law were not Catholics, such as the Anglican Richard Hooker, Hugo Grotius, the Presbyterian Scottish philosophers and the English legal theorist William Blackstone.

[104] Cf. Dworkin, *op. cit.* note 76, p. 378.

[105] See also: Himma, Einar, *op. cit.* note 38, p. 165.

In the 20th century, postmodernism appeared with the representatives of Derrida, Lyotard and Foucault, who challenged law as a rational, coherent or just system, and questioned most, if not all, assumptions of legal reasoning.

3.2.3. Applicability of different theories

Theoreticians discuss the question whether law is related to morality or is an expression of social practice or is an irrational system. Greenberg considers questionable the claim that empirical facts are the only determinants of the content of law.[106] Raz states that ''for positivists, the moral value of law depends on the circumstances of the society in which it is applied, so no morality is the social morality of a population, until it is generally accepted in that population.''[107] This would mean that generally accepted social morality is actually a social practice. However, social practice needs to be evaluated, in order to determine whether it is in accordance with natural laws and empirical facts, in the part where it refers to natural rights. That is why Greenberg is right when he claims that ''social practices alone cannot determine the contribution to the content of law, but value facts are necessary and are evidence of objective moral values.''[108] If practices were the only determinant of law, then it remains unclear why the Nazi system is not still positive valid system today. How to prohibit murder if we do not value it as morally bad? It is not enough to tautologically conclude that it is murder, because there is no criterion why we punish it. Kelsen's theory of law as a social phenomenon completely different from nature, interprets that it is not possible to answer the question of what morality is, that is justice, because the content of justice cannot be reached by rational knowledge, since it is on the other side of reality.[109] If the content of justice, as Kelsen claims, is beyond reality, then there is no mechanism by which slavery, Nazism, communism or apartheid would be unjust. Are unjust laws even valid positive law? Hart proposes that the term ''law'' should be synonymous with positive law[110], while Fuller finds it ''disturbing that law includes all

[106] Greenberg, M., *A metaphisical basis for Dworkinian constructivism*, *op. cit.* note 38, p. 157.

[107] Raz, J., *Legal positivism and the sources of law*, *op. cit.* note 38, p. 263.

[108] Greenberg, *op. cit.* note 105, p. 165.

[109] Cf. Kelsen, H., *Čista teorija prava/A pure theory of law*, Naklada Breza, Zagreb, 2012, 18 – 23.

[110] As cited in Posner, R., *The problems of Jurisprudence*, Harvard University Press, Cambridge, 1993, p. 229.

positive laws, however evil, and excludes natural law as an independent source of legal obligation or a filter for denouncing evil positive laws, since it is clear that Nazi laws were law, although completely immoral.''[111] Apart from Nazism, apartheid was also a positivist system that denied natural law theory. It is clear that such laws were bad, and this conclusion can only be reached through an evaluative-normative process. Descriptions of norms are important, but they do not provide an answer as to why a law is good or bad. It is a significant, but also neglected question, why we consider a certain law to be just and good. Aquinas believed that ''the principles of natural law specify the basic forms of good and bad that are in the domain of reason and *per se* obvious, and therefore it is not necessary to explain the way in which the evil ideologies of an individual society generate legal rules, but they should be rejected as inconsistent with the minimum requirements of justice, especially when it comes to great and obvious mistakes of which no one can be excused for not knowing.''[112] ''There is an objective standard to measure what is right or wrong, which cannot be changed by politicial will…''[113] Nazi Germany had a positive legal system, but its provisions contrary to natural law were not to be applied, as proved in the Nuremberg trial. Otto Hoffmann, a member of the SS in Nazi Germany, testified that he worked in good faith and in accordance with the regulations, that is, the killing programs.[114] If the positivist claim about law as a social fact is correct, and law is, as Coleman states, ''a human artifact that serves various interests and an institutional expression of political morality'', then Otto Hoffmann only carried out activities that were an expression of political morality.[115] ''Nazi-like laws are binding in a technical sense, but do not provide moral reasons for action'', concludes Finnis.[116] Law as an expression of exclusively social circumstances is conditioned by power, and then also by economic interests, which could justify slavery and abortion (if it is the murder of a human being)

[111] Cf. Fuller, L. L., *The Morality of Law*, Yale University Press, London, 1964, p. 107 and 161 – 169. Fuller cites the racist laws of the South African Republic, the law of Nazi Germany, and the communists who tried to abolish God, marriage and the family, also with law.

[112] Finnis, J., *Natural law and natural rights*, Oxford University Press, Oxford, 2011, p. 33.

[113] Waldstein, W., *Legislation (lex) as an Expression of Jurisprudence (ius)*, Ethos, 2, 1996, p. 151.

[114] Joseph, R., *Human rights and the unborn child*, Martinus Nijhoff Publishers, Leiden i Boston, 2009, p. 316.

[115] Coleman, J., *Two versions of the practical difference thesis*, in: Himma, Einar, K., (Ed.), *The nature of Law: Philosophical Issues in Conceptual Jurisprudence and Legal Theory*, Foundation Press, New York, 2011, p. 323. Likewise Hart, *op. cit.* note 102, p. 236.

[116] Finnis, *op. cit.* note 37, p. 93.

and characterize it as a sociological determinant separated from value judgment. Changes of law and therefore of rights, which are the consequence of social changes, come by themselves, but it is necessary to distinguish between the areas and branches of the law that are conditioned by social changes, from natural rights that remain the same regardless of social changes, and if we change them, it almost always ends up adding up bad consequences at the end of an era. An example of this is the Dred Scott judgment of the Supreme Court of the United States of America (hereinafter: USA), which separated law from morality, in such a way that the question of whether a slave was a person was not considered a moral question. The legal norm in the respective areas is not exclusively technical, but also includes a moral dimension. It is not possible to comprehensively mark a social practice as morally neutral, and thus the legal framework that regulates it, because it is obvious that some social behaviors have moral implications, such as theft, lies and murders.

Furthermore, legal standards become cultural standards in such a way that the normative framework indicates whether an act is prohibited or not. That is why, for example, a law that legalizes murder, pedophilia and sodomy as a permissible practice is not morally neutral, and its implementation becomes a cultural ''reach'' over time. Therefore, the complete exclusion of morality from the legal system is dangerous because it opens up the possibility of violating justice to the extreme, as was the case with communism and Nazism. On the other hand, the equalization of law and morality implies the legal imposition of moral excellence that could be in conflict with individual value-systems. Where is the border? We can look for the border between law and morality in Fuller's theory of the morality of obligation and the morality of aspiration, according to which the morality of obligation is connected with the relationship between man and society, while the morality of aspiration is a question of the relationship between man and God. The line of demarcation between the morality of obligation and the morality of aspiration is a foundation that should not be crossed.[117] But the rough division into natural-law and positivist systems causes ambiguities. The inclusion of natural law theory in the positivist system does not mean that all legal requirements are also moral.[118] The status of a human being and the question of its life is certainly a question of natural law and the nature of

[117] Cf. Fuller, *op. cit.* note 111, 10 – 14 and p. 28.

[118] Cf. Finnis, *op. cit.* note 37, p. 112.

things, while the question of punishment for a traffic violation is not. That is why the ''either – or'' solution is not adapted to legal needs and the natural state of affairs. The role of the legal system is to ensure the minimum, which is necessary for the functioning of society, which includes, for example, the prohibition of murder and theft. The prohibition of murder is a moral issue, but the natural law still says nothing about how to regulate punishment because it represents an exclusively social category, which implies that there are social norms that are not related to the issue of morality. But those that are, represent the minimum for the purpose of society's survival. In doing so, natural law would be the standard by which the legitimacy of the system is measured.[119] Positive law, in the part that refers to natural-law issues, should be harmonized with the nature of things (prohibition of killing a human being), while in the part that refers to positive law (question of punishment), it can be harmonized with circumstances that do not relate to the nature of things, but are an expression of social circumstances. Thus, we cannot simply mark abortion as an expression of social practice, without valuing it. If we take into account the possibility that an individual judge, as well as the whole society, can be wrong about legal facts in a certain period (as in the case of slavery), the questioning of the relationship between law and morality becomes even more important.

What about the other dominant theories? Can we say that law and morality are constructions and question their rationality and coherence, in accordance with poststructuralist theory? By denying the role of reason in law, the values we construct will be an expression of power and interests unrelated to any natural state of affairs, which will make it redundant to determine who is considered a human being and a human person, and then what the nature of abortion is. ''General requirements of reason are fundamental goods, principles of logic, that are presupposed to any practical explanations, because it is not difficult to state that there are many different faiths, but not many different logics.''[120] So in order for law not to become an expression of irrationalism and voluntarism, we will agree with Vrban that ''logic, as a universal norm of rationality, could be an instrument of rational discussion of values.''[121]

[119] Cf. Ramet, S., *Postkomunistička Europa i tradicija prirodnog prava/Post-communist Europe and the tradition of natural law*, Alineja, Zagreb, 2004, p. 11.

[120] Finnis, *op. cit.* note 112, p. 371.

[121] Vrban, *op. cit.* note 74, 115 - 117.

3.3. Abortion as a moral-legal issue

Can abortion be justified by a political goal, or is it a moral issue independent of politics, so it will be regulated that way in positive legal framework? Should abortion, according to its definition as an objective good or evil, be prohibited or legitimized, or will the legal framework on abortion be regulated as a political construct, independently of the objective moral nature of abortion? ''Since the nature of law has changed over the centuries, and especially the role of human reason in law and culture, a legal solution to abortion is more difficult to achieve today'', concludes Nikas.[122] However, the solution to the question of abortion cannot be sought in the theoretical ''abstraction'' that is most often used by totalitarian systems, which enables the interpretation of terms in accordance with the realization of political interests. Abortion is not a value-neutral issue, since it involves the issue of disposing of the life and bodily integrity of another human being, therefore it needs to be regulated in accordance with clear parameters that prevent arbitrary interpretations and contradictions.[123] The legal standard on abortion is a reflection of the moral vision of the community. ''The legal regulation of abortion belongs to the field of normative legal theory, that is, the establishment of legal norms from the aspect of political morality and moral legitimacy, but only after determining the content that is the subject of empirical legal theory.''[124]

The legal status of the human embryo and fetus, crucial for the legal regulation of the question of abortion, will be an expression of political and moral philosophy, philosophical theories about human nature, while the conceptual part (concepts such as person, human being, privacy) will include the philosophy of language, logic and metaphysics. Given that the fundamental understanding of man presupposes anthropology, i.e. a defined vision of man, which presupposes ethics, which in turn presupposes ontology, discovering the legal status of human embryos and fetuses is a

[122] Nikas, T. N., *The crisis of reason in western jurisprudnece and the weakening of life protection*, in: Stepkowski, A. (Ed.), *Protection of human life in its early stage*, Peter Lang, Frankfurt na Majni, 2014, p. 82.

[123] Cf. Fuller, *op. cit.* note 111, 40 – 44 and p. 104.

[124] Himma, Einar, *op. cit.* note 38, p. 1.

rather complex task.[125]

3.4. Summary

In this chapter, the importance of the ‘‘search for truth’’ is emphasized, as a prerequisite for further conclusions - either legal or (and) moral. In the analysis of the open question - what is truth, the Aristotle's interpretation of truth is primarily explored, which exists independently of our recognition and knowledge, with the emphasis that experience and opinion testify to us truth, which objectively exists as *veritas logica*. The knowledge of truth by Dworkin is further analyzed, the moral mind by Kant and the opposing relativistic concepts of morality (especially Mackie's). The conclusion refers to denial of the simultaneous existence of positive and negative in the same object, which means that even an abortion cannot be good and bad at the same time, and human embryo/fetus both be and not be a human being, i.e. a person.

In the next paragraph, the relationship between law and morality is elaborated, especially in relation to abortion, revealing how political justification reflects political morality. In order to answer the question about the correctness of ethical theories as the basis of positive-legal morality, the natural-law theory and positive-law theory is further analyzed, referring to philosophers and lawyers such as Greenberg and Fuller in order to conclude that the status of a human being and the question of his life is certainly a question of natural law and the nature of things. The (co)relationship of law and morality is shown through historical exapmles of evil ideologies that have been condemned through international law (i.e. the Nuremberg process in which natural law was opposed to positive laws). It is further concluded that the role of the legal system is to ensure the minimum of morality, which is necessary for the functioning of society, which includes, for example, the prohibition of murder and theft. The difference between the changes in law as a result of social changes and natural rights that remain the same regardless of social changes is emphasized, with the conclusion that it is necessary to distinguish between areas and branches of rights that are conditioned by social changes from natural rights that remain the same regardless of social changes, and their change almost always ends up adding up bad consequences at the end of the epoch.

[125] Cf. Matulić, T., *Bioetički izazovi kloniranja čovjeka/Bioethics challenges of human cloning*, Glas Koncila, Zagreb, 2006, p. 143.

At the end of this chapter there is a paragraph on abortion as a moral-legal issue in which it is stated that regulation of abortion is a reflection of the moral vision of the community. Therefore, the legal status of the human embryo and fetus, which is key to the legal regulation of the issue of abortion, will be an expression of political and moral philosophy, philosophical theories about human nature, while the conceptual part (concepts such as person, human being, privacy) will include philosophy of language, logic and metaphysics.

4. HUMAN RIGHTS

The content of the term ''human right'' is undefined and does not satisfy one of the basic rules of definition, the prohibition of circularity. The circularity of the definition of human rights is inevitable, if we take into account ''that the inherent nature of a right is human, *differentia specifica*, in relation to other, ''ordinary'' rights, *genus proximum*, which are also human.''[126] Every right that a human being has is not ''human right''.[127] It is not easy to explain the difference between positive right that is not human and ''human right'', even though determination of the difference is important, especially in the context of the discussion about fundamental human rights, which exist as natural rights regardless of their recognition in a particular positive legal system.

The subject of human rights is also not always clear. Although it is a fairly simple statement that a human being is the holder of human rights, it is not always understood that way, especially in judicial practice, both in history and today. Today, there are theoreticians who question whether the holders of fundamental human rights are human beings in so-called ''borderline situations'', such as human embryos and fetuses, people in coma and mental patients.

In order to try to find answers to the above-mentioned open questions, the history of human rights, the origin and the holder of human rights will be analyzed.

[126] Graovac, G., *Geneza i važnost prava na osobnu slobodu/Evolution and importance of the right to personal freedom*, Zagrebačka pravna revija, 2, 2013, 2, 240 – 241. Likewise: Griffin, *op. cit.* note 29, p. 6.

[127] Cf. Tomuschat, C., *Human rights: Between Idealism and Realism*, Oxford University Press, Oxford, 2003, p. 3.

4.1. History of human rights

Western civilization is the cradle of natural law from which ''human rights'' emerged. The source of modern human rights is found in ''Greek philosophy, Christianity and European humanism which, despite their different starting points, belong to the core of the natural ethos.''[128]

The *Virginia Declaration of Rights* from 1776, as well as the *Declaration of the Rights of Man and Citizen* from 1789, represent the first constitutional acts that stipulate that all human beings are born as free and have inherent rights. Human rights become powers that belong to every citizen, and they occur as a consequence of the fact that the state, as an organization that promotes the interests of its members, becomes a threat to their realization. Human rights appear as a tool with a ''dialectical function in overcoming the aforementioned tensions.''[129] Throughout the 19th century and until the formation of the international system of human rights after the Second World War, human rights remained exclusively a national issue. Throughout history, traditional international law has protected various groups of human beings such as slaves, minorities, indigenous people, but not individuals.[130] After the Second World War, the international system of human rights departs from the fact that human beings have internationally guaranteed rights as individuals, and not as citizens of individual states. The essential novelty of the newly created international system of human rights is that it finds its source in natural law, in contrast to positivism, which emphasized the role of the state in granting human rights to citizens. The Nuremberg Trial based the condemnation of Nazi war crimes on disrespect for natural law and the condemnation of legal positivism, which throughout the 19th and 20th centuries completely rejected the idea of natural law.[131] The *Universal Declaration of Human Rights* from 1948 is evidence of the return of the natural law tradition to the international legal system. Jacques Maritain and Charles Malik, one of the drafters of the *Universal Declaration of Human Rights*, based the rights listed in it on natural law, as a *apriori*

[128] Aramini, *op. cit.* note 48, p. 88.

[129] Tomuschat, *op. cit*. note 127, p. 13.

[130] Cf. Buergenthal, T.; Shelton, D.; Steward, D., *Međunarodna ljudska prava/International Human Rights*, Pravni fakultet Rijeka, Rijeka, 2011, p. 21.

[131] Likewise Joseph, *op. cit.* note 114, p. 209.

rights that exist independently of the state and also enable protection from its ''predation''.[132] The authors of the *Universal Declaration of Human Rights* confirmed that ''the abandonment of the moral heritage of natural law led to the disasters of Nazism and Stalinism because, like all totalitarian regimes, they put the collective before the individual.''[133]

However, the change of the natural law paradigm in the international system of human rights comes very quickly, only a few decades later, when the ''postmodern system of human rights'' emerges. According to Aryeh Neier, a well-known international activist in the field of human rights, the difficulties in finding the sources of human rights in the 1970s stem from their origin, which can be find in the ''interaction of journalists and non-governmental organizations'' and their development in an ''unpredictable way''.[134] The root of the new system, created in 70s years of the 20th century, the historian Moyn finds in ''political propaganda and programs of human rights advocates'', which made it possible to abandon the previous ''moral visions'' and ''ensured the success of the new system.''[135] It is not clear based on which reason is justified the ideological transition from the natural-law theory (due to which the post-war system of international human rights was created) to ''political propaganda'', just as it is not clear what the new circumstances or needs are, and also the definition of human rights, which would be valued as qualitatively superior to the previous one. It is not clear why the mere fact of the tradition of thought and its permanence would point to its worthlessness, nor why the theory of natural law, present for centuries in human history, is a myth, and the history since the 70s of the 20th century is a valuable reality. In order to determine the nature of human rights in today's system, as well as the nature of the demand for abortion that was legalized in Western society in the 60s and 70s of the 20th century, it is necessary to determine

[132] Cf. Tozzi, P. A, *Sovereignties: Evaluating claims for a ''Right to Abortion'' under International law*, in: Stepkowski, A. (Ed.), *Protection of human life in its early stage*, Peter Lang, Frankfurt na Majni, 2014, p. 52.

[133] Ignatieff, M., *Ljudska prava kao politika i idolopoklonstvo/Human Rights as Politics and Idolatry*, Službenik glasnik, Beograd, 2006, p. 73.

[134] Neier, A., *The International Human Rights Movement*, Princeton University Press, Princeton, 2012, 5 – 7.

[135] Moyn, S., *The last utopia: Human rights in history*, The Belknap Press, London, 2010, 213 - 214. Moyn states that the struggle for human rights began after the Second World War, but decades later they serve entirely new purposes.

whether today's human rights system is an ‘‘expression of passion’’ (Rorty) or do the new demands, that are defined as human rights, have their natural foundation?[136]

4.2. Source of right

The creation of a norm, that is, a human right, implies a procedure that includes three levels: the first level implies the establishment of an object that is considered suitable for ‘‘identification as a human right’’, the second level implies ‘‘the creation of a binding norm’’.[137] In the third phase, it is necessary to make the norm enforceable, that is, to ensure its effectiveness through mechanisms and procedures.[138] While the last two levels are clear and imply the usual procedure of creating and executing a norm, the first level is complex. The complexity is manifested in the fact that determining the object of human rights opens up a complex area of power struggle over the definition of human rights. In order to determine the object of human rights, it is necessary to know the source of human rights. Scientific discussions do not reach a consensus on this fundamental question. Although there are several schools and definitions of human rights, we can divide them into two main ones. On the one hand, there are advocates of human rights who find their basis in human nature, that is, natural law, while on the other hand there are advocates of the political concept of human rights. The first concept implies that human rights derive from human nature, its foundation is in the dignity of the human being. The second concept implies a functional approach, which to some extent can be identified with the United Nation's working definition of human rights in global politics.[139]

4.3. Dignity as a source of human rights

Shestack, Donnely, Gewirth, McDougal, Lasswell and Chen stand out among theoreticians who advocate a natural-law approach to human rights.[140]

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[136] As cited in Shestack, J. J., *The philosophic foundations of human rights*, Human Rights Quarterly, 20, 1998, p. 233.

[137] Cf. Tomuschat, *op. cit.* note 127, p. 31.

[138] *Ibid.*

[139] Cf. Griffin, *op. cit.* note 29, 12 - 13.

[140] Cf. Shestack, *op. cit.* note 136, 211 - 212.

The *Universal Declaration of Human Rights* states that ''*All human beings are born free and equal in dignity and rights*.''[141] Human dignity is a fundamental concept of the human rights system. Human dignity is ''part of the general context within which human rights can be implemented.''[142] Dignity, that each person has, represents the reason why the right of the human being is preferred over the right of the collective. Human rights do not have authority by the very fact that they are incorporated into positive law. Instead, that authority is contained in human dignity. The extraordinary human nature in which intrinsic dignity is contained, means that, as Rita Joseph emphasizes, human rights ''metaphysically precede any positive law and are embedded in it in order not be void.''[143] Human rights belong to man by the very fact of humanity, that means, belonging to the species *homo sapiens*. This is why every human being is the holder of human rights that do not depend on individual, personal characteristics.[144] Humanity is the reason why we do not have to prove to some community that we deserve human rights due to some personal characteristics, which means that even the ''weaker'' members of every society have fundamental rights. If human rights are not related to what it means to be human in the sense of universal human nature, this means that the entire system of human rights is ''incoherent in its foundations and beyond.''[145] Human rights that are not an expression of our human nature are not legitimate because they do not have the foundation on which they would claim its authority.

4.4. Political concept of human rights

On the other side, there are theoreticians who are critical towards the natural law concept of human rights. These are theoreticians who are also critical towards universalism and

[141] Official Gazette, International contracts, No. 12/2009, Art. 1.

[142] Tomuschat, *op. cit.* note 127, p. 89.

[143] Joseph, *op. cit.* note 114, p. 203.

[144] See also: Goodale, M., *Human rights: An anthropological Reader*, Wiley – Blackwell, New Yersey, 2009, p. 25. Goodale emphasizes the uniqueness of the *homo sapiens* species regardless of individual differences in preferences, abilities and interests. Likewise Ignatieff, *op. cit.* note 133, p. 122. See also: Orend, B., *Human rights*, Broadview Press, Ontario, 2002, p. 39. Orend states that all human beings have human rights regardless of nationality, age, race, sex, language, religion, etc. Likewise Ignatieff, *op. cit.* note 133, p. 122.

[145] Grear, A., *Human rights – human bodies? Some reflections on corporate human rights distortion, the legal subject, embodiment and human rights theory law critique*, Law Critique, 17, 2006, 2, 171 – 199.

egalitarianism, such as Augustin Cochin, Joseph de Maistre, Edmund Burke, Karl Marx, Michel Villey.[146] These are also postmodernist theoreticians such as Laclau, Mouffe, Rorty. Post-structuralists see human rights as an opportunity to achieve political goals.[147] Rorty, similarly to Laclau, believes that human rights activists should not rely on reason, but on the passion and courage of their convictions because for them, truth is a matter of perspective, not objectivity.[148] Beitz and Raz deny the existence of universal essential characteristics of human beings because they believe that human beings ''have rights only if there are certain reasons for them.''[149] Griffin concludes that ''the source of human rights cannot be found because the truth cannot be found.''[150]

The mentioned approach contains the following shortcomings: if human rights are a construction (Laclau, Rorty, Mouffe), then they can be questioned at any time. If truth is a perspective (Griffin), who decides whose perspective is true and why should the construction of human rights represent truth, if there is no objective truth? And if activists should rely on the passion and courage of their convictions (Rorty), wasn't Hitler also passionate and courageous in his visions, with his own perspective of the good, although today, rightly and undoubtedly, no one in the civilized world would claim that his perspective was correct and moral, and that the rights of the Jews were a matter of construction.

If human rights depend on social circumstances and political context, then their holder will also be a matter of political concept. The community will judge whether or not we are human, and our rights will change as the law changes. That's why we would agree with theoretician Gewirth, who finds the objective foundations of human rights in reason and morality and considers unforeseen and constructivist approaches as alarming, since they reduce human rights to arbitrary products of power.[151] If the fundamental human right

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[146] Cf. De Benoist, A., *Beyond human rights: Defending Freedoms*, Arktos, London, 2011, p. 81 and 93.

[147] Cf. Tasioulas, J., *On the nature of human rights*, in: Gerhard, E.; Heilinger, J. C., (Ed.), *The Philosophy of Human Rights Contemporary Controversies*, De Gruyter, Stuttgart, 2012, p. 21 and 56.

[148] As cited in Shestack, *op. cit.* note 136, p. 233.

[149] As cited in Shaber, P., *Human rights without foundations?*, in: Gerhard, E.; Heilinger, J. C., (Ed.), *The Philosophy of Human Rights Contemporary Controversies*, De Gruyter, Stuttgart, 2012, p. 80.

[150] Griffin, *op. cit.* note 29, p. 12.

[151] As cited in Shestack, *op. cit.* note 136, p. 226.

depends on the decision of the political oligarchy, then the negation of the right to life and liberty can be justified by cultural differences, which will be contrary to the conclusions of the Nuremberg process.[152]

That is why it is important to determine on which basis the present human rights system is built: on the concept of human nature, which contains intrinsic dignity, or on the basis of the concept according to which human nature is a political issue, a post-structuralist concept that rejects the anthropological assumption about ''human nature'' considering it ''essential contested'' and ''culturally relative''.[153] If we deny the existence of a universal human nature from which human rights stem, we question the fundamental fact that all human beings are holders of human rights. Anthropological understanding of the human being should ''prevent the abuse of fundamental human rights in all political, economic and socio-cultural dimensions''[154], and this is only possible through confirmation of the universality of human nature. It is necessary that the basis of human rights is in ''an anthropological option that will express a metaphysical attitude towards the person as an *apriori* decision, which precedes any social discourse about human being as a person'',[155] because the understanding of human nature as changeable in the ontological sense results in an *aposteriori,* social decision about nature of the human being and his dignity, which may mean that some human beings are, and some are not, holders of human rights. If human nature is not universal, then it will also be difficult to confirm the universality of fundamental human rights, so they will be subject to construction and deconstruction, and over time, it will not matter whether we, as human beings, have human rights or not.

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[152] Cf. Joseph, *op. cit.* note 114, p. 214. Likewise Biškup, M., *Ljudska prava: povijesno-teološki osvrt/Human rights: historical - theological review*, Kršćanska sadašnjost, Zagreb, 2010, 15 – 16. Biškup states that the necessary assumption of human rights is its naturalness, i.e. the fact that they arise from human nature that refers to the essence of a person, which excludes the possibility of their assignment by external entities or acquisition by one's own efforts, which confirms their fundamental characteristics as universal, unchanging and objectively unavailable.

[153] As cited in Freeman, M., *The Philosophical Foundations of Human Rights*, Human Rights Quarterly, 16, 1994, 3, p. 497.

[154] Goodale, *op. cit.* note 144, p. 106.

[155] Matulić, T., *Liječnička profesija između moralne odgovornosti i znanstveno-tehničke učinkovitosti/The medical profession between moral responsibility and scientific-technical efficiency*, in: Znidarčić, Ž. (Ed.), *Medicinska etika 1/Medical ethics 1*, Hrvatsko katoličko liječničko društvo, Zagreb, 2004, p. 181.

4.5. Universality and cultural relativity of human rights

It is not easy to find a common denominator for all today's ‘‘generations of human rights’’. Although it is possible to ‘‘identify the common characteristics of all legal systems for the protection of human rights, such as equality and non-discrimination’’[156], it remains unclear what is the common source of all today's generations of human rights and if it can be related to human nature? The aforementioned question is essential for determining the ‘‘balance of power’’ and reaching a conclusion about the natural (un)foundedness of the right to life of the human embryo and fetus and the woman's interest in abortion, which is assumed to derive from the right to privacy.

The first generation of human rights refers to ‘‘negative rights’’, within which states should refrain from interfering with basic existential rights and freedoms, such as the right to life and bodily integrity, which also include rights such as the prohibition of torture and cruel and degrading treatment. The second generation of rights refers to economic and social rights, such as the right to social security and the right to work. Third generation of rights represent global goals such as the right to peace, the right to development and the right to a healthy environment. It is easy to see how all three generations of human rights differ in their nature. The above-mentioned difference also affects the differences in the holders of rights, holders of obligations, as well as the possibility of their enforceability. The source of first-generation of human rights can simply be linked to human dignity. The rights of the first generation are a prerequisite for the realization of the rights of the second and third generations. All human beings have them, and all human beings, as well as communities, have the obligation to respect them. Failure to comply with them opens up the possibility of filing a lawsuit. These are the rights that are valid or should be valid in all times and places, as long as there are ‘‘human beings who live in community with the authorities.’’[157] These rights were enumerated in the *US Constitution* during the 18th and 19th centuries and the *Declaration of the rights of man and citizen*, therefore ‘‘they are rightly considered the core of defense against state intervention.’’[158] Both in the *Universal*

[156] Tomuschat, *op. cit.* note 127, p. 73.

[157] Tomuschat, *op. cit.* note 127, p. 137.

[158] Tomuschat, *op. cit.* note 127, p. 138.

Declaration of Human Rights and in the *International Covenant on Civil and Political Rights,* as well as in the *International Covenant on Economic, Social and Cultural Rights*, it was confirmed that each human being has rights based on its human nature and inherent dignity. The more recent international documents, such as the *Convention on the Rights of the Child* mentions the dignity of the human being (in the preamble and in several provisions), as well as the *Charter of Fundamental Rights of the European Union* in Article 1. These rights exist in relation to all human beings, which is why their universality can be claimed. In every community, human life is a value and there is no community (except tribes) where killing is allowed without restriction.[159] But even within the framework of fundamental rights, differences in norms appear when issues such as the death penalty and abortion arise.

The second generation of human rights occured in the 20th century. These rights do not imply negative rights, but they assume the responsibility of the community in ensuring economic and social well-being. The holders of rights are all human beings, members of a community, while the holder of obligations is the community itself. However, the mechanisms for securing rights are not clear.[160] Although the rights of the second generation are undoubtedly important, these are social rights that depend on the political and economic system of a particular country. An example of this is the fact that the state cannot be sued if it does not ensure, for example, the right to work. ''The right to an annual vacation can hardly be related to human nature, and to claim the opposite is to distort reality.''[161]

Third generation rights represent global goals. The holder of the right, as well as the holder of the obligation, is not clear in practice. Are the holders of rights individuals and communities, and holders of obligations are communities? By what procedure are these rights exercised? All of the above points to the anthropological questionability of the rights of the third generation because they can hardly be directly related to human nature.[162]

[159] Likewise Dworkin, *op. cit.* note 76, p. 394.

[160] Cf. Tomuschat, *op. cit.* note 127, p. 139.

[161] Tomuschat, *op. cit.* note 127, 6 – 7.

[162] Cf. Tomuschat, *op. cit.* note 127, p. 152.

Since the three generations of human rights are different in nature, it is questionable whether they have equal value. In this context, the relationship between the right to life of a human being and the presumed right to abortion should be examined, if it is proven that it is a human right. The rights of the first generation, the fundamental right to life and liberty, and related rights such as the prohibition of torture and cruel and degrading treatment, derive from human nature and should be valid as immutable in all times and circumstances. The same cannot be considered for the rights of the second and third generation, which depend on the socio-economic development of the community, as well as its traditional, cultural circumstances, therefore it is justified to question the imposition of the Western concept of the rights of the second and third generation in the global sphere. Thus, a woman's request for an abortion may represent, if it is not a human right arising from human nature, a cultural pattern imposed by Western society on a global level. The practice of imposing Western cultural patterns, especially anthropologically questionable human rights, is met with resistance in some countries, especially Arab ones. That the intention to carry out this practice exists in Western society, is evident in the provisions of some international conventions such as the *Convention on the Elimination of All Forms of Discrimination Against Women* (further: CEDAW), which determines that ''*States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.*''[163] It is not out of place to mention the *Council of Europe's Convention on preventing and combating violence against women and domestic violence*, which obligates states to include lessons on gender theory in their regular curricula within the framework of education in order to do everything at all levels of education regarding the issues of (i) ''*...non-stereotypical gender roles...*'' not only in the educational system, but also in ''*informal educational environments, sports, cultural and leisure environments and in the media*.''[164] The aforementioned provisions are about an attempt to change the value systems of communities, and not about fundamental human rights.

Which rights are universal, and which are culturally relative? Proponents of cultural relativism deny the existence of pre-existing rights because they consider them ''a product

[163] Official Gazette, No. 11/1981; Official Gazette, International contracts, No. 12/1993, Article 5.

[164] Official Gazette, International contracts, No. 3/2018, Article 14.

of cultural circumstances, so their recognition is a simple value judgment, like any other'', while proponents of universalism claim that ''human rights are rooted in universally valid truths.''[165] It has been determined that there is a difference in legal nature between the fundamental rights of the first generation and the rights of other generations. If fundamental rights are cultural-relative rights, then both Nazism and Stalinism could be justified by social circumstances. Then also it is not clear by what criteria it could be claimed that democracy is better than apartheid and the Nazi system or that life is better than murder. If advocates of cultural relativism deny fundamental rights and use culture as an excuse to deny them, then they open up the possibility that our right to life and liberty depends on community. If, on the other hand, Western society, through new generations of human rights, which are created through the mentioned conventions, imposes its values as universal, demanding a change in cultural patterns, and these are values that have no basis in human nature, then we can talk about the ''ideological imperialism'' of Western society. Tomuschat states that ''many arguments support the conclusion that the pronunciation of national or regional values serves as a political weapon, and not as a preoccupation with the preservation of national identity, because if human rights arise from human nature, any social divergence is insignificant.''[166]

It follows from the above that the rights we have as human beings in accordance with our human nature cannot be negated by the justification that it is about cultural diversity. But when it comes to an attempt to change value systems of socities, for example with a gender theory, whose purpose is to deconstruct gender polarity, then social divergences are significant because there is no universality of such so-called human rights. The core of universal rights is narrower than Western society would like, so ''it is not only pretentious, but also wrong to insist on their unquestionability'', observes Orend.[167]

The universality of human rights is limited to fundamental rights around which there is a global consensus. The rights associated with human nature and intrinsic dignity, the rights

[165] Binder, G., *Cultural Relativism and Cultural Imperialism in Human Rights Law*, Buffalo Human Rights Law Review, 5, 1999, 213 – 217.

[166] Tomuschat, *op. cit*. note 127, 71 - 72.

[167] Orend, *op. cit*. note 144, p. 86.

of the first generation, testify about their own universality.[168] The recognition of the fundamental rights to life and freedom is only the procedure of establishing something that already exists because their non-recognition does not affect their existence, while this is not the case with politically conditioned rights.

In today's modern or postmodern society, we are witnessing the further expansion of the idea of human rights ''to areas that have nothing to do with human rights as an expression of what is authentically and specifically human in man.''[169] It is about the inflation of rights and the definition of human rights that is based on desires. A request for an abortion could also belong to the mentioned category, if it is shown that it cannot necessarily be derived from human nature. The danger of the idea of ''rights as a trump card'', as defined by Raz, ''enables a grotesque increase in the number of rights'', which opens up the possibility of trivializing fundamental human rights.[170] Tomuschat is of the same opinion, and claims that when ''desire is presented as a right, it can have a devastating effect on taking all human rights seriously, because not everything that improves human life can be considered a human right.''[171]

The complexity of the issue of defining human rights, distinguishing between generations of human rights, human nature and holders of human rights, blurs the contours of human rights as a concept that guarantees every human being basic rights arising from dignity. ''Human rights are truly no longer universal, they are just some decoration that loses its content, and in the name of which systems are destroyed.''[172] ''The thin philosophical foundation justifies questioning the power of the human rights system.''[173]

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[168] Likewise Shestack, *op. cit.* note 136, p. 203.

[169] Matulić, T., *Medicinsko prevrednovanje etičkih granica / Medical pre-evaluating of the Ethics Edge*, Glas Koncila, Zagreb, 2011, p. 117.

[170] As cited in Dworkin, *op. cit.* note 76, p. 394.

[171] Tomuschat, *op. cit*. note 127, 9 -10.

[172] Hrabar, *op. cit.* note 19, p. 669.

[173] Ignatieff, *op. cit.* note 133, p. 100. Likewise De Benoist, *op. cit.* note 146, p. 9, 23 and 58. De Benoist calls them an ideology, a world secular religion whose criticism causes shock, just as the questioning of God's existence once did. De Benoist considers it comical to attribute a ''sacred'' character to human rights, with the parallel exclusion of all forms of the sacred from social life. Likewise Joseph, *op. cit.* note 114, p. 302. Joseph states that universal rights are not universal if they serve some transient ideology.

All of the above also affects the question of whether a human embryo/fetus is a human being with intrinsic dignity, the holder of fundamental human rights and whether it has legal personality, as well as whether abortion is a human right arising from the nature of man.

4.6. Democracy and human rights

Neoliberal democracy in postmodern Western society, ‘‘has the status of a self-evident value, since it ‘‘guarantees’’ human rights. ‘‘It is a politically profitable assumption’’, concludes De Benoist, ‘‘that human rights and democracy are synonymous because the redefinition of a democratic regime as one that respects human rights allows the rejection of any democratic decision that is against the ideology of human rights.’’[174] The number of critical voices that question the value of democracy as an institutional element that promotes people's well-being and rights is growing.[175] ‘‘It is clear that the majority can pose a threat to the democratic principle that tends to abolish all structural elements of equality for all citizens.’’ History testifies that there were democracies that violated basic human rights, such as the USA, founded as a democracy with a system of slavery. It is not uncommon for a democratically elected government to deliberately expand its powers, therefore we should not forget that human rights were founded with the purpose of protecting the individual from state power and in most cases against the majority that may have democratic legitimacy. So, ‘‘as long as a democratic majority respects objective justice, human rights, and natural law in generał, no real problem arises.’’[176] In this context, it is necessary to examine whether abortion is an expression of democracy, objective justice and freedom of society or whether it is an ideology.

4.7. Summary

[174] De Benoist, *op. cit.* note 146, 98 - 102. De Benoist explains that democracy is a political doctrine, while human rights are a legal and moral doctrine. Human rights should limit political prerogatives. Likewise Julien Freund, Jean – Francois Kervegan and Myriam Revault d'Allones.

[175] Likewise Tomuschat, *op. cit.* note 127, p. 158.

[176] Waldstein, *op. cit.* note 113, p. 146.

In the chapter Human Rights, the history and origins of human rights is shown, in Western civilization as well as the postmodern changes characterized by a departure from the natural-law paradigm that was a basis for all international treaties after the Second World War. Radical changes in the concept of human rights from the end of the last century are discussed - in terms of the influence of the media, non governmental organizations, political propaganda and various programs. In the subchapter on the sources of human rights, the three-level process of the creation of a norm that represents (some) human rights is analyzed, and it is pointed out that it is a complex process, especially in relation to the determination of the object of human rights, on which there is no consensus in scientific discussions. In this regard, two main concepts as sources of human rights are analyzed - natural law and political (functional) concept, together with their main representatives. It is concluded that the concept of natural law based on human dignity and humanity guarantees fundamental rights to every member of every society. The political (functional) approach is further analyzed, questioning certain ideas such as ‘‘passion and courage’’, ‘‘the lack of truth’’ or the absence of ‘‘universal human nature’’, as the basis of human rights. It is concluded in favor of the universality of fundamental human rights against constructivist rights, an approach that allows that human rights belong to some but not all people. The basic features of the three generations of human rights and their scope in thepostmodern era is briefly presented. The question of which human rights are universal and which are cultural relative is analyzed. It is concluded that the rights we have as human beings in accordance with our human nature cannot be denied with the justification that it is about cultural diversity. The inflation of rights in the postmodern age, which are defined on the basis of desires is dicussed. At the end of the chapter on human rights, the relationship between democracy and human rights is briefly reviewed.
The importance of this chapter for the subject of the dissertation consists in the analysis of the sources of human rights, who is the holder of basic human rights and whether basic human rights can be limited only to some human beings.

5. PERSONALITY RIGHTS

5.1. History

Throughout history personality rights were not the focus of legal protection, and they were not even discussed.[177] Civil law, ever since the period of Roman law, has been predominantly property-related. In the second half of the 19th century, Gareis, followed by Gierke and Kohler, postulated the idea of personality rights.[178] The second half of the 20th century can be defined as the beginning of modern personality law. The personality rights then become an object of study, especially in civil-legal theory. At the same time states, taught by the horrors of the Second World War, are beginning to recognize personality rights through their own civil law systems, as well as through constitutional declarations of human rights. Today, personality rights are protected more or less all over the world and ''represent quantitatively and qualitatively an increasingly important component of private and civil law.''[179] The theory of personality rights is firmly established on the European continent, and has appeared elsewhere (in South Africa and scarcely in the US).

''Croatian legal space received the first 'flashes' of the personality rights through the General Civil Code, but the real normative imposition of these rights was carried out in 1978 with the appearance of the Obligatory Relations Act (hereinafter: ORA), as a law of the SFRY.''[180] Personality rights, some of which are human rights (more on that *infra*), are also regulated by international treaties and ratified by the Republic of Croatia, such as the *International Covenant on Civil and Political Rights (1966)*[181]*, the International Covenant on*

[177] See also: Baretić, M., *Pojam i funkcije neimovinske štete prema novom Zakonu o obveznim odnosima / The concept and functions of non-proprietary damage according to the new law on obligatory relations*, Zbornik Pravnog fakulteta u Zagrebu, 56, 2006, Posebni broj, p. 477. Baretić states that in the past, a duel or revenge, rather than monetary compensation, was considered the appropriate response to invasions on the non-property sphere of man.

[178] Cf. Neethling, J., *Personality rights: a comparative overview*, The Comparative and International Law Journal of Southern Africa, 38, 2005, 2, 210 - 211. Gierke enumerated the characteristics that distinguish personality rights from other rights: they are private, personal rights, related to the personality of their holder and ending with his death.

[179] Radolović, A.*, Pravo osobnosti u novom Zakonu o obveznim odnosima / Right on personality in the new Obligatory Relations Act*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 27, 2006, 1, 129 -130.

[180] Radolović, A., *Specifični postupovnopravni problemi u zaštiti prava osobnosti / Specific procedural law problems in protecting of the right on personality*, Zbornik Pravnog fakulteta Sveučilišta u Zagrebu, 63, 2013, 3 - 4, p. 695 and 702.

[181] Official Gazette SFRJ, No. 7/1971, Official Gazette, International contracts, No. 12/1993.

Economic, Social and Cultural Rights (1966)[182], the *Charter of the United Nations*[183], the *Universal Declaration on Human Rights*[184], *the European Convention for the Protection of Human Rights and Fundamental Freedoms*.[185] Personality rights are also regulated by the Constitution of the Republic of Croatia, which guarantees the right to life (Article 21, paragraph 1), the right to freedom (Article 22, paragraph 2), the right to a fair trial (Article 29), the right to protection of personal and family life (Article 35), the right to freedom of thought and expression (Article 38), etc.[186] Personality rights are regulated in detail by the ORA.[187] Paragraph 2 of Article 19 of the ORA lists personality rights such as the right to life, physical and mental health, reputation, honor, dignity, name, privacy of personal and family life, freedom, etc. Personality rights are also regulated by numerous other laws, such as the Media Act,[188] Family Act,[189] Penal Code,[190] Criminal Procedure Act,[191] Misdemeanor Act,[192] Copyright and Related Rights Act,[193] Personal Name Act. [194]

5.2. Definition

Each personality right is subjective civil right, but a non-property, which is why it is more difficult to define, considering that as a non-property category it encompasses the field of philosophy. In terms of their content, personality rights represent a mixture of ‘‘many

[182] Official Gazette SFRJ, No. 7/1971, Official Gazette, International contracts, No. 12/1993.

[183] Official Gazette, International contracts, No. 15/1993.

[184] Official Gazette, International contracts, No. 12/2009.

[185] Official Gazette, International contracts, No. 18/1997, 6/1999, 8/1999.

[186] Constitution of the Republic of Croatia, Official Gazette, No. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000, 28/2001, 41/2001, 55/2001, 76/2010 and 5/2014.

[187] Obligatory Relations Act, Official Gazette, No. 35/05, 41/08, 125/11, 78/15, 29/18.

[188] Media Act, Official Gazette, No. 59/04, 84/11, 81/13.

[189] Family Act, Official Gazette, No. 103/15, 98/19.

[190] Penal Code, Official Gazette, No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21.

[191] Criminal Procedure Act, Official Gazette, No. 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19.

[192] Misdemeanor Act, Official Gazette, No. 107/07, 39/13, 157/13, 110/15, 70/17, 118/18.

[193] Copyright and Related Rights Act, Official Gazette, No. 167/03, 79/07, 80/11, 125/11, 141/13, 127/14, 62/17, 96/18.

[194] Personal Name Act, Official Gazette, No. 118/12, 70/17, 98/19.

contents of public and private law, law and morality.''[195] The root of the modern concept of personality rights (as well as human rights) is found in natural law and the concept of inalienable personal rights with which every person is born with and which represent the reason for existence and the basis of legal personality. Such rights are the right to life and liberty.[196]

Radolović defines the personality rights as a branch of law that ''by using the means of civil law protects the personality, the totality of the psycho-social state of a person.''[197] Gavella defines personality rights as ''goods that belong to a person as a biological being, such as life, body, health and as those that are in each legal order recognized to every person as a spiritual and social being, such as freedom, honor, reputation, name, image, privacy.''[198]

As a key problem of the doctrine about personal, non-property goods, the question arises ''whether the legal order protects some non-property goods or recognizes subjective rights on these goods.''[199] ''Basic values such as life and health must be the subjective right of the individual, which he protects with judicial lawsuit'', believes Radolović.[200] Such a concept of personality rights as a subjective right was criticized by Belgian and French jurists, who argued that personality rights are private freedoms, which become a public issue when a person enters into relations with others or when there is a conflict between them.[201] But such criticisms were not supported in practice.[202]

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[195] Radolović, *op. cit.* note 180, p. 712.

[196] Cf. Gavella, N., *Osobna prava / Personality rights*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2000, 13 – 15.

[197] Radolović, *op. cit.* note 179, p. 133.

[198] Gavella, *op. cit.* note 196, p. 31.

[199] *Ibid.*, 16 – 17. See also: Klarić, P.; Vedriš, M., *Opći dio građanskog prava / Universal part of Civil law*, Official Gazette, Zagreb, 2006., 62 – 64. In legal theory, there is no agreement on the definition of the term subjective right. The ''theory of will'' defines subjective right as a guaranteed power of will. The theory of interest defines subjective right as a legally protected interest.

[200] Radolović, A., *Pravo na život, zdravlje, dostojanstvo i privatnost (prava osobnosti) kao temelji građanskog medicinskog prava / The right to life, health, dignity and privacy (personality rights) as the foundations of civil medical law*, Informator, 64, 2016, Part 1.

[201] As cited in Neethling, *op. cit.* note 178, p. 224.

[202] *Ibid.* Neethling states that this criticism lacked dogmatic support and had no influence on judicial practice in Belgium and France.

''Personality rights are private rights, not public rights, and they grant the legal subject absolute power over his personal, non-property assets.''[203] Their positive aspect consists in the authorization to dispose of and decide on personal property, while the negative aspect of personality rights refers to the fact that others should respect it and refrain from harming it. Personality rights are not absolute rights, but can be limited. Private rights are limited by natural laws, acquired characteristics of individuals, social circumstances and the law, and in legal relations everyone is obliged to refrain from anything that would injure someone's person, things or subjective rights.[204] In this context, the questions should be analyzed whether the right to life of a human embryo and fetus can be limited, if it is proven that a human being is also a person, as well as whether the right to abortion can be limited, if it is proven that it is a personality right.

5.3. Monism and pluralism of personality rights

In theory, there are disagreements about the question of whether there is a general personality right, monism of personality rights, or whether there are a number of special personality rights, pluralism of personality rights. The general right of personality is the basis from which all concrete or special rights of personality arise. It is a system that encompasses a wide range of personal rights such as the right to name, image, dignity, reputation, body, life, freedom and health. The German system is an example of a monistic system of general personality law. An example of a system opposite to monism is the example of the French and Italian systems, which represent typical pluralistic systems. French courts have developed the practice of protecting personality rights based on the general provisions on criminal offenses in the criminal code.[205] Thus, the right to bodily integrity, dignity, reputation, feelings, privacy and identity (including name and image) are separate personality rights.[206] Italian courts have also taken a pluralistic approach, by

[203] Gavella, *op. cit.* note 196, p. 27.

[204] Gavella, N., *Privatno pravo/Private law*, Official Gazette, Zagreb, 2019, p. 21. Limitations of personal rights are general and special. The general ones stem from the fact that every person is a social being who needs to respect the rules of the community, while the special ones represent cases when a person is limited, for example, in the right to bodily integrity (for example, when someone is forced to give a blood sample).

[205] As cited in Neethling, *op. cit.* note 178, p. 212.

[206] *Ibid.,* p. 213.

recognizing the right to free development of personality based on the Constitution, followed by the acceptance of the right to privacy and identity (including the right to name) as separate personality rights.[207] Croatia's approach to personality rights is also pluralistic. Separate personal rights are enumerated in the ORA. Despite the acceptance of the pluralistic concept, it is clear, states Baretić, ''that our legislator, enumerating certain personality rights, did not intend to close the circle of personality rights that are protected by the provisions of that law, but that enumerated personality rights are listed only as an example, which is reflected in the provision 'etc.'".[208]

Which of the two listed systems is better? ''Pluralism of personality rights is a more practical and realistic legal project,'' Radolović believes.[209] Although it slows down the creation of new rights and the expansion of the general horizon of personality rights, enumerating individual personality rights does not allow ''forgetting'' something that has been verified as a personality right.[210] The monistic (German) approach has other characteristics: it enables easier expansion of the object of personality rights, and depending on the need, enables the creation of new personality rights. But legal monism in the projection of personality rights ''enables the creativity of judicial practice, but can lead to legal improvisation, even arbitrariness.''[211]

Can the potential right to an abortion based on a woman's request belong to the category of personality rights, if its natural and subjective-civil law foundation is proven? Does it perhaps belong to the domain of personality rights which, according to Gavella, ''is affected by contemporary social, technological and other developments''[212] or which depends on the ''degree of creativity''[213] or ''inventiveness of judicial practice''?[214] Is

[207] *Ibid.* It is similar in the Republic of South Africa, which takes a pluralistic approach, protecting dignity, which represents a concept that serves as a basis for recognizing further personality rights, such as the right to bodily integrity, freedom, reputation.

[208] Baretić, *op. cit.* note 177, p. 466.

[209] Radolović, *op. cit.* note 180, p. 700.

[210] Cf. *ibid.*

[211] *Ibid.*

[212] Gavella, *op. cit.* note 196, p. 30.

[213] Cf. Radolović, *op. cit.* note 179, 164 – 165.

[214] Cf. Baretić, *op. cit.* note 177, p. 480.

abortion a personality right that arises from the concretization of fundamental personality rights, in accordance with Rodin's claim that ‘‘every classification of fundamental freedoms and rights is necessarily incomplete, because their concretization necessarily leads to a change in their scope and content’’?[215] Which personality rights are fundamental, independent of the inventiveness of court practice (Baretić) and whose concretization should not lead to a change in their content (Rodin)?

In order to determine the relationship between the presumed right to life of a human embryo and fetus and the presumed right to an abortion at the request of a woman, it is necessary to determine the content of basic personality rights. Thus we will come to a conclusion about the importance of individual right, their mutual relationship and the limits of their interpretation. The aforementioned analysis is also necessary to determine which personality rights would belong to a human embryo and fetus, if it is proven that a human being is a person, i.e. a person.

5.4. Individual personality rights

The right to life, bodily integrity, freedom, identity, and privacy stand out as basic personality rights, protected in almost all legal systems around the world. But there are also various other personality rights, specific to individual countries, such as the right to the feelings of engaged couples and spouses in cases of adultery (South Africa) and the right to family memories (Belgium and France).[216] In English law, as in most common law countries (except the USA), the doctrine and recognition of personality rights is almost non-existent.[217] As a result of historical development, the protection of personality is based on ‘‘tort law’’, and personality rights are protected within the framework of torts such as, *inter alia*, defamation, persecution, intentional infliction of mental suffering, assault.[218] Therefore, in English common law there is no protection of personality rights that do not fall under one of the existing ‘‘torts’’.

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[215] Rodin, S., *Osnovne značajke prava na slobodno razvijanje osobnosti u njemačkom ustavnom pravu/Basic elements of the right to a free development of personality in German Constitutional Law*, Politička misao, 34, 1997, 1, p. 128.

[216] As cited in Neethling, *op. cit.* note 178, 236 - 237.

[217] *Ibid.,* p. 215.

[218] *Ibid.*

5.4.1. The right to life

The right to life is commonly recognized as a natural right.[219] It is a fundamental human right, protected in almost all countries of the world[220], and the primacy of its protection is emphasized in numerous international acts[221], as well as in Article 2 of the ECHR. In the Republic of Croatia, the right to life is protected by Article 21 of the Constitution which prescribes that ''Every human being has the right to life", as well as Article 19, paragraph 2 of the ORA. The member states of the Council of Europe, in accordance with the practice of the ECtHR, have two main obligations in relation to the right to life: a negative obligation that refers to members of the repressive state apparatus refraining from unlawful killing[222], and a positive obligation to undertake preventive measures aimed at preventing unlawful killings.[223] Considering that the protection of human life is not only a private right, but its protection is also a public interest, it is protected by constitutional and criminal (public) and civil (private) law.

Some theoreticians question the formulation of the right to life as a subjective right. Radolović believes that ''there is no clear criterion in freely disposing of the right to life, which is why the right to life is the least civil-law,'' but concludes that it is still a personal

[219] See also: Pankiewicz, O., *An essay about the values justifying eugenic abortion as confronted with the constitution and the real world?*, in: Stepkowski, A. (Ed.), *Protection of human life in its early stage*, Peter Lang, Frankfurt na Majni, 2014, p. 183.

[220] For example, in Germany the *Grundgesetz* in Article 2 paragraph 2 stipulates that every person has the right to life and physical integrity. In the United Kingdom, the provisions of Article 2, paragraph 1 of the *Human Rights Act* stipulates that ''Everyone's right to life shall be protected by law'', and in paragraph 2 that ''Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained, and; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

[221] These are: *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political rights*, the *Convention on the Rights of the Child*, the *American Convention on Human Rights*, the *Arab Charter on Human Rights*, the *Charter of Fundamental Rights of the European Union.*

[222] *Çakici v. Turkey*, No. 23657/94, judgment of 8 July 1999, par. 86.

[223] *Osman v. United Kingdom*, No. 23452/94, judgment of 28 October 1998, par. 115 - 122, and *Branko Tomašić and others v. Croatia*, No. 46598/06, judgment of 15 January 2009, par. 50 - 51.

right, ‘‘since people can dispose of it (for example, people who work at a very great heights or depths risk their lives every day).’’[224] Neethling also believes that the right to life differs in certain aspects from typical personality rights. The first reason is that ‘‘human life is a *condicio sine qua non* for all other rights of personality, and the second is that the violation of the right to life (that is, death) does not bring the deceased a legally recognized personal damage because his legal capacity ends with death.’’[225] But we could claim that precisely because the right to life is a *condicio sine qua non* for other personality rights, it means that it has primacy among personality rights, and the impossibility of compensation for its violation is a formal issue that does not deprive the right to life of its civil-legal significance. The right to life is a fundamental right, and therefore the greatest good, and as a subjective private right belongs to every human being.

Protection of the right to life includes the entire period of a person's life, from the beginning, until the end. But it is precisely the question of the beginning and end of the life of a human being that becomes problematic in certain circumstances, which is especially evident in modern issues of a biotechnical nature, which also includes abortion at the request of a woman.

5.4.2. The right to dignity

International and national legal documents such as the *Universal Declaration of Human* Rights, the *American Declaration of Independence*, the *Arab Charter on Human Rights*, the African Charter on Human and Peoples' Rights, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the *International Covenant on Economic, Social and Cultural Rights*, the *International Covenant on Civil and Political rights*, the *Convention on the Rights of the Child,* the *Charter of Fundamental Rights of the European Union* prescribe respect for the dignity of every human being. These are mandatory rules, and exceptions to their application are not prescribed. In the Republic of Croatia, the right to dignity is protected by Article 35 of the Constitution of the Republic of Croatia and Article 19, paragraph 2 of the ORA. In the German legal system, dignity is based on constitutionally recognized human dignity, which as a fundamental human right encompasses the entire

[224] Radolović, *op. cit.* note 180*,* p. 711.

[225] Neethling, *op. cit.* note 178, p. 226.

human personality and is understood as the basis for all other rights.[226] Dignity is equally protected in pluralistic systems such as Italian and French. On the contrary, ''the protection of dignity in the United Kingdom (hereinafter: UK) is unjustifiably meager,'' concludes Neethling.[227] It is not listed as a specific right in the UK *Human Rights Act*. Unlike the UK, in most other common law countries, such as the US, dignity is accepted as a concept to be protected. Although there are no specific provisions protecting human dignity in the *US Constitution* either, it has been developed as a concept through the jurisprudence of the US Supreme Court.[228]

Although the concept of dignity is central to the international system of human rights, the problem lies in the fact that it is subject to different interpretations, and then to practice, precisely because of its metaphysical, immeasurable dimension, both at the international and national levels. According to Radolović, ''the right to dignity implies respect for everyone's personality, not only the general one, but also the special one, which each person seeks in his own way.''[229] Neethling speaks of dignity as ''a person's subjective sense of self-respect, that is, a personal sense of self-worth, which due to its subjectivity can hardly be protected in every case.''[230] Personal rights exist as the goods of a person with human dignity.[231] The right to life finds its source in human dignity.[232] Dignity is the reason for prohibiting the treatment of human beings as things, as well as the responsibility for harm due to their killing or injury.[233]

5.4.3. The right to bodily integrity

[226] *Grundgesetz*, Article 1, paragraph 1: ''Human dignity is inalienable right.''

[227] Neethling, *op. cit.* note 178, p. 230.

[228] Justice Murphy referred to the ''dignity of the individual'' in his dissenting opinion in *Korematsu v. United States*, 323 U.S. 214, 240, 1944, as well as in *Cox v. United States*, 332 U.S. ''Human dignity'' was invoked by Justice Frankfurter in a dissenting opinion in *Adamson v. California*.

[229] Radolović, *op. cit.* note 200.

[230] Neethling, *loc. cit.* note 227.

[231] Cf. Gavella, *op. cit.* note 196, p. 32.

[232] See also: Stepkowski, A., *Protection of Human Life Against A Backgorund of Contemporary Legal Culture,* in: Stepkowski, A. (Ed.), *Protection of human life in its early stage*, Peter Lang, Frankfurt na Majni, 2014, p. 7.

[233] See also: Piskernigg, V. J., *The child as a damage in the light of Austrian law*, in: Stepkowski, A. (Ed.), *Protection of human life in its early stage*, Peter Lang, Frankfurt na Majni, p. 144 and 148.

The right to life is closely related to the right to bodily integrity, within which there is a right to health. All natural persons have the right to bodily integrity. Legal persons such as companies do not have the right to bodily integrity because they are not corporeal beings. Gavella talks about ‘‘the right to be, that is, the right to one's own undisturbed physical-biological existence, which is called the right to bodily integrity, the object of which is the personal good of the biological existence of life, the body as a whole and all its parts, as well as physical and mental health.’’[234] Neethling talks about the close connection of the right to life with ‘‘the right to keep the body alive.’’[235] According to Neethling, the right to psychophysical integrity refers to the human body, ‘‘which includes physical and psychological integrity, which means both physical and psychological well-being and health, so any behavior that adversely affects the physical structure, psyche or even sensory feelings can be considered a violation of bodily integrity.’’[236] Radolović believes that the right to integrity (physical, mental and spiritual) is something ‘‘a little lower than the right to life.’’[237] Given that a person exists as a biological person, in a body, bodily integrity is inseparable from existence itself, life. The legal protection of biological, physical life represents the legal protection of a person as a physical and spiritual being. Gavella states that ‘‘the private right of a natural person to bodily integrity, i.e. the protection of a person's life, body and health, gives the person complete private power over the body, which includes doing with life, body and health everything that is not illegal, which means that it depends on the will of the person whether she will allow interventions in one's own body and whether she will allow and even order an intervention in it or not.’’[238] Gavella's, as well as other definitions of bodily integrity, are crucial for the discussion about whether there is a woman's right to an abortion that would derive from the personality's right to bodily integrity, more precisely, can the right to protection of bodily integrity also include an order to another to intervene in one's own body, or does the request for protection of one's own bodily integrity violate the bodily integrity of another subject to whom the intervention was ordered (more on that *infra*).

[234] Gavella, N., *op. cit.* note 196, p. 65.

[235] Neethling, *loc. cit.* note 227.

[236] *Ibid.*, p. 227. Specific forms of physical and psychological injury include pain, suffering, etc.

[237] Radolović, *op. cit.* note 179, p. 149.

[238] Gavella, *op. cit.* note 196, 67 - 68.

5.4.4. The right to bodily freedom

The right to bodily freedom, closely related to the right to bodily integrity, substantively includes the unhindered right to movement, residence, work and activity. The subject of this right is a natural person. The right to bodily liberty is violated not only by complete deprivation of liberty (such as detention or imprisonment), but also by any interference with an individual's freedom of movement. The right to bodily liberty is protected in almost all legal systems.[239]

5.4.5. The right to privacy

Gavella defines the right to privacy as ‘‘the power to lead one's life separately from others and to exclude third parties from the private sphere of one's life.’’[240] The right to private life, according to Radolović, ‘‘becomes synonymous for the personality right, which gives a person the right to 'be alone', not to share some content of life with others or with those with whom she does not want it.’’[241] It is also about ‘‘an expression of respect for the specific personality of each man, who wants and has the right to keep certain information about himself only for himself’’.[242]

According to Neethling, ‘‘privacy is a personal condition of life characterized by the right of a person to determine or control the extent of her privacy, and it can be violated by intrusion into an individual's private sphere or by the disclosure or publication of private facts.’’[243] The right to privacy is recognized in numerous systems. Throughout history, English common law protected only life and property, and it was only at the end of the 19th century, as a result of the growth of printed media, especially newspapers, that interest in privacy arose. *Human Rights Act* (UK) in Article 8 stipulates the right to respect for private and family life, home and correspondence. The concept of privacy is not, nor

[239] Neethling, *op. cit.* note 178, p. 230.

[240] Gavella, *op. cit.* note 196, 217 - 218.

[241] Radolović, *op. cit.* note 179, p. 149.

[242] Radolović, *op. cit.* note 200.

[243] Neethling, *op. cit.* note 178, p. 233.

was it, mentioned in the *US Constitution*. Warren and Brandeis, American legal experts, laid the foundation for recognizing the right to privacy as an aspect of the more general right to personality.[244] This same article was taken into account by the USA Supreme Court when deciding on abortion in the famous case of *Roe v. Wade* (more on this *infra*). In the USA today, the right to privacy is a widely recognized right.

5.4.6. The right to identity

The right to personality (personal identity) implies that man, as a unique individual, has an interest in being represented as he is, and not as he is not.[245] Identity can be defined as the uniqueness or individuality of a person who exists as a person different from other persons. His personality is unique, as well as his appearance, voice, handwriting and the like. ''The right to identity includes the right to a name (i.e. registration in state registers at birth), the right to acquire citizenship and the right to know one's parents.''[246] The right to identity is also standardized in countries such as Italy, France, and Switzerland.[247] In Germany, the right to identity is secured through the sanctioning of counterfeiting, as well as through the economic appropriation of a name or image.[248] In the UK, identity is not directly protected, but protection is provided through torts such as ''malicious falsehood''.[249] In the USA, identity protection is ensured through the tort of defamation.[250]

The above-mentioned rights represent fundamental personality rights protected in almost all countries of Western society. It is important to distinguish whether the mentioned rights are human rights at the same time.

5.5. Human rights and personality rights

[244] Warren S.; Brandeis L., *The right to privacy*, Harvard Law Review, 4, 1890, 5, 193 - 220.

[245] Radolović, *op. cit.* note 179, p. 150.

[246] Hrabar, *op. cit.* note 19, p. 676.

[247] For example, Art. 22 of the *Constitution of the Italian Republic* prescribes that ''*No person may be deprived for political reasons of legal capacity, citizenship, or name*.''

[248] As cited in Neethling, *op. cit.* note 178, p. 235.

[249] *Ibid.*

[250] *Ibid.*

The distinction between personality rights and human rights is a complex legal issue. In German constitutional theory, the aforementioned issue is designated as the ‘‘problem of foundation’’ which ‘‘consists in the fact that the *Grundgesetz* recognizes a supra-positive, i.e. natural right, by which it is itself bound, which is contrary to the understanding that fundamental rights are granted by the Constitution, and that that is the only way they can be realized’’.[251] Mechanism by which human rights would become subjective civil rights is unclear.[252] McHugh starts from the fact that the difference can be found in ‘‘discovering the nature of human rights, that is, their root.’’[253] In the chapter on human rights, it was concluded that natural law theory interprets that an individual has inalienable, intrinsic rights, even if he loses his political status in the community, which is why he is a subject of human rights regardless of the perception of a particular government. These are fundamental, natural rights that precede the state regulation of the legal system. Theoreticians such as Aramini, Ten Haaf, Orend and Goodale advocate the existence of inalienable rights, independent of any government.[254]

This was also concluded in an early decision of the Bavarian Constitutional Court, which argued that the Constitution recognizes the existence of natural rights.[255] Natural rights are understood here as human rights prior to the state, which cannot be abridged by a positivist system, in line with the conclusions of the Nuremberg Trial. However, not all constitutional rights, that is, human rights, are at the same time personality rights in the sense of civil law, but only those constitutional rights that can be constructed as subjective civil rights pass into civil law.[256] In order for a constitutional, human right to be a personality right, it should be ‘‘constructed as subjective and absolute in the sense of civil

[251] As cited in Rodin, *op. cit.* note 215, p. 115.

[252] Likewise De Benoist, *op. cit.* note 146, p. 26. De Benoist concludes that the procedure by which human rights are recognized and declared is unclear. See also: Radolović, A., *Ljudska prava i građansko pravo/Human rights and civil law*, Vladavina prava, 1997, 1, p. 42.

[253] McHugh, J. T., *What Is the Difference between a "Person" and a "Human Being" within the Law*, The Review of Politics, 54, 1992, 3, p. 456.

[254] Aramini, *op. cit.* note 48, p. 88. Goodale, *op. cit.* note 144, p. 4. Orend, *op. cit.* note 144, p. 75. Ten Haaf, L., *Future Persons and Legal Persons: The Problematic Representation of the Future Child in the Regulation of Reproduction*, Open Access Journal, 5, 2016, 1, p. 8.

[255] As cited in Rodin, *op. cit.* note 215, p. 115.

[256] Cf. Radolović, *op. cit.* note 180, p. 703.

law, because without passing through that 'filter' it does not exist, and therefore personality rights are not the right to work, the right to housing or the right to social protection.''[257] Therefore, only rights that are enforceable can be considered subjective rights of personality. But can human rights be conditioned by the fact that they are recognized primarily as constitutional rights, and then as civil rights? Rodin believes that ''by entering the community, the rights of the individual are limited, as well as the freedoms that they enjoyed until then, therefore the constitutional guarantees of fundamental freedoms and rights must necessarily be interpreted in the described context, because rights and freedoms are primarily positive rights and freedoms that arise from social contract and it is not possible to determine or realize them without it.''[258]

Rodin talks about the mutual intertwining of the natural-legal foundation and positive-legal guarantees in such a way that ''the constitutional status of fundamental rights cannot be understood as a mere recognition of the pre-state and pre-legal, 'natural' freedom and equality that is independent of the state and positive law, rather they exist only to the extent that they can be actualized.''[259] But can the actualization of rights condition their existence? It is dependent on the nature of rights. If it's about basic human rights, like the right to life and liberty, the answer is no. But we can question the subjective-legal significance of the right to work, if the state cannot be sued for not providing it to every individual. Human rights, mainly of the first generation, due to their foundation in human nature, are constituted as subjective rights and are guaranteed in the civil law sphere, and enforced. Other human rights, such as the right to work, due to their dependence on social circumstances, that is, their expressed positive-legal aspect, are not subjective civil rights. The right to life is therefore both a human right and a personality right, but even when its civil law significance is denied, it remains a pre-positive right. Does the same apply to the demand for abortion, which depends on social circumstances, primarily the level of development of medical technology? This issue will be analyzed in the chapter on abortion.

5.6. Subject of personality rights

[257] Radolović, *op. cit.* note 179, p. 142.

[258] Rodin, *op. cit.* note 215, p. 113.

[259] *Ibid.*, p. 117.

The category of legal subject is identified in such a way that A is included in the legal system X, which prescribes the rights and obligations of A, from which it follows that A is the legal entity of that system.[260] The concept of a legal subject is a complex concept. The complexity of the concept is ''the reason why changes in the scope of defined subjects are rare, since they require drastic changes in the system.''[261] Most legal systems do not have a consolidated basic law that would determine the legal personality of a human being, and ''different areas of law, with various approaches to legal personality, prescribe different determinants and parameters of legal subjectivity.''[262] Law can be understood as an expression of a particular culture. The prevailing ethical theory in a community reflects the attitude of whether some people are morally more important than others, which is why it is also decisive for the legal status of every human being.

Without exaggeration, we can claim that determining the content of the concept of a physical person, and then the legal status of every human being, is ''one of the most important in every legal era.''[263] The fight over the definition of a person ''represents a fight over basic social values'', according to Nelkin.[264] The philosophical, and then also the legal concept of a person is the subject of different interpretations and radical tensions in some societies. Strong metaphysical disagreements exist especially in the context of determining whether persons, and then legal subjects, are all human beings, and then also a human embryo/fetus, if it is a human being and a person. Although it is clear that every person is

[260] Cf. Beckman, L., *Personhood and Legal Status: Reflections on the Democratic Rights of Corporations*, Netherlands Journal of Legal Philosophy, 47, 2018, 13, p. 20.

[261] Ducor, P., *The Legal Status of Human Materials*, Drake Law Review, 44, 1996, 2, 198 – 200. Crawford, J.; Bell, J. S., *International human rights and humanitarian law*, Cambridge University Press, Cambridge, 2002, p. 16, claim that international law faced problems when it had to give subjectivity to entities other than states.

[262] Ten Haaf, *op. cit.* note 254, p. 5 and 23. See also: Robinson, Z., *Constitutional personhood*, George Washington Law Review, 84, 2016, 3, p. 608. Courts lack a framework for analyzing legal personality because there is no coherent doctrine on this issue.

[263] Cf. Van Beers, *op. cit.* note 12, p. 560. Likewise Nelkin, D., *The Problem of Personhood: Biomedical, Social, Legal, and Policy Views*, Health and Society, 61, 1983, 1, p. 110.

[264] Ohlin, J. D., *Is the concept of the person necessary for human rights?,* Columbia Law Review, 105, 2005, 1, 212 – 214 and p. 224.

a legal subject and holder of personality rights, legal and moral theory and practice sometimes leaves open the question of the beginning and end of legal personality.

5.6.1. Historical development of the legal subjectivity of a natural person

Concepts can be properly understood, including the concept of a legal subject, only when they are placed in an appropriate socio-historical perspective.[265] In this way, it is possible to determine the content of the definition and its interpretation. The legal status of human beings has been the subject of discussion by numerous theoreticians in the history of philosophy and law, from Kelsen and Fuller, to Dewey and Arendt, natural law and positive law theoreticians. Throughout history, the legal status of a person has been an interesting mixture of reality and abstraction, naturalistic and legal-technical perspectives. The later concepts only supplemented the earlier ones, while the core remained the same.[266] Different theoretical interpretations have always resulted in different practices.
In the history of legal theory, two fundamental approaches to the legal status of a natural person crystallized. According to the first, the legal status of a natural person is understood as a philosophical-anthropological concept, while according to the second, the legal status of a natural person is exclusively a ''technical'', abstract status.[267] The first one was inherited from the Greeks and implies the connection of legal status with the essential and universally inherent nature of a natural person, while the second approach to the legal status of a natural person is technical, defined according to the consequences arising from its content.

5.6.2. Definition and scope of the concept of person in Roman Law

In Roman law, the legal subject was understood as technical. According to Mussawira and Connal, ''a natural person in Roman law was only one of the legal operations with a

[265] See also: Baumgardner, P., *Legal Right and Personhood in Hegel's Phenomenology of Spirit*, Birkbeck Law Review, 4, 2016, 1, p. 16.

[266] Cf. Van Beers, *op. cit.* note 12, 569 – 570.

[267] Cf. Vatter, M.; De Leeuw, M., *Human rights, legal personhood and the impersonality of embodied life*, Law, Culture and the Humanities, 1, 2019, 2 – 5.

legal purpose.''[268] Baumgardner finds one of the reasons for the technical concept of a person in Ancient Rome in ''a wide geographical area in which no deeper meaning was attached to the concept of a citizen so the technical definition of a legal person meant – an empty social self.''[269] The disconnection of a legal subject from corporeal human beings meant that neither the birth nor the death of a human being, as a biological category, necessarily coincided with the moments of emergence and cessation of legal subjectivity.[270]

The Romans used the term *persona* for a person, which was broader than a legal subject because it also included slaves.[271] According to Roman law, not all people were legal subjects, nor did they have equal rights within the framework of legal capacity, which consisted exclusively of property rights. ''The term *capitis deminutio maxima* denoted a case in which an individual for certain reasons lost the status of a free man, status *libertatis*, and became a slave, that is, ceased to be a legal subject and became a legal object, *res*.''[272] The reasons for this were sociological-economic and political-social relations, such as class and social affiliation, religion and sex. It can be concluded that the legal subjectivity of slaves was conditioned by changing social circumstances, more precisely, economic goals. The fundamental purpose of a legal entity in Roman law was to resolve property-legal relations. The Roman-legal concept of a legal subject also includes Roman-legal circumstances (use of slaves for economic gains, a wide geographical area, etc.), as well as the purpose of the concept, which is fundamentally focused on property-legal relations.

5.6.3. The relationship between the concept of a person in the philosophical-anthropological sense and a legal subject

[268] Mussawira, E.; Parsley, C., *The law of persons today: at the margins of jurisprudence*, Law and Humanities, 11, 2017, 1, p. 53.

[269] Baumgardner, *op. cit.* note 265, p. 16.

[270] Cf. Van Beers, *op. cit.* note 12, p. 573. Thus, an individual could simultaneously represent different *personae*, depending on the legal and social situation (*pater familias*, owner, employee), by which the legal person was separated from the metaphysical connotations associated with the human individual.

[271] Cf. Curran, W. J., *An Historical Perspective on the Law of Personality and Status with Special Regard to the Human Fetus and the Rights of Women*, Health and Society, 61, 1983, 1, p. 59.

[272] Petrak, M., *Ex nihilo nihil fit*, Traditio Iuridica, 432, Informator, 6461, 2017.

Subjective non-property rights are part of the rights within legal capacity. Precisely because of these personality rights, immeasurable rights, it is necessary to analyze whether a natural person in the legal sense is the same as the concept of a person in a philosophical sense, that is, whether the concept of a legal subject with legal capacity that also includes personality rights can be a technical category. Related to this is the question of whether there is a difference between the subject of human rights and personality rights.

The notion of a legal subject is at the center of the struggle between legal positivism and natural-law theory, more precisely, the exclusively positivist understanding of the legal status of a natural person as fictional and technical on the one hand, and the natural-law understanding of a legal subject that is equal to the philosophical-anthropological understanding of a person, on the other. But should the legal subjectivity of a natural person be an ''either – or'' concept? Given that the scope of legal capacity includes both personality and property rights, we can claim that the status of a legal subject requires both approaches. Such is the point of view of numerous other theoreticians who more or less agree with the position that there is a difference between a legal subject and a person in a philosophical-anthropological sense, but these are not completely separate concepts. Finnis as well proposes an approach that encompasses both understandings.[273] Dewey believes that the concept of a legal subject is practical, in contrast to the concept of a physical person in the philosophical-anthropological sense, which is not.[274] Kelsen claims that ''law does not define man in totality, but with individual acts that belong to the community, and man as a naturalized subject is only an auxiliary concept of legal expertize that regulates the behavior of many people.''[275] Beckman believes similarly and claims that although legal subjectivity is of a natural person is pragmatically determined by law, she remains a person in the philosophical sense.[276] Coughlan believes that legal status is determined by purpose, so he concludes that the legal definition of a person should

[273] Cf. Finnis, *op. cit.* note 37, p. 168.

[274] Cf. Dewey, J., *The Historic Background of Corporate Legal Personality*, The Yale Law Journal, 35, 1926, 6, 658 – 661. Dewey concludes that the concept of a natural person is dependent on non-legal considerations, such as historical, political, moral, philosophical, metaphysical, theological, which require heavy philosophical analysis.

[275] Kelsen, *op. cit.* note 109, p. 49.

[276] Beckman, *op. cit.* note 260, p. 23.

be more restrictive than what a person naturally means.[277] Olivia Little advocates a political, pragmatic concept of legal status, as separate from the natural. [278] Grear believes that there is a deep and inseparable connection between a legal subject and a human being, although it is clear that legal subjects ''are not just people''.[279] Van Beers sees the legal subject as a mask, the already mentioned *persona*, which represents ''the roles that subjects play on the legal stage, while the naturalistic conception of *personae* is necessary in the regulation of bioethical issues.''[280] Mussawira and Parsley consider it necessary to separate the ''functional and pragmatic, Roman concept of the person, from the philosophical, which has far-reaching theological, philosophical and political dimensions.''[281] Ten Haaf distinguishes between naturalistic and constructivist approaches to legal personality, whereby the naturalistic approach implies the determination of the philosophical - anthropological status of a person, while constructivism would imply the creation of legal subjectivity, thus also its separation from philosophical - anthropological status. [282] We can conclude that the majority of theoreticians relate the legal and philosophical notion of person, with the fact that legal includes entities other than human beings, while on the other hand, man is more than a legal definition.

The legal status of a natural person is a question of positive law, but when it includes subjective non-property rights arising from the nature of things, then it is necessary to connect the rights of personality with the natural, philosophical-anthropological status of a person. That is why the legal status of a human being as a fiction is appropriate in the field of property rights, but not in the protection of fundamental rights to life and liberty. Companies represent legal fictions that arise from the fulfillment of presumptions and their legal personality does not imply a subjective non-property right to life, while a human being is a legal subject *ipso iure*, with personality rights. Many theoreticians agree with this

[277] Cf. Coughlan, M. J., *The Vatican, the Law and the Human Embryo*, Macmillan, London, 1992, p. 62.

[278] Cf. Olivia Little, M., *Abortion and the Margins of Personhood*, Rutgers Law Journal, 39, 2008, 2, p. 347.

[279] Cf. Grear, *op. cit.* note 145, p. 179.

[280] Van Beers, *op. cit.* note 12, p. 579.

[281] Mussawira; Parsley, *op. cit.* note 268, p. 53.

[282] Cf. Ten Haaf, *op. cit.* note 254, 5 - 10. The naturalistic approach sees a legal person as a reflection of a human being in real life, and consists of a biological and ontological substrate. In constructivist approaches, a legal person is not defined as a reflection of a human being in everyday life, but as a legal construct that can be anything and is the product of a legislative decision.

statement. Vatter and de Leeuw warn that an exclusively fictional conception of the legal status of a physical person leads to ‘‘functionality generating disembodiedness, which leaves human life unprotected.’’[283] Legal fiction can create ‘‘dangerous and alarming legislation,’’ Aljalian argues.[284] Van Beers concludes similarly. She sees legal fiction as a ‘‘striking example and possibility of law for distorting the truth in order to achieve some purpose.’’[285] The legal subjectivity of a natural person, understood exclusively as a technical one, unrelated to the philosophical concept of a person, makes it possible to reduce man to a means. In today's postmodern society, biotechnological development causes changes in everyday life, which in various dimensions bring the possibility of improving human life and nature, but at the same time carry the danger of dehumanization and denaturalization of human beings, in which postmodernist and poststructuralist philosophy plays a significant role. ‘‘Dignity is oppressed by postmodern efforts to subjugate man as a means to realize an uncontrolled will to dominate.’’[286] Thus, the legal subjectivity of a physical person, a human being, understood exclusively as a fiction, could be a legal tool for the implementation of biotechnological goals while denying personality rights, fundamental human rights.

Is there a difference between a legal subject and a human being as a subject of human rights, in line with the difference between human rights and personality rights? In the international legal framework, human rights are guaranteed to every person. Constitutional rights, i.e. fundamental human rights, belong to all human beings, who are also legal subjects, but with different personality rights. The above interpretation is in accordance with the egalitarian principles of the natural law school. Radolović believes that ‘‘with some views, the school of natural law even harmed learning about the personality rights, because according to natural law all people are equal, and for the school of personality rights they are different, because unlike the school of natural law, which forces mere egalitarianism, the school of personality rights stimulates differences,

[283] Vatter; De Leeuw, *op. cit.* note 267, 2 – 4.

[284] Aljalian, N. N., *Fourteenth amendment personhood: Fact or fiction*, St. John's Law Review, 73, 1999, 2, p. 499.

[285] Van Beers, *op. cit.* note 12, p. 580.

[286] Hrabar, *op. cit.* note 19, p. 668.

personality, talents, abilities, intelligence.''[287] The above is true if we are talking about personality rights that depend on the personality itself, but it does not apply to rights for which the personality is not determinant, unless we want to return to racism and similar -*isms*. De Benoist believes that ''the abstract equality of human beings is contradictory to the proclamation of individuality of the subject because the unique value of the individual cannot be recognized without specifying what makes him different from others, which then implies that we are not equal".[288] De Benoist ignores that the ascertainment of equality in human nature, and then fundamental rights, represents the minimum protection of fundamental rights for human beings and does not imply the denial of uniqueness, and then personal diversity. Every person is equal to another person in dignity and fundamental rights, such as the right to life and liberty. In contrast, the regulation of certain rights, such as the political right to vote, will depend on the personality of the individual person (for example, a person with a severe mental disorder will not have the right to vote). That is why every human being is a subject of human rights by virtue of being human, but as a legal subject he can have a limited number of rights based on legal capacity that depend on personality. Differences in personality rights that exist between individuals belong to the field of the social relations regulated by the state and does not apply to pre-state inalienable rights.

The constitutions of national states prescribe fundamental human rights to human beings by the fact of human equality, which are ascertained and not conditioned by allocation, while on the other hand, personality rights that depend on the individual characteristics of a person and differ depending on the personality of individuals, are guaranteed to each person depending on possessing those characteristics. That is why the concept of a legal subject is partly equal to what it means to be a human being, especially in the area of personality rights, which are substantively equated with human rights arising from human nature, while in some cases it can be fictional, technical, as in the area of property relations. That is why the legal concept of the subject is both a natural-legal and a social concept. Only the ''natural-legal and technical'' approach to the legal personality of a natural person enables ''the provision of minimum protection and equality in the status of

[287] Radolović, *op. cit.* note 179, p. 138.

[288] De Benoist, *op. cit.* note 146, p. 82.

all human beings, both slaves and embryos (if it is a human being), who exist as subjects independent of human decision.''[289]

5.7. Interpretations of the legal subject as a means of excluding human beings from subjectivity

The legal framework of a community determines when and to whom it will grant legal personality. If the legal status of a natural person in a community is interpreted as dependent on social circumstances, then it enables ''social negation, that is, *de facto* exploitation and creation of subordinate groups of human beings.''[290] The concept of a legal subject becomes ''an arsenal and a dialectical weapon with which a social existence can be negated to a group of people.''[291] On the basis of which criteria, that is, individualized characteristics, the decision was made in history and today about a group of people that in the legal system will not be equal in basic human rights, that is, personality rights that are equal in content to basic human rights? After the Second World War, anthropologists analyzed how, based on human differences, such as race, language and culture, the definition of a person narrows or expands, so depending on socio-economic circumstances, some groups or individuals are placed below the line of social acceptability, thereby excluding them from legal system of fundamental rights protection. So often people with disabilities, women, children, the sick and the elderly are qualified as not-fully human beings.[292] Social practice, historically labeled as immoral, also excluded slaves, Jews, and the indigenous population from legal subjectivity. Hart, quoting Plato, describes the legal exclusion of human beings from the community in such a way that ''the demand for equality is exceeded by something that society considers of greater value, and since some human beings have not developed essential human qualities, they naturally

[289] Finnis, *op. cit.* note 37, p. 168.

[290] Bravo, K. E., *On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking*, Northern Illinois University Law Review, 31, 2011, 471 – 473.

[291] Tomuschat, *op. cit.* note 127, p. 79. Tomuschat states that history testifies that entire classes of people were not recognized as legal persons, therefore the exclusion of people from the category of persons is not new. Likewise Van Beers, *op. cit.* note 12, p. 580. Likewise Dewey, *op. cit.* note 274, 664 – 665.

[292] Cf. Goodale, *op. cit.* note 144, 118 - 119. See also: Ducor, *op. cit.* note 261, 200 – 202. Ducor states that until 1855, France had the institution of civil death, which meant depriving the natural persons who were convicted of crimes from the status of subject of law.

enter the classes of slaves, not free human beings''.[293] Analyzing the genocide of African Americans in South Africa, Jews in Nazi camps, kulaks in Stalinist Russia, intellectuals killed in Cambodia, minorities and religious groups around the world, Goodale concludes that ''the rationalization of some ideas leads to dehumanization, which constitutes the dominant strategy by which certain groups or individuals are isolated, after which murders and massacres follow.''[294] Similarly, Grear believes that the psychology of mass violations of basic human rights is almost always the same, it begins with the denigration of humanity (which is opened up by the linguistic and conceptual ambiguity of the legal subject and the human being) and ends up with the destruction of social sensibility towards the group of human beings.[295] The presentation of some examples follows:

Primitive societies, especially those of a nomadic, hunting character, conditioned belonging to the tribe by the fact that the individual had to accept the rules of the group.[296] In such societies, children with deformities were not considered worthy of recognition even at the level of an animal.

Basic human rights were systematically denied to natives. The Spanish and Portuguese invaders did not recognize the natives they found in America. In order to deny Indians human rights, especially the right to own material goods, it was denied that they were normal and reasonable human beings, and they were considered weak-minded and insane.[297] According to Solinger, it was a ''biological interpretation of Indians as inferior.''[298] Indians were seen as enemies who were inferior, bad and unworthy of life, and the same was true for the Aborigines in Australia. In colonial states, there are numerous other examples of the existence of categorization of human beings into citizens on the one hand and subjects who lost their legal status on the other.[299]

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[293] Hart, *op. cit.* note 102, 162 – 163 and p. 175.

[294] Goodale, *op. cit.* note 144, p. 113. Goodale cites examples such as Eskimo children who are not yet human according to the community's internal classification and may die from neglect; a victim of Boren hunters, who consider everything beyond their borders to be inhuman beings, etc.

[295] Cf. Grear, *op. cit.* note 145, 173 – 175.

[296] Cf. Curran, *op. cit.* note 271, 58 – 75.

[297] See also: Biškup, *op. cit.* note 152, p. 49.

[298] Solinger, R., *Pregnancy and power*, New York University Press, New York i London, 2005, p. 29.

[299] For more details see: in Ignatieff, *op. cit.* note 133, 105 - 106.

The criterion of the circumstances of birth was a condition for obtaining status throughout the entire history of the slavery system.[300] Slaves were not subjects of law in ancient Rome. In ancient Rome, there was a division of the slave society into freemen and slaves, and the different social and legal position of slaves depended on the material conditions of life.[301] Slaves were treated as property and belonged to the category of things called *res mancipi,* like animals (such as horses and mules), and were the basic means of labor in the peasant economy.[302] Only when slavery became unprofitable at the end of the classical era in ancient Rome was freedom declared the state of nature, and slavery *contra naturam.*[303] The system of slavery placed economic interest before the interest of human beings.

The United States of America was founded as a democracy even though the system of slavery was widely practiced at that time. Thomas Jefferson claimed the existence of the inferior mental capacity of African Americans and the superior sensibility of whites (he himself was the owner of a large number of slaves).[304] The judgment of the US Supreme Court from 1857, *Dred Scott v. John Sandford* is significant. In that judgment, the judges did not consider it arguable that Mr. Dred Scott was a human being, but there was doubt about whether he was a person, and then a full member of society. It was decided by the majority opinion that Mr. Scott is not a citizen and therefore has no rights and privileges.[305]

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[300] Cf. Rodriguez, J. P., *Slavery in the United States*, Abc - Clio, Oxford, 2007, p. 78.

[301] Cf. George, M., *Slavery and Roman material culture*, in: Keith B.; Cartledge, P. (Ed.), *The Cambridge world history of Slavery*, Cambridge University Press, Cambridge, 2011, p. 387.

[302] Cf. Gardner, J. F., *Slavery and Roman Law*, in: Keith B.; Cartledge, P. (Ed.), *The Cambridge world history of Slavery*, Cambridge University Press, Cambridge, 2011, 415 – 417.

[303] Cf. Horvat, M., *Rimsko pravo/Roman law*, Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2020, p. 102. and cf. Grey, C., *Slavery in the Late Roman World*, in: Keith B.; Cartledge, P. (Ed.), *The Cambridge world history of Slavery*, Cambridge University Press, Cambridge, 2011, 482 - 483.

[304] Cf. Feder Kittay, E., *At the Margins of Moral Personhood*, The University of Chicago Press, 116, 1, 2005, p. 119. Biškup, *op. cit.* note 152, p. 38. Biškup states that the supporters of the conquest took over Aristotle's teaching that some people are by nature slaves, i.e. those for whom it is better to serve because they are not able to be owners of goods since they are not intelligent enough.

[305] Cf. Roden, G. J., *Prenatal Tort Law and the Personhood of the Unborn Child: A Separate Legal Existence*, St. Thomas Law Review, 16, 2003, p. 213. According to Judge Taney, the framers of the Constitution did not originally intended to include African Americans in the word ''citizen''. See also: Chambers, H., *Dred scott: Tiered citizenship and tiered personhood*, Chicago-Kent Law Review, 82, 2007, 1, p. 213 and 219. African

Throughout history, slave status has been defined on the basis of social interests, not the essence of a human being. Another example is Jews in World War II. The Nazi extermination of Jews began by portraying them as monsters, taking away their legal status, excluding them from the world, putting them in ghettos and concentration camps.[306] Jews were declared non-human, and the process of their dehumanization formed the central strategy of the genocide.[307] Also, in Nazi Germany, laws and decrees institutionalized the ''T4 project'', which referred to the killing of disabled people as well as the so called ''mercy killing'' of the mentally retarded.[308]

Communist regimes are another example of how violence against human beings is carried out by denying legal personality. Communist regimes were and are brutal authoritarian idolatries in the name of workers' welfare.[309] Kulaks were considered non-human in the Stalinist regime.[310] In early 1929, Stalin led a campaign for the liquidation of the kulaks as a class of people, considering them a cheap tool and a pure means of the industrial process.[311] According to Slavoj Žižek, Stalin's labor camps represented objective, anonymous and systematic violence embedded in the normal state of affairs.[312] A conservative estimate of the death rate of the kulaks is at least 6 million, and the mass killing was made possible, again, by the dehumanization of the victims, which is evident from the records of Stalin's gulag, where neither the word people (*liudi*) nor life (*zhizn*') is mentioned in the context of the prisoners.[313]

Americans were considered inferior, with fewer rights than others, and their status Taney compared to the status of Indians, another historically disadvantaged group.

[306] Cf. Biškup, *op. cit.* note 152, p. 49.

[307] Cf. Grear, *op. cit.* note 145, 173 – 175. Grear states that the Nazis declared the Jews to be subhuman and nonhuman, and the process of dehumanization formed the central strategy of the genocide.

[308] Cf. Feder Kittay, *op. cit.* note 304, p. 120. On the first day when Hiter was appointed chancellor, 30 January 1933, acts on the sterilization of ''inferior'' human beings were passed.

[309] See also: Goodale, *op. cit.* note 144, p. 226. Goodale states that Stalin ordered killing of all who threatened his rule, during which millions were imprisoned and killed. Likewise Grear, *op. cit.* note 145, p. 173 and 175.

[310] Cf. Laun, *op. cit.* note 34, p. 9. Laun compares kulaks and unbron human beings.

[311] Cf. Alexopoulos, G., *Illness and Inhumanity in Stalin's Gulag*, Yale University Press, London, 2017, p. 16.

[312] *Ibid*., p. 5.

[313] Cf. *ibid.,* p. 62. In *Gulag Archipelago*, Solzhenitsyn, describing the dehumanization of prisoners, stated that the authorities saw prisoners as things (*tovar*) to be used to the maximum level and then discarded as waste.

Almost all violations of fundamental human rights involved dehumanization, denying the human being that he is a person, and putting economic interests and the interests of political power ahead of the individual. Today, it is established as a moral fact that anti-Semitic, racist and communist systems are profoundly unjust and cruel. The fact is that the existence of an individual, a person, that is, a human being, does not depend on human choice, any of the worldviews within the framework of pluralism and social recognition. By recognizing the personal rights of every human being, and presumably also the human embryo and fetus, it is prevented from being treated as thing or animal and reduced to a means to achieve class and social, and sometimes individual goal. When a human being is deprived of its legal personality, it becomes a thing from a legal point of view. Therefore, we should legitimately ask ourselves with Cazor, what reasons allow us to treat some human beings (to which category does the human embryo/fetus belong, if it is proven that it is a human being), as less than human persons again, without being remembered as another epoch that exploited the weak.[314]

5.8. Summary

In this chapter, after presenting their brief historical existence, the controversies surrounding their definition and the monistic or pluralistic theoretical approach to personality rights is analyzed. It is briefly looked at the core of certain personality right: the right to life, to dignity, to physical integrity, to bodily integrity, privacy, identity. The relationship between human rights and personality rights is then analyzed, renouncing the need for personality rights to depend on the possibility of their ''actualization''. In the following paragraph, the complex concept of the subject of personality rights is related, especially the definition of a person, with fundamental social values. In that part, the historical development of the legal subjectivity of a natural person is presented together with the Roman legal interpretation, the comparability of the philosophical-anthropological point of view with the legal one (legal subjectivity), in order to reach the conclusion that the legal concept of the subject is both a natural-legal and social concept. The last sub-chapter on the interpretation of the legal subject as a means of excluding some human beings from subjectivity illustrates the negation of personality rights, and

[314] Cf. Cazor, C., *The Ethics of abortion: Women's rights, human life and the question of justice*, Routledge, New York, 2011, p. 102.

numerous examples throughout history are cited that illustrate the negation of personality rights.

6. STATUS OF THE HUMAN EMBRYO: BIO-MEDICAL, PHILOSOPHICAL AND THEOLOGICAL

In theory, three fundamental understandings of the legal status of the human embryo have been established. According to the first, a human embryo/fetus is an object, that is, it has the legal status of a thing (like a cluster of cells or any human organ). The aforementioned legal understanding is a consequence of the moral understanding according to which a person is not the same as a human being, and consequently, a human embryo, although a human being, is not a person. According to the second, the human embryo/fetus is also an object, but at the animal level, it has a specific value and right to respect like higher mammals, which means that it can be used for the benefit of man. It is also based on a moral understanding that a person is not the same as a human being. The third position considers the human embryo/fetus as a legal subject, a person, and is based on the moral understanding that a human being is the same as a person from the moment of fertilization. In the first two cases, it is about the use of the term person in a philosophical context, which reduces the person to the empiricist - manifestative - functionalist dimension, while the third term implies the indivisible biological-ontological dimension of the person. The third attitude is characterized by Tom and Le Roy as ''conservative'', while the first two are ''liberal''.[315] In the first two cases, the status of the embryo is assigned, while in the third it is ascertained.[316] In order to determine whether one of the three stated positions is correct, it is necessary to analyze the bio-genetic and philosophical-anthropological facts about the human embryo and fetus.

6.1. Bio-genetic facts about the human embryo and fetus

6.1.1. The human nature of the embryo

[315] Cf. Beauchamp, T. L.; Walters, L., *Contemproary issues in Bioethics, Abortion and maternal fetal relations*, Thomson, Belmont, 2013, p. 265.

[316] As cited in Strong, C., *The moral status of preembryos, embryos, fetuses, and infants*, The Journal of Medicine and Philosophy, Memphis, 22, 1997, 5, p. 458.

''The results of bio-medical research can be evaluated objectively, they are not culturally and temporally conditioned, so in a legal and logical sense they represent an *argumentum ad veritatem*.''[317] It has been scientifically proven, and the facts of embryology and genetics (DNA, blood and tissue) dispel all doubt, that fertilization creates a new human being with a genetic code and undeniably human characteristics. There are many medical articles about this.[318] The humanity of the embryo and fetus is biologically proven and accepted by theoreticians who consider it a person from conception, as well as by those who separate its biological humanity from a person.[319] In the Republic of Croatia, the Ethics Committee of Peter's Hospital, as well as medical faculties from Zagreb, Split, Osijek and Rijeka, and the Clinical Hospital Center from Zagreb expressed their opinion on this matter in 2009 at the request of the Constitutional Court of the Republic of Croatia.[320]

Ultrasound is one of the proofs that a living human being develops in the womb from the beginning. A human embryo/fetus is not a thing, an object, but a living organism. It is neither an animal, nor a plant, nor a spiritual creature. It is a living being with a human nature. It has been scientifically proven and historically established that nothing other than man has ever been created from human DNA. The embryo matures, it is more mature in the biological and personal sense, but its human nature does not become either animal or vegetable. It is clear that the bearer of human nature will never become, for example, a dog or a pansy.[321] At no stage does the human embryo/fetus change its nature, nor is there

[317] Hrabar, D., *Istanbulska konvencija i zamke rodne perspektive/ The Istanbul Convention and the pitfalls of the gender perspective*, Vlastita naklada, Zagreb, 2018, p. 9.

[318] Many authors on it: Signorelli, J.; Diaz, E.; Morales, P., *Kinases, phosphatases and proteases during sperm capacitation*, Cell and Tissue Research, 349, 2012, 3. See also: Nathanson, B., *Iz smrti u život/A Journey from Death to Life*, Verbum, Zagreb, 2009, p. 143.

[319] Likewise Cazor, *op. cit.* note 314, p. 7.

[320]https://www.prolife.hr/wp-content/uploads/2017/03/Strucno-misljenje-Povjerenstva-2009.pdf, (accessed: 25 January 2022).

[321] Cf. George, R. P., *Embryo Ethics: Justice and Nascent Human Life*, Regent Law Review, 17, 2004, p. 2. George explains the humanity of embryos and fetuses in such a way that it is clear that it is neither a rock, nor a potato or any other species, but a living member of the *homo sapiens* species in the earliest stage of development. Similarly, Francesco Comagnoni states that the biological and genetic definition proves that the human embryo is a human being, a member of the *homo sapiens* species, and that the biological and genetic nature once established lasts until death. Adriano Bompiani talks about the human embryo as a

a breaking point between humanity and inhumanity. Nor is there a transition from the human organism as a living being to a thing. *Recommendation 1100 (1989) of the Council of Europe* states that ''*a human embryo at all stages of development retains its own biological and genetic identity*.''[322] Therefore, it is determined that it is a human embryo that contains a human identity. We will agree with Nathanson that ''those who still doubt his humanity should say what an embryo is''[323], because if a human embryo/fetus is not a human being, what is it?

6.1.2. Development of the human embryo

At the end of fertilization, each of us contains a genetic code whose identity and uniqueness justify the claim that human life begins at conception. A zygote or single-cell embryo acts as an individual system, a complete and unique organism. An embryo is a separate organism, not part of a larger organism. It controls and directs its own development from the organism itself. Although there appears to be biological confusion at the beginning of embryo development, that is, apparently chaotic cell division, Nathanson explains that it is an ''orderly and completely programmed and logical arrangement of rapidly dividing cells, which is controlled by a set of genes and enzyme systems contained in the chromosome of an embryo not yet implanted.''[324] The new genome is the main information center, a codified program, inherently directed and

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biologically directed and oriented development process, that does not allow changing the biologically defined nature of the human embryo. As cited in Matulić, T., *Pobačaj: Drama savjesti/Abortion: Drama of conscience*, Filozofsko-teološki institut Družbe Isusove, Zagreb, 1997, 120 - 121.

[322] http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=15134&lang=en, (accessed: 25th January 2022), point 7. Likwise Rupčić, *op. cit.* note 69, p. 51, states that the body develops with the power of the internal potentialities that it carries within itself and that strive for seriousness, actualization, and the subject is always the same and matures, bringing its own abilities to reality.

[323] Cf. Nathanson, *op. cit.* note 318, 140 - 143. Nathanson quotes Dr. George W. Corner who concludes that the hidden nature of human development is the reason for its underestimation.

[324] *Ibid.*, p. 151. The biological development of the embryo and the medical evidence of the existence of a new human being from conception are described in the medical literature, and will not be repeated here, but we are referring to the following authors: Sadler, T.W., *Langman's Medical Embryology,* Wolters Kluwer, London, 2010.; Moore, K.; Persaud, T. V. N; Torchia, M., *The developing human – clinicaly oriented embriology*, Saunders, Philadelphia, 2018.

committed to a specific further development.[325] The development of the embryo takes place in a coordinated and continuous manner, with each subsequent stage of development arising from the previous one, and the final form is achieved gradually.[326] Not a single external event is needed to stimulate a new direction of development.[327] Scientists have determined that around the 8th week of pregnancy, organogenesis, the process of developing organ systems, usually ends.

In the period of organogenesis, limbs develop, the bases of internal organs, ossification and the nervous system (reflexes and motor skills) begin. An embryo is considered to become a fetus when it begins to move freely in the amniotic fluid. An essential difference between a human embryo and a fetus is the complex brain function of the fetus, which is also important from a psychological point of view. It has been proven that the fetus and its development are affected by music, noise, food and drink, light, smoke, drugs, physical fatigue, emotional states of the mother such as anxiety, fear and depression.[328] Scientists have observed the existence of the prenatal psyche, which represents the primitive formation of the child's personality and has a strong influence on later development.[329] Due to all of the above, it is clear why Nathanson considers the period of 9 months of pregnancy ''perhaps the most important formative period in the development of a human being'',[330] as well as J. M. M. W. Slack who concludes that ''neither birth nor development after birth is the most important period of life, but it is gastrulation in which there is a division of the mass of embryonic cells from which structures, organs and other various anatomical phenomena arise.''[331]

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[325] Cf. Serra, A.; Colombo, R., *Biološka osnova identiteta i statusa ljudskog embrija/The biological basis of the identity and status of the human embryo*, in: Volarić-Mršić, A. (Ed.), *Status ljudskog embrija/Status of the human embryo*, Hrvatska biskupska konferencija, Zagreb, 2001, p. 40.

[326] Cf. Rupčić, *op. cit.* note 69, p. 56. Likewise Lasić, *op. cit.* note 1, p. 35. Likewise Fuček, I., *Osoba, savjest/Person, conscience*, Verbum, Split, 2003, p. 31, and Švajger, A., *Status ljudskog embrija/Status of the human embryo*, in: Znidarčić, Ž. (Ed.), *Medicinska etika 1/Medical Ethics 1*, Hrvatsko katoličko liječničko društvo, Zagreb, 2004, p. 26.

[327] George, *op. cit.* note 321, 3 - 4.

[328] Cf. Rupčić, *op. cit.* note 69, p. 131, and Fuček, I., *Život – Smrt/Life-death*, Verbum, Split, 2008, 94 – 97.

[329] Cf. Milaković, I., *Kada su majka i njeno dijete bili sami/When the mother and her child were alone*, Svjetlost, Sarajevo, 1986, p. 7 and 159. Milaković states that Peerbolte's school represents the thinking that psychic life begins already in the fertilized egg.

[330] Nathanson, *op. cit.* note 318, p. 143 and 151.

[331] *Ibid.,* p. 151.

6.2. Medical and philosophical criteria of human embryo/fetus personality

6.2.1. Medical and philosophical criteria which deny the subjectivity of the human embryo and fetus from the moment of fertilization

There are numerous medical and philosophical criteria of theoreticians with which the subjectivity of the human embryo and fetus is denied from the moment of fertilization. Iglesias considers the primitive streak as the criterion on the basis of which the human embryo would become a subject, Sass speaks of the beginning of brain activity, Mulkay of resembling a human being, Durand and Reichlin speak of the human embryo as a potential person, while Spaemann considers that the human embryo is a person *tout court* from the moment of conception.[332] Other criteria are cited in the theory as relevant to the moral, and then also the legal status of the human embryo and fetus, such as the implantation of the human embryo in the uterus, the moment when the mother feels the movement of the child, the appearance of the human embryo and fetus, viability, that is, the possibility of survival outside the womb, aspiration, i.e. desire and hope for the future, possibilities of feeling pain, self-determination, i.e. expression of will, socialization, birth. Following is the analysis of the criteria in order to determine whether any of the mentioned criteria is a parameter for determining the moral and legal status of human embryos and fetuses.

Analogy of human embryo with sperm and egg

McCulloch believes that if a fertilized egg, a human embryo, is a subject, then ''the legal subject could be both a sperm and an egg.''[333] Prijić-Samaržija has a similar understanding, who finds the difference between a zygote on the one hand, and a spermatozoon and an unfertilized egg on the other, exclusively in degree of potentiality.[334] T. H. Milby also equates the zygote with the sperm and egg as he concludes that if ''the zygote has the rights of a person because of the capacity to develop into a person, then so may the sperm and

[332] Cf. Goncalves Loureiro, J. C. S., *A European Status of the Embryo*, Boletim da Faculdade de Direito de Universidade de Coimbra, 74, 1998, p. 761.

[333] McCulloch, A., *The rise of the fetal citizen*, Women's Studies Journal, 26, 2012, 2, p. 23.

[334] Cf. Prijić-Samaržija, *op. cit.* note 72, p. 12.

the unfertilized egg.''[335] Berg is on a similar track, but she assumes that, ''if zygote is a person, every cell could be a person, because of the potential to be a person.''[336] Berg, as well as Prijić-Samaržija and Milby, do not take into account the fact that the zygote is a new organism that is self-regulating, with a new genetic code, unlike sperm and eggs. The human embryo, unlike sperm and egg, develops without an external cause and represents a new rational being.[337] It has been medically proven that new life did not begin with an unfertilized egg cell or sperm, but in a zygote, a new organism, and that is why we can establish the existence of enormous biological and ontological diversity in relation to sperm and eggs.

Potentiality

Is a human embryo a human being in potency or a potential being and does it have potential or actual rights accordingly? Noonan, Lee, Kacor, are some of the theoreticians who state that it is a human being in potency, while Fletcher, Tooley, Warren, Singer, Michal J. Coughlan, H.T. Engelhardt consider a potential human being. The understanding of the human embryo as a potential human being is based on the statement that ''potential cannot be equated with the actual existence of a person because the potential to become a person does not imply that a person exists.''[338] Chan and Harris believe that ''the value of potential is only in the possibility of actualization, so the zygote would have value only because of the potential to become a person.''[339] However, authors who consider the human embryo as only a potential being ignore Aristotle's speech about the being as a possibility and as a reality. For Aristotle, being is potentiality and

[335] Milby, T. H., *The New Biology and the Question of Personhood: Implications for Abortion*, American Journal of Law and Medicine, 9, 1983, 1, p. 40.

[336] Berg, *op. cit.* note 72, p. 389 and 390.

[337] Likewise Lee, P., *Abortion and unborn human life*, The Catholic University of America Press, 2010, 104 - 105.

[338] Robertson, J. A., *In the Beginning: The Legal Status of Early Embryos*, Virgina Law Review, 76, 1990, 3, p. 445. Likewise Fletcher, J., *Humanhood: Essays in Biomedical Ethics*, Prometheus Books, New York, 1979, 93 - 96.

[339] Chan, S.; Harris, J., *Consequentialism without Consequences: Ethics and Embryo Research*, Cambridge Quarterly Healthcare Ethics, 61, 2010, 1, p. 66.

actuality.[340] A being contains both possibility and reality, therefore ‘‘potentiality is not only the possibility of a being that does not yet exist, but is real and exists.’’[341] ‘‘In order for the actual to become realizable", says Matulić, ‘‘it must already exist in some way in the potential, because it really did not come from nothing, because ‘‘real’’ did not arise from anything, but from what already existed before as potential.’’[342] ‘‘Finality in the ultimate stages is only possible if it is based in the initial stages,’’ believes Belić.[343] The embryo will only develop into what it already is by nature, so it is not clear when and by what criteria a human embryo would pass from a potential human being to a human being in potency.[344] If the human embryo is a potential being, then it is clear that if it develops, it will one day become a human being, but until that happens, according to the proponents of the ‘‘potential being’’, it means that at that stage it is a non-being, a thing or something else. The biological existence of the human embryo has been unequivocally established and can be clearly demonstrated by ultrasound. The state of pregnancy is not a potential state of pregnancy because when a woman is medically determined to be in a state of pregnancy, it does not mean that a potential human being is developing in her, but an actual, existing human being. A human embryo will only potentially develop abilities because no one can know whether it will live or not.

The authors cite many other arguments for which the human embryo would be only a potential being. Prijić-Samaržija claims that the human embryo has potential rights because it is a potential being, and ‘‘potential rights are not the same as the rights of actual

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[340] Frede, M., *Aristotelov pojam potencijalnosti u Metafizici / Aristotle's concept of potentiality in Metaphysics,* in: Gregorić, P.; Grgić, F. (Ed.), *Aristotelova Metafizika: Zbirka rasprava / Aristotle's Metaphysics: A Collection of Essays,* Kruzak, Zagreb, 2003, p. 288.

[341] Belić, *op. cit*. note 36, 38 – 40.

[342] Matulić, *op. cit*. note 7, 211 - 213. Age-old arguments, *persona potentialis*, that is, a potential person and *persona in potentia*, a person in potency. In addition to potentiality, possibility also plays an important role in the discussion, whereby every real person would be preceded by a potential person, and every potential person would be preceded by a possible person, which means that if a potential person is not a real person, then it is even less a possible person.

[343] Belić, *op. cit*. note 36, p. 137.

[344] Likewise Beriain, I. M., *What is human embryo? A new piece in the bioetics puzzle*, Croatian Medical Journal, 55, 2014, 6, 669 - 670. Beriain states that potentiality imposes the need to determine the final point that the entity must reach in its development.

existing persons, so a potential king would not have the rights of a king.''[345] Prijić-Samaržija ignores the difference between the assignment and ascertainment of rights. The special rights of the king require a grant, unlike the right to life which is not granted. A human embryo is a medically proven human being from conception, which develops autonomously and self-regulatingly, and does not require any external condition to become a human being, unlike granting the status to a king. Prijić-Samaržija ignores that an embryo can be a potential professor, doctor, lawyer because these abilities have not yet been developed and can only be actualized, but not a potential human being. Niman, on the other hand, tries to prove the claim that potentiality is not actuality with the example that ''we are all potential murderers, but before committing the crime we are not.''[346] Potential murderers will not become so unless they decide for themselves, while the human embryo/fetus will actualize its abilities through normal development.

A murderer is a man who has become one by some act, while a human embryo/fetus grows independently of the act. It would be disastrous if, in the same way that a human being actualizes his abilities through development, potential killers actualize that potential. Tooley tries to prove that the human embryo is a potential being by using fiction, giving the example of a kitten who is transformed into a human by a miraculous potion. Tooley believes that ''the possibility of creating human beings would impose on us the obligation to create as many of them as possible, from which it follows that if there is nothing wrong with not giving serum to a cat that turns into a human, there is nothing wrong with killing a being that is not yet a person, but is potential being.''[347] The analogy is inappropriate. Giving serum to a cat represents an intervention that would make it a human being, while a human embryo/fetus develops according to its own nature without any intervention. Because of all the above, potentiality is an unacceptable criterion for defining the subjectivity of a human being.[348]

[345] Prijić-Samaržija, *op. cit.* note 72, p. 13.

[346] Niman, J., *In Support of Creating a Legal Definition of Personhood*, Journal of Law and Social Deviance, 3, 2012, p. 188.

[347] Tooley, M., *Abortion and Infanticide*, Philosophy and Public Affairs, 2, 1972, 1, 136 - 138.

[348] See also: Greasley, K., *Arguments about abortion- personhood, morality and law*, Oxford University Press, Oxford, 2017, p. 159.

The human embryo as a collection of cells

Theorist Thompson, in order to prove that the fertilized egg is just a collection of cells, claims that the zygote is ''no more a person than an acorn is an oak tree.''[349] That this is not the case is argued by Finnis, who states that ''an acorn can stand for years in a stable state, and only if we plant it, the oak will grow, a new biological system that has little to do with the acorn, because if we assume that the acorn was formed in 1971, that it was picked in 1972 and planted in 1975, and after 50 years it grew into an oak, it is clear that it started its growth only in 1975.''[350] The zygote develops auto-regulatory, unlike the acorn, which does not have this ability.

Implantation

According to F. Abel, the embryo only ''by implantation acquires the extra-zygotic information that comes from the mother and is necessary for the creation of a human being'' and concludes that only then ''it becomes a member of the human community.''[351] J.F. Malherbe similarly assumes that ''if the organic life of a human being begins with fertilization, its relational life begins with implantation'' so only ''with implantation could one speak of a person in potency.''[352] The coexistence of the embryo with the mother begins before its implantation in the uterus, from the moment of fertilization. Implantation represents only one stage in the development of a human being.[353] However, the very criterion of coexistence of a human embryo with its mother is not suitable for proving subjectivity, given that people who suffer from autism or live outside social communities are also subjects, regardless of their inability to cohabit with other people.

The possibility of division

Totipotency of the cells of the human embryo means the possibility of separating the cells from the cellular whole and creating a new individual.[354] Based on this criterion,

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[349] Thompson, J. J., *Obrana pobačaja/Defense of Abortion*, in: Prijić-Samaržija, S. (Ed.), *Pobačaj – za i protiv/Abortion - for and against*, Analytica Adriatica, Rijeka, 1995, p. 59.

[350] Finnis, *op. cit.* note 37, p. 395.

[351] As cited in Fuček, *op. cit.* note 328, p. 27.

[352] Cf. Lucas, Lucas, *op. cit.* note 45, p. 94.

[353] Likewise Cazor, *op. cit.* note 314, p. 81 i 83.

[354] Cf. Kurjak, A.; Carrera, J. M.; Mccullough, L. B.; Chervenak, F. A., *The ethical concept of the fetus as a patient and the beginning od human life*, Periodicum biologorum, 111, 2009, 3, p. 342.

theoreticians such as Grobstein, Shannon and Wolter question the individuality of the embryo.[355] They believe that the absence of individuality negates the existence of the subject, and consequently deprives it of legal protection. But does divisibility mean the absence of individuality? Schweiger sees in the ability of cells to take a different path under special conditions an expression of their ''plasticity and ability to regulate in a new environment.''[356] Munthe, as well as Cazor, Lee, Serra, Marshall, P. George do not consider the possibility of division important for the status of the human embryo, having in view of the fact that individuality should not mean cellular indivisibility.[357] ''Every material being is quantitatively extended'', Volarić Mršić concludes, ''which means that by definition it is divisible'', so the individual is not indivisible but is undivided in itself (*indivisum in se*).[358] This is proven by the fact that ''an adult human person can be dismembered into thousands of biological pieces without losing his individuality, as in the case when a grenade blows up a human body.''[359] Furthermore, ''it is not biologically possible for one indeterminate system to give rise to two determined ones.''[360] Matulić states that in these cases ''the human zygote retains the continuity of the biological life process, but in the discontinuity of the concrete individual as the subject of existence (ontological individual).''[361] ''Human twins that are genetically identical are nevertheless

[355] As cited in Lee, *op. cit.* note 337, p. 97.

[356] Švajger, *op. cit.* note 326, p. 22.

[357] Munthe, C., *Divisibility and the moral status of embryos*, p. 8. Lee, *op. cit.* note 337, p. 95. Cazor, *op. cit.* note 314, p. 127. George, *op. cit.* note 321, p. 13. Rupčić, *op. cit.* note 69, p. 246. See also: Kešina, I., *Teorije o početku individualnog ljudskog života i statusu ljudskog embrija / Theories about the beginning of individual human life and the status of the human embryo*, Filozofska istraživanja, 83, 2001, 4, p. 781. Likewise Lasić, *op. cit.* note 1, p. 39.

[358] Lucas, Lucas, *op. cit.* note 45, p. 75.

[359] Matulić, *op. cit.* note 125, p. 208.

[360] Serra, *op. cit.* note 325, p. 57. Evidence that the second embryo begins its own individual existence, while the first continues its development without interruption, preserving its biological and ontological identity, can be found in the study of twins, one of which is a carrier of Down's syndrome, so the first, usually trisomic, continues its own development, while the second, regularly normal, continues his.

[361] Matulić, T., *Pobačaj – Drama savjesti / Abortion – Drama of conscience*, Centar za bioetiku, Zagreb, 2019, p. 80. Paul Flaman refers to the possibility of separating one sapling in plants that can develop into a completely new separate plant under appropriate conditions, and believes that the totipotency of cells in an early embryo does not mean that these cells cannot be part of a single ontological whole, because as in the case of a plant

different ontological individuals.''[362] It is also a medical fact that the zygote rarely divides. 99 to 99.6% of the zygote develops into a single organism, from which it can be concluded that the zygote is destined to develop as a human individual.[363] Due to all of the above, we can conclude that the criterion of divisibility is not suitable for determining the subjectivity of a human being.

Primitive streak

According to the Warnock report from 1985, the embryo would be an individualized organism only on 14th day after fertilization, when the primitive streak appears at the posterior end of the embryo.[364] It is a scientific fact that the primitive streak would not have formed if there had been no fertilization, but its moment of formation is a consequence of the normal sequence of developmental processes. Many theoreticians condemned the stated criterion as an attempt of scientific manipulation.[365] Carlo Flaming and Jerome Lejeune believe that the term preembryo is a scientific deception that enables unlimited manipulations, John Maddox calls it a ''cosmetic trick''.[366] What is a ''pre-embryo'' if not a human being? Is it a thing, an animal or something else until the moment of the appearance of a primitive streak from which a human being would suddenly emerge as a subject?[367] The primitive streak in a human being is not a proof of his subjectivity, but is one of the points of development of a human being.

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sapling which was an integral part of the mother plant, the same is with the human embryo, whose cells are not realistically totipotential, but only show totipotentiality if one or more of them are set aside.

[362] Kurjak, A.; Stanojević, M.; Barišić, P.; Ferhatović, A.; Gajović. S.; Hrabar, D., *Facts and doubts on the beginning of human life – scientific, legal, philosophical and religious controversies*, Journal of Perinatal Medicine, 2022, p. 5.

[363] See also: Serra, *op. cit.* note 325, p. 56. See also: Fuček, *op. cit.* note 328, p. 26, citing Propping, I. P., Kruger J., Layde, P. M., Falek, A., Weinert, S. Likewise Rupčić, *op. cit.* note 69, p. 162. 4% of monozygotic twins occur, that is, 1-2 per 10,000 pregnancies.

[364] Cf. Warnock, M., *A question of life. The Warnock Report on human fertilisation embriology*, Basil Blackwell, Oxford, 1985.

[365] For more details see: Matulić, *op. cit.* note 361, 67 – 69. Aramini, *op. cit*. note 48, p. 143.

[366] As cited in Pozaić, V., *Čovjek na razini embrija/Human at the embryo level*, Vladavina prava, 3, 1999, 3 – 4, 129 - 139.

[367] Likewise Fuček, *op. cit.* note 328, p. 25. Fuček wonders why the nature of the beginning of a horse, dog or cat is not examined. Similarly, Matulić, *op. cit.* note 43, p. 20. Matulić asks the question, did the hedgehog's embryo acquire the characteristics of a person through a primitive streak?

Consciousness and self-awareness

Authors such as Engelhardt, Fletcher, Singer, Tolley, Anna Warren, Feinberg state the consciousness or self-awareness of a human being as the main or one of the criteria according to which a human embryo would be a subject.[368] The criterion of self-awareness, which is according to some theoreticians the decisive criterion for a human being to be considered a person, contains three interpretations. According to the first, the person is the one who has consciousness; according to the second, the person is the one who has the capacity for self-awareness; and according to the third, the person is the one who possesses ''neural architecture''.[369] The discussion about consciousness would bring us back to the deep philosophical questions of Descartes, Leibniz, Kant, Fichte and Hegel, the treatment of which exceeds the limits of the content of this work. But from a medical point of view, it has been established that consciousness arises from the first activity of the brain, and the development of the central nervous system itself is a long and continuous process that begins at the end of the embryonic period and gradually develops until the 2nd year after birth, and probably even later.[370]

There are many open questions when we talk about the consciousness of the human person. There is no general agreement on what constitutes conscious knowledge. Nathanson, as well as Alasdair MacIntyre, note that in ''the theory of consciousness it is not exactly clear whose consciousness is involved, that is, whether a conscious person should be aware of the existence of consciousness in another person, so only people who possess conscious knowledge will attribute the same to another being or is it about the self-awareness of a person, independent of the attribution of such a state by others?''[371] ''If self-

[368] For Engelhardt, a human person is only one who has a developed mental life, and beings who only have a biological life have absolutely no value, including a fetus. Similarly, J. Feinberg states awareness, self-awareness, rationality, planning of future actions, etc. as criteria of a person. As cited in Prijić-Samaržija, *op. cit.* note 72, p. 5. Likewise Coughlan, *op. cit.* note 277, p. 67. Coughlan states that the fertilized egg has no psychological or moral life. Rosmini's theory is that only one who is capable of performing conscious and free actions is truly a person. As cited in Kešina, *op. cit.* note 357, p. 783.

[369] Cf. Cazor, *op. cit.* note 314, p. 28.

[370] Cf. Himma, Einar, K., *A dualist analysis of abortion: personhood and the concept of self qua experiential subject*, Journal of Medical Ethics, 31, 2005, 1, p. 54. Švajger, *op. cit.* note 326, p. 25.

[371] Nathanson, *op. cit.* note 318, p. 148.

awareness is a private, intimate and original sphere of subjectivity to which each individual has his own privileged access''[372], as stated by Gerhardt, then it is not clear how to determine the exact moment in which it arises, it is even less clear what level of mental competence is required (minimum or maximum) and why the same should be the criterion of legal protection? It is an uncertain and relatively abstract criterion, which is why its imposition as a criterion by which a human embryo/fetus would be considered a person is highly questionable. It is also not clear why human and personal life would begin where the cerebral cortex can be functionally and anatomically recognized, and not where it is biologically programmed.[373] Furthermore, by applying the above criterion, a number of other human beings would remain outside of moral and then legal protection. McMahan claims that ''human beings with severe cognitive impairments fall below the threshold of subjectivity, which includes embryos and fetuses, newborns, mentally retarded, demented and comatose people.''[374] Are we ready to deprive all the mentioned categories of the status of moral and legal subject based on the mentioned criterion? Furthermore, if the mentioned criterion is a parameter for defining the legal status of a human being, then the claim of Himma, who believes that ''when determining the existence of a subject by the criterion of consciousness, we are not limited to human beings only'', is correct.[375] Singer, referring to the criterion of self-awareness, claims that ''calves, a pig and a chicken have a 'stronger' moral status than a fetus at any stage of pregnancy, which is why neither a fetus, nor a week-old child, as well as one with a more severe disability, would have the right to live.''[376] Applying the criteria of self-awareness or consciousness within the framework of determining the moral status of a human being would open a Pandora's box, causing severe consequences for all the above categories, as well as for the human embryo/fetus.

Brain life and death

According to some authors, the criterion of ''brain activity'' is a practical criterion for marking the beginning and end of a person. The definition of brain death means the end of the subject, so by analogy, according to the above criterion, brain life would mean the

[372] Gerhardt, *op. cit.* note 60, 143 - 144.

[373] Cf. Kešina, *op. cit.* note 357, p. 782.

[374] As cited in Feder Kittay, *op. cit.* note 304, p. 102.

[375] Himma, Einar, *op. cit.* note 370, p. 49.

[376] Singer, P., *Praktična etika/Practical Ethics*, Kruzak, Zagreb, 2003, p. 114 and 127.

beginning of the subject.[377] During the 1960s, transplantation and resuscitation technologies had the effect of changing the classical definition of death. The Harvard Medical School definition, which was accepted by the entire West, changed the definition that defined death as ''cessation of heart and respiratory activity'' to ''cessation of brain function''.[378] Is there an analogy between the criteria for the cessation of brain activity, as a moment that would mark the end of a person's existence, and brain activity as a criterion for the beginning of a person's existence, in the light of medical facts? ''A functional brain plays an important role as a decisive center of unity in a developed human being, so when it is dead, that unity is lost, as well as the individuality of the person'', while completely different circumstances are present at the beginning of the person, human embryo and fetus, which refer to ''the proper and coordinated multiplication of nerve cells, as well as the gradual organization of the entire body, including the nervous system with the brain.''[379] Therefore, there is a significant difference between the beginning of human existence and its end, because the life and development of embryo cells is incomparable to the case when the brain dies.

In the chapter on personality rights, the status of a legal entity is analyzed as a technical concept. Based on this understanding, according to some authors, the moment of biological death should not coincide with the moment of legal death. Ducor states that biologically dead human beings are certainly also legally dead, but legally dead does not mean biologically dead.[380] It is a legal fiction that represents a departure from the biological understanding of death. Van Beers talks about the interests arising from such fiction because ''by denying biological reality it is possible to take organs from patients who are

[377] Cf. Goldenring, J., M., *The Brain Life Theory. Towards a Consistent Biological Definition of Humanness,* Journal of Medical Ethics, 11, 1985, 4, 198 - 204.

[378] Ducor, *op. cit.* note 261, 213 - 214.

[379] Serra, *op. cit.* note 325, p. 64. Likewise: George, *op. cit.* note 321, p. 13, states that the embryo is not dead like a corpse but alive, it possesses factors for self-integration and organic functioning. See also: Lee, *op. cit.* note 337*,* 80 - 81. In an adult, the brain organizes all the systems of the human organism, and when the brain stops functioning in the adult organism, the work of the organs stops and the human being ceases to exist, while the opposite is true for embryos and fetuses.

[380] Ducor, *op. cit.* note 261, p. 228.

still alive.''[381] The criterion of brain death is especially problematic in the case of anancephalic children who are born without a part of the brain, but with a functional part that allows them breathing. Their status does not correspond to the definition of death as the irreversible cessation of all brain functions. Given that they are suitable organ donors, some authors suggest redefining death as ''loss of higher brain functions''.[382] Legal fiction of death, as well as the beginning of life according to a criterion that would enable the realization of the interests of others, and which would destroy the life of a human being, is unacceptable.

The possibility of feeling pain

Feinberg and Steinbock state ''the possibility of feeling'' as a criterion for being a person, so a human embryo/fetus would only become a moral and legal subject with the possibility of feeling.[383] Sthale, on the other hand, states that research does not prove, nor can a conclusion be drawn, about when the fetus is capable of feeling pain.[384] K. J. S. Anand claims that medical data prove that ''in several areas of the brainstem of the human fetus, a high degree of density of fibers and cells associated with sensation, control of pain, and instinctive responses to pain is observed.''[385] The criterion of feeling pain is a subjective criterion that is difficult to measure and it differs in each individual. It cannot be a serious parameter of legal subjectivity, if we take into account the fact that the feeling of pain is easily manipulated, in such a way that anesthesia or painkillers are sufficient to alleviate or eliminate it. This would mean that an individual loses his legal status at times when he is unable to feel pain. According to this criterion, numerous animals would become suitable for acquiring legal subjectivity.

Mother feels movements

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[381] Van Beers, *op. cit.* note 12. For more details see: Miller, S.; Shah, S. K., *Piercing the Veil: The Limits of Brain Death as a Legal Fiction*, University of Michigan Journal of Law Reform, 48, 2015, 2; Truog, R. D.; Miller, G. F., *Changing the Conversation about Brain Death*, American Journal of Bioethics, 14, 2014, 8; Shah, S. K; Miller, G. F.; Truog, R. D., *Death and Legal Fictions*, Journal of Medical Ethics, 37, 2011, 12; Shewmon, D. A., *Brain Death – Can It Be Resuscitated?*, The Hastings Ceneter Report, 39, 2009, 2.

[382] Ducor, *op. cit.* note 261, p. 216.

[383] As cited in Berg, *op. cit.* note 72, p. 394 and 399.

[384] Stahle, H., *Fetal Pain Legislation: An Undue Burden*, Quinnipiac Health Law Journal, 10, 2007, p. 276.

[385] As cited in Nathanson, *op. cit.* note 318, p. 156.

Historically, ignorance of the biological facts of fertilization has resulted in fetal movement being considered an indication of life of moral value, that is, the presence of a person in the womb.[386] Today's medical evidence completely refutes this claim, given that it has been scientifically proven that human life begins with fertilization.

Viability criterion or the ability of the fetus to live outside the womb

The moment when the fetus can survive outside the womb becomes the criterion for its legal protection with the *Roe v. Wade* ruling of the US Supreme Court. What does sustainability mean and why is the criterion relevant, according to which a human embryo/fetus would ''jump'' from the category of thing to the category of subject?

Viability can be natural as well as artificially induced. It is largely dependent on technology, relative to time and place. It is subject to change, it does not necessarily occur in a period of 20 to 24 weeks. Today's youngest surviving fetus is 21 weeks old, and the lightest is about 250 grams.[387] According to Fost, Chudwin and Wikler, advances in perinatal medicine will make it possible for even younger fetuses to be maintained outside the womb, and it is not excluded that the moment of viability will also be conception.[388] We can determine how the specified criterion is variable in relation to time and place. Given that the ability to survive outside the womb depends on technology, this criterion is not appropriate, nor is it a reason that would make an essential difference between categories of human beings.[389] It is also clear that all human beings are dependent in some life stages or circumstances on other human beings, which is why, according to the mentioned criterion, they would cease to be subjects, and then lose legal protection. Ducor and Nathanson talk about the unfathomable consequences of such an understanding of the subject, if we consider the dependence of the newborn on the mother's food, the elderly on the help of the younger, as well as a number of other circumstances in which human

[386] Cf. Cazor, *op. cit.* note 314, p. 71.

[387] https://miss7mama.24sata.hr/beba/razvoj-u-prvoj-godini/curtis-means-je-najranije-rodeno-dijete-na-svijetu-koje-je-prezivjelo-14007;
https://mycoosada.com/bs/baby/what-is-the-weight-of-the-largest-baby-ever-born.html

[388] Cf. Fost, N.; Chudwin, D.; Wikler, D., *The Limited Moral Significance of 'Fetal Viability'*, The Hastings Center Report, 10, 1980, 6, 10 - 13. Likewise: Strong, *op. cit.* note 316, p. 462.

[389] Likewise Kreeft, P., *Nepobačeni Sokrat/Unaborted Socrates*, Kršćanska sadašnjost, Zagreb, 2007, p. 61. Kreeft states that people without incubators in the wild before 2400 AD were not lesser people. See also: Nelkin, *op. cit.* note 263, p. 103.

beings are dependent, such as the dependence on medical devices such as glasses, pacemakers, hearing aids devices, artificial limbs, etc.[390] There is no reason why legal protection should be given to a human fetus only at the stage of viability.

Criterion of the archetypal embodied form

English, similarly to Wertheimer, believes that there is no similarity between a human embryo and the form of a typical adult human being, the archetype of *homo sapiens*, so it should be ''disqualified'' from legal protection.[391] The category of archetypal form is a subjective criterion that may call into question the legal protection of human beings in different stages and circumstances of life, who for some reasons would not be developed or resemble a typical adult human. During her life, a person can lose her human face due to some circumstances/accidents, which would mean that she loses her legal status.[392] The criterion of archetypal form is as discriminatory a criterion as skin color. Therefore, it is not an exaggeration to say that the authors who propose it are equal to racists.[393]

Gradation

''Gradation'' criterion is proposed as an expression of a ''moderate'' position in a pluralistic society. By the logic of gradation, the right to life is conditioned by the development of abilities, so the more developed individual has a ''stronger'' moral status, and then also legal protection. According to this understanding, a human embryo/fetus would only become a person with development and would consequently receive rights. Authors who advocate such a point of view are L.W Sumner, Bonnie Steinbock, S.I. Benn, Norman Gilespie.[394] Paula Thomet considers the gradation approach to be the golden

[390] About dependence on technology also: Ducor, *op. cit.* note 261, 195 - 196. See also: Nathanson, *op. cit.* note 318, p. 153. Likewise Fortin, J. E., *Legal Protection for the Unborn Child*, The Modern Law Review, 51, 1988, 1, p. 82, states that even though the unborn human is physically dependent on the mother before birth, should not lead to the conclusion that there is no relevant separate existence.

[391] Cf. English, J., *Pobačaj i pojam osobe/Abortion and the concept of a person*, in: Prijić-Samaržija, S. (Ed.), *Pobačaj – za i protiv/Abortion - for and against*, Analytica Adriatica, 1995, p. 79. See also: Wertheimer, R., as cited in Cazor, *op. cit.* note 314, p. 78.

[392] See also: Cazor, *op. cit.* note 314, p. 79, who believes that the human form is not a moral criterion because what about someone who died in a fire.

[393] Likewise George, *op. cit.* note 321, p. 8.

[394] As cited in Lee, *op. cit.* note 337, p. 48.

middle.[395] Olivia Little compares the development of the fetus to a house under construction, and compares the biological system of the human embryo to a pair of bricks.[396] Caloughan states that ''the qualification of a person can be graded depending on whether they are embryos, fetuses, newborns, mentally retarded people and others.''[397] Frković considers it natural to fragment and give different ethical values to different individual stages of development.[398] On the other side are authors like Strong, Cazor, Kreeft, Lee, Robert George, who do not support the theory of ''gradation''.[399] Cazor believes that ''it is equally wrong to kill a 20-year-old as well as a 15-year-old.''[400] A ''gradation'' criterion would mean that it is worse to kill a late adolescent than an early one. A newborn, a fetus and an embryo are of the same species, the difference is in the degree of development. If a human being has value, it has value from conception, not through the development of some biological ability. Human beings are equal on the basis of their human nature in dignity, ''unlike an oak that is valued for accidental attributes, grandiosity, for which a long period of time was needed'', according to P. George.[401] It is clear that there is no more or less intrinsically valuable being and that the growth of a human being's abilities is not decisive for a human being to be considered a legal and moral subject. If it is, then ''Michael Jordan or Albert Einstein have more intrinsic value than human beings who are physically and mentally damaged.''[402]

The fact is that a human embryo/fetus cannot perform the actions of an adult, and as they develop they acquire new abilities and capabilities. However, if fundamental personality rights, that is, fundamental human rights, depend on functions and the ability to perform

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[395] Cf. Thomet, S. P., *Female Autonomy, Foetal Personhood and the English Legal Stance on Abortion Practice*, Quenn Mary Law Journal, 10, 2019, p. 37.

[396] Olivia Little, *op. cit.* note 278, p. 331, 339 - 341.

[397] Coughlan, *op. cit.* note 277, p. 102.

[398] Cf. Frković, A., *Bioetika u perinatalnom razdoblju, Bioetika u kliničkoj praksi/Bioethics in perinatal period*, *Bioethics in clinical practice*, Pergamena, Zagreb, 2006, p. 731.

[399] Cf. Strong, *op. cit.* note 316, p. 458.

[400] Cazor, *op. cit.* note 314, 85 - 86. Likewise Kreeft, *op. cit.* note 389, 57 - 58. Likewise Wasserstrom, R., *The Status of the Fetus,* The Hastings Center Report, 5, 1975, 3, 18 - 20. Wasserstrom argues that there is no morally significant point to distinguish a fetus that is not a person from one that is.

[401] George, *op. cit.* note 321, 16 - 17. Likewise Lee, *op. cit.* note 337, p. 124.

[402] *Ibid.*

them, then personality rights will be taken away from a number of human beings who, in certain circumstances, lack some functions. Based on lack of capacity, human beings with the disorder, as well as newborns and comatose people, would not have the status of the subject. Gradual protection represents a pragmatic approach to embryo rights. The moral and legal status of the human embryo then remains only a consensus, not based on biological facts. This is also the conclusion of the liberal theorist Wertheimer, who states that ''the conservative side is right when it claims that it is not possible to determine a moment that would have such moral weight as to allow murder in one moment, and not in another.''[403] This was also confirmed in *Recommendation 1046 (1986)* of the Council of Europe in which Article 5 states that *''Considering that, from the moment of fertilisation of the ovule, human life develops in a continuous pattern, and that it is not possible to make a clear-cut distinction during the first phases (embryonic) of its development, and that a definition of the biological status of an embryo is therefore necessary*.''[404]

Because of all the above, we can conclude that the ''gradation'' criterion and consequently the functionalist concept of the person opens a dangerous area of legitimizing the treatment of human beings in a way that does not differ much or at all from the dark ideologies of the 20th century.

Feelings of the environment

Theorists De Locht and Beirnaert consider ''the acceptance of the fetus by the parents as a reason why the fetus would be entitled to legal protection.''[405] If a human embryo/fetus is a person only if accepted by others, then all unaccepted marginalized human beings remain without legal protection. Such an understanding of the human person represents discrimination against all those who, for some reason, are not accepted by society.

Spontaneous abortion

Can spontaneous abortion and scientific estimates according to which 84% of all eggs that come into contact with sperm are successfully fertilized, 69% are implanted, 42% of embryos survive 4 weeks, 35% at 8 weeks, and only 31% of fetuses are born, be an

[403] Wertheimer, R., *Understanding the Abortion argument*, Philosophy and Public Affairs, 1, 1971, 1, 67 - 95.

[404] https://pace.coe.int/en/files/15080/html, (accessed: 25 January 2022).

[405] As cited in Matulić, *op. cit.* note 321, 47 - 48.

argument according to which we shoul deny subjectivity to human embryo?[406] Can we equate intentional homicide with an accidental accident in which a person dies, or intentional theft with the accidental loss of things? Or a strong earthquake as a natural state with house bombing? It is clear that the analogy of the biological flow of things and natural events, with intentionally caused acts coming from man, is inappropriate. If mortality is the criterion of subjectivity, then even ''newborns, whose mortality until the 20th century was more than 50%, would not be persons'', Cazor observes.[407]

Interest point of view

The interest point of view implies that only human beings who have interests have the status of legal subjects. Since things do not have interests or the moral status of subjects, Steinbock argues by analogy that ''human beings that do not have interests, such as human embryos'', should not have moral and legal status, but have the value of trees, mountains, lakes and desert areas.''[408] Berg considers that ''the key question is not at which moment the fetus develops an interest, but at which moment that interest forms the basis for legal personality.''[409] Who decides when someone has interests and what constitutes someone's interest? If Berg is right and society decides when a particular interest will form the basis for legal personality, then Berg is indirectly advocating a system of slavery, Nazism or apartheid, which is unacceptable. May the interest of the individual be the criterion of legal subjectivity? This would mean that a human being who has no interest or will, although grown and developed, loses the status of a legal subject. Legal interests differ and depend on capabilities and personalities. The criterion of interest is undefined and unclear, therefore it cannot be a decisive parameter of legal subjectivity.

Birth

Berg believes that there are practical reasons why legal protection would be given to the human embryo and fetus at birth.[410] But the criterion of birth, that is the visibility of the

[406] Cf. Švajger, *op. cit.* note 326, p. 25.

[407] Cazor, *op. cit.* note 314, p. 131.

[408] Steinbock, B., *Life before birth. The moral and legal status of embryos and fetuses*, Oxford University Press, Oxford, 1992, p. 6.

[409] Berg, *op. cit.* note 72, p. 393.

[410] Cf. *ibid.*, p. 397.

child, as well as the place where it is located (in the womb or outside it), along with today's undeniable medical facts that the embryo and fetus *in utero* is a human being, represents the denial of all medical knowledge about the nature of life before birth. Berg follows the ''line of least resistance'', because the birth is visible and undeniable, while the human embryo/fetus is ''hidden''.

6.2.2. Conclusion

None of the criteria mentioned above can be taken as crucial for determining the status of a legal subject, that is, the moment that would represent a jump from a biological human being to a personal one, and thus from a thing to a subject, because no single reason represents a justified argument for which certain stages and biological development carried a certain moral and then legal significance. The fact is that complex biological processes are divided into stages, and by analysis we determine their content. Not a single point in development would represent a turning point according to which a human embryo/fetus would become a person because there is neither an internal nor an external cause that would give such a point of development such legitimacy. If any of the mentioned criteria represents a legal parameter for the existence of legal subjectivity, and then personality rights, then we open wide doors to the possibility of endangering personality rights, the fundamental human rights of all human beings who, in some stages of development and circumstances, lack one of the above-mentioned criteria. Arbitrarily determining whether someone is a person, that is, a subject, practically means that the subjectivity of all human beings can be called into question, and so, for example, a typical adult who has some personality characteristic that is not in accordance with the subjective beliefs of the one who decides on the definition.

6.3. Philosophical status of the human embryo/fetus

6.3.1. Human embryo as a person

The understanding according to which the human embryo as a human being has intrinsic dignity, which means that it is also a person, a moral subject, is shared by authors such as Lee, Damshcen and D. Schoenecker, Finnis, Lejeune, Ramsey, Noonan, P. George,

Moraczewski, Cazor, Liest[411] The aforementioned authors consider all human beings, due to the fact of their human nature, to be intrinsically valuable persons, with full moral and legal status from conception, including the human embryo/fetus.

Natural science cannot prove that an embryo is a person, but neither can it prove that it is not. The question of the nature of the embryo cannot be solved by biology and medicine alone. The fact that the ontological substrate cannot be empirically proven does not imply that it does not exist. Classical ontology takes the position that there are no intermediate states, intermediate stages or intermediate levels between not being a person and being a person. The possibility of a moment of ''jump'' from a non-personal human being to a personal has been discussed since Titus Lucretius Carus in the philosophical poem *De rerum natura*, in which it was pointed out that it is ontologically impossible for such a moment to exist in the time after conception.[412] A human embryo/fetus is or is not a person because it cannot both be and not be a person or be a thing and then a person. ''Since it is impossible to determine the moment when a human being would pass from an impersonal or pre-personal state to a personal state, it is difficult to assert that an embryo is not a person.''[413] If the nature, the person, the body and the self are an inseparable unity, then the belonging of the individual to the human species requires unlimited recognition of human dignity, and being a person does not mean a property that joins the determinant of being human.[414]

[411] Cf. Lee, *op. cit.* note 337, p. 70; Cazor, *op. cit.* note 314, p. 167; Eberl, J. T., *The Moral Status of 'Unborn Children' Without Rights*, The American Journal of Bioethics, 8, 2008, 7, 44 - 46. The same is claimed by Eberl, who, in accordance with the theory of natural law, relates the moral status of beings with inherent values, so the status of the human embryo as a being with a rational nature justifies its moral status as a person, and then the right to life. Markešić, I.; Martin, I.; Markešić, J., *The human embryo and its right to live: a contributon to the sociology of death*, Periodicum biologorum, 3, 2009, 3, 373 - 380. Anton Liest bases the moral status of the human embryo from conception on the arguments of species, identity, potential, interest.

[412] Cf. Petrak, *op. cit.* note 272, No. 432.

[413] Matulić, *op. cit*. note 321, 88 - 97. Erich Blechschmidt claims that man does not develop *towards* man, but *as* man. Cuyas claims that man's prenatal development does not know dialectical leaps.

[414] Matulić, T., *Oblikovanje identiteta bioetičke discipline/Framing identity of a Bioethics discipline*, Glas Koncila, Zagreb, 2006, 20 - 21.

The embryo is corporeal from conception, with the biologically unique identity of a human being. A subject, that is a person who exists in a new organism, cannot just emerge from biological physicality at some point. ‘‘In the human embryo, there are biological and personal identities that are different, but they are inseparably connected, and their separation would create two identities, so the early one would be biological, and the later personal, which is why the subject would have two identities in the later stage, and one in the first.’’[415] Furthermore, if a person is biology and its main element is some biological criterion such as consciousness, in accordance with Locke's definition, then it exists in the beginning because the new genome has everything biologically necessary for the development of consciousness. If it is not biology, but we reduce it to ontology, which cannot be proven empirically either in the beginning or later, there is no reason why it exists later and not in the beginning. If a person is only body or only spirit, we return to Descartes' dualism. If only the spirit, what is the body of the human embryo and fetus?
On the other hand, there are theoreticians who separate a human being from a person, thereby determining the status of a human embryo and citing some of the previously analyzed criteria. Tolley, Singer, Boonin, Engelhardt, Donceel, Mori, Falmigni and Anne Warren are some of the theoreticians who consider the embryo to be a human being, but deny that it is a person. Many authors condition the question of whether a person is the same as a human being with the consequences arising from one or another understanding (separation or equating a human being and a person) or they start from the position that equating a human being and a person represents a religious approach. Tolley calls the equating of person and human being ‘‘philosophically unfortunate’’ because it ‘‘provides cover for anti-abortion positions.’’[416] Similarly, McCullough and Chervenak problematize the biological-ontological approach to the status of the human embryo and fetus because ‘‘it is used by opponents of abortion to confirm its status as a subject, and thus his inalienable fundamental rights’’.[417] Theoreticians such as Caloughan and Paul Thomet conclude that the equating of humanity and person represents a religious concept of man and person.[418] According to Hicks, everyone should ‘‘individually determine who a person

[415] Matulić, *op. cit*. note 321, p. 39.

[416] Tooley, *op. cit.* note 347, p. 42.

[417] McCullough L. B.; Chervenak, F. A., *Critical Analysis of the Concept and Discourse of ‘Unborn Child’*, The American Journal of Bioethics, 8, 2008, 7, p. 35.

[418] Tako na primjer Thomet, *op. cit.* note 395, p. 30, and Coughlan, *op. cit.* note 277, p. 9.

is, taking into account their own interests and beliefs, which is why a person would not be a matter of definition but of personal decision because there is no objective morality that determines an absolute principle and values that define a position about our perspective of a person, and then about the human embryo.''[419] Olivia Little claims that the point of view about the human embryo and fetus as a person from conception is based on metaphysics, so it is necessary to turn to the Enlightenment and the dominant criterion of rationality for the purpose of determining the status of the fetus.[420] Slabbert, on the other hand, claims that ''reasons in favor of the moral status of the embryo as a subject are based on animation, that is, religion, which can potentially threaten secularity and pluralism.''[421] The aforementioned criticisms do not take into account the fact that religious reflection partly belongs to the realm of dogmatics, from which there is no automatic transition to moral truths, while moral reason represents the eminently practical dimension of man, so it is used to assert moral status rationally, with the arguments of logic.[422] The rational basis for the status of the human embryo as a subject, that is, a person, can be found in biological evidence.Metaphysics is part of philosophy, not religion. Any equating of the metaphysical dimension with religion in a pluralistic society leads to its denial. In this way, one dimension of man, discussed since the ancient Greeks, is neglected.

By analogy, one could argue that the question of whether persons like natives, Jews, and other historically disenfranchised groups are slaves is a religious question. The argument according to which it is wrong to kill an embryo and a fetus, like any other adult being, does not rely on theological and religious premises.[423] Although the issue of the personhood of the human embryo and fetus is problematized in such a way that the integrative approach, which also includes the metaphysical, is identified with the Christian one, the inclusion of the metaphysical dimension in the ''substrate of the person'' is also

[419] Hicks, S. C., *The Right to Life in Law: The Embryo and Fetus, the Body and Soul, the Family and Society*, Florida State University Law Review, 19, 1992, 3, p. 844.

[420] Cf. Olivia Little, *op. cit.* note 278, p. 338.

[421] Slabbert, M. N., *The Fetus and Embryo: Legal Status and Personhood*, South African Journal of Bioethics and Law, 1997, 1, 241 - 242. Likewise Fortin, *op. cit.* note 390, p. 56. To animate something means to give breath or life.

[422] Cf. Matulić, *op. cit.* note 9, p. 243.

[423] See also: Lee, *op. cit.* note 337, p. 60.

the point of view of many non-Catholics.[424] Writers such as Noonan, O. J. Brown, Schaeffer, Koop, Moraczewski, and Lee regard the human embryo/fetus as a person from conception, staying outside traditional theological understanding and basing their views on biological and philosophical arguments. Proponents of the view that a human embryo/fetus is not a person should prove that it is not, using the same methodology they require to prove that it is. Since the division of the human being from the person is based on the negation of metaphysics (see *supra*, chapter 2), it is a reductive, empirical approach to the analysis of the personality of the human embryo and fetus. An embryo cannot exist other than as a person, therefore the definition does not depend on human decision because it is not something that man invents, but what man discovers and that requires our ascertainment and acceptance.[425]

6.3.2. Status of the human embryo and fetus from the point of view of dominant ethical theories

Popular ethical theories represent the *condicio sine qua non* for the articulation of fundamental criteria for determining the moral status of human embryos and fetuses, and then for dealing with practical bioethical issues. The most popular are socio-biological, radical-liberal, pragmatic-utilitarian, and personalistic-ontological.[426]

According to the personalist model, the term person does not mean only the subject, but also an ontological and transcendental value.[427] A person is understood on the basis of a definition that does not tolerate gradation into more or less.[428] According to personalistic philosophy, an embryo is a person from conception with human nature and identity. Socio-biological theory sees values as epiphenomena of social life.[429] Biology takes over the role of philosophy and ethics, the ontological dimension is thrown out, man is naturalized and the existence of immutable values, as well as certain human nature, is

[424] See also: Cazor, *op. cit.* note 314, p. 15.

[425] Matulić, *op. cit.* note 7, p. 214.

[426] Cf. Matulić, *op. cit.* note 9, p. 235.

[427] Cf. Sgreccia, *op. cit.* note 41, p. 142.

[428] Cf. Matulić, *op. cit.* note 9, p. 257.

[429] Cf. *ibid.,* p. 225.

denied, so that human life also becomes dependent on the values of the prevailing ideology or culture.[430] The subjectivist and radical-liberal theory contains the basic idea that ethical norms and values cannot be based on concrete facts and objective values, but only on the autonomous choice of the active subject.[431] According to this philosophy, embryos and fetuses may or may not be persons, depending on the subjective philosophy of those who assess it. Pragmatic-utilitarian ethical theory is dominant in Anglo-Saxon countries, and its influence is also present in Europe. Utilitarian theories represented by J.S. Mill and J. Bentham are goal-oriented, with a dominant narrative of the need to maximize pleasure and minimize pain. The fundamental starting point is contempt for metaphysics and mistrust of reason, and the center of ethical judgment is in feeling and experience.[432] Thus, the concept of a person, and then the status of a human embryo and fetus, is devoid of metaphysics and changes in accordance with the demands of utilitarianism.

6.4. Theological status of the human embryo/fetus

Theological beliefs place great value on human life, primarily the Judeo-Christian view, which has historically dominated Western culture and influenced secular trends. Although some theoreticians mentioned earlier relate the equality between humanity and person to religion, the theological status of the human embryo derives from theology. Different religious traditions differ not only in theological foundations, but also in the perspective of the protection of the human embryo and fetus.[433]

Throughout its history, the Catholic Church has highly valued human life, defending it with its own mechanisms.[434] Discussions about the permissibility of abortion in the Catholic Church until the new century were related to determining when a newly

[430] Cf. Aramini, *op. cit*. note 48, p. 50.

[431] Cf. Matulić, *op. cit*. note 414, p. 145.

[432] Cf. *ibid.,* p. 231.

[433] Cf. Ziebertz, H. G.; Zaccaria, F., *Euthanasia, Abortion, Death Penalty and Religion - The Right to Life and its Limitations*, Springer, Berlin, 2019, p. 6, 276 – 280. The authors conclude that abortion is a good test of the importance of religion in the public sphere. Scandinavian countries, such as Norway and Sweden, emphasize women's autonomy and abortion as part of women's rights, while the attitude is different in countries with a Christian tradition.

[434] Pozaić, V., *Vrednota života u nauku Katoličke crkve/ The value of life in the teachings of the Catholic Church*, Obnovljeni život, 56, 2001, 2, p. 206. For more details see: Lasić, *op. cit.* note 1, p. 33, 146 - 149, 179 - 180.

conceived human being acquired a soul. Two currents of thought differed, the current that interpreted the ‘‘immediate revival’’ of the human embryo, from the moment of conception, and the current that believed that a human being acquires a soul later, after a certain period of time.[435] Today's Catholic Church teaching, according to which new human life is present from the moment of conception, is based on three main reasons. They shed light on the fact that the church's attitude is not based on the exaggeration of the sanctity of life from the Judeo-Christian tradition, but on the anthropological status of the human person.[436] The first reason is the scientifically proven truth that a fertilized egg is a living and genetically unique organism of the human species.[437] The second reason is that there is no scientific basis by which one can determine the turning point when a new life should be assigned the moral and legal status of a human being, so it is most reasonable to consider conception as the beginning of human existence, and the third reason is that human life is unique and has its origin and fundamental value in God.[438] ‘‘In the delicate field of medicine and biotechnology the Catholic Church is in no way opposed to progress’’.[439] The stated position is also confirmed by P. George, who states that ‘‘today's position of the Catholic Church on the status of the human embryo is not based on theological proposals of animation, but on scientific conclusions about the humanity, unity and determination of the developing embryo.’’[440] Popes, church councils and encyclicals start from views according to which the human embryo is a person.[441] In the *Declaration on procured abortion* of the Congregation for the Doctrine of the Faith*,* it is stated that ‘‘*From the moment the egg is fertilized, a new life begins that is neither the father's nor the mother's, but the life of a human being that develops for itself. It will never become human if it is not already then*.’’[442] In the *Instruction on respect for Human Life in its Origin and on the dignity of*

[435] Cf. Vidal, M., *Kršćanska etika/Christian Ethics*, Edizioni Borla, Rim, 1992, p. 257. For more details see: Lasić, *op. cit*. note 1, 359 - 360, and Matulić, *op. cit*. note 321, p. 190.

[436] Cf. Matulić, *op. cit*. note 414, p. 20.

[437] Cf. *ibid.*

[438] Cf. *ibid.*

[439] Kurjak, Stanojević, Barišić, Ferhatović, Gajović, Hrabar, *op. cit.* note 362, p. 7.

[440] George, *op. cit.* note 321, p. 19.

[441] Pius XII claims from the first hour of existence, as well as John XXIII and Paul VI, As cited in Lasić, *op. cit*. note 1, p. 364.

[442] Congregation for the Doctrine of the Faith*, Declaration on procured abortion,* Kršćanska sadašnjost, Zagreb, 1974, 12 - 13.

procreation, Donum Vitae, it is confirmed that ''*…new achievements of biology…show that in the zygote created by fertilization, the biological identity of a new human individual has already been established*''.[443] In *Evangelium Vitae*, it is stated that ''*from the time that the ovum is fertilized, a life is begun which is neither that of the father nor the mother; it is rather the life of a new human being with his own growth*.''[444] It is futher stated that ''*The human being must be respected and treated as a person from the very moment of his conception, and therefore from the very moment it must be recognized with all the rights of a person, among which is the inviolable right of every innocent human being to life*.''[445] *Evangelium Vitae* stands on scientific grounds and its conclusions are based on biological-genetic facts.

From the above we can conclude that the position of the Church clearly expresses that human embryo is a human being, not a thing, which has the right to life from conception. Therefore, according to the words of the John Paul II, ''no reason…however serious and tragic, can …justify the deliberate killing of an innocent human being.''[446] Consequently, abortion on demand is considered as an act that ''has characteristics of a particularly serious and deplorable crime…''[447]

Other religions have a different attitude towards the issue of abortion, but they always start from the assertation of human life as a value from conception. Protestant and Lutheran churches stand for the protection of life, but allow abortion and euthanasia in some circumstances, while the Orthodox Church always considers abortion impermissible from an ethical point of view.[448] There is a plurality of opinion in Hinduism on the issue of abortion, but the central aspect is the promotion and protection of life, which is why abortion is fundamentally considered a horrible act that is permitted when the mother's

[443] Cf. Congregation for the Doctrine of the Faith, *Instruction on respect for Human Life in its Origin and on the dignity of procreation, Donum Vitae*, Kršćanska sadašnjost, Zagreb, 2012.

[444] Gaizler, G.; Nyéky, K., *Bioethics*, Magyarország: Semmelweis Egyetem, Dialóg Campus Kiadó, Pázmány Péter Katolikus Egyetem (PPKE), Budapest, 2011, p. 44.

[445] Ivan Pavao II., *Evangelium Vitae,* Kršćanska sadašnjost, Zagreb, 2003, p. 108.

[446] As cited in *ibid.*

[447] As cited in *ibid.*, p. 43.

[448] Ziebertz, *op. cit*. note 433, p. 7. Likewise Koios, N., *Embryo and fetus as seen by orthodox Church*, Periodicum biologorum, 3, 2009, 3, 359 - 363. According to the views of the Greek Orthodox Church, with which the views of Russia and Romania are also in line, the embryo has the right to human identity and life.

life is at risk.[449] Islam differs in its currents, so some prohibit abortion in all circumstances, while others allow it up to the 120th day or for health reasons.[450] In all currents, human life is a value from conception, so the formed zygote deserves respect.[451]

We can conclude that in religions all human beings, including the human embryo/fetus, have an intrinsic value.

6.5. Summary

In this chapter, the analysis of biogenetic facts about the human embryo and fetus is reviewed, together with the medical and philosophical criteria of the personality of human embryo and fetus, its philosophical and theological status. In the paragraphs on biogenetic facts and medical criteria, sources and the latest knowledge from these areas are presented, which speak about the human embryo and fetus as a living human organism. The viewpoints of theorists who attribute subjectivity to the human embryo/fetus only in the later stages of development are discussed, with the focus on the analysis of various criteria (i.e. analogies of the human embryo with gametes, on potentiality, accumulation of cells, implantation, the possibility of division, the criterion of the primitive streak, the existence and absence of consciousness and self-awareness as criteria, brain activity, the feeling of pain and movement of the fetus, its viability and ability to survive, criteria of archetypal embodiment, criteria of gradation, sense of the environment, analogy of the biological course of things and natural events, the interest point of view and finally birth as a visible act). It is concluded that there are no criteria other than conception that would be decesive for determining the legal status of the human embryo/fetus and that would represent a jump from a biological human being to a personal one and because of which certain stages and biological development would carry a moral, and then also legal significance. It is also concluded that biological processes are divided into phases and no single point in development would represent a turning point according to which the human embryo/fetus would become a person because there is neither an internal nor an external cause that

[449] Cf. *loc. cit*. note 442.

[450] Cf. *ibid.*

[451] Cf. Ismail K. H., *Human life cycle and the beginning of life: an islamic perspective*, Periodicum biologorum, 3, 2009, 3, p. 372.

would give some point of the development such legitimacy. It is elaborated on the danger that legal subjectivity, and even personality rights, are associated with some of the mentioned criteria and thus create the possibility of jeopardizing personality rights, and fundamental human rights. Arbitrarily determining whether someone is a person, or a subject practically means that the subjectivity of all human beings can be called into question.

The following paragraph analyzes the philosophical status of the human embryo/fetus. The views of many authors on whether the human embryo/fetus is a person are discussed, such as Lee, Schoenecker, Finnis, P. George or Singer, Engelhardt, Mori, etc. The status of the human embryo/fetus from the point of view of dominant ethical theories is being analyzed. At the end, the conclusion is made about the theological status of the human embryo/fetus, through the presentation of all major religions and their approach to life and abortion.

7. POSITIVE LAW ASPECTS OF THE TERM HUMAN BEING

7.1. Introduction

Legal personality is the basis for social recognition of human beings. A number of international legal acts prescribe the fundamental right to legal recognition of all human beings without exception. The *Universal Declaration on Human Rights* in Article 6 stipulates that ''*Everyone has the right to recognition everywhere as a person before the law*.'' The *International Covenant on Civil and Political Rights* in Article 2 stipulates that ''*each State Party...undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recgnized... without distincton of any kind such as race, colour, sex, language, religion, political and other opinion, national or social origin, property, brth or other status*''. Article 14 of the Constitution of the Republic of Croatia states that ''*Everyone are equal before the law*''. Does the term ''everyone'' refer to every human being and at the same time every person, or does it refer to some human beings, some of whom would not be persons? International legal documents do not define a human being, nor who is considered a person. Human being is a broad term that includes all members of the species *homo sapiens*,

and each one is a human being, that is, a person.[452] ''Man is a human individual from the species *homo sapiens*, and it includes man, woman and child, the born and the one just conceived.''[453]

The above means that belonging to human nature is sufficient to recognize a person as a legal subject. Positive legal systems, international or national, refer to human beings in general, as a species of *homo sapiens*, which includes every single person, that is, man. ORA stipulates that ''Every natural person is capable of being the holder of rights and obligations.''[454] Does the human embryo/fetus belong to the category of ''every natural person''? ''All born beings are legal subjects, but to claim that a human embryo is a legal subject is to claim that it is an independent person,'' Gavella states.[455] If everyone is equal before the law, and everyone refers to human beings, the species *homo sapiens*, can we conclude that the human embryo is excluded from the term ''everyone'' and according to what criteria, or is it included, but in its own way, so it would have the legal status *sui generis*?

From the earlier analysis, it was asserted that it is medically indisputable that the human embryo is a member of the species *homo sapiens*, which means that it is also human. A human embryo/fetus is a human (not a thing or an animal), but at the very beginning of development, which means that it has not developed the typical capacities of an adult and the rights and obligations associated with these capacities. In order to determine whether the fact of underdeveloped abilities is legally relevant for the status of a legal subject, it is necessary to analyze the legal status of human beings in, conditionally speaking, ''borderline situations'', which are called such because of the incomplete capacity to exercise their rights independently and in full. Thus, we will conclude whether the fact that a human being has not developed or in some circumstances of life lacks some characteristic typical of the species *homo sapiens* (for example, the ability to express thoughts), is relevant to the very status of a legal subject. This question also requires an analysis of whether international legal acts entail a concept of a human being as a subject

[452] A human being is different from other living beings, such as animals, plants, microbes.

[453] Hrabar, D., *Pravo na pobačaj – pravne i nepravne dvojbe/The right to abortion – legal and non-legal dilemmas*, Zbornik Pravnog fakulteta u Zagrebu, 65, 2015, 6, p. 797.

[454] ORA, Article 17.

[455] Gavella, *op. cit.* note 196, p. 33.

in which intrinsic dignity is contained, which means that every human being is also a person, or do they entail a concept of human being as an entity to which subjectivity may or may not be added, and his dignity is extrinsic. In order to determine the legal status of human embryos and fetuses, it is also necessary to determine whether only members of the human species are the holders of legal subjectivity or whether other living beings can be the same. From the above we can conclude whether the human embryo/fetus (and some other human beings) can be reduced to the legal status of living beings that are not human, such as animals and plants, or whether the human embryo/fetus is a subject, but *sui generis*, given the biological fact that he is at the very beginning of development, and would accordingly have precisely defined and limited rights. It is also necessary to analyze the consequences of the conclusion that the human embryo/fetus is a *sui generis* subject, or is not, in order to enable clarification of the issue of political conditioning of the legal status of human embryos and fetuses.

7.2. The concept of human being and person in international legal acts

In Article 1 the *Universal Declaration on Human Rights* states that ''*All human beings are born free and equal in dignity and rights*''. The *Convention on the Rights of Persons with Disabilities* in Article 3 emphasizes ''*respect for inherent dignity*'' as a principle, and in Article 10 that ''State Parties reaffirm that every human being has the inherent right to life...'' The *International Covenant on Civil and Political Rights* stipulates in Article 6, paragraph 1 as ''*Every human being has the inherent right to life*''. The *International Covenant on Economic, Social and Cultural Rights* states in the preamble that ''*The States Parties to the present Covenant, considering that... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom...*'' *The Universal Declaration on the Human Genome and Human Rights* also emphasizes the intrinsic value and diversity of all members of the human community[456], as well as *UNESCO's Universal Declaration on Bioethics and Human Rights*.[457] The *Convention on Human Rights and Biomedicine* (1997) advocates the intrinsic

[456]http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.htm (accessed: 25 January 2022).

[457] The Preamble emphasizes that ethical questions, which come with the rapid progress of science... should be examined with due respect for human dignity.

dignity of the human being, the preamble emphasizes its importance for the purpose of preserving fundamental rights and freedoms.[458]

In a series of international legal acts, which determine the protection of ''*inherent dignity*'', ''*inherent right to life*'', ''*all members of the human family*'', it follows that, based on natural law theory, every human being is a person with intrinsic dignity, which is a sufficient fact for having fundamental rights. By recognizing the intrinsic dignity of all human beings, international legal acts do not differentiate between developed and less developed human beings.[459] Although a human being is not defined, no category of human beings is singled out as a non-person or a ''lesser human being'' and all human beings are considered equal in fundamental dignity. In addition to the presented general formulations of human beings and intrinsic dignity, we will analyze the legal status of human beings in conditionally so-called ''borderline situations'', such as persons with disabilities, children and human beings in a coma, in order to determine whether special legislation at the international or national level separates some category of human beings from legal subjectivity, based on some ''deficit'' that the human embryo/fetus also possesses.

7.3. International and constitutional legal status of certain ''borderline'' groups of human beings

7.3.1. Persons with disabilities

Article 6, paragraph 3 and Article 7 of the *Convention on Human Rights and Biomedicine*[460] stipulates that ''*human beings who have mental illnesses are considered persons*.'' The *Convention on the Rights of Persons with Disabilities* advocates for the realization of legal capacity for persons with disabilities despite their cognitive deficit. In Article 12, paragraphs 1 and 2

[458] *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (1997) – Oviedo Convention, Protocol on the Prohibition of Cloning Human Beings (1998) and Protocol on biomedical research (2005)*, Official Gazette, International contracts, No. 13/2003, 18/2003 and 3/2006, Official Gazette, International contracts, No. 13/2003, 18/2003 and 3/2006.

[459] Cf. Thompson Ford, R., *Facts and Values in Pragmatism and Personhood*, Stanford Law Review, 48, 1995, 1, p. 242. For more details see: Finegan, T., *op. cit.* note 16.

[460] *Convention on Human Rights and Biomedicine*, Art. 6 par. 3 and Art. 7.

stipulates that ''*State Parties reaffirm that persons with disabilities have the right to recogniton everywhere as persons before the law*'' and that they ''*…enjoy legal capacity on an equal basis with others in all aspects of life*.''[461] Persons with disabilities are considered subjects under international law, with fundamental human rights and personality rights. It is clear from the provisions that mental incapacity is not a criterion for which persons with disabilities would be denied the legal status of a subject, regardless of the fact that as legal subjects they may have limited business capacity. The provision establishes the intrinsic, not extrinsic, dignity of persons with disabilities, and they are persons in accordance with Boethius', not Locke's, definition of a person. Such a starting point in determining the legal subjectivity of human beings maintains a natural law approach according to which all human beings have the right to be recognized as a legal subject, regardless of their abilities.

The *Constitution of the Republic of Croatia* also does not exclude persons with disabilities from the protection of fundamental human rights, nor from legal subjectivity. In the ORA, it is determined that ''*business capacity is acquired by reaching the age of majority, and legal capacity when person is born*'',[462] and ''*instead of a person who does not have business capacity, his legal representative or guardian will express his will*.''[463] From the aforementioned provisions, it is clear that the Croatian legal system does not take away legal subjectivity from persons who are deprived of business capacity. Based on their humanity, these persons are capable of exercising personality rights and property rights, depending on the type and extent of the cognitive deficit. A human embryo/fetus does not have mental competencies, but will also acquire them through development, so according to the above criterion, by analogy, it should not be deprived of the status of a legal subject.

7.3.2. Children as legal subjects

[461] Official Gazette, International contracts, No. 6/2007, Art. 12, par. 1 and 2.

[462] ORA, Art. 18, par. 2.

[463] ORA, Art. 18, par. 4. In recent times, the protection of human rights has been ''extended'' to persons deprived of legal capacity, and for example, they are recognized with a stronger legal status for entering into marriage than in earlier regulations, and in Croatian family law they are no longer deprived of legal capacity completely (which exactly does not correspond to the principle of proportionality from Article 12 of the *Convention on the Rights of Persons with Disabilities*).

Throughout history, children have had the status of an object owned by adults.[464] Failure to recognize their rights led to their infantilization and reduction to a mere object in need of protection.[465] Only with the *Convention on the Rights of the Child* do children become recognized as legal subjects. The principle of dignity and equality is evident from the preamble of the *Convention on the Rights of the Child*.[466] Children are recognized for their intrinsic dignity and are persons according to Boethius' definition. Their dependence and immaturity, underdevelopment, are no reason to question their legal subjectivity. They are legal subjects, but with a narrowed scope of legal capacity. They have special rights that differ from the rights of adults.[467] Their status is compared by Quinn and Reksas Rosalbo to the legal status of persons with disabilities, who also have a narrowed scope of legal capacity. The difference exists in relation to the fact that children are expected to develop abilities, while persons with mental disabilities are not, but they are still legal subjects.[468] The impossibility of exercising some capacities and the lack of all rights from the broad scope of legal capacity does not affect this fact, which, as in the case of persons with disabilities, maintains the natural-law approach when determining the legal subjectivity of children. They have rights due to the *iure naturali* argument.[469]

On the international scientific ''scene'', there are authors who question the legal subjectivity of children based on the criteria of cognitive abilities, especially in relation to newborns. A newborn is a child especially dependent on parents and the community, has no obligations and responsibilities, and is in the initial stages of human development. Claiming that ''the fetus does not have the right to life as a person,'' Singer concludes that neither does the newborn, who is also incapable of perceiving himself as a being, and

[464] Cf. Hrabar, *op. cit*. note 19, p. 659.

[465] Cf. Hrabar, D., *Bridging the Non-protection of Children's Rights Through the Optional Protocol to the CRC on communications procedure and a future European court*, Godišnjak Akademije pravnih znanosti Hrvatske, 8, 2017, Posebni broj/Special number, 16 - 17.

[466] Cf. Hrabar, *op. cit*. note 19, 661 - 662.

[467] Cf. Hrabar, *op. cit*. u note 19, p. 658.

[468] Likewise Quinn, G.; Rekas-Rosalbo, A., *Civil Death: Rethinking the Foundations of Legal Personhood for Persons with a Disability*, Irish Jurist, 56, 2016, 286 - 288. Quinn and Rekas-Rosalbo talk about the temporary civil death of newborns and the long-term civil death of people with mental disabilities. However, mental difficulties can sometimes be cured (eg waking a person from a coma).

[469] Cf. Hrabar, *op. cit.* note 465, p. 29.

concludes that ‘‘the life of a newborn is less valuable than the life of a pig.’’[470] Singer believes that a newborn would have the right to life only a month after birth, and all contrary thinking represents typically Christian rather than universal ethical values.[471] Warren believes similarly. According to Warren's criteria for a human being to be considered a person, it follows that ‘‘*killing a newborn is not murder*.’’[472] Tooley also denies the right to life of newborns with the criterion of self-awareness.[473] Giubilini and Minerve conclude that ‘‘fetuses and newborns do not have the same moral status as real persons’’ because, they state, ‘‘the fact that potential persons are morally irrelevant, and since adoption is not always in the real interest of people, abortion after birth (killing the newborn) should be allowed in all circumstances due to which abortion is usually allowed, because newborns do not have characteristics that would justify the attribution of the right to life’’.[474] The aforementioned authors deny the fact that a human being exists as a person with intrinsic dignity, thereby they deny their legal status as subjects, as well as fundamental human rights. Intrinsic dignity is the basis of the subjectivity of children who are in a specific position, without legal obligations and responsibilities. ‘‘Children's rights, as a subtype of human rights, are special rights of a special, vulnerable and dependent group of people - children, and they are not their decoration, nor are they given to them by us adults, but they exist for the sake of the child's dignity as a human being.’’[475] The same applies to human rights of embryo/fetus, which, by analogy, although undeveloped and unable to bear responsibility and exercise many rights from legal personality, is suitable for acquiring the status of *sui generis*, legal subject in development.

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[470] Singer, *op. cit.* note 376, 128 - 130.

[471] *Ibid.*

[472] Anne Warren, *op. cit.* note 72, p. 55.

[473] Cf. Tooley, *op. cit.* note 347, 63 - 65.

[474] Giubilini, A; Minerva, F., *After-birth abortion: why shoould the baby live?*, Journal of Medical Ethics, 39, 2013, 5, 261 - 263. Giubilini and Minerva believe that euthanasia should be allowed for infants, children with severe abnormalities, therefore it is necessary to give guidelines to doctors under which conditions death is in the best interest of the child. ‘‘Abortion’’ after birth should be allowed because the moral status of the individual killed is comparable to a fetus, not a child, and killing a newborn could be ethically permissible in all circumstances as well as abortion on a healthy fetus. They believe that newborns, as well as embryos, fetuses, criminals (where the death penalty is legal) are not the subject of a moral right to life, because being human is not a reason for attributing such a right.

[475] Hrabar, *op. cit*. note 19, p. 677.

7.3.3. Human being in coma

People in a coma are human beings who have lost the capacity to manifest their abilities due to some life circumstances. Their inability to perform typically human functions, i.e. the absence of their responsibility, inability to perform obligations, as well as rights for the performance of which cognitive abilities are required, does not affect their status as a legal subject, and as with persons with disabilities and children, does not entail negation of their intrinsic dignity. They are the holders of fundamental human rights and personality rights, and are undoubtedly included in the term ''every human being''. Therefore, the question arises again, if people in a coma are moral, and then also legal subjects, to whom we state human rights and on the basis of their legal personality we recognize that they have personality rights, can we conclude by analogy that human embryos and fetuses, which cannot exercise capacities as people in coma, are legal subjects, although *sui generis*, with a minimal number of fundamental rights? Samar believes that ''humans in a coma are still purposeful entities and deserve the same respect as those entities that are operational, as opposed to human embryos that cannot exercise capacities.''[476] A human embryo/fetus will gain abilities (except in exceptional cases) if allowed to develop, while humans in a coma can irreversibly lose that ability. Samar finds exclusively in the argument of *time* the criterion according to which someone who was a person (because he exercised abilities) has the right to enjoy basic human rights and legal subjectivity, unlike someone who will exercise abilities in the future. As with the previously analyzed categories, children and persons with disabilities, so with human beings in a coma, and finally with human embryos and fetuses, the criterion of cognitive abilities, which is required for some, but not all fundamental human rights from scope of legal capacity, is not a relevant criterion for ascertaining legal subjectivity.

None of the ''borderline'' categories is excluded from the concept of human being in international legal acts, nor from Article 21 of the *Constitution of the Republic of Croatia*. All analyzed categories have the status of a legal subject with basic human rights and personality rights, and the reason for this is their intrinsic dignity, contained in human nature and recognized in the *Constitution of the Republic of Croatia* and other international acts. From the analysis of bio-medical criteria, it was determined that the criterion of

[476] Samar, V. J., *Personhood under the Fourteenth Amendment*, Marquette Law Review, 101, 2017, 2, p. 287.

ability cannot be a criterion according to which the human embryo/fetus is not considered a moral subject, and this also applies to all other human beings. The average adult is a typical example of a legal subject, a category that does not include a human embryo/fetus, newborns, people with mental disorders, people in a coma, but as it has been asserted, regardless of their abilities, they are all legal subjects with personality rights and limited business capacity, in accordance with their development and biological state.[477]

The provision ''*Every human being has the right to life*'' clearly and unequivocally includes all human beings, and does not prescribe a criterion according to which some category of human beings would be excluded. Otherwise, the need for consistency and coherence of the legal system demands that the *Constitution of the Republic of Croatia* be amended in Article 21 in such a way as to prescribe that ''Every human being has the right to life except...''. But such a provision would also call into question the very basis of the international human rights system, which was created for the purpose of protecting all human beings, not some ''categories'' of human beings. Therefore, given the presumption that the general term should be understood to include all entities except those that are expressly excluded by legal definition, the human embryo/fetus should be considered included in the category of human being according to the *Constitution of the Republic of Croatia*, until proven otherwise.[478] Even if there were no final certainty about such an important issue, as the legal recognition of every human being, the maxim *in dubio pro protectione* applies.[479]

7.4. Living beings and other entities as possible holders of legal personality

A human being is a subspecies of the term living being. The term living being includes human beings, plants and animals. The question arises wheher there is a value difference

[477] Smerdel states that ''it is necessary to keep in mind that equality does not imply that all people enjoy equal rights in every aspect.'' As cited in Smerdel, B., *Republic of Croatia,* in: Besselink, L.; Bovend Eert, P.; Broeksteeg, H.; De Lange, R.; Voermans, W. (Ed.), *Constitutional Law of the EU Member States,* Kluwer, London, 2014, p. 227.

[478] Likewise Paulsen, M., *The plausibility of personhood*, Ohio State Law Journal, 74, 2013, 1, p. 66.

[479] Cf. Congregation for the Doctrine of the Faith*, Declaration on procured abortion,* Kršćanska sadašnjost, Zagreb, 1974.

between living beings, that is, whether animals and plants can be on the moral, and then also legal, level of human beings. The answer to the above question is important because it will also lead us to the conclusion as to whether, conversely, a human being can have the status of a thing.

After the Second World War, there was a conflict between theoreticians over the definitions of new subjects.[480] In addition to living beings, other entities are also mentioned in the debates that might be suitable for conferring legal personality. In *Animals' Race Against the Machines*, Michalczak discusses the idea of legal personality for artificial intelligence and concludes that there is a similarity between ''artificial intelligence and the undeveloped intelligence of children'', which would be a potential reason for artificial intelligence to be considered a legal subject.[481] There are also proposals for animal-human hybrids to be given legal protection.[482] It is not uncommon for nature as a whole, as well as some of its parts, to be cited as potential entities that deserve legal protection. In Bolivia, there were discussions about the right to life of ''Mother Nature'', and in India, the Ganges and Yamuna rivers were given legal status.[483] Stone discusses whether trees should have legal personality.[484]

7.4.1. Animals as potential legal subjects

[480] Cf. Selkala, T.; Rajavuori, M., *Traditions, Myths, and Utopias of Personhood: An Introduction,* German Law Journal, 18, 2017, 5, 1037 - 1038.

[481] As cited in Zibner, J., *Legal Personhood: Animals, Artificial Intelligence and the Unborn,* Masaryk University Journal of Law and Technology, 12, 2018, 1, 23 - 84.

[482] Cf. Rivard, *op. cit*. note 72, p. 1428.

[483] Cf. Hatten, R., *Legal Personhood for Animals: Can It be Achieved in Australia*, Australian Animal Protection Law Journal, 35, 2015, p. 41.

[484] Cf. Stone, C., *Should Trees Have Standing?-Toward Legal Rights for Natural Objects*, Southern California Law Review, 45, 1972, p. 456. Dyschkant, A., *Legal Personhood: How We Are Getting It Wrong*, University of Illinois Law Review, 2015, 5, p. 2099, states that New Zealand has adopted an Agreement to recognize the Whanganui River as a legal entity. There are requests for legal personality for monkeys in the US, New York, for the rights of nature in Ecuador, and there was an attempt to pass a Resolution on the right to life of chimpanzees in Spain. In 2014, the Romanian Parliament debated whether dolphins should be included in the concept of legal person due to their developed intelligence and the possibility of forming complex social relationships.

The modern debate on animal rights originates from the philosophy that arose in the early 70s of the 20th century, when animal law is taught at law schools in some parts of the world and since when various proposals of theoreticians have been cited for the purpose of recognizing the moral and potentially legal subjectivity of animals. Some of the most represented theoreticians of the advocacy of their legal personality are Karen Davis, Peter Singer, Tom Regan, Steven M Wise. The criteria mentioned as relevant to the moral and legal subjectivity of animals range from ''the cognitive abilities of chimpanzees to the emotional experience that human beings experience in relation to animals.''[485] Some animal protection movements mention the ''right to end their slavery''.[486] Berg goes a step further and considers the exclusion of animals from legal personhood as ''possible harm to humans.''[487] McLaughlin finds the criterion of animal personhood in ''the similar historical and social treatment of animals and children, so ''if children are legal subjects, so should animals be.''[488]

In support of the claim about the recognition of their legal personality, Davidson concludes that ''the company is proof that legal protection is not exclusively for human beings'',[489] similar to Tom Regan who believes that ''just as companies cannot be legally present in society without people who promote their interests, animals should also have representatives.''[490] Singer, Tooley and Regan are some of the theoreticians who consider it speciesism to treat a human being as privileged compared to animals, so Singer refers to the criteria of rationality and self-awareness because of which ''killing a chimpanzee would be worse than killing a human being with a disability'' since, according to Hume's law, ''biological facts have no moral relevance'', nor were they ''in the age of ancient

[485] Selkala, Rajavuori, *op. cit.* note 480, p. 1045.

[486] Cf. Boyle, B.; Tilly, F., *Legal Personhood for Animals and the Intersectionality of the Civil and Animal Rights Movements,* Indiana Journal of Law and Social Equality, 4, 2016, 2, p. 144. and 177. These are the Citizens United and Hobby Lobby movements.

[487] Berg, *op. cit.* note 72, p. 210.

[488] McLaughlin, P., *If Animals Are Like Our Children Let Us Treat Them Alike: Creating Tests of an Animal's Intelligence for Determinations of Legal Personhood*, Library Faculty Publications, 13, 2019, 18 – 19 and p. 30. Compares the cognitive abilities of animals and children for the purpose of granting legal protection to animals.

[489] As cited in Anestal, D., *Chimpanzees in Court: Limited Legal Personhood Recognition for Standing to Challenge Captivity and Abuse*, The Dartmouth Law Journal, 15, 2017, 2, p. 109.

[490] Cf. Boyle, Tilly, *op. cit.* note 486, p. 172 and 186. Dyschkant, *op. cit.* note 484, 2100 - 2104. History knows a case in France from 1457 where pigs were formally prosecuted for attacking a child.

Greece and Rome sufficient to warrant the protection of one's life, as slaves.''[491] Does Singer desire that, by this understanding, we return to a society of slaves or Nazism in which animals had a stronger moral and legal status than Jews? The fact is that on 24 November 1933, the Nazis passed a law on the protection of animals, ''in order to prevent cruelty and indifference of people to animals and also to develop sympathy and respect for them, which were not considered things... and for research on them, it was necessary to obtain special approval, while some people could be experimented on without restrictions and precautions.''[492] The law seems to have had racist rather than primarily animal protection objectives.[493]

The aforementioned theorists do not recognize the intrinsic dignity of the human species, but consider animals, plants and human beings on an equal moral value. Are there valid arguments for the above?

Some theoreticians have come to the conclusion that it is the unrepeatable genetic code, and not intrinsic dignity, that gives human beings value, and then also legal protection, which is why animals also have it.[494] Although the unique genetic code indicates the individuality of a person, it is only one of the characteristics of a person (see s*upra*, chapter 2). It is clear that there is a difference between animal and human nature. Aristotle emphasized this difference, concluding that ''only man has speech-logos, and the mind is the fundamental dimension of man's being.''[495] Animals do not create art, they do not have freedom and responsibility.[496] ''If all the characteristics of man, such as creation of art, possibility of thinking, religiosity, are reduced to the biology of the brain and neurological abilities''[497], why don't animals have these abilities? A human being with freedom of choice, thought, responsibility and reason will never emerge from the fetus of a cow.

[491] Singer, *op. cit.* note 376, p. 57 and 89.

[492] As cited in Feder Kittay, *op. cit.* note 304, 125 - 126.

[493]https://www1.wdr.de/stichtag/stichtag-erstes-tierschutzgesetz-100.html,https://www.jura.uni-mannheim.de/media/Lehrstuehle/jura/Buelte/Dokumente/Tierschutzrecht/Tierschutzesetz_1933__RGBL._1933__987_ff..pdf

[494] Likewise Niman, *op. cit.* note 346, p. 179.

[495] Haeffner, *op. cit.* u note 8, p. 53.

[496] Likewise Rupčić, *op. cit.* note 69, p. 39.

[497] Scola, Marengo, Prades Lopez, *op. cit.* note 30, p. 115.

Animals have no responsibility towards us, while we, as human beings, have responsibility towards them. It is clear that a chimpanzee does not have a human nature that contains intrinsic dignity, regardless of its cognitive abilities.

Doubts about the moral and legal status of human beings and animals arise from the understanding of human nature and the intrinsic dignity contained in it. If human nature is only a construct, according to the postmodern understanding, then a mouse may have more value than a child or a person with a mental disorder. According to Dworkin's categorization, which distinguishes between material and instrumental values such as art and sacred and inalienable values that are valuable *per se*, the aforementioned theoreticians reduce some human beings to material value, and animals and plants to value *per se*.''[498] The similarities of humans and animals are glorified as ontological impermanence, while differences are devalued as phenomenological transience.''[499] By denying the intrinsic dignity of human beings, it is not only that we are endangering the legal subjectivity of human beings who lack cognitive abilities, but we also reduce them to the status of an animal, artificial intelligence or a river. This would consequently mean that the human embryo/fetus, people with mental disorders, people in a coma are not legal subjects, but chimpanzees, dolphins and other animals are. This would also mean that all animals killed for food were killed illegally. Therefore, we can conclude that animals are not legal subjects because they have no human nature, nor intrinsic dignity, but they can be entities of value for limited political purposes. The aforementioned entities are not entities with intrinsic dignity, and although there may be a justified social interest for which they would be specially protected and their status could also be fictional, like a company, they do not represent legal subjects with fundamental human rights and personality rights arising from intrinsic dignity of every human being.

7.4.2. Legal protection of animal embryos

The status of animal embryos is regulated by legal acts at the European level, as well as by the legislation of the Republic of Croatia. In *Directive 2009/147/EC* on the conservation of

[498] Dworkin, R., *Life's dominion: An argument about abortion, euthanasia, and individual freedom*, Alfred A. Knopf, New York, 1993, 70 - 71.

[499] Matulić, *op. cit.* note 7, p. 91.

wild birds, the European Union regulates the conservation of all types of wild birds, their eggs, nests and habitats. It specifies that it is forbidden to deliberately destroy or damage or remove their nests and eggs, as well as to take their eggs from nature and possess them.[500] If the destruction of eggs of wild birds is prohibited, does this mean that the embryo as a human being has a lower status than the eggs of wild birds when the law allows their destruction? Similarly, the eggs of strictly protected species of birds in the Republic of Croatia are protected by the *Act on Nature Protection*, which determines that within the framework of nature protection, maintenance or adaptation measures are implemented for all species of birds that naturally occur on the territory of the Republic of Croatia, as well as their eggs and nests, and it is prohibited to intentionally destroying or taking the eggs of strictly protected bird species.[501] Equal protection is given to game eggs in the Republic of Croatia, by the *Act on Hunting*, which stipulates that it is forbidden to destroy and damage the litters, nests and eggs of game, and the collection of eggs of feathered game is also considered game hunting.[502] Eggs of protected species of birds, as well as game eggs, do not have the status of a legal subject but are a protected value. A human embryo is destroyed by abortion, as well as during research, which reduces it to a thing, a value less than the protected eggs of wild birds and game, so we can conclude that there is disparity between the level of protection of the human embryo/fetus and the animals.

7.5. Legal status of human embryo and fetus in positive legal framework

7.5.1. Legal acts of the UN

[500] Cf. *Directive 2009/147/EC* on the conservation of wild birds, Art. 1, par. 1 and 2, Art. 5, par. b and c.

[501] Cf. *Act on Nature Protection*, Official Gazette, No. 80/13, 15/18, 14/19, 127/19, Art. 6, par. 2; Art. 153. par. 2, Art. 228, par. 1.

[502] Cf. *Act on Hunting*, Official Gazette, No. 99/18, 32/19, 32/20. Art. 55, Art. 60, paragraph 1 and in Art. 65, paragraph 2, stipulates that if the work of scientific research and scientific-teaching institutions includes the deliberate destruction or taking of the eggs of feathered game, for such work the institutions must obtain prior permission from the Ministry. Art. 92, paragraph 8, prescribes a fine of HRK 30,000.00 to 70,000.00 for a hunting licensee if he destroys and appropriates cubs and destroys and damages game litters, nests and eggs (Art. 55, par. 1), and Art. 98 prescribes a fine from HRK 5,000.00 to HRK 15,000.00 for a legal entity if it appropriates cubs, destroys or damages game litters, nests or eggs (Art. 55, par. 1).

Among the provisions of the international acts that prescribe the right to life of all human beings, it is explicitly stated that ''all human beings'' have the ''right to life''[503], which would imply that the human embryo/fetus as a human being is subject to the application of the aforementioned provisions. The *Convention on the Rights of the Child* defines a child in Article 1 as ''*every human being below the age of eighteen years*'', and Article 6 stipulates that ''*States Parties recognize that every child has the inherent right to life*.''[504] The *Convention on the Rights of the Child* does not explicitly mention the unborn human being, but it does not exclude him. The Preamble of the Convention expressly refers to the *Declaration on the Rights of the Child* of the United Nations (1959), which states the need of children for special care and protection, ''*including appropriate legal protection, before as well as after birth*'', which refers to the conclusion that an unborn human has the right to adequate protection before birth, which would primarily imply the right to life, because what protection is more important than that right, without which other rights do not exist?[505]

International Covenant on Civil and Political Rights in Article 6, paragraph 5[506] prohibits execution of the death penalty on a pregnant woman. The aforementioned ''could also imply the unborn's right to life, which cannot be realized by the death of the mother, therefore this provision can be interpreted not only as a ban on the death penalty (for those born), but also as protection of unborn children from death caused by human actions.''[507] From the *travaux préparatoires* of the *International Covenant on Civil and Political Rights*, it is unequivocally determined that the main reason for Article 4 (now Article 6, paragraph 5) of the original text, which stated that the death penalty may not be carried out on a pregnant woman, was to protect the life of the unborn human.[508] This was confirmed by

[503] For example, *Universal Declaration on Human Rights* prescribes in Article 1 ''*All human beings are born free and equal in dignity and rights'',* and in Article 3 that *''Everyone has the right to life, liberty and the security of person.*''

[504] Official gazette SFRJ, No. 15/1990, Official Gazette, International contracts, No. 12/1993 and 20/1997.

[505] Cf. Hrabar, *op. cit.* note 453, p. 806. In the *Declaration on the Rights of the Child of the United Nations* (1959) states the need of children for special care and protection ''including adequate legal protection, both before and after birth. An unborn child is guaranteed the right to growth, development and care before birth.''

[506] *International Covenant on Civil and Political Rights,* Art. 6, par. 5.

[507] Hrabar, *op. cit.* note 453, p. 806.

[508] Cf. Report of the Third Committee to the 12th Session of the General Assembly, 5 December 1957. A/3764, par. 18.

the Secretary General of the UN in his Report in 1955, in which it was stated that the same paragraph was inspired by humane reasons, but also by reasons to protect the interests of the unborn human.[509] Therefore, it is clear that Article 6 cannot be interpreted in such a way as to protect human life by setting time limits. In Article 24, paragraph 1, it is determined that ''*Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State*.''[510] If unequal treatment of illegitimate children compared to children born from a lawful relationship or children conceived naturally compared to those conceived with medical assistance is considered as discrimination based on birth, we could, if no one has so far contested the personality of an unborn child, also consider it discriminatory to give priority in care (which is necessary with regard to health, medical and living status) to a born child in relation to an unborn child.[511]

7.5.2. The Council of Europe

ECHR in Article 2 paragraph 1 stipulates that ''*Everyone's right to life shall be protected by law*'', and in paragraph 2 that deprivation of life can be justified when it results from the use of force which is no more than absolutely necessary, in three cases: in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection. In the context of the discussion about the personality of the unborn human, as well as the woman's interest in abortion, two questions arise: the criteria by which the human embryo/fetus as a human being would be excluded from the term ''everyone'', and whether abortion is a situation of defense against illegal violence (about that *infra*).

Article 2 of the ECHR

In *Bruggemann and Scheuten v. Federal Republic of Germany*, the European Commission for Human Rights (the Commission) did not ''*find it necessary to decide, in this context, whether*

[509] Cf. Annotations on the Text of the Draft International Covenants on Human Rights Prepared by the Secretary General to the 10th Session of the General Assembly, 1 July 1955. A/2929, Chapter VI, p. 10.

[510] *International Covenant on Civil and Political Rights,* Art. 24, par. 1.

[511] Hrabar, *op. cit.* note 453, p. 807.

the unborn child is to be considered as 'life' in the sense of Article 2 of the Convention.''[512] The ECtHR took the same approach in *Open Door and Dublin Well Woman v. Ireland*.[513] In the case of *H. v. Norway* it was discussed about the termination of pregnancy against the wishes of the father of the child, in which the Commission found that it does not have to decide whether the fetus may enjoy a certain protection under Article 2, but it will not exclude that in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether or to what extent Article 2 protects the unborn life. From the aforementioned provision, it is not clear in which circumstances an unborn human has protection, and in which it does not and for what reasons.[514] The ECtHR avoided giving an unequivocal answer about the status of the human embryo/fetus, on which there is no consensus among the member states. In the judgment *A, B and C v. Ireland* ECtHR confirmed that ''*there might be no European consensus on the scientific and legal definition of the beginning of life*.''[515] In *Paton v. United Kingdom* ECtHR concluded that the life of the fetus is closely related to the life of the pregnant woman and cannot be viewed separately but still left open the question of the status of the human embryo/fetus. EctHR determined that ''*If Article 2 were held to cover the fetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman*.''[516] But Article 2 does not imply absolute protection of any human being, not even a fetus. If the human embryo/fetus enjoys protection based on Article 2, the mother certainly enjoys it too. If protection is absolute for the fetus, then it is also for the mother. There is no legal criterion by which it can be claimed that the life of a human embryo and fetus takes precedence over the life of the mother.

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[512] *Bruggemann and Scheuten v. Federal Republic of Germany*, No. 6959/75, judgment of 12 July 1977, par. 60.

[513] Cf. *Open Door and Dublin Well Woman v. Ireland,* No. 14234/88, judgment of 29 October 1992, par. 66.

[514] Cf. *H. v. Norway*, No. 17004/90, judgment of 19 May 1992.

[515] *A, B, and C v. Ireland*, No. 25579/05, judgment of 16 December 2010. Same in the case *R.R. v. Poland,* No. 27617/04, judgment of 26 May 2011, par. 186, in which it was a case of the inadmissibility of performing an abortion due to a fetal abnormality.

[516] Cf. *Paton v. United Kingdom,* No. 8416/78, judgment of 13 May 1980, par. 19.

Vo. v. France is a significant case in which the ECtHR decided on a claim in which the applicant asserted that the death of an unborn human occurred due to the irresponsible behavior of a doctor, so the ECtHR was forced to directly determine whether Article 2 of the Convention refers to the protection of the human embryo and fetus. Paragraph 75 states that ''*Article 2 of the Convention is silent as to the temporal limitations of the right to life and, in particular, does not define ''everyone" (''toute personne") whose ''life" is protected by the Convention*.''[517] Paragraph 80 states that ''*the unborn child is not regarded as a ''person" directly protected by Article 2 of the Convention and that if the unborn do have a ''right" to ''life", it is implicitly limited by the mother's rights and interests*.''[518] If an unborn human is not a person protected by Article 2 ECHR, it is unclear why the ECHR leaves the possibility of owning the right to life. And if he has the right to life, what interest is more important than life? In paragraph 84, the ECtHR points out: ''*At European level, the Court observes that there is no consensus on the nature and status of the embryo and/or fetus, although they are beginning to receive some protection in the light of scientific progress…At best, it may be regarded as common ground between States that the embryo/fetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law… in the context of inheritance and gifts…require protection in the name of human dignity, without making it a ''person" with the ''right to life" for the purposes of Article 2''*.[519]

Thus, the ECtHR recognized the human dignity of the conceived child and the right to protection of human dignity, but claims that this does not mean that the human embryo/fetus is a person. But what does it mean to recognize the dignity, which is the reason for the legal protection of a human being, if not the recognition that a human being is a person? Or conversely, what does it mean to deny that he is not a person while at the same time recognizing his human dignity? In paragraph 85, contrary to the statement in paragraph 80, the ECtHR states that it is ''*convinced that it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention*.''[520] It is not clear why it is not desirable to define the human embryo, if it is a fundamental question for making logical and just judgments in a

[517] *Vo v. France*, No. 53924/00, judgment of 8 July 2004, par. 75.

[518] *Ibid.,* par. 80.

[519] *Ibid.,* par. 84.

[520] *Ibid.,* par. 85.

series of cases. With their argument, it could be argued that it is neither desirable nor possible not to define whether an unborn human is a person within the meaning of Article 2 of the Convention.

If this is not possible, it is not clear how it is possible to base the life of a human being on the concept of a person, if it is an ''abstract'' concept whose content is not clearly defined. Are we going to claim for other categories of human beings that it is not possible to determine whether they are persons and condition their lives by that category? The judgment was accompanied by a number of separate opinions. Judges Rozakis, Caflisch, Fischbach, Lorenzen and Thomassen argued that in view of the fact that the protection of an unborn human being is far narrower in scope than that given to a child after birth, Article 2 of the ECHR is not applicable to a human embryo/fetus. But if the protection is narrower, isn't the right to life a fundamental right within that narrower scope? And if not, what right can be within the narrower scope if there are no other rights without the fundamental right to life? A human embryo/fetus certainly does not have, for example, the right to work and the right to vote, which it will probably acquire at birth, or be able to exercise them at a more mature age.

Judge Ress argued that ''*that Article 2 applies to human beings even before they are born, an interpretation which seems to (me to) be consistent with the approach of the Charter of Fundamental Rights of the European Union*.'' Judges Mularoni and Stražnicka found that ''*Article 2 must be interpreted in an evolutive manner so that the great dangers currently facing human life can be confronted. This is made necessary by the potential that exists for genetic manipulation and the risk that scientific results will be used for a purpose that undermines the dignity and identity of the human being.*'' If the ECtHR has not determined the status of the human embryo, why and how does it even balance it with the interests of the woman? The ECtHR does not determine whether an unborn person is protected by Article 2 of the ECtHR, which is why there is no logic that can be followed in the judgments that the ECtHR makes. The aforementioned comes to the fore in other issues as well. Thus, in the case of *Znamenskaya v. Russia*, ECtHR decided on the request of the applicant, whose fetus was suffocated in the uterus at the thirty-fifth week of pregnancy. The birth certificate issued by the authorities contained the name of Mr. Z., the applicant's husband, who was identified as the father of the stillborn child. The applicant requested that the name of the biological father of the unborn human

be listed in the birth register. The domestic courts refused to examine the case as a civil suit on the grounds that an unborn human has not acquired civil rights. The ECtHR noted that, bearing in mind that the applicant had developed a strong connection with the embryo, the inability to make changes to the birth certificate undoubtedly affected her private life guaranteed by Article 8 of the ECHR.[521] The ECtHR indirectly, although it did not confirm it, treated the human embryo/fetus as a subject. If he had treated it as a thing, he would not have attached importance to the woman's emotional connection with the thing.

The ECtHR renders judgments leaving the answer to the fundamental question of the beginning of human life to member states,[522] applying a margin of discretion. In the rulings, ECtHR expressly states that *''it is the states that are in the best position to assess the proportionality of certain measures... especially with regard to policies related to moral issues.''*[523] In a series of rulings discussing various bioethical issues, the ECtHR avoided giving the answer to the question whether Article 2 covers the human embryo/fetus. In case it explicitly states that he is not, it should explain based on which criteria. Judgments are therefore not a source for regulating the status of human embryos and fetuses, but it is necessary to carry out a philosophical-legal analysis of whether a human embryo/fetus is a *sui generis* subject covered by Article 2 of the ECHR, and then whether abortion is an exception to the protection of human life.

The Parliamentary Assembly of the Council of Europe, by *Recommendation 874 (1979)* stipulates in point 17.VI. a. as ''*The rights of every child to life from the moment of conception, to shelter, adequate food and congenial environment should be recognised, and national governments should accept as an obligation the task of providing for full realisation of such rights*''.[524] The aforementioned provision means that the human embryo has certain rights from

[521] Cf. *Znamenskaya v. Russia*, No. 77785/01, judgment of 2 June 2005.

[522] Same in *Reeve v. United Kingdom,* No. 24844/94; *Boso v. Italy,* No. 50490/99; *Odièvre v. France,* No. 42326/98; *Vo v. France,* No. 53924/00; *Draon v. France,* No. 1513/03.

[523] *Handyside v. United Kingdom,* No. 5493/72, judgment of 7 December 1976; *Rees v. United Kingdom,* No. 9532/81, judgment of 17 October 1986.

[524] Cf. https://pace.coe.int/en/files/14908/html , (accessed: 25 January 2022)

conception, which justifies its *sui generis* legal status, which primarily contains its fundamental right to life, because without it, other rights cannot be realized.

7.5.3. European Union

The *Charter of Fundamental Rights of the European Union* in Article 1 stipulates that ''*Everyone has the right to life*.'' ''Everyone'' refers to every human being, while the human embryo/fetus is not singled out as a category that would be excluded from the protection of life. The judgment of the Court of Justice of the European Union C-34/10 *Oliver Brüstle v. Greenpeace* [525] is significant, in which it is pointed out in paragraph 35 of the judgment that: ''*any human ovum must, as soon as fertilised, be regarded as a 'human embryo' within the meaning and for the purposes of the application of Article 6(2)(c) of the Directive, since that fertilisation is such as to commence the process of development of a human being*.''[526] This clearly and explicitly, undoubtedly asserted that human life begins at the moment of fertilization of the ovum, because it is not logical to consider that a human embryo is a human being in matters related to its potential exploitation, but in other matters, such as abortion, it is not. Namely, we cannot be human for one purpose, but not for another.

Significant for determining the status of human embryos and fetuses in the EU is the ''*One of Us*'' initiative, which collected more than a million signatures, and related to the legal protection of the dignity, right to life and integrity of every human being from conception. Its main goal was the suspension of EU financing of activities involving the disposal of human embryos, especially in the field of research, public health and development aid. The European Commission (EC) stated in its *Communication* of 28 May 2014 that it does not intend to submit a legislative proposal based on the aforementioned Initiative, with the explanation that the financial framework had already been discussed and an agreement had been reached between the EU member states and the Parliament.[527] However, the financial framework referred to the period 2014-2020, which means that the approach to the mentioned issue may change. The European Citizens' Initiative filed a lawsuit at the

[525] Cf. *Oliver Brüstle v. Greenpeace*, Grand Chamber, judgment of 18 October 2011, C-34/10, EU:C:2011:669.

[526] *Ibid.,* par. 35 - 38.

[527] https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2014)355, (accessed: 25 January 2022).

Court of Justice of the European Union with the aim of annulling the aforementioned Communication COM (2014). The Court of the EU rejected the lawsuit with the explanation that ''*the EC has broad powers when deciding on the initiation of a legislative proposal, since on the basis of them it promotes the general interest of the Union*.''[528]

7.5.4. Organization of American States

The *American Convention on Human Rights* (1969, the so-called San José Pact) in Article 4, paragraph 1, stipulates 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*.'' In the aforementioned provision, the phrase ''every person'' explicitly includes a human embryo/fetus.

7.5.5. Conclusion

The legal status of human embryos and fetuses cannot be read from judicial practice because the ECtHR avoids answering that question. It is not clear why the ECtHR states that it is not desirable and possible to define the status of the human embryo, if it is a fundamental issue for making logical and just judgments in a number of cases. It is also not clear how it is possible to base the life of a human being on the concept of a person, if it is an ''abstract'' concept whose content is not clearly defined, as the ECtHR considers.

The Council of Europe Recommendation 874 (1979) and the *American Convention on Human Rights* explicitly stipulate that the rights of every child to life from the moment of conception should be recognised. From the aforementioned provisions of other international legal acts, it is evident that the human embryo is not excluded from the protection of the right to life in any legal act. It is not explicitly included, but the presumption that every human being is included, as well as the importance of the fundamental right to life, supports the conclusion that the term ''every human being'' also refers to the human embryo/fetus.

[528] *One of us and others v. European Commission*, General Court, judgment of 23 April 2018, T-561/14, EU:T:2018:210, par. 115.

7.6. Legal status of the human embryo and fetus in the international, regional and national legal framework in the context of scientific research

Human embryonic stem cells contain regenerative capabilities and have the capacity for unlimited self-renewal. The human embryo/fetus is useful for the treatment of a wide range of diseases, including diabetes, Parkinson's disease, Alzheimer's disease, spinal cord injuries, leukemia, anemia, cancer, and fetal tissue is also suitable for transplantation. The fact that fetal tissue is desirable for the treatment of various diseases, ''leads to its increased demand over supply,'' says Robertson.[529] Is it justified to destroy human beings in the embryonic stage of development for the benefit of others?

What is the status of the human embryo and fetus in the legal acts that regulate research on the human embryo?

In international acts of a global character, ''the seriousness of the topic of manipulation of the beginning of human life is shy and insufficiently recognized.''[530] There are quite a number of international declarations and conventions dedicated to the issue of the legal status of human embryos and fetuses during research. The *Universal Declaration on the Human Genome and Human Rights* in the preamble emphasizes that research should fully respect human dignity, freedom and human rights, as well as the prohibition of all forms of discrimination based on genetic characteristics. Genome implies belonging to a human being, which is what a human embryo/fetus is. If research, as stated in the preamble, should fully respect human dignity, and the human embryo/fetus is destroyed during the research, this means that his dignity is not respected because the destroyed being does not exist, has no dignity, and whether the destruction procedure was carried out dignified is not important, nor can it be evaluated. In Article 4, it is determined that ''*The human genome in its natural state shall not give rise to financial gains*'', from which it is clear that human life is prioritized over any financial gain. The *International Declaration on Human Genetic Data (2003)* states in Article 5 that ''*human genetic data and human proteomic data may be collected, processed, used and stored, only for the purposes of diagnosis and health care…medical and*

[529] Robertson, J. A., *Children of choice*, Princeton University Press, New Yersey, 1994, p. 211.

[530] Hrabar, *op. cit.* note 52, p. 265.

other scientific research…''[531] UNESCO's *Universal Declaration on Bioethics and Human Rights* in Article 3 determines: ''*1. Human dignity, human rights and fundamental freedoms are to be fully respected. 2. The interests and welfare of the individual should have priority over the sole interest of science or society*''.[532]

We can conclude that human dignity should primarily be protected and that the scientific procedure that endangers it is not justified.[533] In 1986, the Council of Europe adopted *Recommendation 1046 (1986)*, which prohibits any creation of human embryos for research purposes, which was reaffirmed in 1989 with the adoption of *Recommendation 1100 (1989).*[534] The aforementioned recommendations indirectly define the human embryo as a subject because if they were legally defined as a thing, there would be no obstacle to their creation for the purpose of exploitation.

It is clear from all the mentioned documents that they want to prevent manipulations, research, violation of the dignity of born people, but the fact that the human embryo/fetus is a member of the species *homo sapiens* with intrinsic dignity and associated fundamental human rights, as well as the right to life, is not taken into account.
The *Convention on Human Rights and Biomedicine* (1997) from Oviedo, in Article 2, stipulates that ''*the interests and welfare of the human being shall prevail over the sole interest of society or science*.''[535] Article 16 stipulates that ''*Research on a person may only be undertaken if all the following conditions are met:…the risks which may be incurred by that person are not disproportionate to the potential benefits of the research*.'' Thus, it remains unclear again who is responsible for assessing such proportionality, by what criteria is this assessment carried out, what are the associated risks and burdens for human beings and who assesses the

[531]http://portal.unesco.org/en/ev.php-URL_ID=17720&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed: 25 January 2022).

[532]http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html (accessed: 25 January 2022).

[533] See also: Hrabar, *op. cit.* note 52, p. 266.

[534]http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=15134&lang=en, (accessed: 25 January 2022).

[535] *Convention on Human Rights and Biomedicine (1997),* Art. 2.

benefits. Article 18, paragraph 1, stipulates that ''*where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo*.'' Paragraph 2 prohibits ''*the creation of human embryos for research purposes*.'' However, it is practically impossible to ensure ''adequate protection'' if the research involves the destruction of human embryos, nor is it clear what level is ''adequate''. Is it the level at which they are not destroyed or are they partially destroyed? Is it possible for human embryos to remain alive after research? Article 18 is not harmonized with Article 2 since it presupposes the interests of science over the life of a human being.

The ECtHR dealt with the issue of research on embryos in the case of *Parrillo v. Italy*. The court ruled that it cannot say when human life begins, but asserted that ''*human embryos cannot be reduced to 'possessions'*.'' It also determined that human embryos must not be created for industrial and commercial purposes, because their commercial exploitation would be contrary to the rules of order and morality.[536]

The ECtHR does not define the human embryo as a thing, although it does not recognize its subjectivity, but gives legal protection in some circumstances. The ECtHR should clearly define what a human embryo/fetus legally is and based on which criteria.

The European Group for Ethics and Science in New Technologies of the European Union has dealt with the issue of research ethics in numerous opinions.[537] These opinions state that stem cell research aims to alleviate severe human suffering, however, research should be conducted in accordance with ethical and legal requirements. *Opinion No. 12*[538] is significant while in point 2.2. regulates that the human embryo, whatever the moral or legal status conferred upon it in the different European cultures and ethical approaches, deserves legal protection. Even if taking into account the continuity of human life, this protection ought to be reinforced as the embryo and the fetus develop. It also stipulates

[536] Cf. *Parrillo v. Italy,* No. 46470/11, judgment of 27 August 2015.

[537] Cf. https://ec.europa.eu/info/publications/ege-opinions_en, (accessed: 25 January 2022).

[538] Cf. *Opinion No. 12: Ethical aspects of research involving the Use of Human Embryos in the Context of the 5th Framework Programme*, 14 November 1998. Also *Opinion No. 15: Ethical Aspects of Human Stem Cell research and use, 14 November 2000*, as well as *Decision No. 1982/2006/EK Concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007 - 2013).*

that respect for pluralism does not mean a *laissez faire* attitude, but requires an ethical evaluation of the most sensitive issues during research. Accordingly, the EU refuses to finance research on human embryos that leads to their destruction, from which it could be concluded that it morally and legally determines them as subjects, and undoubtedly has an ethical approach to embryos and fetuses.

Within the EU member states, there is diversity regarding the admissibility of research. The United Kingdom allows scientific research into human embryos and the creation of embryos for this purpose. In the UK, the *Human Fertilization and Embryology Act* of 1990 created the regulatory framework for infertility treatment for the first time.[539] It enables research on embryos in a number of cases, which is justified by promoting progress in the treatment of infertility, increasing knowledge about the causes of congenital diseases, developing more effective contraceptive techniques, detecting the presence of gene or chromosomal abnormalities, and the like. The use of embryos for research purposes can only be carried out with the authorization of the UK Human Fertilization and Embryo Authority (HFEA). This same institution enabled the first cloning of human embryos in Europe. The Czech Republic, France, Finland, Hungary, Norway, Portugal, Switzerland and the Netherlands prohibit the creation of human embryos and fetuses for research purposes, but allow research, while Sweden allows the creation of human embryos for research purposes.[540] Germany, Austria and Italy prohibit the reserach on human embryos.[541] Bulgaria, Ireland, Estonia, Luxembourg, Poland and Romania have no specific legislation on that matter.[542] The Croatian *Act on Medically Assisted Fertilization* prohibits scientific and research work on embryos.[543] Belgium, like the UK, allows the trading of human stem cells from surplus IVF embryos and, in certain circumstances, the

[539] Amended by *The Human Fertilization and Embryology Act* 2008, which regulated embryo testing and simplified the law on embryo storage, and with *Human Fertilisation and Embryology (Research Purposes) Regulations* 2001.

[540] https://www.sciencedirect.com/science/article/pii/S1873506108000676?via%3Dihub

[541]https://www.eurostemcell.org/regulation-stem-cell-research-europe;
https://hpscreg.eu/browse/country/ro#:~:text=Stem%20cell%20research%20is%20allowed,Cloning%20is%20prohibited.

[542] *Ibid.*

[543] Cf. *Act on Medically Assisted Fertilization*, Official Gazette, No. 86/2012.

creation of human embryos for the use of human stem cells (eg. for the study of a certain serious diseases).

The legalization of research on embryos in some countries testifies the transition from deontological values to utilitarian justifications, although the solutions, as a consequence of different value systems, differ greatly from country to country. ''Replacing a restrictive approach in research with a liberal one is not justified, especially taking into account different cultural, religious and legal characteristics, therefore the imposition of a liberal uniform European law could be against different value systems.''[544]

7.6.1. The Report of the Committee of Inquiry into Human Fertilization and Embryology - Warnock Report

The Report of the Committee of Inquiry into Human Fertilization and Embryology, commonly referred to as the Warnock Report, according to committee chair Mary Warnock, is a 1984 UK government publication on infertility treatment and embryological research.[545] The Report states that although embryo development is a continuous process, a precise decision needs to be made about the length of time an *in vitro* embryo could remain alive and be used for experimentation. The board opted for a fourteen-day limit and characterizes such a time frame as very conservative. At the same time, concerns about the intentional creation of embryos for the purpose of experimentation are highlighted, but it is nevertheless concluded that any embryo resulting from *in vitro* fertilization should be used for experimentation. The Warnock commission, contrary to the provisions of the above-mentioned international acts, prioritizes the benefits of research over the destruction of embryos.

[544] Hrabar, *op. cit*. note 52, p. 268.

[545] The Report consists of thirteen chapters, the first two of which explain the methods and scope of the investigation. From the third to the eighth chapter, infertility treatment techniques are described. In the ninth and tenth chapters, the process of storing eggs, sperm and embryos is explained in detail. The eleventh and twelfth chapters provide an overview of embryological research and possible future technologies. The thirteenth chapter recommends the establishment of a government body responsible for human fertilization and embryological research.

Giving priority to the interests of science over the life of a human being, takes us back to the times that we considered to have been overcome and represents a violation of the international legal framework on the protection of the right to life of every human being. Science should serve man, not the other way around.[546] ‘‘Every future development of legal regulations and medical possibilities has a big question mark behind the words 'value' and 'ethical'‘’.[547]

7.7. The legal status of the human embryo and fetus in certain branches of legislation in Republice of Croatia and in medicine

7.7.1. The overview of Croatian legislation

Obligatory Relations Act

ORA adopted the legal fiction of *nasciturus* from the Roman law of inheritance and property. Article 17, paragraph 2 of the ORA stipulates that ‘‘*a conceived child is considered to have been born, whenever it is about its gain, provided that it is born alive.*’’[548] The provision protects the breakthrough of a human embryo and fetus with the fiction that it has already been born. Gavella states that ‘‘the aforementioned provision does not recognize that the human embryo is an independent person, but this rule merely reserves the rights for the child, which will belong to him in the event that he is born alive.’’[549] Slabbert similarly asserts that ‘‘the embryo *in utero* has a unique position and the right to 'some form of protection', but it does not have legal personality, so the meaning of protection is in the interests after birth.’’[550] Although the aforementioned provision refers to property rights in the future, the logical question is whether they have priority over the personal and fundamental human right to life. I will agree with Radolović, who finds it illogical that the right of inheritance protects the property rights of human embryos and fetuses, but

[546] Cf. Hrabar, *op. cit*. note 52, p. 273.

[547] *Ibid.*, p. 265.

[548] ORA, Art. 17, par. 2.

[549] Gavella, *op. cit.* note 196, p. 33.

[550] Slabbert, *op. cit.* note 421, p. 245.

‘‘without provisions on the protection of the most important right to life’’[551], as well as with Petrak, who states that ‘‘the first and fundamental breakthrough survival of a conceived child is to be born alive because the conceived child is undoubtedly the holder of the right to life.’’[552] It is not logical to protect the future interests of the *nasciturus*, but not the interest to leave the mother's womb. If a fiction is created for the sake of property rights, isn't it even more necessary for the purpose of possessing the personality right to life?

Penal Code

The *Penal Code* in a series of articles prescribes a more severe punishment and qualifies it as ‘‘serious’’ murder, bodily injury, negligent treatment, threats, etc., when it comes to injuries to a pregnant woman.[553] The heavier punishment, as well as the qualification of the mentioned injuries as ‘‘serious’’, is a consequence of the woman's state of pregnancy, which acknowledges the existence of a human being inside the womb. A woman is ‘‘in a state of pregnancy’’, which represents a change compared to the previous state in which the woman was not pregnant. We can say that the *Penal Code* provides additional protection to the pregnant woman in all the mentioned cases, but because of the human embryo and fetus. A woman would not be protected if she carried a thing in her womb instead of a human being. In this way, subjectivity is indirectly acknowledged to the human embryo and fetus.

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[551] Radolović, A., *Pravni poslovi prava osobnosti/Legal transactions of the rights of personality*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 35, 2014, 1, p. 106.

[552] Petrak, M., *Ius vivendi*, Traditio Iuridica, 433, Informator, 6462, 2017.

[553] The Penal Code prescribes in Art. 111, par. 2, that aggravated murder is one in which a person who is particularly vulnerable due to pregnancy is killed. Art. 115, par. 1, on illegal termination of pregnancy prescribes a sentence of 3 years in prison for anyone who, contrary to the regulations on termination of pregnancy, carries out, encourages or helps a pregnant person to terminate a pregnancy. Art. 117, par. 2, prescribes a prison sentence of 3 years for inflicting physical injury to a pregnant woman. Art. 118, par. 2, prescribes a longer prison sentence for serious bodily injury committed out of hatred towards a pregnant woman, compared to ordinary cases of serious bodily injury. Likewise, Art. 119, par. 2, which deals with a particularly serious physical injury. Similarly, in the case of a threat in Art. 139, par. 3, and in Art. 154, which prescribes pregnancy as one of the circumstances for the criminal offense against sexual freedom to be qualified as serious. The situation is the same in the case of sexual harassment in Art. 156 and in the situation of negligent treatment, (Art. 181, par. 3), as well as quackery in Art. 184, par. 3, as well as in Art. 192, par. 2 and 5, on serious criminal offense against human health.

Family Act

Article 50, paragraph 3 of the *Family Act* stipulates that ''*the husband does not have the right to sue for divorce during pregnancy and until their child is one year old*.''[554]

The aforementioned article recognizes special protection for women during pregnancy and for some time after birth, precisely because of the human embryo and fetus that develops inside her. Therefore, although protection is provided to the woman, it is also provided to her for the sake of the human embryo and fetus.

Act on Medically Assisted Fertilization

Article 32 of the *Act on Medically Assisted Fertilization* prohibits ''*any procedure intended or which could lead to the creation of a human being or a part of a human being genetically identical to another human being, whether alive or dead*'',[555] which confirms the previously analyzed bio-medical fact that an embryo is a human being, because an embryo is a new organism with its own genetic code that is created during fertilization, which means that the creation of an embryo is prohibited. The article does not stipulate that ''the creation of a (born) human is prohibited'', but the creation of a human being, meaning a human embryo. On the contrary, if the embryo is not a new organism, a human being, what is it whose creation is prohibited by Article 32, especially since the whole law is intended for fertilization with the help of medicine?

Labor Act

The *Labor Act* prohibits unequal treatment of pregnant women, women who have given birth or are breastfeeding. Article 30 stipulates that ''*An employer may not refuse to employ a woman because of her pregnancy*...'', and Article 31 stipulates that ''*a pregnant worker... who works in jobs that endanger her life or health, that is, the life or health of a child, is the employer obliged... to offer an addendum to the employment contract, which will contract for the performance of other appropriate jobs for a certain period of time*.''[556] Article 34 prohibits dismissal during pregnancy and leave of a pregnant woman.

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[554] *Family Act*, Art. 50, par. 3.

[555] *Act on Medically Assisted Fertilization*, Art. 32.

[556] Cf. *Labor Act*, Official Gazette, No. 93/14, 127/17, 98/19.

The provisions of the *Labor Act* provide pregnant women with special legal protection solely because of the state of pregnancy in which she is, that is, the human embryo/fetus she carries in her womb. Article 31 asserts ''the child's health'', which for a pregnant woman would mean the health of the human embryo and fetus. Article 31 asserts the threat to the life or the child, but not the born one, but the one that the woman carries inside her. It mentions a child, not a human embryo/fetus, and what is a child (even unborn), if not a small human. If the aforementioned provisions protect a pregnant woman, but precisely because of the human embryo and fetus, the conclusion is imposed that the human embryo/fetus, that is, its life in the mother's womb, is indirectly protected.

Act on Compulsory Health Insurance

Article 19, paragraph 4 of the *Act on Compulsory Health Insurance* determines the right to health care for women in connection with monitoring of pregnancy and childbirth.[557] The aforementioned provision guarantees a woman special health care due to the fact of pregnancy. Therefore, we can conclude that the legislator's approach is to protect a woman's pregnancy, that is, the life of a human embryo and fetus.

Act on health measures for free decision-making about having children

Act on health measures for free decision-making about having children (hereinafter: AHM) prescribes in Article 15 how ''*termination of pregnancy is a medical procedure that can be performed up to ten weeks from the day of conception, at the woman's request*''. Until the tenth week of a woman's pregnancy, the human embryo/fetus has the status of an object of law, a thing. It was the same with goods with which ''the owner could dispose of everything from its destruction (*abusus*), which for an unborn being represents *capitis deminutio maxima* by which *nasciturus* becomes *moriturus* solely on the basis of a submitted request as a manifestation of subjective will.''[558] Why on the tenth week a human embryo/fetus becomes a subject and until then was a thing? Is the woman's request justified and what exactly does it represent in the context of the right to life of a human being (more on that *infra*)? The possibility of abortion for non-medical reasons allows ''millions of human

[557] *Act on Compulsory Health Insurance*, Official Gazette, No. 80/13, 137/13, 98/19.

[558] Petrak, *op. cit.* note 272. The expression *capitis deminutio maxima* in Roman law denoted an individual who, for certain reasons, lost the status of a free man, *status libertatis*, and became a slave, that is, he ceased to be a *persona* and became a *res*.

embryos and fetuses to have the status of objects and are not recognized as persons before the law''.[559]

7.7.2. The status of the human embryo and fetus in medicine

A human embryo/fetus is treated as a patient during surgical procedures, operations, caesarean sections.[560] Ultrasound examinations, as well as prenatal examinations, are performed for the purpose of protecting the human embryo and fetus. A human embryo/fetus can be the subject of intrauterine treatment, which also includes surgery. Smoking prevention programs for pregnant women are often suggested.[561] Although the above testifies to the recognition of the subjectivity of the human embryo and fetus in medical practice, authors such as McCullough and Chervenak claim that ''the embryo and the fetus have an exclusively dependent moral status, which is why the pregnant woman and the medical staff have voluntary duties towards the fetus, but not obligations.[562] Kurjak, on the other hand, considers the fetus a patient *in utero*, but claims that being a patient does not require an independent moral status. ''Being a patient simply indicates that one can benefit from the provided clinical skills of the physician.''[563] So even though the human embryo is a patient, it embodies ''different forms of life, the first of which begins with the preembryo, but is individualized later with the embryo.''[564] Thus Kurjak claims that although the embryo is considered a patient, it is not a person and a subject but a ''life form'' until the period of individuality. But earlier it was established that this life is human and personal and is not the life form of an animal or a plant. Frković claims that for ''in order to discuss the fetus as a patient with an independent moral status, the criterion of

[559] Joseph, *op. cit.* note 114, p. 68.

[560] See also: Peterfy, A., *Fetal Viability as a Threshold to Personhood: A Legal Analysis*, Journal of Legal Medicine, 16, 1995, 4, p. 616.

[561] For example, Lemola Ć. S.; Grob, A., *Smoking Cessation during Pregnancy and Relapse after Childbirth: The Impact of the Grandmother's Smoking Status*, Springer Science Business Media, 12, 2007., 4, 525 – 533. Same Frković, A; Katalinić, S., *Pušenje i alkohol u trudnoći. Pitanje sukoba i interesa/Smoking and alcohol during pregnancy. A question of conflict and interest,* Gynaecol Perinatol, 15, 2006, 3, p. 166.

[562] McCullough, Chervenak, *op. cit.* note 417, p. 37.

[563] Kurjak, Stanojević, Barišić, Ferhatović, Gajović. Hrabar, D., *op. cit.* note 362, p. 9.

[564] Kurjak, Carrera, Mccullough, Chervenak *op. cit.* note 354, p. 342.

viability is important.''[565] Also, the human embryo/fetus is dependent, as Frković, McCullough and Chervenak claim, but its dependency does not affect its existence as a subject, although *sui generis*, as in a series of cases in which human beings depend on each other (various dependencies on medical aids, disabled people who depend on the help of others, etc.). Viability, for the reasons analyzed in the previous chapter, is not a suitable criterion for determining a human being as a person. The above situations prove that the embryo is treated as a patient, a subject, in all practical situations, although in theory this subjectivity will be denied. If the human embryo and fetus is treated as a subject by the physician, can it be an object when the mother judges its status (more on that *infra*)?

7.7.3. Conclusion

The legal status of human embryos and fetuses varies from jurisdiction to jurisdiction and from context to context, depending on the intended purpose and legal situation.[566] Its status depends on the parameters of ethical theory for treating the human being as a moral object or subject.[567] In Croatian legislation, the legal status of human embryos and fetuses is inconsistent, it differs in the branches of law. The ORA protects the future property rights of human embryos and fetuses. In Penal Code, his life is protected by third parties. In medical procedures, his life and future development are protected. In Family Act, the emotional state of the mother due to pregnancy is protected, and the human embryo and fetus, directly or indirectly, are treated as subjects. In AHM, the human embryo/fetus has the status of an object until the tenth week and is not protected from the mother. Isn't it somewhat absurd to protect the interests of the human embryo and fetus in property, criminal protection, social benefits, medicine, but not the right to life in the case of an abortion at the woman's request?[568]

[565] Frković, *op. cit.* note 398, p. 135.

[566] Cf. Gordon D. A., *The Unborn Plaintiff*, Michigan Law Review, 63, 1965, 4, p. 587. Likewise Serrano Ruiz Calderon, J. M., *Eugenics as a human right,* in: Stepkowski, A. (Ed.), *Protection of human life in its early stage*, Peter Lang, Frankfurt na Majni, 2014, p. 75.

[567] Cf. Steinbock, *op. cit.* note 408, 4 - 5.

[568] See also: Peterfy, *op. cit.* note 560, p. 631.

7.8. The importance of bio-medical and philosophical reasoning in relation to the legal status of the human embryo and fetus

All people are legal subjects. A human embryo is a medically proven human being at the beginning of development. An earlier analysis asserted that there is neither a biological nor an ontological criterion in the development of embryos and fetuses by which they would suddenly become persons at some point, therefore it should be assumed that that moment can only be at conception. The human embryo participates in human nature, which means that it has intrinsic dignity. Only humanity, not an arbitrary assessment of a person, is the criterion by which it is understood that all of us as human beings are subjects.[569] The above understanding is in accordance with international legal acts and their definitions of person and human being (see *supra*, chapter 4). The human embryo/fetus is at the beginning of development, which is why it is in a specific legal position. Given the specificity of its natural position, that is, the fact that it is at the very beginning of its own development, it is in a ''*sui generis*'' legal position. Personality rights are aquired by the creation of their subject, without the need for any particular act for the purpose of their acquisition.[570] The creation of a human embryo gives rise to its personality rights, but this number of rights is limited, in accordance with its level of psychophysical development. This is in accordance with Gavella's statement that ''acquisition of personal property, rights regarding property and legal personality coincide in time, but some personal property is created subsequently, through psychophysical development, when a person meets the criteria necessary for business capacity.''[571] There is not a single moral and legal reason why the human embryo/fetus as an unquestionably human being would not be a legal subject in the development, a subject *sui generis*, with a precisely defined scope of rights, in accordance with his natural development. In this way, he is socially recognized and included in the community of human beings, and he is not given, for example, business ability, which depends on the maturity and abilities of the human being

[569] Cf. Feder Kittay, *op. cit.* note 304, p. 101.

[570] Cf. Gavella, *op. cit.* note 196, 31 - 34. The objects of personal rights are personal, non-property goods that are recognized and protected in the legal order, such as life and health, the right to freedom, the right to honor and reputation, the right to privacy, the right to personal identity, the right to mental integrity.

[571] Gavella, *op. cit.* note 204, p. 134.

and can be limited.[572] The above understanding is in accordance with the principle of equality, which does not imply that all involved interests should be valued in the same way, without difference, but that two things should be valued in the same way in the part in which they are equal, and in a different way in the part in which are different. Human beings are equal in their dignity and intrinsic value, but with different abilities in accordance with which rights will be recognized. Given that the number of subjective rights, property and non-property, is immeasurably large, it is a legitimate question whether all rights, including the fundamental human right to life, should be conditioned by legal subjectivity. The right to life is a natural law right, pre-state right, independent of rights of the civic person, of the human individual as a citizen.[573] Jacques Maritan explains that ''fundamental rights, like the right to existence and life; the right to personal freedom or to conduct one's own life as master of oneself and of one's acts… are rooted in the vocation of the person (a spiritual and free agent) to the order of absolute values and to a destiny superior to time.''[574] However, politicial rights ''spring directly from positive law and from the fundamental constitution of the political community… and depend indirectly upon natural law.''[575]

Legal equality implies the existence of legal capacity in all human beings, although there are differences in relation to its scope, which is variable and expands or narrows according to criteria and circumstances, but ''a natural person remains a legal subject for the entire duration of her existence.''[576] Radolović states how ''human beings differ from each other in the scope of personality rights, as well as in the scope of property.''[577] A human embryo/fetus is not an independent person with full legal status, but it does not need to be

[572] Business capacity is acquired only at the age of 18, and earlier, in accordance with recent theoretical and legal considerations, there are cases of limited business capacity of a child only for certain legal affairs and legal actions.

[573] More on that Maritain, J., *The rights of Man and Natural Law*, The University Press, Glasgow, 1945, 45 - 47.

[574] *Ibid.*, 43 - 44.

[575] *Ibid.*, p. 45.

[576] *Ibid.,* p. 134 and 166. All natural persons have legal capacity without exception, but the above does not mean that special legal norms could not determine certain categories of natural persons to have certain special rights or obligations, which would make their capacity different.

[577] Radolović, *op. cit.* note 179, p. 143.

in order to possess basic personality rights.[578] Just as a child, although a legal subject, is not equal to an adult, due to the fact that he does not have business capacity, responsibility towards people, he is treated equally in humanity, and the differences that exist are not a reason to be deprived of the subjective non-property right to life. The analysis of the legal subject ascertained that this concept includes both the technical dimension, aimed at the purpose, as well as the natural law dimension. Precisely because of this fact, the technical purpose of the status of a legal subject will come to the fore with the development of a human being, but the natural law purpose is ascertained at the moment when a human being begins to exist biologically, and then its non-property rights, fundamental human rights, should be recognized. An embryo is a human being that should be treated equally in humanity, but differences exist in relation to a child, as well as an adult, exclusively in the stage of development. The human embryo and fetus should be accorded status in conformity with the specific legal and natural situation in which it finds itself, as we do in all other situations in which human beings are legal subjects, although not with the full scope of rights and obligations. For example, the right to work, which is a human right, does not belong to a child under a certain age. Given that in relation to other ''borderline groups'' of human beings, the difference is that the human embryo/fetus is at the very beginning of development. In accordance with the personality rights analyzed above, as well as the philosophical-anthropological and moral status of the human embryo and fetus, given its *sui generis* legal situation, the human embryo/fetus is suitable for obtaining the personality right to life, the fundamental human right of the first generation, whose holder is every human being regardless of qualities and abilities. The aforementioned determination is in accordance with the existing status of human embryos and fetuses in criminal law, therapeutic procedures in medicine, and family law. Another personality right that, in accordance with development, would belong to the human embryo and fetus is the right to bodily integrity that belongs to him with regard to his biological existence, within which he is entitled to the right to health. The right to the health of the human embryo and fetus includes the right to intrauterine treatment and therapeutic procedures. However, there is a difference between these rights. Right to life is both a human right and a personality right and even when its civil law significance is denied, it remains a pre-positive right, therefore, human embryo/fetus should have it even if it is not considered as

[578] Cf. Beckman, *op. cit.* note 260, 21 - 23.

a member of a community. The right to bodily integrity and the right to health are not of the same nature.

According to Honnefelder, a human embryo/fetus would also be suitable for possessing the right to identity.[579] However, that right implies a name and citizenship, which arise from his birth. The stated limited number of rights is in accordance with the definition indicative in the above-cited *Convention on the Rights of the Child*[580], as well as in the *Declaration on the Right to Life of the Unborn Child of the International Committee for the Protection of Unborn Children* (Vienna, 1986), which determined that a human embryo/the fetus as a legal subject has the right to life, the right to health and its protection. Other rights that are an integral part of the overall legal capacity of a human being, the human embryo will acquire with development, as a newborn, a child and then an adult. The one who claims the opposite, that the human embryo/fetus should not have a *sui generis* legal status, should prove what are the undoubted parameters that challenge the embryo as a *sui generis* subject, as well as explain the ''tectonic'' changes that occur in the legal system through the consistent application of these parameters on all human beings.

7.9. Legal status of the human embryo and fetus – fictional or naturalized

Crockin believes that a conclusion ''about the status of the human embryo cannot be reached because the war over this issue is being waged by hidden agendas.''[581] Hlača states that ''political goals are one of the determinants that influence the creation, development and protection of a person's rights, and even the status of a fetus becomes at a certain stage of the development of society a political-legal tool for the purpose of achieving goals.''[582] What if, regardless of the fact that the human embryo is a legal subject *sui generis* in accordance with the natural state of affairs, its status is nevertheless understood as a political issue conditioned by some other interests? The legal status of the human embryo

[579] Cf. Honnefelder, L., *Bioetics and the normative concept of human selfhood*, in: Duwell, M.; Rehmnn-Sutter, C.; Mieth, D. (Ed.), *The cotingent nature of human life. Bioetics and the Limits of Human Existence*, International Library of Ethics, Law, and the New Medicine, Berlin, 2008, 81 - 82.

[580] As cited in Hrabar, *op. cit.* note 453, p. 804.

[581] Crockin, S. L., *The Embryo Wars: At the Epicenter of Science, Law, Religion, and Politics*, Family Law Quarterly, 39, 2005, 3, p. 632.

[582] Hlača, N., *Ogledi o pravnom statusu fetusa/Essays on the legal status of the fetus*, Zbornik Pravnog fakulteta u Zagrebu, 40, 1990, 2, p. 232 and 240.

and fetus can be conditioned not only by an approach that reduces the human embryo/fetus to a biological substrate by reducing the metaphysical part of the substrate, but also by understanding the legal subjectivity of the human being as fictional, not only in relation to property rights, but also in relation to personality rights. If the legal status of the human embryo and fetus is linked to its philosophical-anthropological status, this will mean that the human embryo has the right to protection based on its own intrinsic value and independently of others. If the legal status of the human embryo and fetus is a technical, political issue, then it is not necessary to determine its biological-ontological components, but it enables others to decide when it is acceptable to protect the rights of the entity.

7.10. Legal status of a human being as a political issue

Scientists Forsythe and Arago, examining whether the human embryo/fetus belongs to the ''dubious class'' according to the established criteria of the modern legal doctrine of equal protection, analyzed whether there is a history of discrimination against them as a group of human beings; do they participate in society equally as other groups; whether they possess as a group some immutable characteristic and whether they are politically powerless, and concluded that the human embryo with its characteristics corresponds to some criteria of a dubious class.[583] The political conditioning of the legal status of human embryos and fetuses is a consequence of abandoning deontological and applying utilitarian principles in bioethical issues. Thus, the legal status and the question of whether a human embryo/fetus is a person becomes, in accordance with poststructuralist principles, ''a calculation that justifies an action.''[584] The concept of the person changes in a way that excludes the human embryo/fetus, which is in line with Foucault's claim that ''a concept once created can be modified if a new problem requires new concepts for which the old one loses its meaning''.[585] A redefinition of the person as a concept that will enable

[583] Cf. Forsythe, C. D.; Arago, K., *Roe v. Wade and the Legal Implications of State Constitutional Personhood Amendments*, Notre Dame Journal of Law, 30, 2016, 2, 303 - 304.

[584] As cited in Hula, K., *Responsibility, Complexity, and Abortion: Toward a New Image of Ethical Thought,* Edinburgh University Press, Edinburgh, 2014, 165 - 169.

[585] *Ibid.* Focault considers traditional ethics, including its concepts, dangerous because it radically limits our possibility of change.

the realization of utilitarian goals will be appropriate when deciding whether a human embryo/fetus is a person.[586] Theoreticians who propose conditioning the legal status of human embryos and fetuses are not rare. Schmidt and Szalewski consider the approach of fictionalizing legal status ''as a compromise between legal technique and opportunity.''[587] Hammack states that ''a flexible approach is the only appropriate response to the complex biological reality of human reproduction in the 21st century.''[588] Berg considers the legal subjectivity of a human being a political issue because ''recognition of the legal status of some entities may harm or limit the rights of already recognized ones.''[589] Dworkin is on the same track, comparing the status of human embryos and fetuses to trees, so ''just as the declaration of trees as a legal entity would prohibit their cutting, so the human embryo/fetus as a legal subject limits one's constitutional rights''[590] ''The issue surrounding a person is clear and has less to do with rational argumentation and more to do with practical politics,'' states Hicks, so ''regardless of the arguments, a middle point of view is sought.''[591] Vines Crist believes that the fundamental rights (to life) of a human embryo and fetus can be conditioned by a legal definition because ''the legal status of a person is result-oriented and depends on the purpose that society wants to achieve, so the legal personality of a human embryo and fetus can be limited, even if is a person.''[592] Dunaway believes that ''human embryos should not be treated the same as born humans for all purposes because within the framework of the principle of legal equality, inequalities in law can be justified by legitimate state interests.''[593] Rivard believes that ''legal

[586] Likewise Joseph, *op. cit.* note 114, p. 149. Joseph highlights the large number of academic literature that tends to redefine the person as a term with philosophical connotations that becomes an easily manipulated concept for the purpose of dehumanizing the child before birth.

[587] As cited in Rupčić, *op. cit.* note 69, p. 201.

[588] Hammack, J. J., *Imagining brave new world: Towards nuanced discourse of fetal personhood,* Women's Rights Law Reporter*,* 35, 2014, 3 - 4, p. 369.

[589] Berg, *op. cit.* note 72, p. 374 and 380. She cites the example that if several entities have the right to vote, from a quantitative perspective the right of others who have the right to vote weakens.

[590] Dworkin, *op. cit.* note 76, 113 - 114.

[591] Hicks, *op. cit.* note 419, 807 - 811.

[592] Vines Crist, J., *The Myth of Fetal Personhood: Reconciling Roe and Fetal Homicide Laws*, Case Western Reserve Law Review, 60, 2010, 3, 864 - 874.

[593] Dunaway, R., *Personhood Strategy: A State's Prerogative to Take Back Abortion Law*, Willamette Law Review, 47, 2011, 2, p. 356.

personhood can be denied, taking into account social interests.''[594] Parness believes that ''it is necessary to evaluate all the consequences that would arise from the status of the human embryo as a subject, in order to reach a conclusion on whether a certain value overrides the others.''[595] Rubenfeld claims that ''the question of the beginning of life is political, not legal, and the point at which the fetus becomes a person is not a matter of fact, but rather a matter of status that is subject to social allocation.''[596]

The aforementioned authors do not see a problem in the fact that the legal system is incoherent with such regulation of the legal status of human embryos and fetuses and that it is politically conditioned and justified by legitimate state interest, although it is clear from history that fundamental human rights should not be conditioned. Limiting or not the business capacity of a human being because it is not sufficiently developed and mature is a social issue, but not a question of the right to life, which the state does not even grant. Some theoreticians, such as Aljalian, are of the same opinion, who concludes that these are ''intellectual games in which the courts provide fictional companies with *de facto* greater protection than the human embryo and fetus (denying their right to life), which is contrary to common sense and alarming, taking into account that the same has had a devastating effect countless times in history.''[597] If there is a legal framework, a fiction, by which a company satisfies legal subjectivity for the purpose of achieving a property purpose, shouldn't it also exist for all human beings, and thus presumably for the human embryo/fetus if proven to be a human being? [598]

William L Saunders believes that ''semantic gymnastics that leads to the dehumanization and denial of personhood to the human embryo and fetus, resulting in its exposure to violence and exploitation, is evident in *Roe v. Wade*, which is an example of ignoring scientific facts for political reasons.''[599] The philosophical-anthropological status of a

[594] Rivard, *op. cit*. note 72, p. 1432, 1495 and 1509.

[595] Parness, J. A., *Values and Legal Personhood*, West Virginia Law Review, 83, 1981, 3, 487 - 501.

[596] Rubenfeld, J., *On the Legal Status of the Proposition that Life Begins at Conception*, Stanford Law Review, 43, 1991, 3, 614 - 615.

[597] Aljalian, *op. cit.* note 284, 518 - 522.

[598] *Ibid.,* p. 495 and 517. Dyschkant, *op. cit.* note 484, p. 2084.

[599] Saunders, W. L., *Judicial interference in the protection of human life – a perspective from the United States,* in: Stepkowski, A. (Ed.), *Protection of human life in its early stage*, Peter Lang, Frankfurt na Majni, 2014, p. 114 -

human being as a person is of course a question and, except in the area of material, property-law relations, it should not be conditioned by the desire or interest of existing human beings. It would be necessary to determine whether there are justified reasons for which the opposite could be claimed.

7.11. Consequences of the status of the human embryo as a subject *sui generis*

Manian, as well as Slabbert, claim that the status of human embryos and fetuses is conditioned not only by abortion, but also by profit from the sale of abortifacients, fertility treatments, and research on stem cells.[600] Parness believes that ''potential changes in family and criminal law (children could sue their parents for neglect during pregnancy, and in criminal law, abortion would be traditional murder)'' should be taken into account when deciding on the legal status of embryos.[601] Steinbock considers the economic consequences in general, and in particular the costs that the status of the human embryo and fetus as a subject would produce for pension insurance.[602] Robertson states that ''enormous profits are made from the sale and provision of reproductive services.''[603] Considering a human embryo as a person would cause complications for carrying out IVF, bearing in mind that it destroys a certain number of embryos.[604] The moral and legal status of the human embryo as a subject would have, according to Gaddie, ''far-reaching consequences for

115 and 119. In the California Medical Association, it was stated that for the purpose of wide acceptance of abortion, it is necessary to underestimate the respect for every human life in order to separate the idea of abortion from the idea of killing. (California medicine - The Western Journal of Medicine, 1970, p. 67. Saunders states that the editors of the journal accepted ''semantic gymnastics'' with the aim of denying the scientific claim that human life begins at conception and lasts until death.

[600] Cf. Slabbert, *op. cit.* note 421, p. 238. Likewise Manian, M., *Lessons from Personhood's Defeat: Abortion Restrictions and Side Effects on Women's Health*, Ohio State Law Journal, 74, 2013, 1, p. 77 and 86. Likewise Joseph, W., R., *Personhood and the Contraceptive Right*, Indiana Law Journal, 57, 1982, 4, p. 603.

[601] Parness, *op. cit.* note 595, p. 487, 500 - 501.

[602] Cf. Steinbock, *op. cit.* note 408, p. 104. argues that if fetuses were counted as dependent people for income tax purposes, the total loss of income could exceed $1 billion annually, and the fiscal consequences could be dramatic even in the context of property law, where age is a factor in calculating receipts and allowances. Pension costs would also be high (calculated by Missouri columnist James Kilpatrick).

[603] Robertson, *op. cit.* note 529, p. 15.

[604] See also: Paulk, L. B., *Embyonic Personhood: Implications for Assisted Reproductive Technology in International Human Rights Law*, American University Journal of Gender Social Policy and Law, 22, 2014, 4, p. 820.

fertility clinics that are part of a $4.5 billion industry in the United States.''[605] Marry Anne Glendon claims that ''in the US, abortion is a highly profitable industry.''[606] Embryonic tissues are used for the needs of the pharmaceutical, cosmetic and food industry, most often for the purpose of obtaining vaccines based on fetal cells, cosmetic preparations, food flavor enhancers.[607] Research on embryos is carried out for the community's interest in new scientific solutions.[608] The definition of the human embryo as a subject endangers all the above-mentioned activities, and then also the economic breakthroughs that come with them. It is necessary to determine what the situation is when it comes to a woman's request for an abortion.

7.11.1. The human embryo/fetus as a *sui generis* subject and abortion at the woman's request

In the context of bioethical discussions on abortion, women are most often mentioned as the subject on whom the status of the human embryo and fetus would depend. Some of the authors who consider the above justified are J.R. Schroedel, B. Paulk, L. Minkoff, M. Paltrow.[609] Rubenfeld suggests that ''the line according to which the human fetus would

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[605] Gaddie, G., *The Personhood Movement's Effect on Assisted Reproductive Technology: Balancing Interests under a Presumption of Embryonic Personhood*, Texas Law Review, 96, 2018, p. 1301.

[606] Glendon, Anne, M., *Abortion and divorce in western law*, Harvard University Press, Cambridge, 1986, p. 20. See also: Švajger, A., *Odgovornost u temeljnim (bazičnim) istraživanjima/Responsability in fundamental (basic) research*, in: Znidarčić, Ž. (Ed.), *Medicinska etika 1/Medical Ethics 1*, Hrvatsko katoličko liječničko društvo, Zagreb, 2004, p. 160. Švajger states that the companies Anatomic Gift Foundation and Opening Lines Inc, which specialize in the trade of fetal organs, make large profits by concluding contracts with clinics where abortions are performed until the end of pregnancy. Since federal law prohibits the purchase and sale of human body parts, they justify their offers as renting space in abortion clinics for the purpose of performing the service of collecting fetal remains and reducing the costs of the clinic. Purchase orders from researchers, university laboratories and pharmaceutical companies are made with the specification of the fetus according to age, type of tissue, preservation method, quantity, etc.

[607] For more details see: Hacques Delaye, J., *Trgovci nerođenom djecom/Traders of unborn children*, I. Zirdum, Đakovo, 1994.

[608] Cf. Robertson, *op. cit.* note 338, p. 501.

[609] Cf. Schroedel, J. R.; Fiber, P.; D. Snyder, B., *Women's Rights and Fetal Personhood in Criminal Law*, Duke Journal of Gender Law and Policy, 7, 2000, 1, p. 117. Likewise Paulk, *op. cit.* note 604, p. 822. The embryo as a person violates reproductive autonomy Minkoff, H. L.; Paltrow, L. M., *The Rights of Unborn Children*

have the status of a person is drawn late enough in its development, so that the woman has the right to an abortion" because he believes that ‘‘due to the constitutional interest of the mother, it is necessary to reject the proposal that life begins at conception.’’[610] Anne Warren claims that ‘‘a woman's right to protection of health, happiness and freedom should override the right to life even of a fully developed fetus because when we have a situation in which there is no strong social need for every child, then regardless of whether it is decent for a woman to have an abortion in the seventh month of pregnancy so she doesn't have to postpone her trip to Europe, that's not immoral.’’[611] Olivia Little believes that ‘‘the early embryo and fetus have a modest status until the third trimester, when the critical issue of the mother's bodily integrity is balanced with the needs of the fetus.’’[612]

If a human embryo/fetus is not a person, it is unclear why the authors propose a ‘‘line-drawing,’’ that is, the point at which the right to life of the fetus overrides the presumed privacy interest. If the demand for privacy overrides the right to life, then it overrides it at all stages of pregnancy. If the status of the fetus is conditional, then it is conditional during the entire period, and not only up to a certain point in the pregnancy. If it is not conditional, then it should be taken into account independently of the interests of other persons, including the mother. ‘‘If the human embryo is a subject, then its subjectivity excludes the right of the parents to freely decide on the birth of children,’’ says Gavella.[613] But we could reformulate the above in such a way that if the human embryo is a subject, then its subjectivity excludes the right to destroy it.

7.12. Consequences of excluding the human embryo from constitutional personality and legal subjectivity

and the Value of Pregnant Women, Hastings Center Report, 36, 2006, 2, p. 26, state that in the past the expansion of the rights of the fetus resulted in the reduction of women's rights.

[610] Rubenfeld, *op. cit.* note 596, p. 601, 630 and 635.

[611] Anne Warren, *op. cit.* note 72, p. 54.

[612] Olivia Little, *op. cit.* note 278, p. 348. Likewise Bird, B., *Fetal Personhood Laws as Limits to Maternal Personhood at Any Stage of Pregnancy: Balancing Fetal and Maternal Interests at Post-Viability among Fetal Pain and Fetal Homicide Laws*, Hastings Women's Law Journal, 25, 2014, 1, p. 56. Bird argues that laws to protect the fetus and the mother can co-exist because women have the right to terminate a pregnancy before viability, but the same needs to be examined in the post-viable stages of pregnancy.

[613] Gavella, *op. cit.* note 196, p. 33.

How can we justify the differences in the treatment of human beings as a legitimate state interest, if we are aware of how the system of National Socialism, the slave society and similar examples mentioned earlier worked in the same way? ''Semantic and legal simplifications of the person have been used in the past to justify the enslavement of African Americans, Jews, and numerous other groups, and the same semantics is present today in relation to the status of the human embryo and fetus,'' Bullock concludes.[614] History provides good reasons to be wary of political arguments that define human beings as non-persons. Conditioning the right to personality, that is, the right to life, to arbitrary criteria that will serve to achieve some goals, has proven countless times in history to be a complete failure with exterminating intentions. In the absence of rational principles on whether every human being is a legal subject, a member of a community, ''the internal code of criteria of a certain community can represent an arbitrary premise.''[615] ''Ethical attitudes from the end of the 19th century and throughout the 20th century that depersonalized and dehumanized human beings'', concludes Stepkowski, and ''today they the same attitude is present towards the human embryo and fetus, are marked as the most shameful chapters in the history of moral philosophy''.[616] Dred Scott was a sign of the times. Is *Roe v. Wade* a sign of the times?

The deprivation of the moral and then legal status of the human embryo and fetus in *Roe v. Wade* can be compared to the deprivation of the status of a slave in the Dred Scott ruling. ''Slavery and abortion share a common problem of the definition of a human being.''[617] *Roe v. Wade* is a ruling that took the interests of others (the mother) without deciding the status of one category of human being (the human embryo and fetus), just as the ruling in Dred Scott. Slavery seemed to make sense in the era when it was practiced, but today the opposite has been proven. Today, the idea that African-Americans are not persons is morally repugnant and legally impossible. Will it take another century to see how today's treatment of the human embryo/fetus is just as horrible? Other theoreticians, such as

[614] Cf. Bullock, J. R., *Abortion rights in America*, Brigham Young University Law Review, 1994, 1, p. 70. Same Feder Kittay *op. cit.* note 304, p. 101.

[615] Fuller, *op. cit.* note 111, p. 181 - 182.

[616] Stepkowski, A., *The necessity for a holistic approach to protecting human life, op. cit.* note 87, 97 - 101.

[617] Nathanson, *op. cit.* note 318, p. 192.

Gregory J. Roden, consider the situation in which the law conditions the existence of the fetus not on its intrinsic value, but on the arbitrary decision of others, to be very disturbing and similar to slavery.[618] M. Weber concludes that ''the legal system that treats unborn children as things has not gone beyond the mentality of slavery.''[619] Lugosi speaks of ''the continued oppression and extermination of an unwanted class of unborn human beings.''[620] Misperception of the public changes, ultimately leads to the exploitation of individuals for social gain, therefore all human beings could be threatened at some point. If a human embryo/fetus is not a person because of the interests of others, then we are all at risk because the political understandings of a person can go in any direction.[621] The numerous analyzed bio-medical criteria that try to prove that the human embryo is not a person are in reality political criteria that are tried to be rationalized. Not a single ''deficiency'' of a human being is sufficient reason to affect the recognition of a human being as a person, which implies that it is also considered morally significant to realize the rights and privileges that come with that status. By reducing the embryo to a protected value, we reduce it to the status of an animal or a plant or lower. The recognition of the human embryo/fetus as a legal subject means that as a member of the human community it is considered a moral subject, which primarily implies treating every human being with respect, as well as the prohibition of killing. There are no criteria according to which some human beings would be recognized with dignity, meaning the status of a legal subject, and others not. Dignity is not ascribed but declared[622], and abandoning the concept of dignity means venturing into dangerous and inhumane waters.[623] No benefit of society before human life should be the goal of law.[624] A pragmatic approach to legal subjectivity in the field of personal rights, which excludes some human beings from the protection of fundamental human rights, besides making law an incoherent and unjust system,

[618] Roden, *op. cit.* note 305, 270 - 285.

[619] Weber, W. M., *The personhood of unborn children - a first principle in surogate motherhood analysis.,* Harvard Journal of Law and Public Policy, 13, 1990, 1, p. 157.

[620] Lugosi, C. I., *Beyond Personhood: Abortion, Child Abuse, and Equal Protection*, Oklahoma City University Law Review, 30, 2005, 2, p. 283.

[621] Cf. Paulsen, *op. cit.* note 478, 66 - 69.

[622] Cf. Schockenhoff, *op. cit*. note 15, 13 - 14.

[623] Cf. Hrabar, *op. cit*. note 52, p. 267.

[624] Cf. *ibid*., p. 265.

represents a bad example of a legal system.[625] In case of doubt about whether a human embryo/fetus is a person whose life cannot be taken away by the state, the scientific concept of a person should support the legal probability of the position that it is a person, with *sui generis* status.[626]

8. LEGAL REGULATION OF ABORTION

Abortion is a political, medical, social, legal and economic issue. The legal regulation of abortion requires the clarification of a series of previous legal, social and philosophical-anthropological questions, of which the fundamental question is whether a human embryo is a person and if so, is abortion, instead of an assumed expression of privacy, the murder of a person. The legal regulation of abortion also requires an answer to other previous questions, such as whether the pregnancy is a healthy or sick medical condition of the woman, what is the nature of privacy interests, what interests, i.e. rights, other subjects have, except for the human embryo/fetus, also the father and the doctor, in which measures political circumstances determine the regulation of abortion, whether abortion is a human right, and then also a measure of the democracy of the community.

8.1. History

In history, abortion has been understood differently, in accordance with different philosophical, theological and medical knowledge of a particular time. For generations, lawyers have interpreted the status of the human embryo/fetus differently.[627] In times when the human embryo was considered an animated life, abortion was a crime against the human being.[628] Hammurabi's code punished abortion, even if it was involuntary and

[625] Cf. Finnis, *op. cit*. note 37, p. 168.

[626] Greasley, K., *Prenatal personhood and life's intrinsic value: reappraising Dworkin on abortion*, Legal theory, 22, 2016, 2, p. 152, states that if we deny personhood to a human embryo/fetus, we should ask ourselves how likely we are to be right this time, given the disastrous consequences that have occurred when denying personhood to human beings in the past.

[627] Cf. Muller, W. P., *The criminalization of abortion in the West*, Cornell University Press, London, 2012, p. 116.

[628] Cf. Ziebertz, *op. cit*. note 433, p. 109.

accidental. The ancient Egyptians believed that life begins at birth.[629] In ancient Greece, Solon and Lycurgus considered abortion a crime that deserved punishment.[630] According to Stoic philosophy, the fetus was not considered a human being. It was believed that a child gets a soul at birth and becomes a person. The aforementioned understanding led to frequent abortions and infanticide, as well as to the aversion of Roman women giving birth in Ancient Rome.[631] In contrast, Justinian's Christian Roman law punished abortion and treated it as murder.[632] In the last phase of the Roman Empire, the fetus was considered as a being that is separate from the mother, which became one of the religious and ethical standards of Western civilization.[633] In the early Middle Ages, the Church had a particularly significant role in the debate on abortion, which was ''also a matter of family honor and social reputation, although the above is not documented,'' according to Mistry.[634] Augustine, the great Christian philosopher, had no doubts about the status of the unborn child: ''It did not belong to the mother's body while it was in her womb''.[635] Thomas Aquinas, the medieval great of philosophical thought, teaches that abortion is an unnatural act and explains that when terminating a pregnancy, those who do it ''kill the child's body and soul''.[636] Sixtus V was the first pope to declare all intentional abortions murder.[637] During the Middle Ages, from the 13th to the 17th century, common law in Europe established the rule that pregnancy exists when it is visible or when a woman declares that she is pregnant, since primitive medical ''technology'' did not allow determining the existence of a child. Only from the moment when a woman ascertained that she was pregnant, the abortion was considered murder.[638] At that time, doctors dealt exclusively with the treatment of diseases, not ''parenthood planning'', and reproduction

[629] Cf. Slabbert, *op. cit.* note 421, p. 239, and Riddle, J. M., *Eve's Herbs: A history of contraception and abortion in the West*, Harvard University Press, Cambridge, 1997, p. 70.

[630] Cf. Lasić, *op. cit.* note 1, p. 59.

[631] Cf. *ibid.,* p. 47 and 59.

[632] Cf. Slabbert, *op. cit.* note 421, p. 239.

[633] Cf. Curran, *op. cit.* note 271, p. 59.

[634] Cf. Mistry, Z., *Abortion in the early middle ages C 500-900*, York Medieval Press, Boydell and Brewer, Suffolk, 2015, p. 298.

[635] Lasić, *op. cit*. note 1, p. 69.

[636] *Ibid.* 94 - 99.

[637] *Ibid.* 102.

[638] Cf. Hammack, *op. cit.* note 588, p. 359.

in Europe was dependent on external factors such as war, plague, famine.[639] The *Constitutio criminalis Carolina*, which was enacted in 1532 by Charles V, Holy Roman Emperor, prescribed the death penalty for abortion. In England, in 1803, the *Malicious Shooting or Stabbing Act* prescribed the death penalty for a person who causes or performs an abortion after the mother felt movement, and in 1837 the penalty was reduced to 15 years of imprisonment. In Enlightenment France, abortion was a crime that was punished with a sentence of 20 years of hard prison for anyone who enables a woman to have an abortion.[640] Austria only abolished the death penalty for abortion in 1787, which was prescribed for a woman and any person who helps her to have an abortion. Prussia defended the general rights of man and the human embryo/fetus in the *Allgemeines Landrecht* in 1794. In the period of the middle to late 19th century, common law in the Europe abandoned the distinction between the period before and after the movement of the human fetus.[641] In the United Kingdom, until 1948, abortion was punishable by life imprisonment. In the USA, until 1821, according to common law, abortion was allowed until the moment the mother felt the first movement, and with the progress of medicine in the mid-19th century and the knowledge that the human embryo/fetus is alive before the mother feels movement, scientists and doctors advocated for the restriction of abortion even before that moment.[642]

During the 19th century, doctors adhered to the Hippocratic Oath, expressing clear resistance to performing abortions.[643] An 1857 American Medical Association Committee Report attributed the practice of abortion to ''widespread popular ignorance of the true nature of the crime, and the belief that the fetus is not alive until the mother feels movement''[644] In the mid-to-late 19th century, states legalized abortion as murder, regardless of the moment the mother felt the movement of the unborn human, which is why the human embryo/fetus was protected at every stage of development, based on

[639] Cf. Riddle, *op. cit*. note 629, p. 122 and 169.

[640] Cf. *ibid.,* p. 208.

[641] Cf. Tribe, L. H., *Abortion: The Clash of Absolutes*, W. W. Norton and Company, New York, London, 1990, p. 34.

[642] Cf. Dunaway, *op. cit.* note 593, p. 337.

[643] Cf. Tribe, *op. cit.* note 641, 28 - 30.

[644] Johnson, A., *Abortion, Personhood, and Privacy in Texas*, Texas Law Review, 68, 1990, 7, 1523 - 1524.

medical evidence that human life begins at conception.[645] Legal theory continued to condemn ‘‘criminal abortion’’ in the USA and UK during the decades before World War II until the general reform movement and liberalization in 1965.[646] After World War II, in the late 1940s, ten Nazi leaders were convicted of criminal acts of incitement to abortion.[647] Part of the Nuremberg Records refers to the human embryo/fetus which is considered a subject to which legal protection belongs.[648] Historian Hunt, in his research on the Nuremberg Trials, states that ‘‘the condemnation of abortion did not apply only to forced, but also to voluntary abortions.’’[649] The decriminalization of abortion was condemned in the Nuremberg Trials as incitement to abortion, and Nazi directives on the decriminalization of abortion were given as evidence of crimes against humanity.[650] In 1947, the British Medical Association condemned abortion, and the doctors who performed it were considered war criminals and persons without moral and professional

[645] Cf. Forsythe, Arago, *op. cit.* note 583, p. 281, and Riddle, *op. cit.* note 629, p. 209.

[646] Cf. Curran, *op. cit.* note 271, p. 72. During the 60s and 70s, many Western countries legalize abortion. Germany (although emphasizing the right of the embryo as an independent human being subject to constitutional protection) in 1975, England in 1967, US in 1973, France in 1975, Italy in 1978. Scandinavian countries took a neutral approach of bureaucratic form. Ireland, Belgium and Switzerland did not radically change the legal approach to abortion in the 70s and 80s. Switzerland liberalized abortion back in the 1940s of the 20th cetury.

[647] Cf. Puppinck, G., *Abortion and the European Convention of Human Rights*, Irish Journal of Legal Studies, 3, 2013, 2, p. 176. For more details see: Hunt, J., *Abortion and the Nürnberg prosecutions - a deeper analysis*, in: Koterski, J. W. (Ed.) *Life and Learning VII: Proceedings of the Seventh University Faculty for Life Conference*, University Faculty for Life, Washington, 1998.

[648] Cf. Joseph, *op. cit.* note 114, p. 10.

[649] Joseph, *op. cit.* note 114, p. 10. Joseph states that Richard Hildebrandt and Otto Hofmann were sentenced after World War II to 25 years in prison (Hofmann) and death (Hildebrandt) for, among other things, coercion and instigation of abortion.

[650] Cf. *ibid*., p. 73 and 145. Joseph states that in the Nürnberg Trials abortion was treated as a violation of the right to life and freedom of a human being, and that the Nazis considered abortion as an act of murder. For more details see: Schuster, E., *The Nürnberg Code: Hippocratic ethics and human righst*, Lancet, 351, 1998. i Telman, J., *Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*, Review of Law and Social change, 24, 1998, p. 93. Telman states that the Abortion Act in post-war Germany maintained the acceptance of responsibility for the actions of the Nazi government, as well as the rejection of the view that there are less valuable human lives. The exception was East Germany, which was not held responsible for the actions of Hitler's government, but abortion was regulated in accordance with ideological and economic goals.

conscience.[651] It is possible that the influence of new ideologies led to the fact that abortion, from a criminal offense and a conviction in the Nuremberg Trials in the post-war period, became a right that is treated like, for example, going to the dentist.

8.2. The road to the legalization of abortion in communism

The Soviet Union was the first country in the 20th century which legalized abortion and made it available on demand.[652] Marxist society considered the legalization of abortion as a tool that enables the realization of women as workers.[653] Lenin legalized abortion by decree of the Commissar for Health and Justice in 1920, with the alleged aim of liberating the Soviet woman and proclaiming her equality with men. Stalin's Constitution (1936) prohibited abortion (until 1953, when the ban was lifted).[654] In communist Yugoslavia and then in the Socialist Republic of Croatia, AHM ''reflected the socialist goal of including women in the context of self-governing economic production.''[655] In the communist regime, economic interests and collective goals were put before individual ones, which was and is today, of direct influence on the moral and then legal status of the human embryo/fetus, and then on the question of the possibility of abortion.

8.3. Factors in the legalization of abortion in Western society

[651] Cf. Joseph, *op. cit.* note 114, p. 191.

[652] Cf. Avdeev, A.; Blum, A.; Troitskaya, I., *The history of abortion statistics in Russia and the USSR from 1900 to 1991*, Population: An English Selection, 7, 1995, p. 42.

[653] Cf. Valjan, V., *Bioetika/Bioethics*, Svjetlo riječi, Sarajevo and Zagreb, 2004, p. 161. On the contrary, Selanec, who cites various examples of the ''different'' status of women compared to man in the socialist system. See: Selanec, G., *A Betrayed Ideal: The Problem of Enforcement of EU Sex Equality Guarantees in the CEE Post-socialist Legal Systems*, University of Michigan Law School, Michigan, 2012, 13 - 62. Selanec states that ''true socialism insisted that some differences between man and women are too obvious to be denied and ignored'', p. 14.

[654] Cf. Laun, *op. cit.* note 34, p. 52.

[655] Popović, P., *Kritika koncepcije pravednosti usvojene u Rješenju Ustavnog suda o tzv. ''Zakonu o pobačaju''/A Critique of the Conception of Justice Adopetd in the Decision of the Constitutional Court in the So-called ''Abortion Law''*, Bogoslovska smotra, 88, 2018, 1, p. 132.

Solinger believes that ‘‘The Great Depression consolidated the link between the economy and reproduction because the reproduction of socially and economically unfit women caused social and economic problems.’’[656] In the 30s of the 20th century, poverty, along with the population theory, is cited as one of the main reasons in favor of the legalization of abortion, so a low percentage of births is considered the key to economic prosperity and equality.[657] In the 40s and 50s of the 20th century, the focus in the abortion debate has shifted to psychiatric reasons. The concept of health is changing in such a way that it ‘‘includes the entire mental state of a woman’’.[658] Just as doctors had a great influence on legal restrictions on abortion in the 19th century, they had an equal influence in the fight for its legalization. Dr. Nathanson, one of the leading men of NARAL, the movement in the USA for the legalization of abortion, claims that the most successful tactic for the legalization of abortion was ‘‘convincing liberal intellectuals of the guilt of the church hierarchy for imposing dogmatic views on the secular state expressing opposition to the legalization of abortion’’.[659] Noonan cites population growth, the pill, and a changed valuation of sexuality as factors that influenced the legalization of abortion.[660] The changed valuation of sexuality is a consequence of the global cultural and social upheaval in relation to the role of women in society, which occurred in the 60s of the 20th century.[661] Sexuality reformers used ‘‘the tactic of treating women as victims of men's lust on the one

[656] Solinger, *op. cit.* note 298, p. 116.

[657] Cf. Tribe, *op. cit.* note 641, p. 35 and 41, and Reagan, J. L., *When abortion was a crime*, University of California Press, Oakland, 1997, p. 230. Solinger, *op. cit.* note 298, 164 - 167, 189 - 190. Solinger states that in the late 1950s Malthus' theory of overcrowding was associated with the fertile female body. Special efforts were made to prevent pregnancies among women from Latin America.

[658] Tribe, *op. cit.* note 641, 36 - 37. A tragic case that influenced the legalization of abortion is the case of ‘‘Thalidomide’’, a drug that in the late 50s and early 60s led to the birth of many children with deformities in Europe.

[659] As cited in Bellulo, E., *Samo žene mogu odlučiti o pobačaju?/ Only women can decide on an abortion?*, Spectrum, 2014, 3 - 4, 1 - 2, p. 107; Ziegler, M., *Women's Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, Berkeley Journal of Gender, Law and Justice, 28, 2013, 2, p. 251. Ziegler says NARAL leader Larry Lader advised colleagues to promote the view that the anti-abortion position is that of a ‘‘religious minority’’ that has no right to force the majority to think the same way.

[660] As cited in Glendon, Anne, *op. cit.* note 606, p. 11.

[661] Cf. Stettner, S.; Burnett, K.; Hay, T., *Abortion: History, Politics, and Reproductive Justice after Morgentaler*, University of British Columbia Press, Toronto, 2017, p. 134.

hand and seekers of self-awareness on the other'', states Reagan.[662] The question of the role of women in society is still a significant factor influencing the social attitude towards the issue of abortion availability.

8.4. Activism and media in Western society

Marx Ferree and Anthony Gamson analyzed public debates in Germany and the US and concluded that the media is the main spreader of change and key factor in times when the cultural code is questioned, in a way that it changes the standard language and consciousness of people.[663] According to Ferree and Gamson, as well as Tozzi, the international movement for the legalization of abortion was based on several key premises: words have no intrinsic meaning, language is subject to change, objective truth does not exist, and the agents of social change are the so-called experts and unelected activists.[664] That the media is the main promoter of certain ideologies and thus of abortion in the period before and after the Second World War, was also confirmed by the testimony of Dr. Erich Wetzel, one of the Nazi ideologues, who described the way in which newspapers, radio, films, pamphlets and lectures are used to instill the idea ''that it is harmful to have several children because of the costs they bring and that it is necessary to establish facilities for performing abortions that women would practice voluntarily and doctors perform without regard to professional ethics.''[665] Reagan considers the legalization of abortion a clear example of how ''private activities'' can reshape public opinion, the results of which, according to Nossiff, ''the political oligarchy wants to control.''[666] Therefore, we can conclude that media support, along with other factors, significantly contributed not only to the legalization of abortion, but that it is also considered a measure of the democracy of society, even though ''it remains unclear with

[662] Reagan, *op. cit.* note 657, p. 9, 92 and 230.

[663] Cf. Ferree M. M.; Gamson, W. A.; Gerhards, J.; Rucht, D., *Shaping Abortion Discourse, Democracy and the public sphere in Germany and the United States*, Cambridge University Press, Cambridge, 2002, p. 10.

[664] Cf. *ibid.*, 6 -16, and Tozzi, *op. cit.* note 132, 60 - 61.

[665] Joseph, *op. cit.* note 114, p. 190

[666] Reagan, *op. cit.* note 657, p. 2, and Nossiff, R., *Before Roe, Abortion policy in the States*, Temple University Press, Philadelphia, 2000, p. 28.

what legitimacy the media take a position according to which it privileges one, conditionally speaking, the pro-choice side and deprivileges the other, pro-life side?''[667]

8.5. Feminism and abortion

At the beginning of the 19th century, first-wave feminism appeared, which aimed to achieve the civil rights of women, primarily their right to vote. Abortion was considered the ultimate exploitation of women within the framework of the first feminism.[668] First-generation feminism was not for separation of sexuality from reproduction, but, on the contrary, such separation was seen as a danger that makes it easier for men to have sex outside of marriage. The idea of abortion was detested and described as an insult to body and soul, both for the unborn human and for the mother.[669] Elizabeth Cady Stanton, a prominent feminist of the first wave, fought for women's education and voting rights, along with the right to ''say no'' to her husband, and she considered all of the above necessary components of sexual, that is, personal dignity, while she called abortion ''the degradation of women.''[670] Ziegler states that within the framework of feminism, the ''pro-life'' movement ''held to the logical support of equality of sexes on the one hand, while at the same time opposing abortion as the degradation of women and an excuse for men who want to use them, on the other.''[671] Within the framework of feminism, the ''pro-life'' movement considered pregnancy a natural process, and saw women as defined, among other things, by biology.

The second wave of feminism supported most of the demands of the first wave, but advocated abortion. In the early 1920s, on the wave of second feminism, doctors, lawyers and activists created a concept of privacy that defined female fertility as a private matter, and in the 1960s reproductive autonomy became a fundamental requirement for a

[667] Ferree, Gamson, Gerhards, Rucht, *op. cit.* note 663, 6 - 16.

[668] Cf. Bellulo, E., op. cit. note 659, p. 104.

[669] Cf. Solinger, *op. cit.* note 298, p. 60. Likewise Schroedel, Fiber, Snyder, *op. cit.* note 609, 90 - 91.

[670] Cf. Solinger, *op. cit.* note 298, p. 60.

[671] Ziegler, *op. cit.* note 659, p. 238 - 239. Ziegler states that Goltz, one of the pro-life feminists of the 1970s, highlighted abortion as an insidious form of enslavement of women, representing a ''Playboy right to sex'' that allows men to avoid paying child support and face the consequences of their actions, therefore the choice of abortion represents a negation, not the fulfillment of the ''right to control one's own body''.

woman's full civil status.[672] Along with the idea that the separation of sexual and reproductive capacities leads to the full realization of women, the anti-slavery argument is used. This argument tries to prove that abortion is one of the ways of realizing a woman's bodily integrity and represents her liberation from the status of a slave, as well as from torture, cruel and humiliating treatment.[673] Feminists of the second wave, such as Kristin Luker, claim that the women who represent feminism of the first wave ''are less educated, have no career and raise children in a conventional marriage, while those of the second wave are better educated, careerists and do not identify women with reproduction.''[674] On the other hand, one could conclude with Glendon, how second-wave feminism, unlike authentic feminism, ''represents a combination of anger and hatred towards men, along with promiscuity.''[675] Second-wave feminism is the target of criticism of third-wave feminism, which is often associated with queer and gender ideology.

8.6. The legal aspect of abortion in relation to the issue of abortion as a human right, female autonomy, privacy, reproductive health

AHM prescribed in Article 15 that ''*termination of pregnancy is a medical procedure that can be performed up to ten weeks after the date of conception, at the request of the woman*.'' If it is determined that 10 weeks have passed since conception, the pregnant woman is referred with a request to the commission of the first degree. The commission can approve termination of pregnancy based on medical, eugenic and legal reasons. Article 25 of the AHM stipulates that ''*regardless of what is prescribed by law, termination of pregnancy can be carried out or completed when there is an imminent danger to the life and health of the woman or when the termination of pregnancy has already begun*.''

In order to determine whether an abortion at the request of a woman is justified, that is based on the free decision of the mother, it is necessary to analyze the arguments used to justify it. The above requires an answer to the question of whether abortion is part of a

[672] Cf. Solinger, *op. cit.* note 298, p. 83 and 165.

[673] This argument is used by the authors in the following article: Copelon, R.; Zampas, C.; Brusie E.; DeVore, J., *Human Rights Begin at Birth: International Law and the Claim of Fetal Rights,* Reproductive Health Matters, 13, 2005, 26, p. 126.

[674] As cited in Robertson, *op. cit.* note 529, p. 67.

[675] As cited in Ziegler, *op. cit.* note 659, p. 165.

woman's right to reproductive autonomy and part of reproductive health. The concept of autonomy, privacy, freedom, reproductive health, abortion as a human right and abortion as a personality right within the civil legal order will be analyzed.

8.6.1. Autonomy

The fundamental postulate of any just and universal legal system includes the recognition of the fundamental human right to freedom, which derives from autonomy, but it is an open question whether abortion belongs to the said category. The autonomous individual is considered an absolute value in a liberal democracy. Autonomy, as a fundamental value of a liberal society, is absolutized and imposed in the public sphere as a supreme value by ''arguments based on a moral vision and assumed metaphysical, ontological and ethical determinants.''[676] Since the majority of liberal-oriented citizens neither know nor understand the assumed determinants, because however, it is only the privilege of the theoretician, the definition of autonomy becomes subject to numerous interpretations, depending on the circumstances. [677]

Autonomy consists of the Greek words *αὐτός*, meaning alone, own, and *νόμος*, meaning law. Autonomy comes to the fore when a person chooses what she wants to do, which puts the will of a person in the foreground as a property of a person, and ''the subject is not only the cause of the act, but also of its consequences.''[678] Graovac talks about the state according to which ''the subject retains the ability to act independently of any necessity, whether internal (moral norms) or external, such as laws.''[679] Autonomy is a way of human existence, which consequently means that it is not autonomy by itself that determines man's autonomy, instead it is a man who determines autonomy.''[680] Gerhardt speaks of self-determination as self-conscious behavior.[681]

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[676] Matulić, T., *Liječnička profesija između moralne odgovornosti i znanstveno-tehničke učinkovitosti/ The medical profession between moral responsibility and scientific-technical efficiency*, in: Znidarčić, Ž. (Ed.), *Medicinska etika 1/Medical Ethics 1*, Hrvatsko katoličko liječničko društvo, Zagreb, 2004, p. 187.

[677] Cf. *ibid.*

[678] Tićac, *op. cit.* note 63, 767 - 768.

[679] Cf. Graovac, *op. cit.* note 126, p. 241.

[680] Cf. Matulić, *op. cit.* note 169, p. 25.

[681] Cf. Gerhardt, *op. cit.* note 60, p. 281.

Within the discussion of abortion as an expression of a woman's autonomy, two fundamental questions arise. The first relates to the question of whether abortion is an expression of autonomy as a part of human nature, and the second relates to the question of the limits of autonomy, that is, acting in relation to others. If abortion is part of human nature, and the subject is the cause of the act and consequences, then the autonomous woman, and she alone, is the cause of the abortion that ends with the removal of the human embryo/fetus from the womb. Furthermore, an autonomous man is always in a community with others, which implies limitations in man's actions. According to the ethics of Immanuel Kant, the individual as a transcendental subject is capable of autonomous will, but it is not absolute. There is no such thing as absolute autonomy ''but it is determined *apriori* by objective, i.e. universal value elements.''[682] The limit of autonomy, and then freedom, implies responsibility towards others. According to Bloch, ''only a madman is completely free in a way that nothing is imposed on him from the outside.''[683] Freedom of self-determination without the share of natural determination in human life does not exist.[684] It is clear that human freedom is limited, because man is a limited being based on his own nature, and the limits of freedom are conditioned by the evaluation of the very act that we do in freedom. In the legal sense, we are talking about autonomy that is limited by natural laws, acquired characteristics of individuals, social circumstances and law, which is manifested in legal relationships in which everyone is obliged to refrain from anything that would harm someone's person, things or subjective rights.[685] One's private right is limited by another's private right.[686] Is abortion, in accordance with the above analysis of the sources of human rights, a natural human right arising from intrinsic dignity or a political concept, a postmodern construction and desire? Is a woman unlimited in its performance? We can conclude that, if a woman is absolutely autonomous, then there are no restrictions on her actions towards others, neither general nor special, which refers primarily to the father of the human embryo/fetus, the doctor

[682] Matulić *op. cit.* note 676, p. 174. Matulić, *op. cit.* note 169, p. 22. An absolutely autonomous man means the existence of only one man because the prerogative ''absolutely'' is indivisible.

[683] Bloch, E., *Prirodno pravo i ljudsko dostojanstvo/Natural law and human dignity*, Izdavački centar Komunist, Beograd, 1977, p. 146.

[684] Cf. Haeffner, *op. cit.* note 8, p. 180.

[685] Cf. Gavella, *op. cit.* note 204, 16 - 22.

[686] Cf. *ibid.*

who performs the abortion and the human embryo/fetus itself. Finally, abortion itself implies the role of the other since the woman cannot perform it herself, which means that the act of abortion has nothing to do with the concept of autonomy.

8.6.2. Abortion as a human right

At the Conference in Vienna in 1993, activists argued that women's rights should be understood as human rights. Ritossa believes that ‘‘procreative rights are one of the basic human rights, and restrictions on abortion are a disproportionate and unreasonable burden.’’[687] In order to determine whether the stated claims are justified, it is necessary to determine whether abortion is a right arising from a woman's, and then her human nature. There is no question that the right to procreation, both for men and women, is a basic human right that stems from freedom and is in accordance with their biological nature. It is also clear that women's rights are human rights by the very fact of a woman's humanity, which is why her human rights would derive from her human nature, just like the rights of men. However, if abortion is a procreative right, then it is also a human right, which would mean that, like the right to life, it is in accordance with the intrinsic dignity of the human being and his freedom, which consequently needs to be protected. Therefore, if abortion is a human right, then it represents freedom that comes from human nature, and in order to determine whether abortion is an expression of freedom, it is necessary to analyze whether it can be subsumed under one of the definitions of freedom. We distinguish freedom as: (a) moral freedom - *libertas ab obligatione*, i.e. the right to act that is not limited by moral laws and freedom of action, and (b) *libertas a coactione*, which means that a person is not legally prevented from performing an act (freedom is taken away when, for example, the prisoner cannot leave the prison premises).[688] The act of abortion, however, is conditioned by the status of the human embryo/fetus, the rights of the father as the parent of the human embryo/fetus, the doctor who may or may not perform the abortion, as well as the level of development of medical technology. Given that the human embryo/fetus is a moral subject and a legal subject *sui generis*, it means that abortion is not *libertas ab obligatione*, because there is no free choice in the case when we are conditioned

[687] Ritossa, D., *Prijepori o pravu na pobačaj u RH/ Issues on the right to abortin in the Republic of Croatia,* Zbornik Pravnog fakulteta u Rijeci, 26, 2005, 2, p. 994.

[688] Cf. Haeffner, *op. cit.* note 8, 162 - 163.

by the right to life of another subject. Whether abortion is *libertas a coactione* depends on what kind of law it is. Since the human embryo/fetus is a *sui generis* subject, then a just law does not allow abortion on demand (except for medical reasons that have nothing to do with the autonomy argument), so it would not be *libertas a coactione* either.

Is abortion a human right?

The fact is that a woman cannot perform an abortion herself, which means that she is conditioned by the environment and others. We can conclude that abortion does not maintain the woman's nature or the state of the order of nature, because if it were not so, the woman should be able to perform it herself, but instead she is conditioned by the level of development of medicine. The above leads to the conclusion that in natural circumstances and conditions of undeveloped medicine, abortion is life-threatening, while pregnancy remains a natural, biological process, which can also be dangerous, but in exceptional situations. With technological progress, circumstances change, so the term ''safe abortion'' appears.[689] Abortion is performed today in several ways: ''vacuum suction (most often in the early stages of pregnancy), curettage and dilation, induction (injection into the uterus of a substance that causes abortion, most often prostaglandin) and hysterotomy (a surgical procedure similar to a caesarean section, used in advanced pregnancy, most often when the mother's life is in danger).''[690] Nowadays, medical abortion is also available. The very fact that it is not natural, but requires medical technology for its execution, makes it clear that it does not come from human nature, and that it is made ''safe'' by circumstances that depend on economic, that is, medical development. Abortion does not arise from human nature and intrinsic dignity, but is imposed as a political and social issue, but that should not mean that natural reasons for or against it are excluded from the social debate. Abortion as a human right can only mean that it is a political concept, a postmodern construction and desire (more on that *infra*).

We can conclude with Joseph that abortion as a human right is an expression of radical feminism that is created by an ingenious tool of ideological indoctrination, which has its starting point in constructed and culturally relative human rights that are reinterpreted over time.[691]

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[689] *Beijing Declaration and Platform for Action*, point 97.

[690] Pezo, *op. cit.* note 3, 1078 - 1079.

[691] Cf. Joseph, *op. cit.* note 114, p. 199 and 204.

8.6.3. Abortion as a personality right – the right to bodily integrity, the right to privacy, the right to health

If abortion is not a human right, can it be a subjective non-property right, a person's right to privacy or bodily integrity? The right to privacy is closely related to the right to bodily integrity, in fact it is equated with it in content in one part because the protection of bodily integrity is considered the protection of private property.

The doctrine of privacy was first developed in the late 19th and early 20th centuries, implying an individual's right to protection from government interference in areas of private life such as marriage, reproduction, and child bearing.[692] It was described as a private right by Louis Brandeis and Samuel Warren in 1890 in the Harvard Law Review, which stated that an invasion to privacy of a person subjects her to mental pain that is far worse than inflicting physical injury.[693] If abortion is a right to privacy that derives from the right to bodily integrity, then abortion is a good that ''gives a woman relatively complete, integral private legal authority over her body, which implies that she can do with it as she pleases and exclude a third party from interfering with it, so it depends on her will whether or not she will allow intervention in her own body or even order it.''[694] According to Graver's definition of embodiment, the above would mean that a woman has ''privileged access to the body's interior, which is autonomous and separate from the environment.''[695] This would imply that a woman has the right to have an abortion herself and that the human embryo is part of her body. From the legal side, private property is limited, so a woman cannot, for example, kill a man in her apartment. Privacy, as well as physical integrity, is limited in many ways (see *supra*, chapter 5), for example, when the policeman checks the percentage of alcohol in the blood of the driver, when conducting investigations there is a justifiable reason to enter someone's private property, by testing

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[692] Cf. Ritter, G., *Women's Citizenship and the Problem of Legal Personhood in the United States in the 1960s and 1970s*, Texas Journal of Women and the Law, 13, 2003, 1, p. 16.

[693] Cf. Johnson, *op. cit.* note 644, p. 1532.

[694] Gavella, *op. cit.* note 196, p. 35.

[695] Graver, D., *Personal Bodies: A Corporeal Theory of Corporate Personhood*, University of Chicago Law School Roundtable, 6, 1999, 1, p. 235.

employees for drugs, by taking fingerprints to create an identity card.[696] If privacy is limited in these situations, it is also limited in respect of another human life. If it is not, then by analogy we can claim that ‘‘all those who in one way or another come into contact with social property at the disposal of the state can be deprived of their lives if the state so decides because the state has the right to dispose of its property in the same way as a pregnant woman with a fetus in her body.’’[697] The uterus is part of the woman as a subject, her property. In that uterus there is a human embryo, so during pregnancy the woman would carry another subject inside her, which limits the right to abortion. Formally and legally, a woman might be able to do whatever she wants with herself, just as a man can commit suicide. If a person is autonomous regarding his body, then he could cut off his own ear or hand. But then, after surgical treatment, he will be referred to psychiatry. If the human embryo/fetus is a subject, then its murder will remain murder regardless of whether it is inside or outside the womb, regardless of whether it is committed by a woman or a doctor and a woman, regardless of whether it is legalized or not. A woman may not kill a newborn that is outside her body, even though the child is ‘‘hers’’. Why should the state provide a service that enables it while it is in her body? Given that throughout the history of Western thought, traditional ethics forbids doing something to someone else's body, then it is clear that the decision to have an abortion, which represents the deprivation of another life and bodily integrity, is not morally justified. Furthermore, even if we assume that the human embryo is not a subject (*sui generis*), which medicine has proven not to be true, if a woman has a right to privacy that is interpreted as an order to another to invade her body, which would be stronger than the right to the life of the subject in her, the question is how a woman can order procedure to another person, without violating the freedom of that other person (doctor), if it is about her private sphere. If a doctor is required to perform a procedure that he does not consider medically justified, then it is a violation of his bodily integrity because the doctor has nothing to do with the woman's privacy and her bodily integrity. If abortion is reproductive freedom, then it implies that a person has a procreative choice that does not violate a moral obligation and that others should respect.

[696] According to the Penal Code, the criminal offense of violation of privacy (Chapter 14, Articles 141 to 146) refers to home and business premises, secrecy of letters and other shipments, unauthorized sound recording and wiretapping, image recording, disclosure of professional secrets, unauthorized use of personal data. Physical integrity is not included.

[697] Matulić, *op. cit.* note 7, p. 239.

However, such freedom does not imply the duties of others (the state and doctors) in order to provide the resources or services necessary for the realization of that choice. Privacy negates the possibility of state support in performing abortions.[698] MacKinnon also thinks so, because the private sphere implies intimacy, (as opposed to some public, for example, economic issue) so if ''privacy in the territorial sense means that everyone does what they want in their own space, and abortion is a private matter, the government has no obligation of providing support.''[699] Gretchen also accepts such an understanding, arguing that ''it is problematic that the constitutional domain of privacy enables the expulsion of abortion from the public domain and places it in the private and dependent sphere, because such a domain of privacy does not result in the duty to provide state resources for the purpose of abortion.[700] Robertson similarly confirms that he interprets the right to reproduction as ''a negative right against the interference of public and private, so respecting reproduction, which is an expression of personal identity and dignity, does not mean a positive right to services or resources necessary for reproduction.''[701] Feminist West doubts the defense of abortion through the concept of privacy because ''the right to privacy suggests selfishness and voluntary decision-making.''[702] The negative aspect of privacy implies non-interference in private decisions, which implies that the state is not obliged to provide a service. It is paradoxical to demand from the state to realize privacy through a public health service. The refusal to provide a public service does not imply interference with privacy, but only the failure to provide the technique that leads to the end of the subject's life in the mother's womb. If, on the other hand, pregnancy is a medical condition that needs to be treated by public health services, then the so-called the right to abortion cannot be justified by the argument of privacy. It is not the legalization movement and human rights activists that determine whether the state should provide the service, but such conditions either exist by nature or not.

On the other hand, some theoreticians, such as Solinger, argue that the restriction of abortion by the state leads to ''public policy regulating reproduction emphasizing the

[698] See also: Ritter, *op. cit.* note 692, p. 38.

[699] Dworkin, *op. cit.* note 498, 51 - 52.

[700] Ritter, *op. cit.* note 692, 38 - 39.

[701] Robertson, *op. cit.* note 529, 23 - 30.

[702] As cited in Dworkin, *op. cit.* note 498, p. 58.

position and status of the woman as the one who gives birth, thus influencing women's behavior.''[703] Tribe believes that ''restricting abortion enables state implementation of population policy and eugenics.''[704] Shrage claims that the possibility of performing an abortion from a moral and legal point of view means ''being free from social coercion in matters of procreation and from the physical invasion of another, as well as following one's own conscience in moral matters, so the ban of abortion would unreasonably harmed that request.''[705] The illogicality of Shrage, Solinger and Tribe's claim is evident in the fact that no one (except in the case of rape) forces a woman to have a child, least of all the state. The state does not force sexual intercourse, but by not providing abortion services it does not deny its natural basis. The mother's privacy is only violated by the biological process of pregnancy, the possibility of which can be predicted when sexual intercourse is takes place (except in the case of rape, more on that *infra*), just as it can be predicted that living near Mount Etna implies the possibility of damage in the event of volcanic eruptions.

8.6.4. Women's rights as reproductive rights

Until the early 50s and 60s of the 20th century, the mother's health was not associated with or recognized as a reason for abortion, but then the definition of health was expanded to include the psychological and emotional health of women in addition to the physical. This was done through the media, within the framework of second-wave feminism, when the term ''reproductive politics'' was defined. Abortion advocates have successfully linked abortion to pregnancy care, contraception, fertility, and women's health in general, leading them to a potentially powerful strategy of presenting abortion as a health issue.[706] Today, some theoreticians such as Manian, claim that ''proponents of reproductive rights should educate the public that restricting abortion has broader consequences for women's health.''[707] Steinbock talks about the need for a creative approach in health care and states that ''the value we place on autonomy, understood as an right of the adult person to make

[703] Solinger, *op. cit.* note 298, p. 17 and 54.

[704] Tribe, *op. cit.* note 641, p. 110.

[705] Shrage, L., *Abortion and social responasibiltiy, depolarizing the debate*, Oxford University Press, Oxford, 2003, p. 44 and 56.

[706] Cf. Manian, *op. cit.* note 600, p. 77.

[707] *Ibid.*

decisions about her own body and treatment, often requires a creative approach by health care providers.''[708] Steinbock does not explain what constitutes a creative approach and why potential treatment would require creativity in approach, nor how a woman's autonomy relates to health care. It is paradoxical to promote abortion as a medical procedure and individual freedom at the same time, because individual freedom has nothing to do with medical assessment of the disease. But is abortion on demand a matter of health, and therefore a healthy pregnancy would be a disease?

Today, the term ''reproductive health'', whose interpretation is often ambiguous and inconsistent, is used in a number of international acts on human rights, as well as in documents of non-governmental organizations. Abortion becomes a service within reproductive health, as part of reproductive policy. Reproductive health is defined by Article 7, Paragraph 2 of the *Programme of Action adopted at the International Conference on Population and Development* (further: *ICPD Programme of Action*) as ''*a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes*.''[709] Article 7, paragraph 3, states that ''*reproductive rights embrace certain human rights that are already recognized in national laws, international human rights documents and other consensus documents. These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health*.''[710] It is a fundamental human right of each man to decide if he wants to have children and the number of children he wants to have. This fundamental right does not imply state intervention in such a way that if a couple ''exceeds'' the number of children they want to have, the state should enable abortion. Nor does it imply the ''one child'' policy of the People's Republic of China. The obligation of the state is not to enable the change of biological reality, because by analogy, if someone wants to be shorter, the state should enable that desire. The contradiction of certain provisions of the *ICPD Programme of Action*

[708] Steinbock, *op. cit.* note 408, 161 - 162.

[709] *International Conference on Population and Development*, 1994, *Program akcije Međunarodne konferencije o stanovništvu i razvoju/ Programme of Action adopted at the International Conference on Population and Development*: Ch, I, res, Annex, U.N doc. A/CONG.171/13/Rev.1, 1994, Art. 7, par. 2.

[710] *Ibid.,* Art. 7, par. 3.

is evident in Article 7, Paragraph 6, which stipulates that reproductive health care should include abortion as specified in Article 8, paragraph 25, and Article 8, paragraph 25, determines that ''p*revention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion*...'' and that ''*in no case should abortion be promoted as a method of family planning*''.[711] It is clear that the need to eliminate abortion as a method of family planning cannot at the same time represent a regular health service because if it were a morally neutral health service, there would be no need to emphasize its elimination. If abortion is a health service in the case when there are no complications related to the pregnancy, then a healthy pregnancy, a pregnancy without medical complications, is a disease, the treatment of which would be in accordance with the *Constitution of the Republic of Croatia*, which guarantees all citizens, in accordance with the law, the right to health care (Article 59).[712] If abortion on request was a health service, and it is not, given that it is based on the argument of autonomy, that is, privacy, and not on a medical assessment of the state of health, then the woman would be able to protect the right to health through a civil lawsuit. Abortion as a health service implies that the patient ''refers to the doctor for the treatment of her illness, and that the doctor may not refuse such a service'', which is in accordance with Article 248 of the ORA and the obligation to enter into a contract.[713] In doing so, it would be necessary to respect the principles of the treatment contract, which implies full information about the patient's state of health (disease), certainty and uncertainty of treatment.[714] Otherwise, if pregnancy is not a disease, and abortion on demand is a private matter, then it should not be made possible through the health service because, as ascertained, the right to privacy does not imply the interference of another or a third party. How does the medical profession characterize the abortion of an healthy pregnancy?

In the expert opinion of the medical faculties of the Republic of Croatia, it was pointed out that ''from a medical, professional and ethical point of view, there is no justification

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[711] *Ibid.,* Ch. I aNnex 7.3 . Ch. I Res 1 annex 8.25, i CH. I Res. 1 Annex Ch 2, Art. 8, par. 25, Art. 7, par. 24.

[712] Cf. Constitution of the Republic of Croatia, Art. 14, Art. 59.

[713] Cf. Radolović, A., *Medicinsko-pravni problemi eutanazije i pravo na život 2. dio/Medico-legal problems of euthanasia and the right to life*, 2 Part. Radolović states that in the legal sense, the process of termination of pregnancy must be organized as a contract between the patient (mother), the father of the child, the doctor (hospital) and (this is extremely important!) the guardian of the unborn human being.

[714] Cf. *ibid.*

for the abortion of a healthy fetus at the request of a healthy pregnant woman, where the term unwanted pregnancy is used as a euphemistic condition for the institutionalized death of the embryo, i.e. the fetus, in which the qualification of unwantedness is a sufficient indication for the procedure'' and it is confirmed that ''it is an irrevocable scientific fact that during pregnancy we are talking about human life in the stages of the embryo and fetus, and only in the case of a threatened pregnancy can ethical justification for abortion be found.''[715] Similarly was also confirmed by a group of 140 gynecologists in a joint statement on the protection of maternal health in Dublin[716], in which they state that abortion is not ''a medical practice, unless it has a 'therapeutic' purpose necessary to preserve the mother'' and in which they confirm that ''direct abortion is not medically necessary to the woman's life would be saved''. There is a fundamental difference between abortion and necessary medical treatments that are performed to save a mother's life, even if such treatment results in the loss of the life of her unborn child. The ban on abortion in no way affects the availability of optimal care for pregnant women.''[717] Then it is not about the right to abortion, but the right to life of the mother.[718] But then we are not talking about abortion on demand, but about therapeutic abortion. In the normal course of the biological process, as stated in the expert opinion of medical faculties in the Republic of Croatia in 2009, pregnancy is not a disease. Pregnancy is a natural process that occurs as a result of sexual intercourse. In some circumstances, pregnancy can have complications, but then it is a medical issue whose value basis we do not analyze here (cases of complications related to pregnancy are listed in the International Classification of Diseases of the World Health Organization, in the chapter that determines complications in pregnancy).[719] What is clear from the International Classification of Diseases of the World Health Organization is that there is no ''woman's request'' as a reason for abortion based on the arguments of autonomy, privacy, desire.

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[715]https://www.prolife.hr/wp-content/uploads/2017/03/Strucno-misljenje-Povjerenstva-2009.pdf, (accessed: 25 January 2022).

[716] As cited in Puppinck, *op. cit.* note 647, p. 178, (*The Irish Times, 10 September 2012, ''Forum in Dublin on Maternal Health'': http://www.irishtimes.com/news/forum-in-dublin-on-maternal-health-1.527381).*

[717] *Ibid.*, p. 177.

[718] Cf. *loc. cit.* note 708.

[719] Cf. International Classification of Diseases, World Health Organization, Chapter XV., Medicinska naklada Zagreb, Tenth revision, 2012.

Is the fact that the pregnancy is unwanted enough to qualify it as a disease? Fletcher mentions the ethical principle according to which a desired pregnancy is a healthy state, while an unwanted one is a disease.[720] Filipče, Klobučar, Kmabovnski claim that ‘‘a woman who did not wanted pregnancy cannot be treated as healthy, just because she has normal blood pressure, and the embryo has a normal biophysical profile, and as the reason they state that women are not only private wombs, but have creative, rather then reproductive potential.’’[721] If a child is desired, then pregnancy becomes a natural state, not a disease, and the fetus a patient that needs to be taken care of.[722] It is interesting to note that in Denmark the indication for abortion is ‘‘housewife syndrome’’, and in the USA 90% of abortions are performed on healthy women, with 95% of healthy fetuses being aborted.[723] The right to abortion represents a situation in which ‘‘a woman's desire to have an abortion is transformed into a right.’’[724] The disease does not depend on desire or volition. A particular condition cannot qualify as a disease because of our desire to qualify it as such. You don't need to be a doctor to come to the conclusion that cancer is a disease that is diagnostically determined according to existing medical parameters, therefore it is clear that a biological state cannot be declared a disease according to one's subjective criteria.

The doctor uses diagnostics to determine whether it is a disease, so we cannot be sick because we want to, but medicine determines whether or not we are sick. The introduction of the category ‘‘unwanted pregnant’’ as an automatic expression of a diseased state would, by analogy, represent that any state contrary to subjective desires can be a disease, so for example the desire to be an excellent soprano, which is biologically impossible for us, would be a diseased state. If abortion as an unwanted pregnancy is a ‘‘medicine for healing’’ a woman's mental health, then for example someone who has mental problems because he is poor could ask for money from the state to treat his health condition in this way. Thus, someone who cannot have children and this leads him to a state of mental

[720] Cf. Fletcher, *op. cit.* note 338, p. 138.

[721] Filipče, D.; Klobučar, A.; Kmabovnski, V., *Bioetički aspekti reprodukcijskog zdravlja/Bioethical aspects of reproductive health*, V. B. Z., Zagreb, 2006, 63 - 64.

[722] Likewise Lugosi, *op. cit.* note 620, p. 293. Lugosi concludes that pregnancy is not a disease but a reproductive phase in the life of a healthy future mother, a normal natural physical state.

[723] Cf. Diamond, E. F., *A catholic guide to medical ethics*, Linacre Institute, Leeds, 2001, p. 135.

[724] Hrabar, *op. cit.* note 453, p. 812.

illness could seek help from the state by abducting other people's children or adopting a child even though he does not meet the legal requirements. That is why the interpretation of the ECtHR in *Costa & Pavan v. Italy* is dangerous, in which the Court considered that the wish of the applicant can constitute a right under Article 8 of the ECHR, determining that the ''desire'' for a healthy child ''represents an aspect of their private and family life that is protected Article 8''.[725] According to the ECtHR, the legal impossibility to fulfill this wish gives the applicants the status of ''victim'' and violates their right to respect for private and family life.[726] In this way, ''a very dangerous area of turning any desires (they can also be of sexual provenance, such as incest or pedophilia) into individual freedoms opens up.'' [727]

But Howard L. Minkoff, Lynn M. Paltrow conclude that ''the woman and the doctor in the process of abortion are a unique class, excluded from the standard medical model according to which the doctor provides professional judgment and information to the individual about the health procedure.''[728] This would mean that abortion represents a rare exception, according to which the subjective request, that is, the patient's wish, would be at a qualitatively higher level than the doctor's professional opinion. Minkoff and Patrow do not answer what are the special parameters that would exclude pregnancy as a disease and abortion as a treatment from the standard medical model. The woman's desire and her subjective judgment of the condition that would cause a woman to demand an abortion based on privacy or bodily integrity have nothing to do with the professional opinion of a doctor who should act in accordance with his profession. The category of desire, in the case of abortion, becomes a medical category. I will conclude with Joseph that ''the ideological redefinition and grotesque reclassification of abortion as a criminal activity into a medical procedure is logically absurd, which ignores the fact that a procedure classified as medical for the mother is in fact a deliberately lethal procedure for the child.''[729] Proponents of abortion with vague explanations and incomprehensible arguments try to justify abortion on demand. It is a violation of logical premises, because

[725] As cited in Puppinck, *op. cit.* note 649, p. 160.

[726] Cf. *ibid.*

[727] Hrabar, *loc. cit.* note 72.

[728] Minkoff, Paltrow, *op. cit.* note 609, p. 27.

[729] Joseph, *op. cit.* note 114, p. 189.

if a human embryo/fetus is a fetus, which it is, then we cannot do everything to save it in one situation, and abort that same fetus when we don't want it.

8.7. An unborn human being as the alleged perpetrator of the criminal offense of assault on the body of a woman

The interest in abortion, in addition to arguments related to the woman's privacy and the protection of her bodily integrity, also tries to prove the idea that the human embryo/fetus is an aggressor, which would imply that the human embryo/fetus is an intruder in the mother's womb. Representatives of this understanding include Eileen McDonagh, Judith Jarvis Thompson and Jane English.[730] The main argument of such an understanding is that the fetus bears responsibility since it imposes a duty on the woman to provide him with help, and she did not give her consent for this. Responsibility in law implies subjectivity, so it is strange that they argue about the same phenomenon and being as a responsible being, while at the same time depriving that being of all other rights, especially the right to life.

8.7.1. The hypothetical case of violinist

In legal theory, there is a well-known hypothetical situation in which Thompson tries to prove the claim that the fetus is the aggressor. In a hypothetical example, Thompson states that we should imagine that we have been kidnapped by a music lovers' association, and suddenly wake up in a hospital connected by a tube to the body of a famous violinist who will die if he does not use our kidneys, and after nine months have passed, we will recover without consequences.[731] With the given example, Thompson finds an analogy between us and the mother, so just as we are not obliged to give the violinist the use of our kidney, so the mother is not obliged to give her body to the fetus. In this way, she tries to prove that just as a violinist does not have the right to use our kidneys, neither does a human embryo/fetus have the right to live. The proposed analogy is not correct for several

[730] See English, J., *Abortion and the concept of person,* Cambridge University Press, 5, 1975, 2, 233 - 243; McDonagh, E., *Breaking abortion deadlock: from choice to consent,* Oxford University Press, New York, 1996; Thomson J. J., *A defense of abortion*, Philosophy and Public Affairs, 1, 1971, 1.

[731] Cf. Thompson, *op. cit.* note 349, p. 64, 69 - 70.

reasons. The first is that it is inappropriate in the part where kidnapping and forcible attachment are compared to voluntary sexual intercourse. The analogy would therefore only be valid in the case of rape. Another reason is that the analogy tries to prove that just as the violinist endangers the ‘‘man’’, the child endangers the ‘‘mother’’, which would equalize the child and the violinist, without taking into account that the violinist's right to life is not violated for some reason that would come from the man which is connected to the violinist, the violinist himself is threatened by the state he is in, while the child, by analogy with the violinist, is directly threatened by the mother's activity. This would also mean that every fetus, therefore also the one whose birth we want, endangers the life of the mother and represents a ‘‘violinist’’. An important legal and moral difference exists in the responsibility for another's life because we are not responsible for someone's death if we do not voluntarily sacrifice ourselves, while we are responsible for the direct killing of the fetus.[732] Outright killing is morally and legally different from failure to render aid because intent is an important factor in law when determining liability. There is a big difference in, for example, not donating the organs needed for someone to survive and a violent act against a human being who needs a natural home. The violinist will die unless he gets help, while the human embryo/fetus, unless we destroy him, will live. The violinist will die by our inaction, but not by our direct intervention. A similar example is cited by Greasley with the analogy of helping the poor, ‘‘who may die if we don't want to help them, but we won't kill them because they might take our food.’’[733] Others do not have a duty to keep us alive, but they do have a duty not to kill us. The third and fourth reasons are given by Finnis, who finds the problem of the mentioned example in that Thompson starts from the fact that our rights depend on the assignment, not the ascertainment (life does not depend on someone else's decision) and that she does not take into account that the mother's duty not to abort does not represent the special responsibility she bore for the child, rather than the ordinary duty that everyone bears for his neighbor.[734]

Contrary to the stated reasons, F. M. Kamm, following Thompson's argument, believes that if the fetus is deprived of life, ‘‘it is deprived of something to which it had no right anyway because the desire to survive cannot morally demand continued support that

[732] Likewise Lee, *op. cit.* note 337, 135 - 136.

[733] Greasley, *op. cit*. note 348, p. 56.

[734] Cf. Finnis, *op. cit*. note 37, p. 287.

began as a result of pregnancy in the female body, and as a result of a voluntary act it is permissible to terminate it, just as one would terminate a project that is too exhausting."[735] A project involving the destruction of a human being differs in its nature from other projects. Because of all the above, Thompson's analogy is almost completely inapplicable to the issue of abortion and inapplicable to real life.

Analogy, as Macklin claims, could be a powerful way of argumentation, if it is similar in essential aspects.[736] Thomson's pregnancy analogy is grotesque. Much like Thomson, Eileen McDonagh and Robin West are of similiar opinion. They believe that the killing of a human embryo/fetus is morally justified, even when it has equal legal status because a pregnant woman is authorized to defend herself from external as well as internal violence.[737] Anne Warren compares the situation to self-defense and claims that there are situations in which the killing of innocent human beings is justified.[738]

8.7.2. The hypothetical case of scientist and hypnosis

J. English tries to prove the justification of abortion with the hypothetical case of a scientist who hypnotizes innocent people. English describes how, in a hypothetical situation, a scientist uses hypnosis to induce people to jump out of the bushes and attack innocent bystanders, so if you are a bystander you have the right to defend yourself, regardless of the fact that the attackers are innocent, therefore, by analogy, a woman can defend herself against an innocent fetus, and a doctor who performs abortion would be the equivalent of a bodyguard defending an infirm elderly person under attack.[739] The analogy is flawed on several counts. The presence of a human embryo/fetus in the womb is not comparable to a direct attack, nor is the role of the bodyguard and doctor equal because the bodyguard defends while the doctor attacks directly. A human embryo/fetus is not an aggressor

[735] Kamm, F. M., *Creation and abortion – a study in moral legal philosophy*, Oxford University Press, Oxford, 1992, p. 39 and 78 - 79.

[736] Cf. Macklin, R., *Personhood in the Bioethics Literature*, Health and Society, 61, 1983, 1, p. 49.

[737] For more details see: West, R., *Liberalism and Abortion*, Georgetown Univerisity Law Center, 87, 1999, 2117 – 2147. See also: McDonagh, E. L., *My Body, My Consent: Securing the Constitutional Right to Abortion Funding*, Albany Law Review, 62, 1999, 3, 1057 - 1118.

[738] Cf. Anne Warren, *op. cit.* note 72, p. 45.

[739] Cf. English, *op. cit.* note 391, 75 - 76.

because the biological situation of pregnancy does not present conditions that could legally qualify as an attack requiring self-defense. The theoretical, legal and legislative characteristic of self-defense is: the need for it to be an absolutely necessary defense in order to eliminate a simultaneous or directly imminent illegal attack from oneself or another; that the danger (for which the person is not liable) cannot be removed in any other way, and that the harm done is less than that which threatened.[740] The state of pregnancy does not meet any of the above conditions because abortion is not a necessary defense for a simultaneous and illegal attack, non-liability can be questionable (in all cases except in the case of rape), and the evil done, if it is about the right to life of a human embryo/fetus in comparison with the transitory ''burden'' of pregnancy, is greater than the evil endured. If a human embryo is a bully, an aggressor, then one should have the intention of entering someone's space in order to use it, while with a human embryo/fetus it is a natural process without the intention of occupying the space.[741] Aggression implies an activity that human embryo/fetus does not perform. The human embryo/fetus has no intention of violating mother's autonomy, no one asked it if it wants to be born and be in the mother's body. A woman cannot be asked to consent to an appearance or ''project'' as stated by Kamm, which occurs as a consequence of a biological process. We did not consent to be male or female, short or tall. Pregnancy is not a criminal offense nor is it the role of the state to protect pregnant women from alleged private violence arising from their biological condition. On the contrary, if the human embryo/fetus represents a threat to the well-being of other persons, i.e. the mother, Lugosi asks the justified question ''why draw the line with them, if disabled people, for example, would also represent a potential threat to everyone on whom they depend?''[742] Lugosi justifiably asks if theories about the right to self-defense against non-consensual invasion from unwanted fetuses appeared because of ''theoretician's prediction that one day the human embryo/fetus will have the status of a legal subject and then the old arguments of choice, privacy, autonomy will not even apply.''[743]

[740] Cf. Penal Code, Official Gazette, No. 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, Art. 22.

[741] Likewise Cazor, *op. cit.* note 314, p. 147 and Lee, *op. cit.* note 337, p. 139.

[742] Lugosi, *op. cit.* note 620, p. 293.

[743] *Ibid.*, p. 291.

8.8. Specific causes of abortion and their possible consequential legal aspect

8.8.1. Rape

According to data presented by Joan R. Bullock in Abortion rights and America, the cause of 1% of all abortions is rape or incest.[744] In 99.9% of cases of rape, the woman does not get pregnant. Girth and Burgess state that ‘‘scientists associate the low number of rape pregnancies with a high percentage of male sexual dysfunction during rape, and the same is true for raped fertile women.’’[745]

The rape of women is a serious social problem and one of the important issues in the context of realizing women's rights. Liberal theorists advocate the availability of abortion when the pregnancy is the result of rape. On the other hand, natural-law theorists believe that abortion in the case of rape implies punishment of the innocent (Lugosi), causes additional mental and emotional problems for women (Lee), does not punish the rapist and cannot undo what was done (Cazor), to grave evil responds with even harder evil (Kreeft).[746] The regulation of abortion in the case of rape is not a decisive parameter for the legal regulation of abortion at the general level, but exceptionally, since the figures show that pregnancy in the case of rape is an exceptional case, as the case of rape itself should be. This exception should be strictly regulated by law, starting from an individual approach, which would also include providing every possible economic, social and psychological support to the woman.

8.8.2. Sex-selective abortion

In some countries, such as China and India, sex-selective abortions are carried out. In India in particular, society and family pressure women to abort a female child, while in

[744] For more details see: Wilke, J., *Abortion Questions and Answers*, Hayes Publishing, Cincinnati, 1988, 146 - 150.

[745] Diamond, *op. cit.* note 723, p. 146. Girth and Burgess state that out of 101 men, 57 of them had sexual dysfunction. Regarding the raped fertile women who ovulated, only 10% remained pregnant.

[746] See: Lee, *op. cit.* note 337, p. 131 and 134; Cazor, *op. cit.* note 314, p. 184; Lugosi, *op. cit.* note 620, p. 289. and Kreeft, *op. cit.* note 389, p. 117.

China the one-child policy encourages sex-selective abortion.[747] Second-wave feminists are not united on the issue of legitimizing sex-selective abortion. Some of them see the restriction of sex-selective abortion as ''an additional deprivation of women's autonomy'', while others see the act itself as directed against women, given that girls are most often aborted.[748]

In the international community, sex-selective abortion is condemned. The UN Committee on the Rights of the Child has condemned selective abortion as discrimination against girls and a serious violation of their rights to ''survival''.[749] The above means that the UN Committee expressly recognizes that abortion, even if selective, violates the right to ''survival'' of the unborn human. In the publication Preventing gender-biased sex selection, the World Health Organization explicitly states that discrimination against women during abortion has profound effects on women's mental and physical health.[750] Similarly, the FIGO Committee determines in its guidelines that sex-based abortion should not be allowed.[751] The complexity and paradox of sex-selective abortion comes to the fore in situations where abortion is promoted as a woman's right on the one hand, but on the other hand, when it comes to sex-selective abortion, it is considered an attack on the female human embryo/fetus. Joseph talks about ''big business that is mostly the fault of doctors.''[752] Sex-selective abortion is one of a number of reasons a woman can, within privacy requirements, have an abortion. The paradox is that sex-selective abortion is condemned in the international community, and it is only one of the reasons for abortion that is supported through international activism.

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[747] Cf. Joseph, *op. cit.* note 114, 274 - 275. Joseph cites Gitu Aravamudhan in ''*Disappearing Daughters – the tragedy of female feoeticide*'' which states that China's one-child policy encouraged sex-selective abortion, causing women to abort, mostly female child (China eventually abandoned the ''one-child'' policy because they found a shortage of 50 million women). In India in the 80s, there was a large number of sex-selective abortions.

[748] Cf. Greasley, *op. cit*. note 348, 234 - 235.

[749] Cf. UN Committee on the Rights of the Child, *General Comment No. 7*, 2005, point 11, b, I.

[750] Cf. World Health Organisation, *Preventing gender-biased sex selection,* WHO Library Cataloguing in Publication Data, 2011, p. 12.

[751] Cf. FIGO Committee for the Ethical Aspects of Human Reproduction and Women's Health, *Ethical guidelines on sex selection for non-medical purposes*, International Journal of Gynaecology and Obstetrics, 92, 2006, 329 - 330.

[752] Joseph, *op. cit.* note 114, p. 276.

8.8.3. The eugenics movement and abortion

Eugenics was present even in primitive societies, especially of a nomadic, hunting character, in which children with deformities were considered animals, which is why they were abandoned.[753] The eugenics movement gained its visibility and theoretical support at the end of the 19th century in Francis Galton's Inquiries into Human Faculty and Its Development, which promotes the improvement of the human race through science. The Malthusian principle, which emphasizes, among other things, how increased reproduction of the lower class negatively affects the genetic heritage of society, along with the idea that the quality of the population is degraded by delivering the poor women, contributed to abortion being considered a solution to the aforementioned problems.[754] Apart from poverty as a class reason for implementing eugenics, the reasons for eugenic abortion in the 19th century were also racial. In the USA, the authorities believed that Native women lacked the biological capacity for true motherhood that white women possessed.[755] In addition, a possible deformity of the future child or some disease of the woman were considered reasons for sterilization, so since the beginning of the 20th century, by the 1940s, up to forty thousand people were sterilized in the US. These were mostly mentally ill women or those who carried the risk of a genetic disease of the child, and their sterilization was justified by high costs in the health care system and poor opportunities for their employment.[756] Doctors refused to treat children with disabilities, and eugenics was propagated through movies.[757] The procedures and methods of eugenics developed in USA were taken over by Nazi Germany. In the book of psychiatrists and lawyers from 1930, which served as a theoretical base for the Third Reich, the phrase ‘‘life not worth living’’ is mentioned, and thus was qualified the life of people with retardation, the elderly,

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[753] Cf. Curran, *op. cit.* note 271, p. 59. Zergollern – Čupak, Lj., *Bioetika i medicina/Bioethics and Medicine*, Pergamena, Zagreb, 2006, p. 61, states that in ancient times there were Taygetic rocks where malformed children were left, as well as the Spartan laws of Lycurgus which ensured healthy offspring. Seneca demanded that freakish children should be drowned in the Tiber.

[754] Cf. Serrano Ruiz Calderon, *op. cit.* note 566, p. 72. See also: Solinger, *op. cit.* note 298, p. 109.

[755] Cf. Solinger, *op. cit.* note 298, p. 86.

[756] Cf. Robertson, *op. cit.* note 529, 70 - 72 and p. 92.

[757] Cf. Cupp, R., *Cognitively Impaired Humans, Intelligent Animals and Legal Personhood*, Florida Law Review, 69, 2017, 2, p. 491.

children with disabilities, and finally of all Jews.[758] The *Prevention of Hereditary Disease Act* of 1933 allowed sterilization if doctors believed there was a high probability that the offspring would have a physical or mental defect, so without the patient's consent up to 400,000 people were subjected to forced sterilization during the twelve-year Nazi regime.[759] Leo Alexander, together with Andrew Ivy, witnessed how the Nazi regime carried out a gradual manipulation of the German medical profession, which led to a subtle reversal in the basic attitude of doctors, which is that there is such a thing as a life not worth living.[760] The crimes, regardless of their proportions, began with small steps. Prosecutor McHaney proved that the Nazi abortion program involved the systematic extermination of children deemed inferior or undesirable, and the decriminalization of abortion was a means of preventing the birth of such ''socially and ideologically undesirable groups.''[761] Leo Alexander coined the term ''ctenology'' to mean the science of destruction of human life.[762] Gerhard Hoffmann asked Germany to single out sick, freakish children after birth and hand them over for the ''painless destruction'' of the so-called health police.[763] The defendants in the Nuremberg Trial tried to justify war crimes (this is how the murders of children were qualified) with the thesis that ''it is better for the world to prevent the arrival of imbeciles.''[764]

8.8.3.1. Health and quality of life criteria

[758] Cf. Diamond, *op. cit.* note 723, p. 177.

[759] Cf. Telman, *op. cit.* note 650, p. 111.

[760] Cf. Joseph, *op. cit.* note 114, p. 37 and 45. The phrase ''a life not worth living'' comes from the article *The physician and genetic improvement*, authored by prof. F. Lommel, published in 1933 in Deutsches Ärtzeblatt.

[761] Joseph, *op. cit.* note 114, 147 - 148, p. 188 and 289. In Poland during the Nazi occupation, abortion was not against positive law, which did not invalidate the fact that at Nürnberg Trials abortion was classified as a crime against humanity.

[762] Cf. *ibid.*, p. 99.

[763] Cf. Robertson, *op. cit.* note 529, p. 131. Lawyer K. Binding pleaded for permission to destroy ''worthless lives'' citing the social benefit of such a procedure. Psychiatrist Hocke considered individual existence to be insignificant compared to the interest of society. That tandem is responsible for the murders of at least 20,000 ''lives not worth living''. Likewise Aramini, *op. cit*. note 48, 290 - 291, states that Hitler's program to remove the mentally ill and malformed children was connected with the belief that medical means should be used on those who are socially useful. For more details see: Lifton, J. R., *The Nazi doctors – Medical killing and psihology of genocide* Basic Books, New York, 1986.

[764] Nikas, *op. cit.* note 122, p. 93.

After the Second World War, eugenics was out of the question, and politics, contrary to the previous criminal regime, was aimed at protecting people with cognitive disabilities and focusing on human dignity as the basis of legal subjectivity. What society thought was overcomed after the Second World War, in the 70s of the 20th century, returns to the big door. In the 1970s, eugenicists defined a child as a ''wonderful little creature'' who should be spared the misfortune of being born to ''unqualified'' parents.[765] Today, many social policies do not value healthy children and children with disabilities equally. One of the goals of ultrasound is to detect abnormalities.[766] Some of the theoreticians claim that there is a state interest in healthy children, since unhealthy ones require high social costs (Rubenfeld), and they also emphasize the death of a disabled child as a social benefit that prevents additional health care costs and avoids the problem of overcrowding (M. Martin).[767]

The term ''irresponsible reproduction'' is mentioned in the literature, which would imply the birth of an unhealthy child that causes costs to the social system and is dependent on others.[768] In his article The Unborn Child, Winfield sees the defective and abnormal newborn as a growing problem and cost to society, but also to human happiness.[769] ''Most severely endangered children have interests, but a few have lives that are so filled with pain or deprived of the things that make life worth living, that their best interest means death,'' Steinbock claims.[770] It is about the idea that the correct state of health of a person gives value to the human person. Prenatal diagnosis enables the abortion of embryos and fetuses

[765] Cf. Solinger, *op. cit.* note 298, p. 117 and 195. Solinger states that in the 1970s, Elena Gutierrez claimed that the sterilization of economically and ''ethnically vulnerable'' women was in line with doctors' desire to define them as undesirable child-makers.

[766] Cf. Verbeek, P., *Obstetric Ultrasound and the technological mediation of morality- A postphenomenological Analysis*, Human Studies, Springer, Berlin, 31, 2008, p. 16.

[767] See Rubenfeld, *op. cit.* note 596, 610 - 611. See also: Martin, M., *Ethical Standards for Fetal Experimentation*, Fordham Law Review, 43, 1975, 4, p. 560. Likewise Fleischman A. R.; Macklin R., *Fetal Therapy: Ethical Considerations, Potential Conflicts* in: Weil, W. B.; Benjamin M. (Ed.), *Ethical issues at the outset of life, contemporary issues in fetal and neonatal medicine*, Blackwell Scientific Publications, Boston, 1987, p. 122.

[768] Cf. Robertson, *op. cit.* note 529, 73 - 77.

[769] Cf. Gordon, *op. cit.* note 566, p. 579.

[770] Steinbock, *op. cit.* note 408, p. 69.

that are not healthy. Prenatal tests are not always accurate and ''difficulties in analysis are not uncommon,'' says Ward.[771] Zergollern Čupak asks an interesting question about ''whether it is even necessary to know that a human embryo/fetus may be predestined for a genetic or chromosomal hereditary disease, since the disease may appear late in life or may not appear at all.''[772] But the very assumption that genes form a person, and if they are not perfect, it is necessary to eradicate the person, represents the Nazi logic.

Eugenic abortion represents an ideology that eliminates not only on the basis of race, but also on the basis of economic standards, whereby the value of a person becomes a quantitative category, a mathematical formula according to which some will ''deserve'' life, while others, weaker and sicker, will be exterminated. The key to the rhetoric of eugenics lies in the understanding of suffering as evil (Pankiewicz).[773] It denies the intrinsic dignity of human beings, and the basic argument of that point of view is that killing is better than living, if life, presumably, would be suffering. It is not wrong to say that in history there are known examples of people with congenital defects who are geniuses.[774] How to compare the quality of life and is it only materially measurable, since these are abstract propositions that can hardly be quantified? ''It is not clear who can determine the quality of life criteria with any authority'' (Salvino Leone).[775] How can killing be called an act in favor of man and who judges about it? How is it possible, based on assumptions, to give a rational explanation about the so-called quality of life and predict the future that is

[771] Ward, C. M., *An ethical and legal perspective on foetal surgery*, Department of Plastic and Reconstructive Surgery, The Charing Cross Hospital, London, 1994, p. 414.

[772] Zergollern-Čupak, *op. cit.* note 753, p. 136. If we take into account the fact that in the rich array of human diseases, there are more than 30,000 clinical entities, more than half of which are directly and indirectly related to heredity, and among them the most common are genetic, monofactorial diseases, genopathies, of which there are over 6,000, such as and chromosomal diseases that are associated with abnormalities in the shape or number of chromosomes.

[773] Cf. Pankiewicz, *op. cit.* note 219, p. 185.

[774] Cf. Nosić, S., *Prenatalni razvoj djeteta i zaštita njegova života/Prenatal development of the child and protection of his life*, Crkva u svijetu, 24, 1989, 4, p. 351. Likewise Pozaić, V., *Život prije rođenja/Life before birth*, Filozofsko-teološki institut Družbe Isusove, Zagreb, 1990, p. 107, which cites the example of a husband with syphilis, a wife with tuberculosis, one of the four children died, and the other three suffer from an incurable fatal disease. The mother is pregnant, what would you recommend? Students - abortion. Professor - you just killed Beethoven.

[775] As cited in Matulić, *op. cit*. note 321, p. 204.

hidden to most of us and establish it as a universal principle whose application has the best consequences?[776] As Valković notes, ‘‘who among us can say that he is a better or more human or happier than the one who is missing an arm?’’[777]

8.8.3.2. Conclusion

The pre-implantation logic of eliminating people with disabilities also implies the elimination of those whose disability occurs during life, as well as the poor and those of a lower economic standard, which imposes the idea that the value of a person depends on the assessment of others, more precisely, whether or not we are socially useful. If the economy decides who has and who does not have the right to life, then just as unhealthy human embryos and fetuses pose a threat to born, adult people and the economic system, so do all those who come into the circumstances of a disability or illness during their life and suddenly need help from guardians or the health system, lose their right to life. Is eugenic abortion then the first step towards the systematic elimination of the old and the infirm, the weak and the helpless? It is clear that we can all experience cognitive difficulties during our lives, which could put our humanity and basic dignity, equated with quality and abilities, into question.[778] This is contrary to Kant's theory according to which man is an end in himself, not a means. We will conclude with the authors Mattei and Verspieren that Europe needs strong preventive measures ‘‘in areas where signs of manipulation and eugenics appear’’,[779] including in the matter of eugenic abortion, which represent the risk that human life becomes conditioned by the wishes of parents and state policy, such as it was in the not so distant past.

8.9. Legal position of doctors – conscientious objection

[776] Cf. Finnis, *op. cit*. note 37, p. 291.

[777] As cited in Kurjak, A.; Zergollern Čupak, Lj., *Pravo na život i pravo na smrt/ The right to life and the right to death*, Jugoslavenska medicinska naklada, Zagreb, 1982, p. 211.

[778] Likewise Nathanson, *op. cit.* note 318, p. 171 and 172. Nathanson states that today life and death are becoming a dry mathematical formula according to which bioethical statisticians calculate units that would quantitatively express the quality of life, feeling, pain, depression, and each of the details is evaluated with regard to the importance for the patient, and the evaluation forms the total result.

[779] As cited in Goncalves Loureiro, *op. cit.* note 332, p. 766.

A human embryo/fetus is undoubtedly, medically ascertained, a human being. Considering that pregnancy, based on the expert opinions of the Medical Faculties in the Republic of Croatia (with one dissenting opinion), is not qualified as a disease, it is a legitimate question whether a doctor is obliged to perform an abortion, especially since we have ascertained that a woman's privacy cannot be connected with a health service. The human right to appeal to conscience is closely related to the right and freedom to express opinion, conscience and religion, which are guaranteed by many international documents.[780] The right to conscientious objection is recognized by the *Universal Declaration of Human Rights*, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, the *International Covenant on Civil and Political Rights*, the *Charter of Fundamental Rights of the EU*, as well as *Resolution 1763 (2010)* of the Council of Europe. In the Republic of Croatia, the appeal of conscience is recognized in all laws regulating health issues. The *Code of Medical Ethics and Deontology* of the Croatian Medical Association ''within the provisions on family planning, states the possibility of an 'ethical evaluation' by doctors, which implies an ethical judgment on the possibility of supporting the continuation of life through conception and in antenatal care, and is justified and desirable even in the case when termination is being considered and also in the case where termination of life by violent means is being considered.[781] Doctors are called to protect patients, serve humanity and practice their profession with conscience and dignity, and respect human life from conception.[782] The Hippocratic Oath originated in V-IV. century BC, states ''I will use those dietary regimens which will benefit my patients according to my greatest ability and judgement, and I will do no harm or injustice to them. I will not give a lethal drug to anyone if I am asked, nor will I advise such a plan; and similarly I will not give a woman a pessary to cause an abortion.'' Although the Hippocratic Oath was changed and corrected many times, the original, quoted part remained.[783] The Declaration of the World Medical Association in Geneva from 1948 states ''I will respect

[780] Cf. Hrabar, *op. cit.* note 453, 817 - 818. Hrabar states that Article 20 of the Act on Medicine enables the doctor to appeal his conscience due to ethical, religious or moral views and beliefs, provided that it does not conflict with the rules of the profession and that it does not cause lasting consequences for the health (of women) or endanger the life of patients.

[781] Hrabar, *op. cit.* note 453, p. 819.

[782] Cf. Hrabar, *op. cit.* note 52, p. 273.

[783] Cf. Matulić, *op. cit*. note 361, p. 207.

human life from the very beginning''. A key contribution of the Nuremberg Trials was the merging of Hippocratic ethics and the protection of human rights into one code. Doctors were not excluded from criminal liability, based on natural law, in the Nuremberg Trials, regardless of the positive law that reflected Hitler's attitude towards conscience. The Nazi slogan read ''The German conscience is called Adolf Hitler'', and its goal was ''liberation of man from the degrading chimera called conscience or morality.''[784] Hitler's prohibition of acting in accordance with conscience prevents the realization of good in one's own conscience, so coercion towards someone to do an act which he considers evil, does not affect the realization of the belief, but the belief itself, concludes Puppinck.[785] A doctor can refuse to perform an abortion that has nothing to do with a medical procedure, but only with the woman's desire, by appeal to conscience, which is a rational judgment about the value of an act. Otherwise, we need new conclusions from the Nuremberg Trial, as well as the revision of the Hippocratic Oath.

8.10. Legal status of men

Throughout history, the attitude towards fatherhood has changed, parallel to the changes in values in society. In ancient Rome, the father had *ius vitae ac necis*, the right to decide on the life and death of family members, which meant his absolute family authority as an elder. In the Middle Ages, fathers also had an important family role. Only with the French Revolution did the understanding of the father's role change, in such a way that his role as ''head of the family'' weakened. In today's society, depaternalization has reached its peak, and we can say that the patriarchal arrangement of the family has almost disappeared. Rising divorce rates contribute to the phenomenon of absent fathers. It is justified to ask whether, in parallel with this phenomenon, there was a consequent reduction of their biological and social rights in relation to children, before and after birth. In order to determine the rights and obligations of the father as the parent of a human embryo/fetus, especially in the context of the abortion debate, it is necessary to start from the fundamental principle governing family-legal relations, the principle of equality.

[784] Hermann Rauschning, as cited in Puppinck, G., *Conscientious Objection and Human Rights: A Systematic Analysis*, Brill Research Perspectives in Law and Religion, 1, 2017, 1, p. 9.

[785] Cf. *ibid.*, p. 30.

8.10.1. Legal framework of equality of the sexes

Almost all international documents prohibit discrimination based on sexes and emphasize the need to achieve equality between men and women. The *Universal Declaration on Human Rights* in Article 2 prescribes the rights and freedoms for everyone, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 16 determines that ''*Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family.*'' The *International Covenant on Civil and Political Rights*[786] also stipulates that all persons are equal before the law and have the right to equal legal protection without any discrimination regarding race, skin color, sex. Article 23 confirms Article 16 from the *Universal Declaration of Human Rights* and establishes the equality of spouses in rights and duties at the time of marriage, in marriage and during divorce. Equality of sexes is one of the key goals (Goal No. 5) of the UN Sustainable Development Program until 2030. And the Security Council confirms in Resolution 2122 (2013) that achieving sustainable peace requires the alignment of policies in the fields of security, development, human rights and equality of sexes. The significance of equality of sexes is also evident in CEDAW[787], which in Article 1 and 2 emphasizes the need to protect the principle of equality between women and men in the political, economic, social, cultural and civil spheres (Article 1), as well as the introduction of the principle of equality between men and women into all national constitutions or other appropriate legislation (Article 2, a). In Article 12 the equality of the status of men and women in family planning is expressly stated. It is emphasized the need for ''*States to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning*.''[788] Family planning includes a woman's pregnancy, which means that men and women are completely equal when making decisions related to an unborn human. CEDAW in Article 16 determine ''*the same rights of men and women to decide freely and responsibly on the number and spacing of their children...(e) ''the same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption*

[786] Cf. *International Covenant on Civil and Political Rights*

[787] Cf. *Convention on the Elimination of All Forms of Discrimination Against Women,* Art. 1 and 2.

[788] *Convention on the Elimination of All Forms of Discrimination Against Women,* Art. 12.

of children (f).''[789] It was previously mentioned that the ICPD Programme of Action determines that abortion should in no case be considered a measure of family planning, therefore the provision ''free decision on the number and spacing of children'' cannot be interpreted in a way that gives the right to abortion, but in a way that includes freedom of decision in accordance with biological and other possibilities of women and men. The importance of equality of sexes is emphasized in the legal acts of the European Union and the Council of Europe. Article 8 of the *Treaty on the Functioning of the European Union* stipulates that the Union ''*in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women*.''[790] The *European Convention for the Protection of Human Rights and Fundamental Freedoms* in Article 14 prohibits discrimination in the enjoyment of the rights and freedoms recognized therein, on any basis, such as sex, race. The principle of equality of sexes permeates all international legal acts, as well as regional ones. Given the biological difference between men and women, it is logical that equality in the practical sense should be realized in accordance with it.

At the level of the Republic of Croatia, the importance of equality of sexes is highlighted by the *Constitution of the Republic of Croatia* and laws. The *Constitution of the Republic of Croatia* in Article 3 determines that freedom, equality, equality of sexes and respect for human rights are ''the highest values of the constitutional order of the Republic of Croatia and the basis for the interpretation of the Constitution.''[791] In Article 14 stipulates that ''*everyone in the Republic of Croatia has rights and freedoms, regardless of their race, skin color, sex, language, religion, political or other belief, national or social origin*...'' and in Article 35 that ''*everyone is guaranteed the respect and legal protection of his personal and family life, dignity, reputation and honor.*''[792] The protection of personal and family life is guaranteed to both men and women to the same extent, and no single sex stands out as dominant in achieving any of these rights, that is, their protection. If equality of sexes is a fundamental principle, and it follows from all the aforementioned acts that it is, then it cannot be considered that one sex has greater rights than the other, but that each has rights in accordance with biological possibilities, including in the area of family life. The aforementioned is also

[789] *Convention on the Elimination of All Forms of Discrimination Against Women,* Art. 16.

[790] *Treaty on European Union and Treaty on the Functioning of the European Union,* 13 December 2007, OJ C 202, 7 June 2016, 1–388, Art. 8.

[791] Cf. *Constitution of the Republic of Croatia*, Art. 3.

[792] *Constitution of the Republic of Croatia*, Art. 14. and 35.

confirmed by the *Act on Equality of sexes*[793], which defines equality of sexes in the way that ''*women and men are equally present in all areas of public and private life, have equal status, equal opportunities to exercise all rights, as well as equal benefit from achieved results*.''[794] Private life also includes the issue of a woman's pregnancy, which means that the equality of men and women also applies to the mentioned area, since it is not explicitly excluded. Discrimination is defined by Article 6 of the *Act on Equality of sexes* as ''*any difference, exclusion or restriction made on the basis of sex, the consequence or purpose of which is to endanger or prevent the recognition, enjoyment or use of human rights and basic freedoms in the political, economic, social, educational, social, cultural, civil or other areas, based on the equality of men and women*.'' If, during the period of a woman's pregnancy, a man is excluded from decisions about a human embryo and fetus solely on the basis of the biological fact that a human embryo/fetus is in mother's body, while such a situation is biologically impossible for a man even though the child is biologically his, then it can be determined that, based on the definition of discrimination, a man is discriminated against because he is deprived of his rights in relation to making decisions about his child. The father and mother have an equal share in the creation of a new child, so by the analogy of ''ownership'' they would have equal rights, therefore the stated rights should be interpreted in accordance with the instruction of the Act on Equality of sexes, namely that its norms ''*must not be interpreted or applied in a way which would limit or diminish the content of the guarantees on equality of sexes that stem from the general rules of international law*...'' (Article 4).

Numerous other laws of the Republic of Croatia contain provisions on the equality of women and men. The *Family Act* (further: FA) is particularly important, which is based on the principles of equality between men and women and equality, solidarity and communication when making decisions. The principle of equality between men and women in Article 3, Paragraph 1 of the FA stipulates that ''*women and men have equal rights and duties in all family-legal relationships, especially in relation to parental care*.''[795] The provision of the aforementioned article does not exclude pregnancy, which means that rights and duties also apply to decisions about human embryos and fetuses. Article 50 paragraph 3 of the FA prescribes that ''*the husband does not have the right to sue for divorce during pregnancy,*

[793] Cf. *Act on Equality of sexes*, Official Gazette, No. 82/2008 and 69/2017.

[794] *Act on Equality of sexes*, Art. 5.

[795] Cf. *Family Act*, Art. 3, par. 1.

and until their child is one year old.''[796] Article 305 of the FA stipulates the obligation of ''*the father of an illegitimate child to support the child's mother for the duration of the pregnancy and for one year after the birth of the their child, if she does not have sufficient means of living*.''[797] From the above provisions it is clear that the man has social and economic obligations during the woman pregnancy. A man also has a family and economic obligation in relation to a child in the event of a divorce (from birth until he reaches the age of majority and another period after reaching the age of majority).

Consistent legal regulation of the rights and obligations of men and women would imply either the release of the man, the father of the child, from all obligations during the woman's pregnancy and after birth, or the possibility of participating in decision-making during pregnancy, as well as after birth until adulthood. As long as the father of the child is not explicitly excluded from decisions regarding the pregnancy (as in the case of a lawsuit for divorce), he should be considered equal. When a child is born, it only changes its location, and the man remains the father both before and after birth. The location of the child before birth is not biologically possible anywhere else except in the mother's womb, and the father, even if he wants to, is not enabled to carry the child biologically. Does this biological fact mean that he has no rights, in addition to the fact that he has clear legal obligations? According to Article 31, paragraph 3 of the FA, ''*spouses decide by agreement on the birth and raising of children, and on performing tasks in the family union*.'' It does not follow from the mentioned article that a man is exempt from the right to make decisions about an unborn child during pregnancy. The term ''decide on giving birth'' indicates that the legislator considered that they jointly make a decision on the conception of a child and eventual abortion, and not, for example, in which maternity hospital the child will be born. In Article 65, paragraph 2 of the FA, it is possible to ''*recognize the paternity of a conceived, but not yet born child, which produces a legal effect if the child is born alive*.'' In paragraph 4 of the same article, it is possible, with the mother's consent, to recognize the paternity of a stillborn child. This means that the father is recognized with the right to paternity of the human embryo/fetus, which by analogy should also recognize all other rights in relation to the human embryo/fetus. ORA stipulates in Article 1101 that ''*parents have the right to fair monetary compensation in the event of the loss of a conceived and unborn*

[796] *Family Act*, Art. 50, par. 3.

[797] *Family Act*, Art. 30.

child.''[798] This provision respects the principle of equality of sexes, and the father is recognized as an equal parent in relation to the conceived child. The *Act on Medically Assisted Fertilization* in the provisions of Article 14, paragraph 1 prescribes that for the procedure of assisted fertilization, as well as for the disposal of unused embryos, ''*the consent of both marital or extramarital partners is necessary*.''[799] According to Article 14, paragraph 3, ''*marital and extramarital partners individually or together can withdraw their consent and give up the procedure of medically assisted fertilization until sperm cells or eggs or embryos have been introduced into the woman's body.*'' Article 16, paragraph 2, stipulates that a father acknowledges a child in advance, which means that he has an obligation towards him, so it remains unclear why he should not have rights. The equal role of the father is prescribed in Article 18, in which it is pointed out that married or extramarital partners can give up ''*their own use of the embryo created for their procreation*.''[800] According to Article 19, paragraph 2, ''*donation and use of an embryo...can be carried out only on the basis of the free written consent of the woman and the man from whom the embryo originates and who have given up using the embryo for their own procreation*.''[801] From the above provisions it is clear that a woman is not autonomous in her decisions in relation to the human embryo/fetus, nor can it be because without sperm cells it cannot conceive a child. The equal rights of the father and the mother are asertained until the embryos are transferred into the woman's body. Can this provision interpret that the father loses his rights in relation to the human embryo/fetus the moment the embryos are transferred into the woman's body? Again, rights would depend on location, but the right, if it exists, cannot be conditioned by place and time. The above would mean that men are discriminated against because of the biological fact of impossibility to give birth, which would be contrary to all the mentioned international, regional and national legal acts which prohibit discrimination based on sexes, both female and male. The omission of a man's rights from decisions related to a woman's pregnancy, and especially the request for a woman's abortion based on bodily integrity, which excludes the rights of not only the man, but also the doctor, as well as the

[798] The case of *Znameskaya v. Russia*, in which the ECtHR established a man's right to be ascertained as the father in the event of a stillbirth. A similar situation was resolved by the ECtHR in the case *Habulinec and Filipović v. Croatia*, No. 51166/10, judgement of 4 June 2013.

[799] *Act on Medically Assisted Fertilization*, Art. 14, par. 1 and 3.

[800] *Act on Medically Assisted Fertilization*, Art. 18.

[801] *Act on Medically Assisted Fertilization*, Art. 19, par. 2.

human embryo/fetus itself, is in contradiction with the above-mentioned provisions on gender equality, as well as with the cited articles of the FA.

8.10.2. Jurisprudence

8.10.2.1 European Court of Human Rights

The European Court of Human Rights has decided in some cases on the rights of the father in the context of abortion. In *W.P. v. United Kingdom*, the applicant claimed that English law violated the right to life of his unborn child (Article 2 ECHR) and his right to private and family life (Article 8) because it allowed abortion on request women without counseling and the involvement of the man, the father of the child.[802] The applicant claimed that he has the right to be informed and consulted, as well as the right to submit a petition in the procedure of making a decision on abortion. The Commission considered that the father of the aborted fetus can be considered a ''victim'' of the termination of his wife's pregnancy.[803] Nevertheless, Commission concluded that ''*having regard to the right of the pregnant woman, does not find that the husband's and potential father's right to respect for his private and family life can be interpreted so widely as to embrace such procedural rights as claimed by the applicant, i.e. a right to be consulted, or a right to make applications, about an abortion which his wife intends to have performed on her*.''[804] The Commission thus clearly determined that the rights of the father in relation to his private life, which includes the decision whether or not to have children, which he is biologically unable to give birth to, are not equal to the rights of a woman who carries a human embryo/fetus in her body. We could say that there is no more important dimension of the right to privacy than the right to protect the life of one's own child, therefore it is not clear why the Commission considers the said right to be a ''broad'' interpretation of privacy. The request of the father to protect the life of the human embryo/fetus is in accordance with the principle of equality of sexes which permeates international acts. However, the Commission understood the opposite in the case of *H. v. Norway*[805] from 1977, which also dealt with the abortion of a woman against the father's

[802] Cf. *W.P. v. United Kingdom*, No. 8416/78, judgment of 13 May 1980.

[803] Cf. *W.P. v. United Kingdom*, No. 8416/78, judgment of 13 May 1980, par. 2.

[804] *W.P. v. United Kingdom*, No. 8416/78, judgment of 13 May 1980, par. 27.

[805] Cf. *H. v. Norway*, No. 17004/90, judgment of 19 May 1992.

wishes. The father of the aborted child complained that Article 2 ECHR was violated because the abortion of a 14-week-old fetus was unnecessary to protect the life and health of the mother. He also complained that Article 3 ECHR was violated because no measures were taken to avoid the risk of pain to a fourteen-week-old fetus during an abortion, and also Article 8 was violated because the father of the child was deprived of the minimum rights in relation to the unborn child. The Commission once again ascertained that ''*it does not have to decide whether the fetus may enjoy a certain protection under Article 2*'' (point 1). In relation to Article 3, the Commission found that *''…(The Commission) has not been presented with any material which could substantiate the applicant's allegations of pain inflicted upon the fetus other than what appears from the courts' judgments mentioned above. Having regard to the abortion procedure as described therein the Commission does not find that the case discloses any appearance of a violation of Article 3''*.[806] In relation to the man's allegations of violation of Article 8 The Commission concluded (point 4) ''*that any interpretation of the potential father's right under these provisions in connection with an abortion which the mother intends to have performed on her, must first of all take into account her rights, she being the person primarily concerned by the pregnancy and its continuation or termination*.''[807] How did the Commission determine that a woman is primarily concerned about pregnancy, while a men is not? Does that mean it doesn't matter who the father of the child is because he isn't worried anyway? Bearing in mind that it was the father who filed the complaint with the ECtHR, it is not logical to determine that the woman is primarily concerned about the pregnancy. In the *Boso v. Italy*[808] case, the ECtHR again rejected the request of the father of the aborted child, repeating the understanding from previous judgments[809], but also confirming that ''potential fathers'' can be victims of abortion within the scope of Article 34 ECHR. In point 2, the ECtHR concluded that ''*any interference with the right protected under Article 8 which might be assumed in the circumstances of the case was justified as being necessary for the protection of the rights of another person (the mother).*'' The ECtHR considered that the request was not founded for the reason that the abortion was done in order to protect the right of the mother to decide about her own body, therefore does not represent an unauthorized encroachment on the father's right to private and family life. The above means that the father's privacy can be

[806] *H. v. Norway*, No. 17004/90, judgment of 19 May 1992, par. 3.

[807] *H. v. Norway*, No. 17004/90, judgment of 19 May 1992, par. 4.

[808] Cf. *Boso v. Italy*, No. 50490/99, judgment of 5 November 2002.

[809] Cf. *Boso v. Italy*, No. 50490/99, judgment of 5 November 2002, par. 2.

invaded, while the mother's is not allowed. Such an understanding is discriminatory on the basis of sex. The case of *Weller v. Hungary* is interesting, in which a Romanian woman was married to a Hungarian man with whom she had four children. After giving birth, she did not have the right to ask for compensation for the child because she was not a Hungarian citizen, so her husband asked for compensation, but the authorities refused him because he was not the child's mother. In that case, the ECtHR held that the father was discriminated against on the basis of paternity, but not sex, because biological fathers could not claim compensation, while adoptive parents and male guardians could. In point 35, the ECtHR notes that the authorities did not provide an objective and rational basis for justifying the general exclusion of biological fathers from benefits aimed at supporting all those raising newborn children. The ECtHR expressly confirmed the existence of discrimination against fathers after the birth of a child.[810] If the ECtHR confirms the existence of discrimination against biological fathers after the birth of the child, how is it not relevant before the birth? The ECtHR explicitly states in point 33 that ''*while differences may exist between mother and father in their relationship with the child, both parents are ''similarly placed'' in taking care of the unborn child*.'' Given that in *Boso v. Italy* the ECtHR found that the biological fact of paternity is not relevant for an abortion would be considered a violation of the father's privacy, and in *Weller v. Hungary* it states that both parents are similar in terms of caring for unborn children, the EctHR's understanding is contradictory. In the *Evans v. United Kingdom*[811] case, the ECtHR decided on the issue of removing eggs from the ovaries for the purpose of *in vitro* fertilization. The applicant complained that her ex-partner was allowed to withdraw his consent for the use of embryos, which prevented her from giving birth to a child. The ECtHR considered that ''*that 'private life'…incorporates the right to respect for both the decisions to become and not to become a parent*.''[812] It emphasized that both men and women deserve equal treatment during the *in vitro* fertilization procedure.[813] It is clear that even in the case of pregnancy through IVF, men and women participate differently in the procedure, so it is not logical for the ECtHR in this case to consider that the different

[810] Cf. *Weller v. Hungary,* No. 44399/05, judgment of 30 June 2009, par. 39.

[811] Cf. *Evans v. United Kingdom,* No. 6339/05, judgment of 10 April 2007.

[812] *Evans v. United Kingdom,* No. 6339/05, judgment of 10 April 2007, par. 71. The same conclusion was reached by the ECtHR in *R. R. v. Poland Poljske*, par. 180, *Dickson v. United Kingdom,* par. 66, *Paradiso and Campanelli v. Italy,* par. 163 and par. 215.

[813] Cf. *Evans v. United Kingdom,* No. 6339/05, judgment of 10 April 2007, par. 90.

degree of participation in pregnancy, biologically conditioned, is not relevant when deciding on conception through *in vitro* fertilization, and it is relevant, that is, men do not have equal rights when it comes to natural conception. From the above cases, it is clear that reference to paternity discrimination is possible only in the time period after the birth of the child, but also when the decision is made to start a pregnancy (by artificial means), but the ECtHR does not provide an argument that would justify the exclusion of the father from decisions about the human embryo and fetus during a woman's pregnancy.

8.10.2.2. Jurisprudence in USA

In the USA, attitudes towards the legal status of the father, i.e. his rights and obligations when deciding on an abortion, differed from state to state. In *Touriel v. Benveniste* in 1961, the California Superior Court held that the father, regardless of the mother's consent, has a legally protected ''marital interest'' in the human embryo and fetus, and that the father is entitled to compensation in the event of an abortion.[814] If a father was given an equal right to co-decide on the birth of a child, and against the mother's wish for an abortion, it might be possible to establish that a woman ''must'' give birth, and the father could compensate her for this service. In *Doe v. Rampton*, the Court invalidated a Utah State Code that ''in all cases consent to an abortion must be given by the father of the fetus.''[815] The Florida Court of Appeals held in *Jones v. Smith* that an unmarried father had no legal standing to seek a ban of planned abortion by the mother. It considered illegal a Florida law that stipulated that before terminating a pregnancy, the physician shall obtain the written request of the pregnant woman and, if she is married, the written consent of her husband. The Florida court concluded that there is no right of the prospective father to order the mother to terminate the pregnancy, considering that such a decision is in line with the interpretation of the US Supreme Court in *Roe v. Wade*.[816] *Planned Parenthood of Central Missouri v. Danforth*[817] is a case in which the US Supreme Court challenged the constitutionality of a law from Missouri because it considered unconstitutional the provision requiring the prior written consent of a parent (in the case of a minor) or a spouse

[814] Cf. *Touriel v. Benveniste*, Docket 776790, Cal. Super. Ct. Oct. 20, 1961.

[815] Cf. *Doe v. Rampton*, 366 F. Supp. 189, D. Utah, 1973.

[816] Cf. *Jones v. Smith*, 278 So.2d 339, Fla.Sup.Ct., 1973.

[817] Cf. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 1976.

(in the case of a married woman) when enacting women's decisions about abortion. The court upheld the decision of the lower court and abolished the need for the consent of the married and unmarried partners, which meant that the men lost the right to veto a woman's decision to have an abortion. The court considered that neither the state nor the partner can encroach on a woman's right to decide about her own body. However, a woman needs a partner to become pregnant and a state to be able to carry out an abortion. How then are they not relevant when making a decision on abortion?

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*[818], the US Supreme Court upheld the constitutional right to abortion established in *Roe v. Wade*, and abolished the requirement that a woman seeking an abortion should sign a statement informing her husband of her subjecting to abortion procedure, except in exceptional cases.

In *Stanley v. Illinois*[819], the US Supreme Court ruled that fathers of children born out of marriage have a fundamental right to their children, and found unconstitutional Illinois acts that presume an unmarried father is incapable of custody of his offspring. The court concluded that unmarried father Stanley was entitled to a hearing on his parental capacity before his children were taken from him...by denying him a hearing, the state denied Stanley the equal protection of the laws guaranteed by the 14th Amendment. If the Supreme Court considered that the father of the child should not be discriminated against in relation to the care of the child, regardless of whether it is a married or unmarried spouse, can by analogy he be discriminated against before the birth of the child? Equal protection guaranteed by the 14th Amendment is denied when the father is not allowed to participate in the woman's decision to have an abortion.

If the unborn human is as much the father's as the mother's, then both parents are equally responsible for making decisions about the unborn human. In *Davis v. Davis*[820], the Tennessee Supreme Court ruled that a father has the right to quit from assisted reproduction, despite his ex-wife's wishes. The court considered that it is necessary to follow the wishes of those who donate their sperm and eggs, and in the event of a dispute, a prior agreement between the gamete donors should be implemented, and in the absence of such an agreement, the court should weigh the interests of the parties, usually ruling in favor of the party that wants to avoid reproduction. Such an understanding reveals an

[818] Cf. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 1992.

[819] Cf. *Stanley v. Illinois*, 405 U.S. 645, 1972.

[820] Cf. *Davis v. Davis*, 842 S.W.2d 588, 1992.

approach similar to the ECtHR, which takes into account the father's rights if the human embryo/fetus is not in the mother's womb, which means that the father's rights depend on the location of the child, which, by biological determination, can only be in the mother's womb during pregnancy.

8.10.3. Rights and obligations of a men during a woman's pregnancy

Jurisprudence shows that a men has rights in relation to a human embryo/fetus when it comes to IVF fertilization, as well as after the birth of a child. An understanding that excludes men from decisions about pregnancy and abortion is unjustified and discriminatory against men based on biology. For this reason, it is in contradiction with all international and national acts that promote equality of sexes. There is no reason why a woman's demand for bodily autonomy, on which the demand for abortion is unfoundedly based, would be stronger than a men's fundamental right to a human embryo/fetus. Also, even if a woman had the right to an abortion on request up to a certain stage of pregnancy, it is not clear from court practice and positive legal legislation what the legal status of a men is when a woman no longer has that legal right and whether a men has rights related to pregnancy from that moment on. Myers claims that ‘‘the father has fewer rights during woman's pregnancy because he is not carrying the unborn child, but his rights will increase with the age of the child.’’[821] Such an understanding is in line with the previously mentioned notion that emphasizes the biological fact that pregnancy takes place in the female body, so by the argument of female autonomy, the men, although the biological father, should be excluded from the discussion on abortion, and the woman is privileged, which is discriminatory. Some authors, such as O'Neill and Watson, believe that ‘‘the father could not prevent the mother from having an abortion, but he should still have some influence’’,[822] but they leave it unclear what kind of influence it is and to what extent. The theory cites other arguments that exclude the father from the abortion debate. Schroedel talks about the reduced intensity of the father's physical and emotional connection with the unborn human, due to which the father would perceive the pregnancy as an ‘‘outsider’’, while the woman is the one who is the source of the creation of a new

[821] Myers, J. E., *Abuse and neglect of the Unborn*, Duquesne Law Review, 23, 1984, 1, p. 62.

[822] O'Neill, P. T.; Watson, I., *The Father and the Unborn Child*, The Modern Law Review, 38, 1975, 2, 184 - 185.

life.[823] Who can measure the emotions of a father or the mother during pregnancy? Emotions are not a morally relevant category considering their unreliability, changeability and possible conditioning by external substances, therefore the intensity of the father's or mother's connection with the human embryo and fetus should not represent a legally relevant parameter for standardizing the rights and obligations of the father in relation to the unborn human. The fact that fathers file lawsuits due to the impossibility of participating in decisions about their own child during the mother's pregnancy indicates their emotional involvement with the fact of paternity. If, on the other hand, emotions constitute a legal parameter, then consistency would require that fathers, who are denied of their rights, should be free from all legal obligations during a mother's pregnancy.

On the other hand, it is in the interest of some men to get rid of responsibility by having an abortion easily. The freedom of abortion becomes, in the words of Simone de Beauvoir, one of the pillars of feminist philosophy prominent in the French existentialism of the left orientation, ''a pleasant lie of the men'', but it is not a solution, but a radicalization of this pleasant lie to which the woman in reality submits, and men fails to help her.[824] Robertson notes how men intoxicated by the sexual revolution and freedoms of the 1960s are creating a new sub-class of poor women forced into self-support.[825] Abortion is, instead of liberation, an expression of female reproductive enslavement, especially in circumstances where women are left abandoned and without economic resources. Emphasizing autonomy as a reason why a men should be excluded from the abortion debate, harms the woman primarily, in a way that relieves the men of responsibility, whether in an economic or familial sense. We can conclude with Laun and Glendon that abortion cements male advantage at the expense of harmful consequences for women.[826]

8.10.4. Men as an ideal – equality of women with men

Some of the arguments of second wave feminism are based on the understanding of the need to separate biological nature from social role in order for women to achieve equality with men. Theorists like Siegel believe that in order to achieve equality between women

[823] Cf. Schroedel, Fiber, Snyder, *op. cit.* note 609, p. 188.

[824] Cf. Laun, *op. cit.* note 34, p. 28.

[825] Cf. Bullock, *op. cit.* note 614, p. 65 and 69.

[826] Cf. Laun, *op. cit.* note 34, p. 30 and Glendon, Anne, *op. cit.* note 606, p. 50.

and men, ‘‘it is necessary to separate the biological and social categories of pregnancy’’ because according to Siegel, the legislator should consider reproduction as a social, not a biological category, in order to avoid the social standard according to which a woman's role is reproduction.[827] Using the arguments of the second wave of feminism, Siegel separates a woman's biology from her social role, thereby placing the role of ‘‘men worker’’ before the biological category of motherhood, because a woman, in order to achieve equality, needs to assume the social role of a worker, not a mother, which a men cannot biologically fulfill anyway, because he is not woman. Siegel, together with the feminists of the second wave of feminism, degrades the woman in such a way that the role of the male worker is imposed as a value that every woman should achieve. Treating women like men encourages the existing hierarchy of sexes.[828] The constitutional doctrine of equality of sexes suffers from a lack of focus on the biological reproductive differences of women and men. The fact is that women are biologically capable of giving birth, and men are not, which represents a biological advantage. Even if it were a biological limitation, it is clear that human beings are limited in many aspects, so they differ in appearance, intelligence, abilities, etc. Should the state allow us to change the same? If the equality of a woman with a men implies abortion, which would enable a woman to be biologically equal to a men within the framework of privacy requirements, according to which a woman's biological ability to give birth would be treated as a disease, then we can talk about contempt for femininity and men's biology as an ideal. Men, as a biological, psychological and social category, thus becomes a social, cultural and normative standard, according to which social goals and strategies should be regulated. The reproductive or sexual asymmetries of women and men require the respect of both women and men in the entire biological and ontological substrate, which implies the exclusion of the possibility that one dimension of women would be negated for the purpose of biological equalization with men. The thesis of equality is distorted if it does not imply taking biological differences into account, and abortion makes women subordinate because they have to deny their biological condition. Popović concludes that ‘‘the right to abortion would be a constitutional standard that would represent a normative request addressed to a woman

[827] Cf. Siegel, R., *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, Stanford Law Review, 44, 1992, 2, 351 - 368.

[828] Cf. McConnell, J. E., *Relational and Liberal Feminism: The Ethic of Care, Fetal Personhood and Autonomy*, West Virginia University College of Law, 99, 1996, 2, 300 - 301.

to ‘‘mold’’ herself into a biologically unconditioned men in order to compete with him in the public sphere.’’[829] ‘‘The actual equality of women with men has led to the human embryo being regarded as an originally female intended creation, and abortion as self-destruction.’’[830] Only a woman is capable of motherhood, and respect for the female body includes respect for the human embryo/fetus. Abortion presupposes that women are free from their own nature by becoming men. *Reductione ad absurdum* we can claim that men should become equal to woman, so instead of men, the ideal would be a woman with the biological possibility of giving birth. Similarly, Greasley and Glendon express doubts about the use of abortion as an argument for equalizing the sexes, but emphasize the need to provide women with the conditions that will enable the child's right to life.[831] True equality requires significant public spending for women.[832] Help is especially needed for women who, due to poor economic and family circumstances, reach out to abortion, which has nothing to do with the demand for autonomy, as second-wave feminists suggest.[833] Feminist Khiara M. Bridges has the opposite opinion, who sees a poor pregnant woman who asks for financial assistance as problematic, and believes that ‘‘it is necessary to seriously consider her desire to end the pregnancy in order to avoid being demonized as the 'queen of social assistance' in political and popular discourse through abortion.’’[834] Bridges' claim is an expression of contempt for weaker women, while such a reduced conception of female biology is an expression of radical feminism, and is close to male chauvinism. Similar arguments are evident in the popular citations of Third World countries such as Nigeria, which are cited as an example of a country where girls' pregnancies, due to the lack of a minimum legal age for marriage, end in death, so abortion should be widely available.[835] Instead of strict control and prohibition of marriages of minors, as well as all related criminal acts, the problem is the restrictive law on abortion, because it is about non-professional interventions that can cause death.[836] The true solution to women's equality, and then to the issue of abortion, should be sought in an approach

[829] Popović, *op. cit.* note 655, p. 146.

[830] As cited in Dworkin, *op. cit*. note 498. Prijić-Samaržija, *op. cit.* note 72, p. 117.

[831] Cf. Greasley, *op. cit*. note 348, 98 - 99 and Glendon, Anne, *op. cit.* note 606, p. 259 and 262.

[832] Cf. Dworkin, *op. cit*. note 498.

[833] Likewise Robertson, *op. cit.* note 529, p. 229.

[834] Bridges, K. M., *A Reflection on Personhood and Life*, Supra, 81, 2011, 10, p. 98.

[835] As stated in Cook, R. J., *Studies in Family Planning*, Population Council, 24, 1993, 2, 74 - 78.

[836] *Beijing Declaration and Platform for Action*, point 97.

that entails ''taking into account the causes of abortion, as well as the socio-political forces that produce unwanted pregnancies, in order to avoid the trivialization of the decision on abortion and the trivialization of the different contexts in which they women live.''[837] Poor financial conditions require appropriate social policies to help poor pregnant women, programs to help pregnant women, provide kindergartens, prevent male violence and draconian punishment for rapists, and not trivialize the problem with the theory of autonomy, which is completely inappropriate in the matter of abortion, and absurd when it is about women with economic and family problems.

We can conclude that the true equality of women with men implies giving women every possibility of support so that, if they want to, they can realize their full biological potential.[838]

8.11. Abortion in international law

Abortion is not listed as a woman's right in any binding international or regional treaty. *International Covenant on Civil and Political Rights* in Article 17, paragraph 1, stipulates that ''*no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*.''[839] At the time when the *International Covenant on Civil and Political Rights* was drafted, most states prohibited or restricted abortion.[840] Article 17 therefore could not be created with the purpose of realizing the woman's interest in abortion. Over time and due to the factors described above, the situation in the states changed in such a way that more and more states began to legalize abortion on demand. The UN *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) was adopted, which in Article 11, paragraph 1, states that ''*States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in*

[837] Smyth, L., *Feminism and abortion politics: choice rights, and reproductive freedom*, Women's Studies International Forum, 25, 2002, 3, p. 335.

[838] Likewise Glendon, Anne, *op. cit.* note 606, p. 53 and 58.

[839] *International Covenant on Civil and Political Rights,* Art. 17, par. 1.

[840] Cf. Tozzi, *op. cit.* note 132, 58 - 60.

particular f)...the safeguarding of the function of reproduction.''[841] In Article 12, paragraph 1 of CEDAW prescribes that ''*States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning*.''[842] However, the aforementioned articles do not prescribe a woman's right to an abortion, nor can that conclusion be derived from their interpretation. Family planning includes deciding on the number of children a person will have, the spacing between births, the decision not to have children, and the age at which they want to have children. The decision that a person does not want to have children is private and autonomous, and does not imply the possibility of asking someone else (a doctor) to perform an abortion service. Protection of reproductive functions does not imply their denial, which abortion is. Abortion, as stated above, is generally not a health care issue. A woman's reproductive function includes the possibility of conception and childbirth. Discrimination against women in the field of health care related to pregnancy would mean the denial of health services related to pregnancy protection, not abortion. When a woman is in menopause, she loses her reproductive function, i.e. the ability to conceive and give birth to a child, so it is not logical to interpret the protection of reproductive functions in such a way as to imply the negation of the above. In Article 16 (e) it is stipulated that ''*The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights*.''[843] Ritossa interprets that provision in such a way that procreative rights can be considered one of the basic human rights in the Republic of Croatia.[844] It has already been established that procreative rights are basic human rights, therefore every woman should be able to decide in privacy how many children she will have and how she will plan her family. However, the mentioned article does not imply the intervention of the state because the state has no influence on the private birth process. Family planning should take place in accordance with the anthropology of both men and women. Can the said provision be interpreted as the right to health guaranteed by Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (as well as Article 24 of the *Convention on the Rights of the Child*)? Article

[841] *Convention on the Elimination of All Forms of Discrimination Against Women,* Art. 11, par. 1.

[842] *Convention on the Elimination of All Forms of Discrimination Against Women*, Art. 12, par. 1.

[843] *Convention on the Elimination of All Forms of Discrimination Against Women,* Art. 16.

[844] Ritossa, *op. cit.* note 687, 982 - 984.

12 of the aforementioned agreement determines in paragraph 1 that member states recognize the right of everyone to enjoyment of the highest attainable standard of physical and mental health. The Committee for Economic, Social and Cultural Rights of the UN, responsible for the interpretation of provisions, adopted at its 22nd session in August 2000 *General Comment No. 14*: the right to the highest standard of health. According to the Committee's interpretation, it includes: access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.[845] The Committee did not confirm that abortion is a right that exists within the right to health, thereby confirming that pregnancy is not a diseased state that is contrary to health.[846]

Convention on the Rights of Persons with Disabilities in Article 23 paragraph 1, b stipulates that ''*States Parties shall take effective and appropriate measures to eliminate discrimination against persons with disabilities in all matters relating to marriage, family, parenthood and relationships, on an equal basis with others, so as to ensure that the rights of persons with disabilities to decide freely and responsibly on the number and spacing of their children and to have access to age-appropriate information, reproductive and family planning education are recognized, and the means necessary to enable them to exercise these rights*.''[847] The aforementioned Article, which also states the right to family planning, can also only be interpreted as the right of every person to decide when and how many children to have, which excludes the interpretation that is opposite to biological reality (what abortion is). Such an approach is also evident in *Resolution 1607 (2008)* of the Council of Europe ''Access to safe and legal abortion in Europe'', which in point 1 stipulates that ''*abortion can in no circumstances be regarded as a family planning method. Abortion must, as far as possible, be avoided. All possible means compatible with women's rights must be used to reduce the number of both unwanted pregnancies and abortions.*''[848] Therefore, if we speak in terms of system compatibility, we cannot interpret CEDAW in such a way that family planning implies the right to abortion, and within the framework of the Council of Europe, advocate the position that abortion should be avoided.

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[845] Cf. https://www.refworld.org/pdfid/4538838d0.pdf, point 11, (accessed: 25 January 2022).

[846] Cf. *ibid.,* point 8.

[847] Official Gazette, International contracts, No. 6/2007.

[848] http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17638, (accessed: 25 January 2022).

However, point 5 of the *Resolution 1607 (2008)* states that ''*The Assembly affirms the right of all human beings, in particular women, to respect for their physical integrity and to freedom to control their own bodies. In this context, the ultimate decision on whether or not to have an abortion should be a matter for the woman concerned, who should have the means of exercising this right in an effective way*'', while in point 7.8. of the same Resolution, the Assembly ''*invites the member states of the Council of Europe to promote a more pro-family attitude in public information campaigns and provide counselling and practical support to help women where the reason for wanting an abortion is family or financial pressure*.'' However, point 5 and point 7.8. are not aligned. The promotion of a pro-family attitude is inconsistent with the requirement of physical integrity, because if the physical integrity, from which the so-called the right to abortion would stem, is understood as a value that should be protected, then there is no need to promote a pro-family attitude. One value negates the other, so they cannot both represent values at the same time. Point 1 and point 6 are also inconsistent, because the recommendation to avoid abortions and reduce them contradicts the statement that a woman should be provided with the means to exercise the right to an abortion on request in an efficient manner.

In the framework of the UN Human Rights Council, the debate was about whether the ban on abortion could cause serious mental and physical pain and suffering that could qualify as cruel and degrading treatment.[849] Torture and other cruel and degrading acts are absolutely prohibited by international law (Article 7 of the *International Covenant on Civil and Political Rights*, Article 3 of the ECHR). Torture and other cruel and humiliating acts are defined in Article 1 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* as ''*any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed...or for any reason based on discrimination of any kind...*'' The term does not refer to pain or suffering resulting from lawful sanctions. That is why the fact that a person experiences pain or serious physical or mental suffering is not enough to be subject to the application of Article 1 of the mentioned Convention because the state should have the intention of inflicting pain, and this is not the case when abortion is not provided, instead the state protects the human embryo/fetus by not providing abortion.

[849] Cf. Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (A/HRC/22/53), 1 February 2013, point 50.

States have no obligation to ensure that individuals are free from any physical or mental pain because this cannot be achieved, rather the state is prohibited from causing pain by punishment or action.

8.11.1. Jurisprudence of the European Court of Human Rights

European Convention for the Protection of Human Rights and Fundamental Freedoms in Article 2 stipulates that ''*Everyone's right to life shall be protected by law*'', and in Article 8 paragraph 1 as ''*Everyone has the right to respect for his private and family life, home and his correspondence.*''[850] Can Article 8 be interpreted in such a way as to include the right to abortion?

The ECHR dealt with the issue of abortion in numerous judgments, interpreting Article 8 and Article 2 of the ECHR. As concluded above, the ECHR has never excluded prenatal life from the scope of application of the ECHR in any judgment. In relation to Article 8, the ECtHR interprets it by prescribing positive and negative obligations of member states. Negative obligations, according to the interpretation of the ECtHR, imply that state interference should be ''in accordance with the law'', result in ''legitimate goals'' presented in Article 8, paragraph 2 of the ECHR, and be ''necessary in a democratic society.''[851] Positive obligations of the state, in with regard to respect for private life, can include: ''*the adoption of measures to ensure respect for private life even in the sphere of relationships between individuals...*''[852] The ECtHR in its judgments did not clearly specify what the term private life means[853], but considers it a broad term that cannot be exhaustively defined, but considers that it covers a number of situations such as: protection of sexual relations (*Brüggeman and Scheuten v. Germany*), a mother's wish to change the surname engraved on the grave of her stillborn child (*Znamenskaya v. Russia*), the right to become and not become a parent (*Evans v. United Kingdom* ; *R.R. v. Poland*). In the judgment *R.R. v. Poland* points

[850] *European Convention for the Protection of Human Rights and Fundamental Freedoms,* Art. 2 and Art. 8, par. 1.

[851] *Tysiąc v. Poland,* No. 5410/03, judgment of 20 March 2007, par. 109. See also *A, B. and C. v. Ireland*, par. 218.

[852] *Tysiąc v. Poland,* par. 110.

[853] Cf. *Costello-Roberts v. United Kingdom,* No. 13134/87, judgment of 23 February 1993.

out that ''private life'' is a broad concept, encompassing, *inter alia*, the right to personal autonomy and personal development.[854]

Has the ECtHR interpreted Article 8 to include the right to abortion and Article 2 to make abortion an exception to the right to life? In the case of *Pretty v. United Kingdom*, it emphasized that ''*Article 2 cannot be interpreted without twisting the language as granting the diametrically opposite right, namely the right to die; nor can it create the right to self-determination.*''[855] In *Vo v. France*[856], paragraph 75, it explicitly states that abortion does not represent a justified exception to Article 2, but this is the case exclusively when it comes to the protection of the mother's life and health, therefore only the protection of the life of the unborn human being on the one hand and the life and health of the mother on the other can be considered a fair balance. In paragraph 88 of the same judgment, ECtHR states that the first sentence of Article 2, as one of the most important fundamental provisions of the Convention and a guarantor of one of the fundamental values of democratic societies from which the Council of Europe consists, requires not only that states refrain from intentional deprivation of life, but also that they take appropriate steps to protect the lives of persons under their jurisdiction. The ECtHR confirms that life is a fundamental value and advocates a proactive approach by states in order to protect it. If abortion is not an exception listed in Article 2, and the right to life of every human being is a fundamental right, did the ECtHR interpret that abortion belongs to the sphere of privacy or autonomy provided for in Article 8 ECHR? In the *Brüggemann and Scheuten v. Federal Republic of Germany*[857] case, the Commission ascertained that Article 8, paragraph 1 of the ECHR cannot be interpret that pregnancy and its termination are, in principle, in the exclusive area of the mother's private life, and the possibility that under certain circumstances the protection can be extended to the unborn child is not excluded (paragaraphs 56 - 59). It is clear from the above that abortion is not understood as an area of a woman's autonomy. In paragraph 60 of the same judgment, the Commission explicitly states that it ''*protects some interests related to pregnancy*'', but these interests can also include an unborn human being and a woman who needs to be helped during her pregnancy,

[854] Cf. *R.R. v. Poland,* No. 27617/04, judgment of 26 May 2011, par. 180.

[855] As cited in Puppinck, *op. cit.* note 647, p. 156.

[856] Cf. *Vo v. France*, No. 53924/00, judgment of 8 July 2004, par. 75.

[857] Cf. *Brüggemann and Scheuten v. Federal Republic of Germany*, No. 6959/75, judgment of 12 July 1977.

either economically or in other ways. In *Boso v. Italy*[858], the ECtHR found that the Italian law on voluntary termination of pregnancy, which allows termination of pregnancy in the first 12 weeks of pregnancy (if there is a risk to the physical or mental health of the woman), struck a fair balance between the woman's interests and the need to protect the unborn child. In doing so, the ECtHR did not decide on the status of the human embryo/fetus, but spoke of the assumption ''… *that, in certain circumstances, the fetus might be considered to have rights protected by Article 2 of the Convention, he assumption that the fetus could be considered to have the rights protected by Article 2 of the Convention*.''[859] The ECtHR talks about the need for balance, which is not enforceable in practice since abortion represents the destruction of an unborn human being. Also, even if balance is possible to find, it is not possible to make a decision on whether a fair balance between rights and interests has been established only based on the assumption, and it is especially not possible if the status of the human embryo/fetus is not known, because it is not clear why a balance between rights is needed if human embryo/fetus is not a subject (*sui generis*)? In *A, B and C v. Ireland*, the ECtHR determines that ''*The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child.*''[860] In paragraph 238, ECtHR concludes that ''*a prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature*'', although it does not explain what constitutes unqualified and what constitutes qualified respect for the protection of life. In paragraph 214, it determines that ''*while Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her eligibility for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8*.'' The ECtHR explicitly states that abortion does not constitute an exception to Article 2, nor would it be given under Article 8. Although the ECtHR recognizes in the mentioned provision that Article 8 is not a ground for abortion, it still allows it, by allowing "welfare" to be interpreted broadly, since ''welfare'' can mean

[858] Cf. *Boso v. Italy,* No. 50490/99, judgment of 5 November 2002.

[859] *Boso v. Italy,* No. 50490/99, judgment of 5 November 2002, par. 1.

[860] Cf. *A, B and C v. Ireland,* No. 25579/05, judgment of 16 December 2010. Same in *P. and S. v. Poland,* No. 57375/08, judgment of 30 October 2012, par. 213.

economic as well as any health reasons. That is why it is necessary to define what welfare and ‘‘a number of health reasons’’ mean, otherwise the ECtHR opens a Pandora's box because if each individual interprets that the state should provide him with welfare from his privacy, which can mean both economic and any health reasons, then the state can be brought into the awkward position of fulfilling the wishes of individuals based on welfare requirements. The difference between a real medical reason for an abortion and a health benefit is great, because as Puppinck states, ‘‘a woman's right to an abortion when her life is threatened is not her right to an abortion, but her right to life.’’[861]

An analysis of the ECtHR judgments shows that the competence and responsibility of member states to regulate the scope of provisions on abortion lies with the national authorities of the member states. States have a margin of discretion when creating a normative framework in accordance with their own social conventions and moral values.[862] The ECtHR does not explicitly affirm either the status of the human embryo/fetus or the right to abortion. However, in no judgment did he consider that Article 8 represents a woman's right to autonomy, from which the right to abortion would arise.[863] The ECtHR did not include the human embryo/fetus in the scope of Article 2 ECHR, but did not explicitly exclude it. While prescribing the need to balance rights, it remains unclear on both the right to life of the human embryo/fetus and the demand for abortion. The general principle of the ECtHR is that the fundamental right guaranteed by the ECtHR, i.e. the right to life, cannot be subordinated or placed on the same level with rights that it does not guarantee, but are guaranteed only by national, internal rights (and what is like the right to abortion).[864] To consider abortion a right would be *ultra vires*.[865] Intentional abortion is a ‘‘blind spot’’ in the judgements of the ECtHR, which violates the ECHR, because it threatens the interests and rights guaranteed by it, without any adequate justification.[866] The judgments of the ECtHR would be logical if the ECtHR were to

[861] Puppinck, *op. cit.* note 647, p. 178.

[862] Likewise Bach-Golecka, *op. cit.* note 87, p. 198.

[863] Cf. Hrabar, *op. cit.* note 453, p. 811.

[864] Cf. Hrabar, *op. cit*. note 453, p. 814.

[865] Cf. Puppinck, *op. cit.* note 647, p. 162.

[866] Cf. Hrabar, *op. cit*. note 453, p. 809.

determine the right to life of the unborn human, as well as the privacy of the mother. In this way, ECtHR judgments represent political decisions without clear legal arguments.

8.11.2. The Court of Justice the European Union

The Court of Justice of the European Union (CJEU) has ruled in the case of *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*[867] and concluded that medical termination of pregnancy, carried out in accordance with the legal rules of the respective country, represents a service described in Article 60 of the EEC Treaty (point 21). Apart from the above, the CJEU did not decide on the very nature of the abortion, nor on the woman's request for an abortion.

8.12. Judgments of the constitutional courts of some EU Member States

The judgments of the constitutional courts of some EU Member States that will be analyzed in this paragraph are the judgments analyzed in the Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991. *et al*. They are a starting point for a critical analysis of the decision of the Constitutional Court of Croatia, which also allows us to determine whether the Croatian decision has drawn the right conclusions from foreign examples. The decisions of the European constitutional courts presented here also provide an incomplete but relatively broad European overview of the constitutional treatment of abortion in European countries.

8.12.1. Constitutional Court of Slovakia

In the judgment I. ÚS 12/01 of 4 December 2007, the Constitutional Court of Slovakia states in point 1 that ''*Although the system of laws does not consider the unborn as citizens entitled to the fundamental right to life guaranteed under Article 15 of the Constitution*'', this is not ''*meant to deprive them of all constitutional protection (CTD 116/1999)*'', and in point 2 that ''*the constitution-maker differentiates between every person's right to life (first sentence) and the protection of an unborn human life (second sentence). This differentiation indicates the difference between the*

[867] Cf. *The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others*, C-159/90, EU:C:1991:378, 4 October 1991.

right to life as a personal, subjective entitlement and the protection of an unborn human life as an objective value''.[868] The Constitutional Court of Slovakia with the aforementioned provision establishes the human embryo/fetus as an objective good, which leaves open the question of whether it is an objective good such as a national flag (or any other thing of special value), or an objective good such as every human being, that is, subjective and personal life. In point 5, states that ''*The creation of various categories of the right to life, of which not every right would have the same weight, or alternatively, even the creation of new subjects of law through the judicature (next to the classical dichotomy: natural vs. legal persons) would be in contradiction to the constitutional postulate of equality of people in their rights. At the same time, such forming of the Constitution would have prospectively incalculable consequences of creating various categories of fundamental rights, the content of which would be specified in dependence on the bearers (holders) of those rights*.''[869] If a human embryo/fetus were objectively good at the level of things, such as a flag, it would represent the above mentioned ''Creation of different categories of the right to life'', because a human embryo/fetus is a scientifically proven human being. In points 6 and 7, it states that unborn human life has ''*the character of an objective value*'' and ''*acquires the character of a constitutional value that enjoys constitutional protection*.''[870] It is not clear from the statements of the Constitutional Court of Slovakia what the category of constitutional value represents and what level of protection it implies. Does it equate the human embryo with a thing or an animal or is it equal to every human being who is a constitutional value? In point 9, states that ''*according to the Constitution, the nasciturus is not a subject of law to which the fundamental right to life belongs*.''[871] The Constitutional Court of Slovakia does not explain why the *nasciturus* is not a subject of law and does this also apply to an eight-month-old fetus, for example? It is also not clear on the basis of which criteria the above is determined and why the *nasciturus* is a constitutional value, if it is not a subject of law.

The Constitutional Court of Slovakia does not want to leave the *nasciturus* without any protection, so in point 10 it conceives the protection of unborn human life as a ''*constitutional value, whereby it acknowledges normative status to the need for protecting this value*

[868] The Constitutional Court of Slovakia, judgment I. ÚS 12/01 of 4 December 2007, available at: https:// www.ustavnysud.sk>documents, point 2, (accessed: 25 January 2022).

[869] *Ibid.*, point 5.

[870] *Ibid.,* point 6 and point 7.

[871] *Ibid.,* point 9.

at the level of the constitutional imperative'',[872] although such protection in terms of fundamental human rights, as well as in terms of personality rights, means nothing, if it does not confirm the fundamental right to life of the human embryo/fetus as a subject *sui generis*. In point 13, states that the right to privacy and protection of private life guarantees an individual autonomous self-determination, so ''*within this scope, and protected by the Constitution as well, there is also the possibility of a woman deciding on her own spiritual and physical integrity and its various layers, inter alia, also on the fact whether she will conceive a child and how her pregnancy will develop. By becoming pregnant (either in a planned or unplanned or voluntarily way or as a consequence of violence), a woman does not waive her right to self-determination*.''[873] A woman cannot ''self-determine according to a biological process'' because it is biologically impossible for her. No one puts a child in a woman's womb so that her self-determination would be threatened. In point 14, it similarly states that ''*Any limitation whatsoever on the decision-making of a woman on the issue of whether she inclines to tolerate the obstacles in autonomous selfrealisation, and thus whether she wants to remain pregnant until its natural completion, represents interference with the constitutional right of a woman to privacy.*''[874] Earlier it was asserted that privacy has nothing to do with with the doctor who should perform the abortion and the state which should enable it (negative aspect of privacy). A woman cannot have an abortion herself, therefore the above question is not a category of her ''desire to carry the pregnancy to term.'' In point 16, the Constitutional Court of Slovakia states that ''*On the one side, the law-maker must not ignore the imperative contained in the first sentence of Article 15 par. 1 of the Constitution –the duty to provide protection to an unborn human life, and on the other side it has to respect the fact that everybody, including the pregnant woman, has the right to decide on her(his) private life and to protect the realisation of her(his) own idea thereof against unauthorised encroachment*.''[875] The Constitutional Court of Slovakia states in point 9 that ''*the nasciturus is not a subject of law to whom the right to life belongs*'', and in point 16 it talks about the need for its protection so is again unclear based on what reasons. If the human embryo/fetus is a constitutional value at the level of a thing, and not a subject, then there is no need to balance the rights of the subject, i.e. the woman, with the thing. Such simultaneous protection of the right to life of the *nasciturus* and the

[872] *Ibid.,* point 10.

[873] *Ibid.,* point 13.

[874] *Ibid.,* point 14.

[875] *Ibid.,* point 16.

woman's desire for an abortion is not even practically possible. Therefore, the court statement from Article 16 cannot be a ‘‘guiding provision’’ in practical action because the conclusion that follows from it is contradictory. The Constitutional Court of Slovakia believes that its role is to find a way out of the conflict between the constitutionally protected value (unborn human life) and a limited human, fundamental right (a woman's right to privacy).[876] But there is no way out of that conflict because there is no border between the two so-called conflicting rights. Either the woman's desire for an abortion will be recognized, for which there is no reason not to be recognized from the beginning to the end of the pregnancy, or the right to life of the human embryo/fetus will be recognized, which can only be recognized from the moment of fertilization.

However, the Constitutional Court of Slovakia considers that ‘‘*The law-maker may - and in the interests of protecting the constitutional value of unborn human life must - lay down the procedure and the time limits for cases in which a pregnant woman decides for abortion, whereby this procedure may not be arbitrary; it has to enable a pregnant woman to make a real decision on abortion, and also maintain respect for the constitutional value of unborn human life*.’’[877] The aforementioned is not possible because the decision for the former cancels the latter and *vice versa*. However, the Constitutional Court of Slovakia, contrary to the statement from Articles 9 and 10 about *nasciturus* as a constitutional value, considers ‘‘*The choice of twelve weeks as a limit for carrying out an abortion upon the request of a mother cannot be considered, according to the opinion of the Constitutional Court, as an arbitrary one. This period derives from the time of creation of sensibility in the fetus, and is in accordance with prevailing European practice of relevant legislation of the states permitting abortion upon request*.’’[878] According to the opinion of the Constitutional Court of Slovakia, the subject's criterion is sensitivity, while until that moment the human embryo/fetus is a ‘‘constitutional value’’. However, in point 22, it states that ‘‘*The law-maker is an authority entitled to determine the relevant maximum period for carrying out abortions, whereby the Constitutional Court reviews only potential excess in the course of considering this situation by the lawmaker; it does not review whether the period concerned is in optimum compliance with the current state of knowledge of medical science*.’’[879] But how does it determine sensitivity as a criterion of subjectivity in point 21 and is this criterion related

[876] Cf. *ibid.*, point 17.

[877] *Ibid.*, point 18.

[878] *Ibid.*, point 21.

[879] *Ibid.*, point 22.

to the ''current state of medical science''? The Constitutional Court of Slovakia cannot examine ''exceeding'' without previously established fundamental criteria of regulation, both the subjectivity of the human embryo/fetus, and the concept of privacy in the context of the mother's desire for an abortion.

8.12.2. Constitutional Court of Spain

The Constitutional Court of Spain, in judgment number 53/1985 of 11 April 1985, states in point 7 that ''*the arguments put forward by the appellants cannot be accepted in support of the thesis that the unborn child is also entitled to the right to life, however, … we must state that the life of the unborn child, in accordance with the arguments in the foregoing points of law in this judgment is a legal right constitutionally protected by Art. 15 of our fundamental regulation.*''[880] The Constitutional Court of Spain states in the first part that it does not accept the thesis that the unborn child has the right to life, while in the second part states that the life of the unborn child is the legal right, which is a textbook example of contradiction. The Constitutional Court of Spain further states that ''*this protection which the Constitution dispenses to the unborn child implies two obligations for the State in general terms: that of refraining from interrupting or hindering the natural gestation process, and that of establishing a legal system for the defence of life which presupposes an effective protection thereof and which, given the fundamental nature of life, also includes as a final guarantee, criminal regulations. This does not mean that said protection needs to be absolute; in fact, as occurs with all constitutionally recognised rights, in specific cases it may and even should be subject to restrictions…*''[881] The right to life is limited in exceptional cases. But such exceptions are regulated in detail because the fundamental human right to life is not like other rights, but is a condition for the existence of all other rights. If, according to point 7, an unborn human does not have the right to life, why does it have constitutional protection and what would it include? In point 8, it states that ''*Together with the value of human life and substantially relating to the moral dimension thereof, our Constitution has also raised personal dignity to the status of fundamental legal value, which without prejudice to the rights inherent in it, is inextricably linked to the free development of*

[880] The Constitutional Court of Spain, judgment number 53/1985 of 11 April 1985, point 7. As cited in Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 *et al.* of 21 February 2017, point 7.

[881] *Ibid.*, point 7.

personality (Art. 10) and the rights to physical and moral integrity (Art. 15) to freedom of ideas and beliefs (Art. 16) to honour, to personal and family privacy and to one's own image (Art. 18.1)….Dignity is recognised for all persons in general, however, when interpreting the constitution and attempting to specify this principle, the obvious fact of the feminine condition cannot be ignored and the specification of the aforementioned rights in the framework of maternity, rights which the State should respect.''[882] Self-determination about one's own life does not imply a request to another (doctor) for help in destroying the third (human embryo/fetus). Dignity does not depend on another, it is not extrinsic. Also, as stated above, dignity comes from human nature, abortion does not come from human nature, because if it did, no external aids, primarily medical technology, or the help of others would be needed for its execution. In point 9, the Constitutional Court of Spain states that ''*The question raised is that of examining whether legislation is able to exclude specific cases of the life of the unborn child from criminal protection…These conflicts are extremely serious and of a particularly singular nature and they cannot be 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 fetus, given that that prevalence presupposes loss, in any case of a right which is not only constitutionally protected, but which embodies a central value of the constitutional system*.''[883] We can find an equal approach in the judgment of the Slovak Constitutional Court analyzed above. It is clear that a woman's desire for an abortion destroys the life of a human embryo/fetus. It can't be destroyed a little. Both are irreconcilable, no matter how much one tries to perform the "theoretical stunts" analyzed above. The Constitutional Court of Spain states that ''*…insofar as progress is made in enforcing preventive policy and in the generalisation and intensity of the assistance in a social State…this will decisively contribute to preventing the situation on which decriminalisation is based*.''[884] The Constitutional Court of Spain takes the approach that abortion should be avoided, therefore confirming that it is not based on dignity of the women, nor does it attain the dignity of women, nor is it about the free development of personality (point 8), because then it would not be necessary to avoid it, rather we would have to encourage it. The Constitutional Court of Spain states in point 12 that regarding ''*therapeutic abortion, this Court considers that the requisite intervention of a doctor to interrupt the pregnancy without any*

[882] *Ibid.*, point 8.

[883] *Ibid.*, point 9.

[884] *Ibid.*, point 11.

previous medical opinion is insufficient. Protection of the unborn child requires firstly, that, as in the case of eugenic abortion, an appropriately specialised doctor should ascertain the existence of any foundation for the case and should issue an opinion on the circumstances of each case.''[885] The Constitutional Court of Spain again confirmes that therapeutic termination of pregnancy is not related to autonomy or the free development of a woman's personality, but may be a medical issue that requires a doctor's expert opinion. In point 13, which mentions the role of the father when making the decision on abortion, the Constitutional Court of Spain states that ''*…the solution put forward by legislature is not unconstitutional, given the special nature of the relationship between the mother and the unborn child which means that the decision will have a considerable effect on her life*.''[886] Can we determine the percentage of influence of the decision on the life of a human embryo/fetus on the mother and on the father who are equally parents? Is the mere fact that the mother is pregnant, and not the father, enough to conclude that the father should not have rights, but that he has social and economic obligations after the birth of the child? It has already been analyzed how the denial of father's rights during a woman's pregnancy represents discrimination against men. The Constitutional Court of Spain confirms in point 14 that *''… it is pertinent to mention, in terms of the right to conscientious objection that such a right exists and may be exercised, irrespective of whether or not such a regulation has been issued. Conscientious objection is part of the content of the fundamental right to ideological and religious freedom acknowledged in Art. 16.1 of the Constitution and, as this Court has indicated on several occasions, the Constitution is directly applicable, especially in matters of fundamental rights*.''[887] The aforementioned statement is in accordance with international documents on the right to appeal to the doctor's conscience. The doctor has the right to refuse to ''perform the service'', in accordance with his own professional and moral principles, which confirms that abortion is an issue that involves a number of participants and cannot be reduced to the issue of a woman's self-realization.

In the context of determining the subjectivity of the unborn man by the Constitutional Court of Spain, it is important to mention the later judgment (CTD 116/1999) in which it states that ''*Although 'the system of laws does not consider the unborn as citizens entitled to the fundamental right to life guaranteed under Article 15 of the Constitution', this is not meant to deprive*

[885] *Ibid*., point 12.

[886] *Ibid*., point 13.

[887] *Ibid*., point 14.

them of all constitutional protection.''[888] The Constitutional Court of Spain states that the human embryo/fetus is not a citizen and therefore has no fundamental right to life, thus denying the existence of its legal subjectivity based on humanity, but for some reason it does not deprive it of ''all constitutional protection'', which would mean that the unborn human has some protection. But what part of the overall protection is that? Smaller, bigger, half than a born child and what rights does it entail? It is solely about the fundamental right to life, which cannot be protected to some extent because you cannot kill someone halfway? The Constitutional Court of Spain adopted a compromise solution, not based on natural, biological facts, which is why certain provisions of the judgement are contradictory.

8.12.3. Constitutional Court of Hungary

In judgment No. 64/1991 of 17 December 1991 (Abortion I), the Constitutional Court of Hungary decided whether the decrees violated the Article of the Constitution, which stipulates that no one can be arbitrarily deprived of the right to life and human dignity, whether this omission led to discrimination, whether there was a violation of the Article of the Constitution guaranteeing the right to legal capacity, whether the decrees violated the right to freedom of conscience since they did not guarantee doctors and health workers the right to refuse to terminate a pregnancy, whether the right to terminate a pregnancy stems from a woman's fundamental right to human dignity. According to the judgment of the Constitutional Court of Hungary, the regulation of termination of pregnancy also referred to the fetus's right to life, its legal status which is undoubtedly linked to the fetus's right to legal capacity. The Constitutional Court of Hungary considered that ''*the legal status of the foetus in the decision in the above context, i.e. as a condition of the foetus' subjective right to life and human dignity. Therefore, the decision on the fetus's legal personality in the context of the decision relates to whether the fetus is a human being under the law.*''[889] The Constitutional Court of Hungary claims that legal status of the fetus is a prerequisite for human dignity, which would mean that human dignity is conditional, and

[888] https://www.globalwps.org/data/ESP/files/Law%202-2010.pdf, (accessed: 25 January 2022).

[889] The Constitutional Court of Hungary, judgment No. 64/1991 of 17 December 1991 (HUN-1991-S-003). As cited in Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 *et al.* of 21 February 2017, point 18.

that legal capacity, as an artifact of the legal system, is *prior in tempore.*[890] The Constitutional Court of Hungary states that ''*the right to self-determination as a basis for the disposition of fetal life can only arise in the first place if we assume that the fetus is not legally human. If the fetus is a legal subject, it has a subjective right to life. In this case, the mother's right of self-determination cannot, as a rule, be exercised, but only in a few exceptional cases.*'' [891] The Constitutional Court of Hungary expressly confirms that the right to life negates the mother's desire for an abortion. Therefore, the key question is whether the fetus is a legal subject. The Constitutional Court of Hungary states that ''*on the basis of the Constitution and international treaties on human rights, every human being has the unconditional right to be recognized as a legal entity, i.e. a person in the legal sense of the word. The right to human dignity means that the individual has an inviolable core of autonomy...a quality that coincides with human existence...the dignity of the person and life are inviolable regardless of development or conditions, or the fulfillment of human potential*.''[892] The human embryo exists as a human being, which means that it has human dignity. According to the Constitutional Court of Hungary, such dignity is inviolable, which means that the human embryo/fetus should be recognized as a legal subject (*sui generis*). The Constitutional Court of Hungary further states that ''*the question is whether the legal status of man should follow the above-mentioned changes in the concepts of man in the natural and spiritual sciences and in public opinion, and whether the legal concept of man should extend from before birth to conception. The nature and scope of such an extension of legal personality can only be compared to the abolition of slavery.*''[893] The Constitutional Court of Hungary concludes that the legal status has yet to ''be extended to prenatal status'', although it does not specify the criteria by which it would be excluded. Also, the Constitutional Court of Hungary did not determine the status of the human embryo so it could be able to determine whether the prenatal stage is expressly excluded because it further states that ''the question of the legal personality of the foetus cannot be decided by interpreting the Constitution in force.'' Therefore, we cannot talk about changing the legal concept of personality without knowing whether the prenatal stage is already included in legal personality. The Constitutional Court of Hungary considered that ''*the only constitutional possibility of changing the legal capacity, and thus the legal concept of*

[890] *Ibid.*

[891] *Ibid.*

[892] *Ibid.*

[893] *Ibid.*

man, is to extend it to before birth. The implementation of this is not unconstitutional if it does not conflict with the legal concept of man as currently accepted in the Constitution.''[894] From this statement, it is clear that abstract equality is the most important element of the legal concept of man, which is the concept into which the human embryo would fit, as the Constutional Court futher states that ''*the fundamental legal status of a human being is that his legal capacity is independent of any of his attributes. If the legal status of a human being, which expresses the human quality of the person born, is in no way affected by his or her individual characteristics or by the typical characteristics of his or her condition (e.g. age), then the development and other characteristics of the foetus may be irrelevant to the capacity to exercise rights and the right to life and dignity*.''[895] The Constitutional Court of Hungary concludes that the legal status of a human being is independent of individual characteristics, which means that the human embryo/fetus should have the legal status of the human being and the capacity to exercise the right to life and dignity. Further it states that ''*the Constitutional Court can only give an opinion on the constitutionality of a given abortion regulation after the legislative decision on the legal status of the foetus and depending on that decision*''[896], which is a logical conclusion, if we keep in mind the fact that without asserted basic concepts, no conclusion can be reached on the issue of abortion.''[897] It concludes that ''*a total ban on abortion would not be constitutional, because it would completely ignore the mother's right to self-determination (and her right to health). It is the responsibility and competence of the legislator to decide where the law draws the line between the prohibition of abortion and the unconstitutional extremes of unjustified abortion, and what indications it requires.''*[898] If it is ascertained that there is a right to life of a human being from conception, then its protection is not extreme. If the state is obliged to protect the right to life, can it prioritize self-determination at some point and based on which legal criteria? It is also questionable whether abortion can be related to the concepts like self-determination (autonomy and privacy) and to health (more on that *supra*). The Constitutional Court of Hungary does not analyze the concept of self-determination and how it is related in the context of abortion requests. The Constitutional Court of Hungary

[894] *Ibid.*

[895] *Ibid.*

[896] *Ibid.*

[897] *Ibid.*

[898] *Ibid.*

judgement touched almost all important legal issues in abortion debate and related them to philosophy, although it left them open to debate.

In 1992, the Parliament enacted the Act on Protecting Fetal Life which did not extend the legal personality of the human being to the human embryo/fetus, but its preamble declares that foetal life, which begins at conception, deserves respect and protection.[899]

The judgment of the Constitutional Court of Hungary No. 48/1998. of 23 November 1998 (Abortion II.) stated that even though the Parliament did not recognise the legal personality of the fetus in the Act on Protecting Fetal Life, that does not mean that foetal life is not constitutionally protected. It notes that ''*the State's objective and institutionalised duty to protect human life extends to lives which are in their formation. This duty, in contrast with the right to life, is not absolute. This is why the legislature may consider other rights – such as the mother's right to health or self-determination – against it*.''[900] However, mother's rights are considered only in the serious crisis situation, ''*on the ground of assuming that bearing the child i.e. enforcing the protection of the foetus, would put a burden on woman which is is far bigger than the usual burden of pregnancy*.''[901]
Even though the question of the legal status of the fetus is still left open, the Constitutional Court of Hungary ascertained that the life of the human embryo/fetus should be protected from the beginning and abortion allowed only in the serious situations.

8.12.4. The German Federal Constitutional Court

The German Federal Constitutional Court (hereinafter: the Court) in the judgment of the First Senate of 25 February 1975, following the oral hearing of the 18th/19th November 1974, in point 1, starts from the fact that ''*Human life represents, within the order of the Basic Law, an ultimate value, the particulars of which need not be established… it is the living foundation of human dignity and the prerequisite for all other fundamental rights*.''[902] The aforementioned

[899] 1992 Act on Protecting Fetal Life

[900] The Constitutional Court of Hungary, judgment No. 48/1998. of 23 November 1998, 333.

[901] *Ibid.*

[902] The German Federal Constitutional Court (hereinafter: the Court) in the judgment of the First Senate of 25 February 1975 (BVerfGE 39, 1), available at:

provision is a confirmation of the conclusion that the basis of the legal protection of every life is human dignity and that without the fundamental right to life there are no other rights. The Court further states that ''*The obligation of the state to take the life developing itself under protection exists, as a matter of principle, even against the mother…Since, however, the one about to be born is an independent human being who stands under the protection of the constitution, there is a social dimension to the interruption of pregnancy which makes it amenable to and in need of regulation by the state*.''[903] The Court states that the human embryo is a subject with corresponding legal protection and determines it as an independent legal good, and its right to life is a fundamental human right and the highest constitutional value, which is why abortion belongs to the domain of legal regulation. The above statement also implies that abortion is a matter of public and not subjective morality. The Court states that a woman's right to privacy is not unlimited ''*but is limited by the rights of others, the constitutional order, and the moral law*''[904], which is an interpretation that is in line with the above-mentioned interpretation of the limitations of the subjective right to privacy. It further states that ''*A compromise which guarantees the protection of the life of the one about to be born and -permits the pregnant woman the freedom of abortion is not possible since the interruption of pregnancy always means the destruction of the unborn life… precedence must be given to the protection of the life of the child about to be born. This precedence exists as a matter of principle for the entire duration of pregnancy and may not be placed in ques-tion for any particular time*.''[905] Unlike other courts that try to resolve the conflict in a way that consensualizes rights and desires that cannot be consensualized because the recognition of one inevitably leads to the annulment of the other regardless of at which point they decided to find a tipping point after which the human embryo's right to life would prevail or *vice versa*, the Court expressly confirms by stating that ''one cancels the other''. Regarding the method of achieving legal protection of the human embryo/fetus, the Court asserts that ''*namely, if the protection required by the constitution can be achieved in no other way, the lawgiver can be obligated to employ the means of the penal law for the protec-tion of developing life. The penal norm represents, to a*

https://groups.csail.mit.edu/mac/users/rauch/germandecision/german_abortion_decision2.html, part II, point 1. (accessed: 25 January 2022).

[903] *Ibid.,* II, point 2.

[904] *Ibid.*

[905] *Ibid.*

certain extent, the 'ultimate reason' in the armory of the legislature.''[906] In BVerfGE 88, 203 (Schwangerschaftsabbruch II) it repeats in point 1 that ''*Even unborn human life is accorded human dignity…The right to life does not commence first with the mother's acceptance of the unborn*.''[907]

The judgment of the German Federal Constitutional Court (Second Senate of 28 May 1993 - 2 BvF 2/90 and 4, 5/92 - D. - I.) confirms what was stated in the 1975 judgment that ''*The Grundgesetz 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…Unborn human life - and not just human life after birth or an established personality - is accorded human dignity. It applies irrespective of any particular religious or philosophical views, which the state is anyway not entitled to pass judgment on, because it must remain religiously and ideologically neutral… The duty to protect unborn life relates to an individual life not to human life generally (1. a and b)*''.[908] The Court refers in point 2 to the resolution of the reasons for which a woman decides to have an abortion in practice, analyzed above, without mentioning, in the context of abortion, the abstract concept of ''autonomy'' as a reason that would justify it. The Court states that it is the state that sets ''*The standards of conduct for the protection of unborn life…when it enacts legislation containing regulations and prohibitions as well as duties to act or desist from acting. This also applies to the protection of the unborn vis-à-vis its mother.*''[909] However, the Court is of the opinion that the mother's legal duty to protect the unborn shall not be applied in some cases by stating that ''*in certain exceptional circumstances the woman's constitutional rights make it possible for the legal duty not to be applied…''*.[910]

Furthermore, the Court emphasizes counseling and not criminal law as an effective instrument for the protection of foetal life by stating that "*the Basic Law does not fundamentally prohibit the legislature from shifting to a concept for protecting unborn human life which, in the early phase of pregnancy, emphasizes counseling the pregnant woman to convince her*

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[906] *Ibid.,* III, 2, b.

[907] The German Federal Constitutional Court (hereinafter: the Court) in the judgment of the 28 May 1993 (BVerfGE 88, 203 (Schwangerschaftsabbruch II)), available at: https://bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1993/05/fs19930528_2bvf000290en.html, point 1 (accessed: 25 January 2022).

[908] *Ibid.,* part D, point 1.

[909] *Ibid.,* part D, point 2.

[910] *Ibid.,* part D, point 1.

to carry the child to term; it could thus dispense with the threat of criminal punishment based on indications and the ascertainment of grounds supporting the indications by third parties.''[911] The Court focuses attention on the educational value of the law, which is a reflection of prevailing values in society, and determines that ''*a) Legal rules of conduct should provide two kinds of protection. First, they should have a preventative and repressive effect in an individual case if injury to the protected legal value is threatened or has already occurred. Second, they should strengthen and support values and opinions on what is right and wrong among the public and promote legal awareness, so that from the start, due to such legal orientation, the injury of a legal value is not even contemplated*.''[912] Abortion is not an exclusively positive legal issue which excludes morality, is not a morally neutral act and therefore the normative framework by which it is regulated also has an educational function. The Court clearly confirms the previously analyzed claims about the equality of man and women by respecting biological differences and concludes that ''*b) The obligations to protect unborn life, marriage and the family (Article 6 of the Grundgesetz) and to ensure equal rights for men and women in the workplace…compel the state and especially the legislature to lay the right foundations so that family life and work can be made compatible and so that childraising does not lead to disadvantages in the workplace*...''[913] Therefore, it is necessary to make it possible for a woman, considering her biological capabilities, to be able to exercise her rights in order to achieve true equality. It re-emphasizes the state's obligation ''*d) to maintain and raise in the public's general awareness the unborn life's legal right to protection*.''[914] In part II. the Court suggests to the legislator to approach the concept of protection, which ''*in the early stages of pregnancy focuses on counseling of the pregnant woman during the early phase of pregnancy so as to encourage her to carry her child to term...*''[915] Especially in part V. it emphasizes the role of the doctor who ''*owes the woman help and advice - albeit from a medical viewpoint*…''[916]

The judgement of the German Federal Constitutional Court is logical and in accordance with the philosophical-anthropological and legal conclusions presented in this scientific research.

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[911] *Ibid.,* 11.

[912] *Ibid.* point 1.

[913] *Ibid.,* point 3, b.

[914] *Ibid.,* point 3, d.

[915] *Ibid.,* II.

[916] *Ibid.*, V.

8.12.5. The Constitutional Council of France

The Constitutional Council of France (hereinafter: the Constitutional Council) in *Decision No. 2001-446 DC* of 27 June 2001, did not accept the proposal to assert the unconstitutionality of the *Voluntary Interruption of Pregnancy (Abortion) and Contraception Act* that prescribed extending the deadline for abortion on request from 10 to 12 weeks, which the applicants claimed represented an attack on respect for the human being from the beginning of life.[917] The proponents of the proposal believed that the Act ''*violates the principle of the respect due to any human being from the commencement of its life*" since permits the interruption of the development ''*of a human being having reached the fetus stage*", which ''*constitutes a potential human being*" and is eligible for ''*strengthened legal protection*"; violates, *by disregarding the obligation of prudence which is incumbent on the legislature ''in the absence of a medical consensus" on these questions, the precautionary principle which constitutes a constitutional objective set by Article 4 of the Declaration of Human and Civic Rights of 1789.*''[918] The Constitutional Council, similar to the aforementioned Constitutional Courts of some EU member states, concludes in point 4 that ''*it is not for the Constitutional Council, which does not have a general discretionary decision-making power comparable to that of Parliament, to call into question the provisions enacted by the legislature on the basis of the state of knowledge and techniques; it is always legitimate for Parliament, acting within its powers, to amend earlier legislation or to repeal it and substituting fresh provisions for it if necessary; the exercise of this power must not, however, have the effect of depriving constitutional requirements of their legal guarantees*.''[919] If it is true that the Constitutional Council cannot question the provisions made by the legislator, then it is not clear what exactly the Constitutional Council decides on, since the role of the constitutional courts is to determine whether the Act is in accordance with the Constitution. In point 5, the Constitutional Council concludes that ''*By raising from ten to twelve weeks the period during which a pregnancy may be voluntarily terminated where the pregnant*

[917] Cf. The Constitutional Council of France (hereinafter: the Constitutional Council) in Decision No. 2001-446 DC of 27 June 2001, available at:
www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/a2001446dc.pdf,
(accessed: 25 January 2022).

[918] *Ibid.,* point 3.

[919] *Ibid.,* point 4.

woman is, because of her condition, in a situation of distress, the Act has not, in the current state of knowledge and techniques, destroyed the balance that the Constitution requires between safeguarding human dignity against any form of deterioration and the freedom of women under Article 2 of the Declaration of Human and Civic Rights;… the legislature intended to exclude any fraud against the law and, more generally, any denaturing of the principles that it laid down, and these principles include 'respect for the human being from the beginning of its life'...''[920] It is not clear how the Constitutional Council came to the mentioned conclusion if it stated in point 4 that the fundamental issues are within the competence of the Parliament, because the Constitutional Council does not have information about the criteria used to find a balance because if it is up to the legislator to decide on the question of when life begins, then the Constitutional Council can hardly come to the conclusion that the balance has not been violate. The Constitutional Council should declare itself non-competent to decide on the issue of the unconstitutionality of the law on extending the deadline for abortion on request from 10 to 12 weeks. The aforementioned means that the Parliament should first find answers to the fundamental questions so that the Constitutional court can decide on the prevailing constitutional values. In point 6, states that ''*contrary to what applicants state, the precautionary principle is not a principle of constitutional status*.''[921] If the precautionary principle is a principle, then it is also a constitutional principle because it cannot be legal without being in accordance with the constitution, since the constitution is the highest legal act of each state. If it is a matter of legal protection of life, which represents a fundamental constitutional value, we can determine that there is no situation that is more important for the application of the precautionary principle. In point 7, the Constitutional Council states that ''*if the termination of pregnancy is medically more delicate when practised between the tenth and twelfth weeks, it can, in the current state of knowledge and medical technique, be practised safely enough for women's health to be unthreatened*.''[922] Constitutional Council contrary to the statement from point 4, concludes about the safety of ''termination of pregnancy'' even though it does not have the competences for its assessment. If abortion is a procedure carried out on the basis of arguments aimed at preserving women's health, it is not clear why its safety is questioned and how the Constitutional Council determined this, if it is about issues that are within the competence of the Parliament.

[920] *Ibid.,* point 5.

[921] *Ibid.,* point 6.

[922] *Ibid.,* point 7.

The judgement of the Constitutional Council is another in a series whose provisions are contradictory, since phrases like ''balancing rights'' are used without solving the fundamental issues. However, neither the Constitutional Council, nor the previously mentioned constitutional courts, provide a single legal criterion to explain what balancing exactly entails, when it would be, nor how it is possible to balance two rights, one of which cancels the other. We can conclude that it is a matter of copying judgments guided by political goals outlined in the second wave of feminism.

8.12.6. The Constitutional Court of Italy

The Constitutional Court of Italy (hereinafter: the Court) in the judgment of 18 February 1975, questioned the constitutionality of the Article 546 of the Penal Code, which prohibited any abortion, except in necessary cases when there was a possibility of serious harm and great danger. In section 10 of the Italian Penal Code, voluntary abortion was called ''a crime against the integrity of the offspring.'' The Court stated that ''*the protection of the human embryo has a constitutional basis and that Article 2 of the Constitution recognizes and guarantees the inviolable human rights…among which are the rights of the fetus.*''[923] The Court recognizes the need for legal protection of the fetus, where its right to life is an inviolable human right. It continues to question the protection of his fundamental rights stating that ''*the interest of the fetus established by the constitution can come in conflict with other values that are constitutionally protected ... and consequently, the law cannot give total and absolute priority to the interest of the first (human embryo/fetus)...*''[924] It also states that ''*The condition of a pregnant woman is quite special and does not find adequate protection in a general rule such as Art. 54 of the Penal Code…There is no equivalence between the right to life and health of those who are already a person, such as the mother, and the protection of the embryo who is yet to become a person*.''[925] The Court considers that there is no equality of rights between a woman and a fetus because the fetus has yet to become a person. The Court previously determined that the protection

[923] The Constitutional Court of Italy (Gazz. Uff. n. 55, IV.), judgment of 18 February 1975, available at: https://www.biodiritto.org/ocmultibinary/download/2544/24273/9/72355f6b82a1ff53c970cd3c8b8a7c68.pdf/file/27_75.pdf , (accessed: 25 January 2022).

[924] *Ibid.*

[925] *Ibid.*

of the human embryo has a constitutional basis and that there is a constitutionally determined interest of the fetus. Given that the Court concludes that the fetus has yet to become a person, on what basis does it conclude that the protection of conception has a constitutional basis? If there is a constitutionally determined interest, in the case of a fetus it can only consist of the fundamental right to life.

That is why it is necessary to analyze two questions: whether there is equality in the status of women and fetuses, and equality in their rights. If the fetus is a subject *sui generis*, then it has the right to life, if not, then it is a legal matter. If it is the case, then there is no need to balance rights. However, there is no equivalence between the right to life and the demand for autonomy, because equivalence can only exist if a decision is made between two equal rights. Therefore, the criterion of health can be equal to the right to life, only if health is so impaired that life is endangered. Based on the above, the exceptions provided for in Article 546 are sufficient to achieve equivalence between the right to life and health (possibility of damage and great danger, which primarily refers to seriously endangered health and protection of life). If the fetus is not a subject, then there are no conflicting rights.

The Court declared unconstitutional the part of Article 546 of the Penal Code that does not provide for the termination of pregnancy when prolonged gestation might cause harm, medically ascertainable and inevitable, to the health of the woman. However, the Court also makes a clarification: ''*the exemption from punishment… does not exclude that… the procedure must be performed to save the life of the fetus when possible…so the legality of abortion must be based on on a prior assessment of the conditions that justify it*.''[926] From the above, it is obvious that the Court does not base abortion on a woman's right, but on exceptions that include a woman's fundamental right to life and health. Also, if the fetus is not the subject, why are precautions necessary? The judgment is contradictory in the articles described above.

8.13. Comparison of the Constitutional Courts decisions

The Constitutional Court of Spain, similarly to the Constitutional Court of Slovakia, considers that the unborn life has constitutional protection, but that protection is not absolute. It is not a citizen but it has the character of an objective value, which leaves open

[926] *Ibid.*

the question of whether it is an objective good such as a national flag (or any other thing of special value), or an objective good such as every human being, that is, subjective and personal life. The Constitutional Court of Hungary is of the opinion that even if the Parliament did not extend the legal personality of the human being to the pre-natal period, that does not mean that foetal life is not constitutionally protected. The Constitutional Council of France considers that Parliament is the one who regulates fundamental issues on the basis of the state of knowledge and techniques. The Constitutional Court of Italy states that protection of the human embryo has a constitutional basis but however, it leaves open its legal status. The German Federal Constitutional Court explicitly states that unborn human life is accorded human dignity and that it applies irrespective of any particular religious or philosophical views.

Regarding the abortion issue, the Constitutional Court of Slovakia believes that its role is to find a way out of the conflict between the constitutionally protected value (unborn human life) and a limited human, fundamental right (a woman's right to privacy). The Constitutional Court of Spain is of similar opinion that even though dignity is recognised for all persons in general, ‘‘feminine condition cannot be ignored’’. Advocates of so called “balanced approach” between the rights of the fetus and womans condition are also the Constitutional Council of France, as well as The Constitutional Court of Italy which states that the law cannot give total and absolute priority to the interest of the human embryo/fetus if it comes in conflict with “other values”. The theoretical ‘‘balancing’’ of the philosophical-anthropological status of the human embryo and the woman's request for an abortion is not practically possible because it is about two conflicting demands and rights (since abortion represents the end of the life of a human embryo/fetus). The German Federal Constitutional Court explicitly states that a compromise which guarantees the protection of the life of the one about to be born and permits the pregnant woman the freedom of abortion is not possible since the interruption of pregnancy always means the destruction of the unborn life. However, it concludes that in certain exceptional circumstances the woman's constitutional legal duty to give birth to a child, shall not apply, similar as the Constitutional Court of Hungary, which considers that abortion should be allowed in a ‘‘serious crisis situations’’.

8.14. US Supreme Court - *Roe v. Wade*

In 1973, the US Supreme Court ruled in *Roe v. Wade* that the fetus receives the status of a person only when it is viable, and abortion is allowed in the first trimester without any restrictions.[927] It repealed a Texas law that allowed abortions only when the mother's life was in danger. The US Supreme Court was deciding two fundamental questions: whether a human embryo/fetus is a person within the meaning of the 14th Amendment and whether a woman has a right to an abortion that would derive from the right to privacy. The US Supreme Court ruled that the Texas law violated the right to privacy contained in the 14th Amendment to the *US Constitution*. It concluded that the right to privacy ''…is *broad enough to encompass a woman's decision whether or not to terminate her pregnancyis broad enough to include a woman's free decision whether or not to carry the pregnancy to term.*''[928]

Many jurists in the US have criticized the court's interpretation of the concept of privacy. Until then, the concept of privacy did not exist as a concept within the framework of reproduction related to abortion in American legal practice, so its establishment, judges Serrano and Calderon see as ''the activism of the Supreme Court that led to the conflict of constitutional provisions.''[929] The concept was criticized by other judges as well. Thus, some believed that freedom comes to the fore only for the purpose of protecting the mother's life, and in all other cases the prohibition is rational (Rehnquist),[930] the right to privacy includes the state and doctors (Brandeis), a woman is not isolated in her privacy (White).[931] Forsythe and Arago criticize the US Supreme Court's assumption that a pregnant woman, before feeling the movement of a human fetus, had the right to an abortion, as noted in an article by Cyril Means.[932] There was no right to abortion, but due to poorly developed medicine, the existence of a human embryo/fetus in the mother's womb could not be detected.

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[927] Cf., the US Supreme Court, judgment *Roe v. Wade*, 410 U.S. 113, 1973, available at: https://supreme.justia.com/cases/federal/us/410/113.

[928] *Roe v. Wade*, 410 U.S. 113, 1973, par. 153.

[929] Serrano, *op. cit.* note 566, 78 - 80.

[930] Cf. Dworkin, *op. cit.* note 498, p. 105.

[931] Cf. Tribe, *op. cit.* note 641, p. 92 and 96.

[932] Cf. Forsythe, Arago, *op. cit.* note 583, p. 280. (Means, C., Jr., The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality, 14 N.Y. L.F. 411, 424, 1968.) In *common law*, there were only three criteria: conception, the moment when the woman felt the movement of the fetus and birth. Viability was never mentioned by common law judges.

In deciding the second issue, the US Supreme Court concluded that ''*we need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer*.''[933] The conclusion of the US Supreme Court that ''*We do not have to answer the difficult question of when life begins. Bearing in mind that doctors, philosophers and theologians are unable to reach any consensus*'', cannot be taken as a parameter of the legal regulation of abortion, given that the US Supreme Court has brought that conclusion in 1973, when medicine did not have a strict answer about the beginning of life. Today, it is clearly medically proven that a human embryo is a human being from conception.

The US Supreme Court analyzed how the term person is most often used in the *US Constitution* and concluded that ''*in nearly all these instances, the use of the word is such that it has application only post-natally*'', and therefore does not include a human embryo/fetus.[934] Although it is clear that the concept of a legal subject of a physical person most often refers to an average adult with developed cognitive abilities, this still does not impose the conclusion, in accordance with the analysis of the person in the constitutions, that it excludes children, the elderly, people with mental disabilities, persons with disabilities, etc. Also, the US Supreme Court did not analyze the use of the concept of privacy in the constitutional sense, which is why a different approach to these two key issues is evident. Namely, he concluded that the concept of privacy is broad enough to include a woman's right to an abortion, while he did not conclude the same for the term person. I will agree with E. Rice who sees the interpretation of the person in *Roe v. Wade* as ''an example of judicial creation of the mask of an abstract, technical person, which hides and rejects humanity.''[935]

[933] *Roe v. Wade*, 410 U.S. 113, 1973, par. 159. It similarly held in *Planned Parenthood v. Casey*, 505 U.S. 833 in 1992, in which he concluded that ''at the heart of freedom is the right to define one's own concept of existence, meaning, the Universe and the mysteries of human life.''

[934] Cf. *Roe v. Wade*, 410 U.S. 113, 1973, par. 157.

[935] Rice, C. E., *Contraception as a Mask of Personhood*, Par. Thomas Law Review, 1, 2003, 1, 713 - 714.

The judgment was criticized by many constitutional lawyers. Some of the criticisms refer to the fact that the judgment does not contain a single sentence that could be classified as a legal argument, which is why, in addition to the fact that the *US Constitution* does not stipulate the right to abortion, the judgment represents a usurpation of democratic authority and is an expression of illegitimate judicial power (Robert Bork),[936] as well as that the Supreme Court, as when deciding on slavery, considered it unnecessary to base the decision on abortion on scientific and medical data (Dunaway).[937] Roden concludes that ''it is an extreme tragedy that the 14th Amendment, enacted to protect slaves, is being used as an instrument to kill a human embryo/fetus, just one hundred years after the Civil War.''[938]

8.15. US Supreme Court - *Dobbs v. Jackson Women's Health Organization*

In 2022, the US Supreme Court ruled in *Dobbs v. Jackson Women's Health Organization* that the Constitution of the United States does not confer a right to abortion.[939] It repealed a *Roe v. Wade* and returned the authority to regulate abortion to the people and their elected representatives. The US Supreme Court was deciding on critical questions: whether the Constitution confers a right to obtain an abortion, whether the right to obtain an abortion is rooted in the Nation's history and tradition and whether it is an essential component of ''ordered liberty.''

The US Supreme Court judges who ruled in *Dobbs v. Jackson*, contrary to *Roe v. Wade*, analyzed from different perspectives the question whether there is constitutional right to abortion. By using historical method, they came to the conclusion that ''the right to abortion is not deeply rooted in the Nation's history and tradition.''[940] Furthermore, the US Supreme Court analyzed constitutional provisions, especially the Fourteenth

[936] As cited in Tribe, *op. cit.* note 641, 82 - 83.

[937] As cited in Dunaway, *op. cit.* note 593, p. 330.

[938] Roden, *op. cit.* note 305, p. 285. 14th amendment of the *US Constitution* states that no state shall deprive any person of life, liberty, or property, without due process of law, nor shall it deny equal protection within the limits of its authority.

[939] Cf., the US Supreme Court, judgment *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 2022, available at: https://supreme.justia.com/cases/federal/us/597/19-1392/.

[940] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 2022, part B, par. 2. d.

Amendment and concluded that ''the Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision'' and that ''the abortion right is also critically different from any other right that this Court has held to fall within the Fourteenth Amendment's protection of 'liberty.''[941] The US Supreme Court reasoning confirmed that man's liberty is limited and not every demand or wish of the individual can be defined as freedom.

The US Supreme Court also referred to *Roe v. Wade* judgment by calling it ''egregiously wrong'' with ''exceptionally weak reasoning and damaging consequences.''[942] Judges in *Roe v. Wade*, as opposed to judges in *Dobbs v. Jackson*, didn't even analyzed the concepts of liberty, even less privacy, so that they could conclude that the right to abortion derives from these concepts. The US Supreme Court stated that ''*without any grounding in the constitutional text, history, or precedent, Roe imposed on the entire country a detailed set of rules for pregnancy divided into trimesters.*''[943] It can be concluded that the judges in *Dobbs v. Jackson* see *Roe v. Wade* as a politicial decision.

The US Supreme Court also referred to reasoning of judges in *Roe v. Wade* regarding the viability criteria and concluded that ''*the arbitrary viability line, has not found much support among philosophers and ethicists who have attempted to justify a right to abortion. The most obvious problem with any such argument is that viability has changed over time and is heavily dependent on factors—such as medical advances and the availability of quality medical care—that have nothing to do with the characteristics of a fetus*.''[944] Can external circumstances, which are different in different countrues and are subject to change, such as medical development, determine the right to life of a human being? The US Supreme Court by mentioning ''characteristics of a fetus'' starts from a natural law reasoning as opposed to arbitrary, that is political reasoning of judges in *Roe v. Wade*. The US Supreme Court did not want to define the legal status of the human embryo/fetus and stated that ''*our opinion is not based on any view about if and when prenatal life is entitled to any of the rights enjoyed after birth*'' because it believes that ''*nothing in the Constitution or in our Nation's legal traditions authorizes the Court to adopt that*

[941] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 2022.

[942] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 2022.

[943] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 2022, part B, par. 1. a.

[944] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 2022, part B, par. 1. c.

'theory of life.''[945] However, the US Supreme Court nevertheless analyses some theoretical personhood charachteristics and acknowledges that ''*among the characteristics that have been offered as essential attributes of 'personhood' are sentience, selfawareness, the ability to reason, or some combination thereof…it is questionable whether even born individuals, including young children or those afflicted with certain developmental or medical conditions, merit protection as persons.''*[946]

The US Supreme Court asserts that ''*abortion presents a profound moral question*''[947] and leaves open the possibilities of the citizens of each State from regulating or prohibiting abortion.

As opposed to *Roe v. Wade*, the US Supreme Court judges in *Dobbs v. Jackson* approached to the question of abortion from scientific and legal perspective, not an activistic and political one. The judges themselves state that they cannot allow their decisions to be affected by any extraneous influences, such as concern about the public's reaction to their work.[948] Although the US Supreme Court did not want to determine the legal status of the human embryo/fetus, it opened up fumdamental questions regarding the validity of abortion and the status of the human embryo/fetus, which cannot be ignored in the future.

The judgement *Dobbs v. Jackson* led to profound cultural changes in American society surrounding the issue of abortion. After the jugement, in first six-months alone, many US states have passed near-total bans on abortion[949] and 30000 fewer abotions were performed.[950] Moreover, in November 2024, ten US member states held referendums on

[945] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 2022, part D, par. 3.

[946] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 2022, part B, par. 1. c.

[947] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 2022, VII.

[948] Lindgren Y. F., *Dobbs v. Jackson Women's Health and the Post-Roe Landscape*, Journal of the American Academy of Matrimonial Lawyers, 35, 2022, p. 246.

[949]https://www.guttmacher.org/2023/01/six-months-post-roe-24-us-states-have-banned-abortion-or-are-likely-do-so-roundup (accessed: 13 December 2023).

[950] https://societyfp.org/wp-content/uploads/2023/03/WeCountReport_April2023Release.pdf. (accessed: 13 December 2023).

abortion rights initiatives that resulted in seven out of the 10 ballot measures supporting abortion rights and one anti-abortion measure in Nebraska.[951]

The judgment was criticized by some theoreticians, like Bhagotra and Hinder, who see it as a ''significant restriction of women's rights''[952]. Some of the other criticisms are that the judgment ''shakes not just the foundations of *Roe* but all other substantive due process cases, including those which protect marriage, the use of contraception and consensual sexual activity between people of the same sex.''[953] However, there is a difference between abortion and above-mentioned cases. As justice Alito in his majority opinion explained, ''abortion destroys … potential life and … none of the other cases, involves this critical moral question''.[954]

8.16. New tendencies

The judgement *Dobbs v. Jackson* had an impact worldvide. It prompted French government to constitutionalize right to abortion. France became the first country to enshrine the right to abortion in its Constitution on 4 March 2024, even though the constitutionalisation of abortion had already been considered in 2017 and 2019, but without success. The amendment in French Constitution prescribes that ''*the law determines the conditions under which a woman's guaranteed freedom to have recourse to a voluntary interruption of pregnancy is exercised*.''[955] After the inclusion of the right to abortion in the French Constitution, similar

[951] https://www.guttmacher.org/2024/11/abortion-rights-state-ballot-measures-2024) (accessed: 29 November 2024).

[952] Bhagotra A.; Hinder T. S., *Dobbs v. Jackson: a Constitutional breakdown*, Constitutional Law Review, 2, 2022, p. 59.

[953] Johnson, R., *Dobbs v. Jackson and the Revival of the States' Rights Constitution*, The Political Quarterly, 93, 2022, 4, p. 617. For more details see: Blagojevic, A.; Tucak, I., *The right to abortion and the possible effects of the Dobbs decision on contemporary legal trends,* Studia Iuridica, 99, 2023, 257 - 276; Kaufman, R.; Brown, R.; Martínez Coral, C.; Jacob, J.; Onyango, M.; Thomasen, K., *Global impacts of Dobbs v. Jackson Women's Health Organization and abortion regression in the United States*, Sexual and Reproductive Health Matters, 30, 2022, 1, 22 - 31; Palacio, H., *Implications of Dobbs v Jackson Women's Health Organization*, American Journal of Public Health, 113, 2023, 4, 388 - 389.

[954] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 2022, part C, par. 1.

[955] https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000049251463 (accessed: 10 April 2024)

initiatives have already been considered in other countries such as Spain and Sweden.[956] Moreover, European Parliament adopted on 11 April 2024 a Resolution on the inclusion of the right to abortion in the EU Charter of Fundamental Rights (further: Resolution). Resolution calls on to amend Article 3 of the EU Charter of Fundamental Rights to state that ''*everyone has the right to bodily autonomy, to free, informed, full and universal access to sexual and reproductive health and rights, and to all related healthcare services without discrimination, including access to safe and legal abortion*.''[957] Resolution notes that the EU Charter of Fundamental Rights enshrines the main fundamental rights and liberties for people living in the EU and specifies abortion as an act that has direct implications for the effective exercise of the rights recognised in the EU Charter of Fundamental Rights, such as human dignity, personal autonomy, equality, health and physical and mental integrity.[958] It is not explained how these concepts can be related to right to abortion on demand. Moreover, does that mean that the abortion on demand is then unlimited, and it can be performed during whole pregnancy? Resolution calls on the Member States to fully decriminalise abortion and invites Poland and Malta to repeal their laws and other measures concerning bans and restrictions on abortion.[959] It further prescribes that abortion methods and procedures should be an obligatory part of the curriculum for doctors and medical students.[960]

The values and principles related to abortion are in the competence of EU Member States. However, if EU Charter of Fundamental Rights is to be amended, it should be accepted by 27 Member States, which is, by taking account diversity of moral standpoints of EU countries, not highly possible.

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[956] https://www.europarl.europa.eu/doceo/document/TA-9-2024-0286_EN.html, I. (accessed: 10 April 2024). For more details see: Tongue, Z., *France's constitutional right to abortion: symbolism over substance*, Medical Law Review, 32, 2024, 3, 392 - 398; Faucher, P., *French Parliament ratifies the inclusion in the French Constitution of "guaranteed freedom" for abortion: but does this really prevent future restrictions?*, BMJ Sexual and Reproductive Health, 50, 2024, 153 - 154; Bojovic, N.; Stanisljevic, J., *Constitutional enshrinement as a way of safeguarding abortion rights: The case of France*, Healthy Policy, 147, 2024, 105 - 124; De Meyer, F.; Romainville, C., *Constitutionalising a Right to Abortion: Unveiling its Transformative Potential Amidst Challenges in Europe***,** European Constitutional Law Review, 20, 2024, 3, 361 - 391.

[957] *Ibid.,* 3.

[958] *Ibid.,* C.

[959] *Ibid.,* 6.

[960] *Ibid.,* 11.

In April 2024 the Dicastery for the Doctrine of the Faith of the Catholic Church published the declaration "Dignitas Infinita" on Human Dignity in which it discuess abortion, among other moral issues. It confirmes once again that abortion on demand is the deliberate and direct killing of a human being in the initial phase of his or her existence, by whatever means it is carried out and ascertaines that the dignity of every human being has an intrinsic character and is valid from the moment of conception until natural death.[961]

9. DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF CROATIA No. U-I-60/1991. *et al*. OF 21 FEBRUARY 2017

9.1. Solving demanding cases

When analyzing court decisions on demanding cases, which include abortion, an important question arises as to whether the decision was made to achieve political goals or in accordance with scientifically proven facts, i.e. whether abortion is a matter of social strategy or a morally independent issue (see *supra*, chapter 3). Resolving of the issue of abortion as a social and natural issue is complicated, apart from political circumstances, by the fact that it is a multidisciplinary issue that requires knowledge of philosophical and political theories.

Theorists differ on the approach judges should take when deciding complex, difficult issues like abortion. Posner sees judges as moral philosophers, while Dworkin believes that the duty of judges is not to be a substitute for the legislator, but to establish the rights of the parties with principles and thus justify political decisions.[962] ''In legal theory, a principle embodies the highest hierarchical rank of an idea and represents the basis for judging or interpreting other provisions of a regulation.''[963] Principles represent a standard that must be respected, as some dimension of morality, unlike politics that imposes a goal

[961]https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_ddf_doc_20240402_dignitas-infinita_en.html (accessed: 10 April 2024)

[962] Cf. Dworkin, *op. cit*. note 76, 92 - 97. Posner, *op. cit*. note 108, p. 132.

[963] Hrabar, *op. cit*. note 19, 659 - 660.

that must be achieved, for the sake of improvement economic or socio-political situations.[964] Therefore, the application of principles is justified, especially in demanding cases, because they prevent a strictly positivist and legalistic approach on the one hand, as well as an exclusively natural law approach on the other. In this way, the rigid application of law is prevented, which opens up the possibility of making unfair and unreasonable decisions, as evidenced in the Nuremberg process. The legal validity of principles depends on morality. That is why constitutional judges, when solving the issue of abortion, should take into account, in addition to positive legal regulations, the moral tradition of the people and stick to scientifically proven facts and the principle of consistency of the legal system, so that the judicial activity does not, as Soper states, reveal ''the connection between law and ideology instead of law and morality.''[965] A departure from scientific and professional opinions will mean that the legal regulation of abortion is ideological, that is, interest-based.

Did the judges of the Constitutional Court of the Republic of Croatia when passing *Decision No. U-I-60/1991 et al.* (further: Decision) were guided by principles and judicial restraint, bearing in mind scientific facts, that is, expert opinions, political and moral theory with which they explained the applied value patterns, or did they act as activists guided by interests and ideological goals? What goal did the Constitutional Court of the Republic of Croatia wanted to achieve? Is the Decision logical and does it reflect the requirement for the consistency of the legal system?

9.2. On the Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991. *et al.*

The Constitutional Court ruled on two fundamental objections of the applicant of the constitutional complaint. The plaintiffs first complaint is that the unconstitutionality of the AHM[966] stems from the fact that with the promulgation of the 1990 Constitution, the

[964] Cf. Dworkin, *op. cit.* note 76, p. 34.

[965] Soper, *op. cit.* note 96, p. 122.

[966] Cf. *Act on health measures for free decision-making about having children*, Official Gazette, No. 18/1978.

Constitution of the Socijalist Federal Republic of Yugoslavia[967] ceased to be valid, and with it Article 191, which stated: ''*It is the right of a person to freely decide on the birth of children. This right can be limited only for health protection*'', on the basis of which the AHM was adopted. The complainants claimed that with the termination of validity of the constitutional basis on the ground of which the contested AHM was adopted, it became completely unconstitutional. The second fundamental complaint of the applicant of the constitutional complaint is that the law is not in accordance with Article 21 of the Constitution, which stipulates that every human being has the right to life, and an embryo is a human being equal in dignity to other beings, and at the same time the subject of the right to life as guaranteed by the Constitution.

The Constitutional Court of the Republic of Croatia evaluated Article 21 of the *Constitution of the Republic of Croatia* ''*Every human being has the right to life*'', Article 22 of the *Constitution of the Republic of Croatia* ''*Human freedom and personality are inviolable*'', Article 35 of the *Constitution of the Republic of Croatia* ''*Everyone is guaranteed respect and legal protection of his personal and family life, dignity, reputation and honor*.''[968]

Considering the multidisciplinary nature of the topic, the Constitutional Court of the Republic of Croatia consulted medical faculties in the Republic of Croatia, chairs of family and constitutional law at the Faculties of Law in the Republic of Croatia, theologians, experts in medical ethics. Comparative legislation, specifically international and regional documents, as well as judgments of constitutional courts of some EU member states were extensively discussed in the Decision.

On 21st February 2017, the Constitutional Court by a majority of votes (12:1) issued a decision not to accept the proposal to initiate the procedure for the assessment of compliance of the AHM with the Constitution, but ordered the Croatian Parliament to pass a new Act within two (2) years. It asserted that certain legal institutes and concepts from the AHM no longer exist, which is why the Act is not formally in accordance with the Constitution (point 49). The Constitutional Court considered that since the AHM is

[967] Cf. *Constitution of the Socialist Federal Republic of Yugoslavia*, Official gazette SFRY, No. 9/1974; *Constitution of the Socialist Republic of Croatia*, Official Gazette, No. 8/1974.

[968] *Constitution of the Republic of Croatia*, Article 21, 22, 35.

based on old value bases and principles that differ from today's, it is necessary to modernize it (point 50).

9.3. Analysis of the Decision No. U-I-60/1991. *et al.*

9.3.1. Moral aspect

The Constitutional Court states in point 22 that ''*moral attitudes can be in conflict and that each individual judges moral and ethical issues in accordance with his right to self-determination.*''[969] The above statement is correct in the case when the courts decide on issues that belong to the domain of private morality, but not public law issues. Considering that the question of the moral and legal status of a human being, a human embryo/fetus, is not a part of the subjective and private domain, but a public one, and cannot be compared with questions such as belonging to a certain religion, relationship to sexuality and similar personal and moral questions, the statement of the Constitutional Court is inapplicable to the issue of abortion regulation. The killing of a human being or the system of slavery, on a moral level, is not equal to the question of whether someone helps the poor or behaves sexually freely. The moral fact that it is unacceptable to rape a woman cannot be justified by a different value-system. There is a difference between one's personal preference and public morality, because killing is not the same as, for example, liking chocolate ice cream, and respecting human life is not a matter of personal preference.[970] The issue of human life is not just one of the rights whose respect is subjectively decided.[971] The conclusion of the Constitutional Court is in accordance with the understanding of theorist Singer, who classifies abortion as ''an area of private morality in which the law must not interfere, but must be tolerated as a different moral value-system.''[972] Protection of human life is a public issue, as is protection from violence, prohibition of torture and similar natural-legal issues. The *sui generis* status of the human embryo/fetus, which primarily implies the fundamental

[969] *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al*, point 22.

[970] Cf. Beckwith, *op. cit.* note 91, 3 - 5.

[971] Likewise Gosić, N., *Bioetika in vivo*, Pergamena, Zagreb, 2005, p. 175, which states that no man can claim that he can kill another by imagining that he is acting rightly on the basis of an isolated and exclusive autonomous-individualistic desire.

[972] Singer, *op. cit.* note 376, p. 110.

right to life, cannot be threatened by a subjectivist value-system that the state should support through the public system. Due to all of the above, it is not correct to claim that issues of morality and ethics are exclusively in the domain of the individual, and even less so is abortion, which would belong (see *supra*, chapter 8) to the domain of public service. In point 22, the Constitutional Court states that ''*as moral attitudes cannot always be translated into legal norms, moral duties exceed the limits of the law...they cannot be the exclusive basis for the legal determination of an issue*.''[973] The issue of the possible murder of a human being is a moral issue that enters into the area of legal regulation because it is about the minimum of morality that belongs to the legal domain, that is, the moral duty that consists in the prohibition of killing a human being. By stating that ''morality cannot be the exclusive basis for regulating an issue'', the Constitutional Court relativizes morality in a way that in reality conditions it politically, just as the US Supreme Court did in the Dred Scott case. In the previous chapter, the relationship between law and morality was analyzed (see s*upra*, chapter 3) and it was concluded that the legal system does not exclude morality in its entirety. An exclusively positive-legal approach, which implies a complete separation of morality from the law, was denied even in the Nuremberg Trials, when it was determined what horrors it can lead to. The regulation of abortion is a moral issue that consequently requires a value determination according to a positive legal rule that legalizes or prohibits it. In the same point, the Constitutional Court states that ''*termination of pregnancy is a moral issue that does not only concern the dignity of a woman ... termination of pregnancy is reflected in the attitude of the social community on its ethical acceptability or unacceptability, philosophical and ethical attitudes on the right to protection and the right to dignity of a human being*.''[974] The acceptability or unacceptability of a phenomenon in the community is subjected to a validation process (see *supra*, chapter 3). If this is not the case and the social acceptability of a phenomenon in a pluralistic society is not subjected to criticism and the discovery of the natural order of reality, then how can we deny communism, Nazism, slavery, apartheid, which were not socially seen as moral evil at the time of their existence? Therefore, it is clear from history that the murder of human beings by their dehumanization can be imposed as a socially acceptable attitude. The *sui generis* status of the human embryo/fetus imposes the need to protect its life. Furthermore, the Constitutional Court relates the concept of dignity with a woman's autonomy in the

[973] *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al.*, par 22.

[974] *Ibid.*

context of abortion, which is not in accordance with the concept of dignity (see *supra*, chapter 5). A woman's dignity does not depend on the provision of medical services because her dignity is not extrinsic. Also, liberal theorists talk about abortion as a ''lesser evil'' and not an expression of a woman's dignity. The concept of dignity in the context of abortion can only refer to the dignity of the human embryo/fetus.

In point 41, the Constitutional Court states that it is ''*expected to arbitrate between two parties, the one that considers that life begins at conception and is within the domain of Article 21, and the other that considers that life begins at birth*.''[975] The claim that the Court is expected to arbitrate is an arbitrary conclusion that refers to the achievement of political goals, and not to respect for the rules of the profession. The function of the Constitutional Court of the Republic of Croatia is not to ''reconcile'' the conflicting parties, but to determine the facts, analyze expert opinions, along with knowledge of political and moral philosophy. Otherwise, the discussion about abortion could also be conducted at the Conciliation Court. Arbitrating between the two parties, as stated by the Constitutional Court of the Republic of Croatia, would mean finding a compromise, which makes the adoption of a Decision by the Constitutional Court of the Republic of Croatia unnecessary, because a compromise solution does not require previous analysis of the case in question, such as determining the previous parameters in the discussion on abortion, like philosophical - anthropological status of the human embryo/fetus, the theory of human rights, the concept of privacy within the legal framework. Regardless of established facts, the need to consensualize opposing views will lead to a theoretical ''balancing'' of the philosophical-anthropological status of the human embryo and the woman's request for an abortion. Practically, such balancing is not possible because it is about two conflicting demands and rights (since abortion represents the end of the life of a human embryo/fetus, not half or a little life). Instead of the above, it is necessary to decide for one or the other and face the consequences that arise from such a decision. The goal of the Constitutional Court of the Republic of Croatia was consensus, the harmonization of opposing viewpoints. Would the Constitutional Court of the Republic of Croatia conclude the same in every situation where there are conflicting opinions, such as for example the issue of slavery or the status of natives? There is no compromise on the level of fundamental rights that derive from human nature, although to some extent pluralism can be treated as a desirable

[975] *Ibid.*, point 41.

consequence of the fact that fundamental values can be realized in a different but equally good way.[976] It does not follow that a compromise in killing the human embryo/fetus, as some solution ''in between'', is acceptable. Fundamental rights do not imply compromises, like those of the Nazi system. If intentional abortion is an intrinsically evil act and its execution constitutes murder, which can be concluded since it leads to the end of an innocent human life and since there is a need for its prevention, highlighted in the previously analyzed international legal acts, then its positive - legal solution should maintain the natural state of affairs, as well as taking into account the social factors that influence it, primarily the fact that it is most often the result of a woman's unfavorable economic and social situation.

A similar approach of the Constitutional Court is also evident in point 23, in which the Constitutional Court of the Republic of Croatia states that ''every reasonable legislator should strive to not deepen, but mitigate social divisions with *his legislative decisions, and bring closer and harmonize the values and attitudes represented by individual social groups.*''[977] It is a similar approach as in the previously analyzed point 41, so instead of arbitration, Constitutional Court talks about harmonizing values and mitigating divisions. The above means that regardless of the objective state of affairs, a ''just solution'' should be found that will reconcile the conflicting parties. Such a thesis represents Rawls's concept of justice, which ''gives priority to what is right over the idea of the conception of good.''[978] This means that the concept of good (the good of human life with intrinsic dignity in accordance with the natural-law understanding) is excluded if it does not fit into the concept of justice. Thus, a society that adheres to a certain comprehensive doctrine (philosophical or individual worldviews) is considered unjust.[979] ''Justice'' becomes a political criterion, which makes it unnecessary to evaluate the legal system, because political criteria can be used to deviate from natural reality, if it is for the purpose of achieving some interest. The positive-legal regulation of abortion based on ethical theory,

[976] Cf. Haldane, *op. cit*. note 103, p. 143.

[977] *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al.*, point 23.

[978] Popović, *op. cit.* note 655, p. 140.

[979] See also: Covell, C., *The Defense of Natural Law: a Study of the Ideas of Law and Justice in the Writings of Lon L. Fuller, Michael Oakeshott, F.A. Hayek, Ronald Dworkin, and John Finnis*, St Martin's Press, New York, 1992, 140 - 141.

that is, political philosophy that avoids a comprehensive approach that will include philosophical doctrines and even metaphysical ones, is brought to a kind of *status quo*, without finding a concrete and clear solution because it would violate neutrality. It is about ethical pluralism, which represents a neutral model of bioethics that does not impose values on anyone, but limits itself to setting procedural rules.[980] Law then does not depend on the truth for the purpose of realizing the common good, but is reduced to a purely procedural mechanism of seeking consensus.[981] Popović points out that ''there is a shift from a realistic and objective to an abstract and subjective understanding, whereby all arguments are placed behind the veil of ignorance, and opposing views are harmonized into the permissibility of abortion.''[982] Tolerance is imposed as a key value of a pluralistic society, although a completely tolerant society, aimed at reducing conflict, rather than establishing the truth, means renouncing all values because it equates them all.[983] For the sake of harmonizing values, we cannot tolerate slavery, nor can we tolerate murder. Some moral questions inevitably represent a particular approach because they can be answered through positive legal legislation either by denying or affirming, therefore the statement of the Constitutional Court about the need to harmonize values that are irreconcilable is not correct.

In point 22.1, the Constitutional Court of the Republic of Croatia lists the viewpoints of pro-life advocates, concluding that ''*it seems that in this group the moral viewpoints are also conditioned by the religious beliefs of its advocates*.''[984] ''It seems'' is an inappropriate expression of the Constitutional Court (which is also repeated in point 41), bearing in mind that it should not make conclusions based on appearances, but should justify them based on facts. What exactly does the statement that ''moral views are also conditioned by religious beliefs'' mean? ''From the perspective of religion, moral law is also God's law, but from the perspective of social philosophy, it is not necessary for moral considerations to be equated with God's commands.''[985] Puppinck explains the difference between moral and

[980] See also: Aramini, *op. cit*. note 48, p. 52. Goodale, *op. cit.* note 144, p. 110.

[981] Sgreccia, *op. cit.* note 41, 70 - 71.

[982] Popović, *op. cit.* note 655, p. 132 and 148.

[983] See also: Aramini, *loc. cit.* note 980.

[984] *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al.*, point 22. 1.

[985] Haldane, *op. cit*. note 103, p. 176.

religious beliefs in the way that ''religious belief results from religious prescriptions, for which individual conscience needs an act of faith and does not rely on reason, while moral conviction is the result of reason, that is, a rational procedure that excludes religion or cult, and seeks to be objectively justified.''[986] Labeling objective moral conviction with the argument of religion means that we consider objective moral convictions, such as the prohibition of murder, theft, etc., as a religious dogma. Such labeling of objective morality becomes secular dogma. In this way, we open ourselves up to the possibility of excluding the objective moral belief from the discussion, marking it as a religious dogma, since, in a secular pluralistic society, the religious value-system represents an individual and thus cannot be dominant in positive legal legislation.[987]

At the same time, any theological arguments, concludes Matulić, ''are considered exclusively a private matter in the *de facto* space of the public and state, which is a privileged place for non-Christian, identified with neoliberal, whereby the only public metaphysics remains the secularized, as ideological, because if it is not, then religious metaphysics would not bother her.''[988] The modern and postmodern understanding of human life, person and dignity, connected with biological facts about the human being, is a question that is problematized within the framework of pluralism in such a way that the philosophical, that is, the metaphysical dimension is negated and reductionist approach imposes a perspective in which any attempt to include metaphysics would be equated with a religious dimension, which is why only by excluding it, the approach to valuing human life would be considered secular (see *supra*, chapter 6). In order to avoid the above, we must accept the fact that the question of the status of the human embryo/fetus is not a question of religion, but of science and philosophy, although the conclusions of both fields (religion and science) may coincide. The conclusion of the Constitutional Court of the Republic of Croatia on the cited point is not based on arguments, but its arbitrariness is obvious, in the phrase ''it seems'', which in itself makes argumentation impossible.

9.3.2. International legal framework

[986] Puppinck, *op. cit.* note 784, p. 10, 37 - 38.

[987] Cf. Coughlan, *op. cit.* note 277, p. 112. Coughlan is one of the theoreticians who claims that the concept of an objective moral law is a recipe for a religious rule, not a society of rational arguments.

[988] Matulić, *op. cit.* note 125, p. 164 and 191.

On the one hand, international law, as well as the comparative law of the EU constitutional courts, does not represent a *per se* confirmation of value-basedness, but requires re-examination. Otherwise, there is no need to analyze expert opinions or establish scientific facts by the Constitutional Court of the Republic of Croatia, because decisions could be ''copied''. On the other hand, comparative solutions have their advantages because they enable new insights and show solutions that, if they are logically and argumentatively supported, can represent a contribution to Croatian legal practice, with the prerequisites for their application.

In points 23.1, 24 and 25, the Constitutional Court of the Republic of Croatia concludes that the comparative analysis shows that termination of pregnancy is permitted, when it comes to the member states of the Council of Europe, that is, the European Union, with greater or lesser restrictions, in almost all states, from some of which associate it with an earlier stage of pregnancy (usually up to the 10th, 12th or 14th week), and some with a later one (Sweden, 18th week), with the exception of Germany, where the right to life is recognized for both the human embryo and the fetus.[989] However, medical facts must be the same everywhere, so it is not logical that, for example, in Germany a man is dead when his heart stops beating, in Finland when he can no longer speak, and in Sweden when his brain stops to function.

In point 26, the Constitutional Court of the Republic of Croatia, analyzing the international legal framework, concludes that ''*It is well-known and generally accepted that every human being has the right to life, but it is not a question of who is considered a human being in the sense of a person who enjoys full legal protection?*''[990] From earlier analysis it is asserted that the international legal framework of human rights, created after the Second World War, accepts Boethius' definition of a person as a human being with intrinsic dignity, whereby no single category of human beings is singled out because the fundamental purpose of adopting international legal acts was the protection of the rights of every human being to life. It is clear that the international legal framework does not define either a person or a life, but taking into account that the entire system was created to protect the

[989] Cf. *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al.*, point 23.1, 24 and 25.

[990] *Ibid.*, point 26.

fundamental right to life, is it possible to legitimately question the reason for which it was created, almost by the same mechanisms by which in history human beings were excluded from legal protection (see *supra*, chapter 5), but this time another ''category'' of a human being and based on another set of characteristics? Philosophical-anthropological analysis, as well as analysis of moral criteria, asserted that there is no moment in which a human being would become a person at some point of development, instead, every human being is a person, including a human embryo/fetus. In point 26 the Constitutional Court of the Republic of Croatia stated that ''*the legal terms used in international documents are of a general and principled nature, they do not provide an unequivocal answer to this doubt and open space for different interpretations*.''[991] If the terms ''human being'' and ''person'', used in international legal acts, are of an ambiguous and general nature, and represent the foundation on which the entire system of human rights is built, can they represent a legal parameter for the regulation of abortion at the national level? Given that they are general and do not provide a clear answer to the fundamental question in the debate on abortion, they do not oblige to act in a precise sense. Citing international legal acts and court practice related to the issue of abortion represents a contribution only in the sense that they show that there is no obligation of the state to act according to the binding international legal framework (as concluded *supra*, chapter 8). Such a point of view is confirmed by the Constitutional Court of the Republic of Croatia itself in point 21, in which it states that ''*the international courts themselves point out that certain progress has been made, but that we cannot yet speak of the existence of generally accepted positions that would bind all states as a common heritage*.''[992] In point 26.2. The Constitutional Court states that ''*Committees and specialized agencies of the UN demand that termination of pregnancy be legal and accessible and continuously warn of the connection between restrictive laws on termination of pregnancy and the mortality rate of pregnant women.*''[993] The opinions of the said Committees are recommendations, soft law and have no binding legal force. Given that the issue of abortion is a question of the value system of the Member states, and in the chapter on human rights it was ascertained that it is not justified to impose values or change value patterns that belong to the area of sovereignty of national states, around which there is no consensus at the global level, but only around the

[991] *Ibid.*, point 26.

[992] *Ibid.,* point 21.

[993] *Ibid*., point 26. 2.

minimum of universal rights, the opinions of the aforementioned Committees represent recommendations that member states apply in accordance with their own value system.[994] In point 27.1, the Constitutional Court states that ''*in its practice so far, the ECtHR has not interpreted the term ''life'' and in the interpretation of Article 2 of the Convention, it starts from the position that it is not desirable (Vo v. France, paragraph 85), nor is it possible to respond to the abstract question of whether an unborn child is a person within the meaning of Article 2 of the ECHR.*''[995] The aforementioned article is analyzed in the chapter on the status of the human embryo. It was concluded that, in accordance with the interpretation of the ECtHR, the right to the life of a human being cannot be based on an abstraction (if the concept of a person is an abstraction), and the undesirability of the answer to the question refers to the interested-based evaluation of human life. It seems that the Constitutional Court was ''pinched'' by arguments that would speak in favor of the protection of the human embryo/fetus from abortion, but it bowed down to interest groups that can most easily be labeled pro choice.

The Constitutional Court in point 27.1. states that ''*the right to life occupies the first and most important place (in the ECHR)... it is not absolute in the sense that it protects life unconditionally*''[996], which means that it expressly recognizes its primary importance and limitation in strictly prescribed exceptional cases that are rare (either which case of taking life). The thousands of abortions performed annually in the Republic of Croatia are certainly no exception. Is a woman's desire for an abortion a strictly prescribed exception? An analysis of ECtHR judgments, as well as the assumption that abortion on request is a defense against illegal violence coming from a human embryo/fetus, found that it is not.
In point 27.2. it is stated that ''*Article 2 of the ECHR contains two fundamental elements: the general obligation to protect life by law and the prohibition of intentional deprivation of life except in certain, strictly prescribed, cases. Even assuming that the fetus can be considered to have the rights guaranteed by Article 2 of the ECHR, the assessment of a possible violation of its rights depends on the particular circumstances of the specific case, i.e. on whether the national legislation on termination*

[994] Rodin states that differences in legal systems arise from differences in the fundamental settings of legal and social systems. Cf. Rodin, S., *Constitutional Relevance of Foreign Court Decisions*, The American Journal of Comparative Law, 64, 2016, 4, p. 819.

[995] *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al.*, point 27.

[996] *Ibid.,* point 27. 1.

of pregnancy has established a fair balance between the need to protect the fetus, on the one hand, and the rights and interests of the woman, on the other hand.''[997] If the assumption is true that the fetus has rights from Article 2 of the ECHR, then it is also legally protected because abortion does not represent one of the exceptions in strictly prescribed cases (see *supra*, chapter 8), except when it comes to the issue of endangering the life and health of the mother, an equally valuable right. The ECtHR does not state that the legislation should establish a ''fair balance between these two, conditionally opposed rights'', but that the protection of the fetus depends on whether the national legislation prescribes such a possibility. The ECtHR does not explain what a fair balance is, since it cannot explain it without determining the status of the human embryo/fetus. In point 28.3. The Constitutional Court of the Republic of Croatia states that ''*the ECtHR consistently advocates the position that the unborn (child) is not considered a 'person' directly protected by Article 2 of the ECHR, and that if an unborn being does have a 'right to life', it is implicitly limited by the rights and interests of the mother (Vo v. France, paragraphs 79 and 87).*''[998] By analysis of the judgments in the chapter on the status of the human embryo/fetus, it was ascertained that the ECtHR avoids giving an answer to that question. In point 85, it explicitly refers to the aforementioned case of *Vo v. France*, where it points out that ''*it is not possible to answer the abstract question of a person*.'' The ECtHR never once asserted that a human embryo/fetus is not a person, but instead it recognized his human dignity. Furthermore, if the human embryo/fetus has a right to life, it is implicitly limited by the rights and interests of the mother, but by rights equal to the rights of the human embryo/fetus (right to life). The ECtHR does not state that the right to life of a human embryo/fetus is limited by the mother's right to privacy, but gives a general formulation to ''the rights and interests of the mother''. As analyzed, abortion does not constitute a right under the ECHR.

In point 29, the Constitutional Court of the Republic of Croatia interprets that ''*although the Court of Justice of the EU in the Oliver Brüstle v. Greenpeace case established that every human ovum at the moment it is fertilized is considered a 'human embryo' within the meaning and for the purposes of applying Article 6(2)(c) Directive 98/44/EC of the European Parliament because that is when the process of development of a human being begins*''[999] and how ''*...regardless of this, it seems*

[997] *Ibid.,* point 27. 2.

[998] *Ibid*., point 28. 3.

[999] *Ibid*., point 29.

that its definition of a 'human embryo' cannot be interpreted as having explicitly or implicitly defined the concept of 'human being', especially not in the sense of equal protection of born and unborn being, from the moment of its conception''.[1000] The Constitutional Court of the Republic of Croatia arbitrarily interprets that the Court of Justice of the EU interpreted the definition of ''human embryo'' in a limited way, i.e., only to determine the scope of application of the mentioned Directive, because the Court of Justice of the EU statement, that the procedure of a human being begins with fertilization, is explicit and leaves no room for interpretation. Some statements must be valid for all relations equally, so it cannot be considered that the zygote has been created for some situations and not for others. That is why it is not clear on the basis of which arguments the Constitutional Court of the Republic of Croatia has brought the opposite conclusion. The phrase ''seems'' indicates an approach based on assumptions, precisely in the case when it is a conclusion that would call into question the Constitutional Court of the Republic of Croatia's own conclusions from point 45 (see *infra*).

In point 30, the Constitutional Court of the Republic of Croatia states that ''*Constitutional adjudication (according to the decisions of the constitutional courts, see from points 17 to 20), tries to mediate, i.e. channel the social conflict, in connection with the role of women in the family and society, demanding (real) equality of women and equality of sexes. Constitutional courts strive to establish a fair balance between conflicting rights and interests.*''[1001] Previously, the judgments of some (EU) constitutional courts on abortion were analyzed. Apart from the judgment of the Federal Constitutional Court of the Republic of Germany, the other judgments do not provide clear and logical parameters for action in a precisely defined sense. This is problematic considering that ''decisions of constitutional and European courts are taken as the final and true state of affairs (*curia locuta, causa finita*).''[1002] The phrase ''just balance'', which is the guiding thread of most judgments of constitutional courts, does not represent a contribution to Croatian legal practice because is practically impossible. Equality of sexes was analyzed in the chapter on abortion, where it was determined that the ideal of

[1000] *Ibid*., point 29.

[1001] *Ibid*., point 30.

[1002] Smerdel, B., *Kriza demokratskog konstitucionalizma i izgledi demokratske tranzicije u RH / The crisis of democratic constitutionalism and the prospects of further democratic transition in Croatia*, Zbornik Pravnog fakulteta u Zagrebu, 69, 2019, 1, p. 20.

equality is not only a biological men, but also a biological woman with the ability to give birth. Any other attempt to achieve equality of sexes leads to the opposite effect.[1003] In point 31, the Constitutional Court of the Republic of Croatia concludes that ''*almost no European constitution explicitly or implicitly recognizes the special right to life before birth*''[1004], which is not true because the constitutions of EU member states (and not European constitutions) do not expressly exclude the human embryo/fetus from protection of the right to life, which means that they implicitly include it. Only such an explicit provision would mean the accuracy of the statement of the Constitutional Court of the Republic of Croatia regarding the constitutions of other EU member states. Also, the constitutional courts (except for the German Constitutional Court) are not determined according to the mentioned question, and the majority consider it the domain of the legislator, which is stated in point 33 of the Decision.

In point 33, the Constitutional Court concludes that ''*regardless of the differences in the approach chosen by the constitutional courts... they are all unique and consistent in their view that the answer to the question of when life begins is within the jurisdiction of the legislator... the task of the Constitutional Court is to examine it whether the legislator respected the constitutional values and rights guaranteed by the constitution and whether it carried out the test of proportionality/balancing in order to establish a fair balance between the rights of women and the interests of protecting the unborn being*''.[1005] Without an answer to the question of when life begins, which the Constitutional Court of the Republic of Croatia classifies as the domain of the legislator, it is not possible to answer any of the above questions, which it claims are within its jurisdiction. If the Constitutional Court of the Republic of Croatia considered that the fundamental issue of the abortion debate on when life begins is within the jurisdiction of the legislator, it is unclear for what reasons it sought the opinions of medical faculties, which express themselves on this issue, from a bio-medical aspect. If the fundamental issue of protecting the life of a human being is not analyzed, it is not possible to determine whether the legislator respects the constitutional values of equality, non-discrimination, freedom, etc. If the issue of life is within the competence of the legislator, then a special

[1003] On equality of sexes see: Smerdel, B., *Ustavno uređenje europske Hrvatske/The Constitutional Order of the European Croatia*, Official Gazette, Zagreb, 2020, 315 – 316.

[1004] *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al.,* point 31.

[1005] *Ibid*., point 33.

legislative act would previously, before the decision of the Constitutional Court of the Republic of Croatia, be necessary to determine whether all human beings have the right to life, and if some do not, based on which criteria they do not.

In agreement with the statement from Judge Šumanović's separate opinion, that the results of an extensive comparative analysis cannot serve as a valid argumentative parameter of the decision of the Croatian Constitutional Court, we will conclude that existing comparative solutions, as well as positive legal legislation, mostly do not provide answers to legal gaps that exist in the issue of abortion.

9.3.3. Legal basis and values

Analyzing the first of the two fundamental objections (the first: due to the termination of validity of the constitutional basis on the ground of which the challenged AHM was adopted, it became completely unconstitutional and the second: the AHM is not in accordance with Article 21 of the Constitution, which prescribes that every human being has the right to life, and the embryo is a human being equal in dignity with other beings, and at the same time the subject of the right to life as guaranteed by the Constitution), which refers to the termination of the validity of the constitutional basis on the ground of which the AHM was adopted, the Constitutional Court of the Republic of Croatia concludes in point 37 that ''*the fact that the Act remained non-compliant with the new Constitution is not in itself sufficient to establish its inconsistency with the Constitution, as well as the fact that the Act was adopted at the time of a different constitutional and legal arrangement... because the opposite implies bringing legal certainty and continuity into question*.''[1006]It is a contradictory conclusion that non-compliance does not imply disagreement, because the terms (not only in the linguistic sense) non-compliance and disagreement are almost synonymous. Furthermore, continuity *per se* does not constitute value. Analyzing the values of totalitarian systems, such as communist and Nazi, it is clear that continuity is not always an advantage, even though change should be justified. If continuity is a value *per se*, it is unnecessary to review the Acts because, based on the principle of continuity, we will conclude, regardless of the outcome of the evaluative normative process, that they should be left in force. The principle of legal continuity is particularly inapplicable in a

[1006] *Ibid*., point 37.

situation where two diametrically opposed constitutional arrangements are involved, and the Act being decided on contains value implications (it is not an Act which regulates traffic violations). Changing the value system implies the value deconstruction of the old system and the creation of a new one, which will be reflected in the Act that also contains moral issues, that is, issues that include a value element. The Constitutional Court of the Republic of Croatia itself confirms the same in point 49.1, in which it states ''*since the adoption of the Constitution in 1990, a completely new legal and institutional framework of the health, social, scientific and educational system has been built, which is based on other value bases and principles... the "obsoleteness" of the disputed Act is obvious, i.e. the necessity of its ''modernization*''.[1007] Since the values and institutions within the communist system are not in balance with the new values, the principle of continuity is inapplicable as a justification for determining the conformity of the contested Act with the Constitution of the Republic of Croatia.

The rule of law and the requirement of coherence, require the establishment of a legal basis for the purpose of assessing the conformity of laws with the Constitution. The fact that the new Constitution does not contain a legal basis on the ground of which the Act was adopted, calls into question the legitimacy of the law. In point 38, the Constitutional Court of the Republic of Croatia states the rule of law as the highest value of the constitutional order, and therefore imposes the determination of the legal basis as one of the most important issues within the framework of the assessment of the conformity of acts with the Constitution. The Constitutional Court itself states in the same point 38 that ''*according to Article 5, Paragraph 1 of the Constitution, in the Republic of Croatia every act must be in accordance with the Constitution*.''[1008] According to what criteria is the AHM in accordance with the Constitution if there is no legal basis in the new Constitution? The important fact is that every Act Proposal in the Republic of Croatia must contain a legal basis without which the legislative body does not consider the Act Proposal, so if there was no legal basis for promulgating the law, such a law should be considered unconstitutional.[1009] If in the

[1007] *Ibid.,* point 49. 1.

[1008] *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al.*, point 38.

[1009] On the contrary, Kostadinov asserts in the expert opinion given on the occasion of the constitutionality assessment of the AHM the following: ''the request for Act to be declared unconstitutional due to the absence

Socialist Federal Republic of Yugoslavia there was a legal basis (in the formal sense, in the material sense it should still be examined) on the ground of which the act was passed, can it be negated in a democratic society? The Constitutional Court of the Republic of Croatia refers to the reason of legal certainty, because of which the AHM would not be inconsistent with the Constitution of the Republic of Croatia, which is paradoxical if we take into account that the legal basis on which the Act is passed is a confirmation of legal certainty. The AHM is formally incompatible with the Constitution because it does not respect the law-making procedure which stipulates that the basis must be stated in the Act Proposal, and the legal basis does not exist in the current Constitution of the Republic of Croatia. The material inconsistency of the AHM results from the inconsistency of the previous values on the basis of which it was adopted with the current one, which makes the law substantively inconsistent with the Constitution of the Republic of Croatia.[1010]

9.3.4. Compliance of the Act on Health Measures for Free Decisons on Childbirth with Article 21 of the Constitution of the Republic of Croatia

The second fundamental objection of the applicants of the constitutional complaint is that the Act is not in accordance with Article 21 of the Constitution, which stipulates that every human being has the right to life. An embryo is a human being, therefore a subject of the right to life as guaranteed by the Constitution. The *Constitution of the Republic of Croatia* prescribes in Article 3 that ''*freedom, equality... are the highest values of the constitutional order of the Republic of Croatia and the basis for the interpretation of the Constitution*'',[1011] and in Article

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of a constitutional basis for its adoption is contrary to the constitutional principle of the rule of law''. Cf. *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al.*, point 5. 1.

[1010] Cf. Hrabar, *op. cit.* note 453, p. 798. Hrabar states that ''The principle of constitutionality in the narrower, legally technical sense requires that Acts should be in accordance with the provisions of the Constitution, and considering that the AHM was adopted at a time of a different socio-political system, which was also reflected in different legal and constitutional provisions, it is not in accordance with The Constitution of the Republic of Croatia, that is, with the provisions of Article 21, paragraph 1 of the Constitution...'' ''Now, when new Acts are passed, they must be in accordance with the existing, not the previous Constitution'' the answer should be sought in, for example, the death penalty. The death penalty existed in SFRY (and SRC). Since the provision on the death penalty was deleted from the new Constitution, the Penal Code containing the provision on the permissibility of the death penalty would be unconstitutional.

[1011] Cf. *Constitution of the Republic of Croatia*, Art. 3.

14 it prescribes that ''*everyone is equal before the law*'',[1012] so it was necessary to determine whether the term ''all'' and ''equality'' applies to the human embryo/fetus. ''Article 3 of the Constitution defines the 'highest values of the constitutional order'.''[1013] If equality is the highest value, wouldn't it require determining to whom everything applies and whether a certain group of human beings is excluded from it? Although, as Dworkin concludes, ''constitutional provisions on freedom and equality are abstract'',[1014] can the article of equality be understood as if the creators of the Constitution of the Republic of Croatia wanted to exclude the human embryo/fetus from its scope, as well as from Article 21? If they wanted to exclude him, they had to do so unambiguously and clearly (for example: except for the unborn human), because ''everyone'' includes both the born and the unborn because both are human beings (from Article 21). The analysis of the constitutional legal aspects ascertained that the human embryo is included in the constitutional concept of a human being, and therefore a person, as well as all other ''borderline'' cases.

9.3.5. The intention of the framers of the Constitution

Article 21 of the *Constitution of the Republic of Croatia* which prescribes ''*Every human being has the right to life*'' requires an analysis of who is included in the term ''every'' human being, whether some category of human beings is excluded, what is the purpose and social value function of that Article. One of the ways to find the answer is an attempt to understand the intention of the constitutional creators, that is, the creators of the aforementioned rule. Balkin calls the application of the original text and principles to current circumstances ''a conversation between old and new generations'', according to which ''living constitutionalism and fidelity to the original meaning of constitutional terms, would represent two sides of the same coin.''[1015] Legal regulation requires the interpretation of new social circumstances. In order to determine the original intention of the framer of the constitution, it is necessary to analyze whether the principle of equality and the value of human life, visible from the text, structure and history of the *Constitution of the Republic of Croatia*, are threatened by the legislative act on abortion (AHM) and who

[1012] *Constitution of the Republic of Croatia*, Art. 14.

[1013] Smerdel, *op. cit.* note 477, p. 203.

[1014] Dworkin, *op. cit*. note 76, p. 149.

[1015] Balkin, J. M., *Abortion and Original Meaning*, Yale Law School, 24, 2007, 2, p. 352.

did the Croatian constitution creators meant by the term human being, that is, did they wanted to exclude human embryo/fetus from that concept.

The *Constitution of the Republic of Croatia* does not prescribe the right to abortion, and the right to privacy, from which is inappropriately attempted to relate to right to abortion in theory, is listed as hierarchically only in seventh place among personality rights in the ORA, in contrast to the right to life, the first and highest personality right, whose carrier is a human embryo/fetus.[1016] Analyzing the rule of protection of the life of every human being from Article 21 of the *Constitution of the Republic of Croatia* and the fundamental principle of equality, it cannot be determined that they were written with the intention of excluding a certain category of human beings, more precisely the human embryo/fetus. Our Constitution creators did not differentiate between human and personal life, nor did they limit the subjectivity of human life in any way. In the chapter (number 7) on the constitutional and legal aspects of the human being, it was concluded that we do not find a criterion by which a human embryo/fetus would be separated from other so-called ''borderline'' cases. On the other hand, Article 191 of the Constitution of SFRY was not transferred in any form to the text of the Constitution of the Republic of Croatia.

There is a possibility that the creators of the *Constitution of the Republic of Croatia* wanted to deliberately bypass such a difficult issue as the subjectivity of the unborn, or else they overlooked the consequences brought about by such an Article 21.

9.3.6. Unconstitutional consequences

In point 41.1, the Constitutional Court of the Republic of Croatia, citing its previous Decision from 2010, states that ''*every single constitutional provision must always be interpreted in accordance with the highest values of the constitutional order, which are the basis for interpreting the Constitution itself.'' These are: freedom, equality, equality of sexes*...''[1017] The interpretation of a woman's desire for an abortion cannot be related with the value of freedom and equality of sexes, because as it was ascertained, freedom does not imply a request for the intervention of another (doctor, the state), but the achievement of equality of sexes is only

[1016] Cf. ORA, Art. 19, par. 2. Cf. Petrak, *op. cit.* note 545.

[1017] *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al.*, point 41. 1.

possible in accordance with the woman's biology, otherwise a man is imposed as an ideal. The Constitutional Court states in point 41.1. that ''*no provision may be interpreted in such a way as to produce unconstitutional consequences, nor may it be taken out of context and independently interpreted, including Article 21 of the Constitution of the Republic of Croatia.*''[1018] In the context of the unconstitutional consequences, the Constitutional Court of the Republic of Croatia does not mention the provision on the right to privacy, on which the mother's request for an abortion would be based, but exclusively Article 21 of the Constitution of the Republic of Croatia. The above confirms that the approach of the Constitutional Court of the Republic of Croatia to these two, relatively speaking opposing rights, is different. The Constitutional Court of the Republic of Croatia does not analyze what is meant by unconstitutional consequences, nor is it clear how the protection of a human being's life, as a fundamental human right, can be contextualized and interpreted. The phrase ''unconstitutional consequences'' encompasses a wide range of possible consequences, and it is unclear under which criteria the protection of the right to life would produce consequences that would be unconstitutional, nor what they would be and why they outweigh the right to life of a human being.

In point 41.2, the Constitutional Court of the Republic of Croatia states that ''*human dignity is fully protected, non-derogable... derogation from this rule is not allowed... and human rights form an integrated system for the protection of dignity.*''[1019] Human dignity is the basis for protecting the lives of all human beings. Therefore, there are no derogations from the rule of protecting the dignity of a human being, and then also of a human embryo because it is undoubtedly a human being. With that provision, the Constitutional Court recognizes the intrinsic, not the extrinsic, dignity of every human being, which also means the human embryo/fetus. In point 42, the Constitutional Court of the Republic of Croatia concludes that ''*The Constitution of the Republic of Croatia guarantees every human being the right to life, a right that is a prerequisite for all other rights, but the Constitution itself does not contain a definition and does not elaborate on the concept of a human being, that is, does it include born persons (human), which undoubtedly have legal subjectivity and unborn human beings*.''[1020] A born person is a man, but a man is every human being, including the unborn. By the very fact that a human

[1018] *Ibid*., point 41. 1.

[1019] *Ibid.,* point 41. 2.

[1020] *Ibid*., point 42.

embryo is a human being, it is also a human because it cannot be a human being and not be a human, that is, a person. It is clear that the Constitution of the Republic of Croatia does not and should not elaborate on definitions, especially complex ones such as the philosophical concept of a person (it does not elaborate on the legal one either), but in case of doubt to whom the term refers, it is necessary to take into account and analyze scientific and expert opinions, unless it has an activist approach in solving a complex issue. The Constitution of the Republic of Croatia does not elaborate on the right to privacy, much less the request for an abortion that would allegedly stem from it. If the Constitutional Court of the Republic of Croatia claims that the issue of the right to life is not within its competence, a request for privacy would be even less. Ascertaining the status of a human being, determined by the historical-legal method, is the most important question by which the darkness or light of epochs and communities was measured. In the previous analyses, it was asserted that there is no moral criterion by which the human embryo and fetus would be denied the moral status of the subject, and then the legal, *sui generis* status. If there is a doubt about such an important question since when a person is included in legal subjectivity, shouldn't it then be explicitly stated that ''Every human being has the right to life, except...'' (with a clear explanation of the criteria), even more so taking the statements of the Constitutional court that dignity is non-derogable and that the right to life is a prerequisite for all other rights.

In point 43, the Constitutional Court states ''*the right to freedom and personality as fundamental rights*''[1021], and in point 44, it states that ''*the Constitution guarantees respect and legal protection of personal and family life and dignity*'',[1022] and in point 44.1, it states that ''*The right to privacy guaranteed by Article 35 of the Constitution includes everyone's right to freedom of decision and self-determination. Therefore, the right to privacy is inherent in a woman's right to her own spiritual and physical integrity, which includes the decision whether to conceive a child and how her pregnancy will develop*'' and ''*any limitation of a woman's decision-making in autonomous self-realization, including whether she wants to carry the pregnancy to term, represented an interference with her constitutional right to privacy, unless it is a direct social need*.''[1023] The Constitutional Court does not analyze the concept of privacy (see *supra*, chapter 5), as well as autonomy.

[1021] *Ibid.,* point 43.

[1022] *Ibid*., point 44.

[1023] *Ibid*., point 44. 1.

From the previous analyses, it was determined that a woman's decision to have an abortion cannot include the public health system, because pregnancy, medically determined, is not a disease that can be treated by abortion, nor does the private in this context include the public. The decision whether a woman will conceive a child has nothing to do with claim towards doctor to perform an abortion. A woman requests a medical procedure based on desire, paradoxically invoking privacy. The Constitutional Court of the Republic of Croatia brings conclusions with the introduction of value and even metaphysical terms such as ''spiritual integrity'', without specifying what it would entail. The contradiction of relating abortion with personal and family life, as well as self-determination, is also evident in Article 50, in which the Constitutional Court orders the legislator to determine preventive measures to make termination of pregnancy an exception. Why if ''termination of pregnancy'' is solely a matter of self-realization of a woman and protection of her spiritual and physical integrity, and if the human embryo/fetus is not a subject *sui generis*?

The Constitutional Court ignores the issue of the status of the human embryo/fetus, and thus its existence and right to life, in order to achieve the goal of autonomy, which is imposed as a supreme value. The Constitutional Court arbitrarily determines the limit up to which autonomy would excede the right to life, because by not determining the status of a human embryo/fetus, it is not even possible otherwise. Likewise, in point 45, the Constitutional Court states that ''*the legislator has the freedom of discretion in achieving a fair balance between a woman's right to freedom of decision and privacy, on the one hand, and the public interest in ensuring the protection of the unborn being, on the other hand*'',[1024] although it is clear that by not determining the status of the human embryo/fetus, it is not possible to determine the protection, much less succeed in its accuracy. The Constitutional Court of the Republic of Croatia could not balance the above-mentioned demands and rights because it did not have elaborated previous parameters for this. With that provision, the Constitutional Court called into question the earlier provision that the right to life is protected except in strictly prescribed cases and that dignity is non-derogable. If there is a public interest in the protection of the unborn being, it surely outweighs the private interest of the individual. Otherwise, each individual, invoking autonomy, could threaten the public interest. In point 45.1. states that ''*it is within the competence of the Constitutional Court*

[1024] *Ibid*., point 45.

to review the legislation regulating the issue of termination of pregnancy, in order to assess whether it is in accordance with constitutional principles and values.''[1025] What values did the Constitutional Court take into account, apart from the previously mentioned need to harmonize positions? Article 3 of the *Constitution of the Republic of Croatia* states that ''*Freedom, equality, national equality and equality of sexes, peacemaking, social justice, respect for human rights, inviolability of property, preservation of nature and human environment, the rule of law and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution*.''[1026]

Equality of sexes is not achieved through abortion. The value of freedom and privacy is not related to abortion, and respect for human rights includes respect for the right to life of every human being, which is a human embryo and fetus, therefore the right to life cannot belong to him, for example, from the tenth or twelfth week, and not before, because he is a human being, not something or nothing. Isn't the value of human life the greatest value, from which the Constitutional Court distances itself, putting it under the jurisdiction of the legislator in point 45.1? The Constitutional Court does not even respect the value of the rule of law because it legitimizes an Act that does not contain a legal basis. In point 45, the Constitutional Court determines that ''*an unborn being, as a value protected by the Constitution, enjoys constitutional protection in the sense of Article 21 of the Constitution only to the extent that it does not conflict with a woman's right to privacy*'',[1027] noting in point 45.1 that ''*the question of when life begins is not within the jurisdiction of the Constitutional Court'' but rather the question of ''...whether a balance has been achieved between conflicting rights and interests*.''[1028] If we take into account the fact that the Constitutional Court of the Republic of Croatia in its Decision did not elaborate or clarify the parameters by which it was guided when making its decision, except for the principle of justice which is inappropriate in the given context because without clarified previous definitions it is not possible to arrive at an answer about a just solution, then it is clear that the requirement of achieving a fair balance cannot be met. The criterion of ''just balance'' is very doubtful, because it is not clear who is the one who determines what is just. The category of human embryo/fetus as a constitutionally protected value is a vague category from which it is not possible to

[1025] *Ibid.,* point 45. 1.

[1026] *Constitution of the Republic of Croatia*, Article 3.

[1027] *Ibid*., point 45.

[1028] *Ibid.,* point 45. 1.

conclude what level of protection it would entail. The creation of new legal categories necessarily requires an explanation of the reasons for their application, as well as the consequences they produce. Apart from the fact that the phrase constitutionally protected value is not clear, it is also not clear why exactly the human embryo/fetus represents a constitutionally protected value and based on which philosophical-anthropological and legal parameters. If the Constitutional Court of the Republic of Croatia does not determine who has the status of a person, and then a legal subjectivity, on what basis does it determine who represents a constitutionally protected value? Is the human embryo thus reduced to the level of an animal, an artificial intelligence or an image?

Such a solution, the application of which is abstract, meets the needs of achieving political goals. By not recognizing the human embryo as a medically proven human being with intrinsic value, the Constitutional Court equates it with plants and animals, thereby opening the possibility of arbitrarily excluding other categories from subjectivity in the future. In point 46, the Constitutional Court states that ''*the legislative decision is in accordance with the Constitution according to which termination of pregnancy can be performed at the request of the woman until the end of the 10th week of pregnancy*'' and that ''*the disputed legislative decision did not disturb the fair balance between the constitutional right of a woman to privacy (Article 35 of the Constitution) and freedom and personality (Article 22 of the Constitution), on the one hand, and the public interest in protecting the lives of unborn beings, which the Constitution guarantees as a value protected by the Constitution (Article 21 of the Constitution), on the other hand*''[1029], which represents the conclusion that is in direct contradiction with point 42, in which it concludes that ''the right to life is a prerequisite for all other rights.''[1030] The right to life implies the right to be born, while the right to live implies the right to ''maintain'' life. A born person has the right to live, not to the life he already possesses, while an unborn man has the right to be born. A balance between the right to life and ''a woman's constitutional right to privacy'' is not possible. One cancels out the other. Petrak concludes that ''the right to life belongs to the *nasciturus* from conception, which is why the possibility of terminating a pregnancy before the end of the tenth week is *contra constitutionem*, because a pregnant woman has the right to life and death over the conceived child until the tenth week, whereby the facts of the ORA, which does not distinguish between the period before and

[1029] *Ibid.,* point 46.

[1030] *Ibid.,* point 42.

after 10 weeks, and which in that aspect governs the very foundations of the status rights of natural persons, are ignored.[1031]

If a woman has the right to privacy, why does that right disappear at the tenth week and what is the legal status of the father of an unborn human from the tenth week? The Constitutional Court does not elaborate on the legal status of the father, although his role in parenting is equal to that of the mother. If the human fetus has the right to life, why does it only in the tenth week become a person, a legal subject, but by what criteria, if the definition of a person is in the domain of the legislative body? The Constitutional Court did not provide a single legal criterion for which the balance point would be in the tenth week of a woman's pregnancy. With the aforementioned assertion, the Constitutional Court annulled all earlier relevant provisions of the legislation and analysis of the concepts of the right to life and dignity.

In point 47, the Constitutional Court concludes that ''*AHM is not inconsistent with Articles 2, 3, 14, 16, 21, 22, 35 and 38 of the Constitution, as well as with the Constitution as a whole*.''[1032] The Constitutional Court concludes that although, as ascertaindes, there is no legal basis for AHM in the new Constitution. Furthermore, Article 15 of the AHM (termination of pregnancy can be carried out up to ten weeks from the day of conception) is not in accordance with Article 3[1033] because it violates the principle of freedom and equality of human beings, treating the embryo as a thing. The same article is contrary to Article 21[1034], because it violates the right to life of a human being, as well as article 14, paragraph 2, ''all are equal before the law.''[1035] Freedom can be limited solely to protect the legal order, morals and public health.[1036] The freedom to abort a child, that is abortion on demand,

[1031] Petrak, *op. cit.* note 552.

[1032] *Decision of the Constitutional Court of the Republic of Croatia No. U-I-60/1991 et al*, point 47.

[1033] *Constitution of the Republic of Croatia*, Article 3. ''Freedom, equality, national equality and equality of sexes, peacemaking, social justice, respect for human rights, inviolability of property, preservation of nature and the human environment, the rule of law and the democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the basis for interpreting the Constitution.''

[1034] *Constitution of the Republic of Croatia*, Art. 21, par. 1. ''Every human being has the right to life.''

[1035] *Constitution of the Republic of Croatia*, Art. 14, par. 2.

[1036] *Constitution of the Republic of Croatia*, Art. 16, par. 1. ''Freedoms and rights can only be limited by law in order to protect the freedom and rights of other people as well as the legal order, public morality and health.''

does not belong to any category. Abortion does not constitute freedom prescribed in Article 22.[1037] The freedom to abort a child is not an expression of equality of sexes either (Article 3) for the reasons stated earlier. Abortion cannot be related to dignity and personal and family life from Article 35[1038], because there would be no need for its prevention, and for the reasons stated above.

9.3.7. Traces of political activism and judicial restraint

The Constitutional Court did not analyze the status of the human embryo/fetus, and bioethical questions multiply in line with technological development. By focusing on the exclusively existing positive - legal legislation of this complex issue, which does not solve the issue of abortion, but ensures the *status quo*, the goal of clearly ascertaining the rights of the subjects involved, such as the human embryo/fetus, mother, father, doctor and finally the state, is avoided.

The conclusion about the non-existence of a unified position, as well as the very fact of complexity, without discussing the real nature of the problem (what is privacy and who is a person with the right to life), ignoring scientifically proven facts about the parameters crucial for the regulation itself, points to political conditioning when solving the issue of abortion. The political goal and interested-base problem solving, regardless of the established nature of the matter, is historically and legally unacceptable and calls into question the foundations of the international human rights system. Popović concludes that it is surprising the marginalization of natural-scientific evidence of medical ethics and the expert opinions of the chair of family law in the Decision of the Constitutional Court.[1039] The Constitutional Court of the Republic of Croatia chose an activist approach when solving the issue of abortion, guided by the principle of justice in order to ''reduce conflict'' in society, which is why the interpretations of fundamental rights are contradictory, the

(2) Any limitation of freedom or rights must be proportional to the nature of the need for limitation in each individual case. For more on limitations see: Smerdel, *op. cit*. note 477, p. 229.

[1037] *Constitution of the Republic of Croatia*, Art. 22 ''Man's freedom and personality are inviolable.''

[1038] *Constitution of the Republic of Croatia*, Art. 35 ''Everyone is guaranteed the respect and legal protection of his personal and family life, dignity, reputation and honor''.

[1039] Cf. Popović, *op. cit.* note 655, p. 139 and 148.

status of the human embryo/fetus in the legal system of the Republic of Croatia remains inconsistent, conclusions about the status of the human embryo/fetus remain unclear in application (constitutionally protected value), which is why the entire solution is unprofessional, as well as some of the terminology used by the Constitutional Court of the Republic of Croatia. As Smerdel states, the Constitution is ‘‘a dam, an obstacle that provides protection.’’[1040] The Constitutional Court is ‘‘an independent body of experts with broad competences, the most important of which are: evaluation of the constitutionality of acts and the protection of fundamental human rights and freedoms in proceedings initiated by a constitutional lawsuit.’’[1041] That's why the Decision of the Constitutional Court is not of great value for solving the problem of abortion. The decision was made with ‘‘limited insight into the issue’’[1042] of abortion. The Constitutional Court's decision did not reduce divisions in society, they still exist because an approach that denies the need to determine the true state of affairs cannot even achieve this.

10. CONCLUSION

The research results present that every human being is also a person. Given its *sui generis* legal situation, the human embryo is a legal entity in development, suitable for the recognition of legal capacity that encompasses several personality rights. The protection of the human embryo's right to personality derives from regional and international documents, and the rights and interests of other persons, such as the mother's right to privacy, are different in relation to the right to protect the life and health of the human embryo/fetus.

With regard to the first mentioned result of the research, we concluded that modern science is characterized by the naturalization of man, which implies the reduction of man to biological elements, and that in researching the question of who man is, the dominant

[1040] Smerdel, B., *Predgovor: Za povratak idealima krčkog Nacrta ‘‘Božićnog ustava’’/Foreword: To return to the ideals of the Krk Draft of the ‘‘Christmas Constitution’’*, in: Galović, T. (Ed.), *Hrvatski ustav i njegov ‘‘Krčki nacrt’’ (1990.)/ The Croatian Constitution and its ‘‘Krk draft’’ (1990)*, Mala knjižnica ‘‘Krčkog zbornika’’, Krk, 2018, p. 16.

[1041] Smerdel, *op. cit.* note 477, p. 223.

[1042] Smerdel, B., *The Republic of Croatia: three fundamental constitutional choices*, Croatian Political Science Review, 1, 1992, 1, p. 62.

and even the only methodology is the experimental method. The denial of the ontological substrate of a person is a consequence of contempt for metaphysics and its identification with religion. We concluded that if we reject non-empirical reality, we must also reject concepts such as identity, dignity, and then the equality of human beings. Although the existence of a person cannot be proven empirically, because it is a philosophical concept, it has been proven by the historical legal method that any denial of personality to human beings, and consequently their legal status, has led to serious violations of fundamental human rights in history.

In relation to the issue of humanity/personhood of the human embryo/fetus, we concluded that the humanity of embryos and fetuses has been medically proven. Compared to earlier times when nothing was known about conception and fetal development, today medicine has proven beyond doubt that a human embryo is a human being from conception. It is neither an animal, nor a plant, nor a microbe, but it is a living being. There is no moment when suddenly, a few days or weeks after conception, he becomes a human being. The human embryo retains its identity, individuality and uniqueness throughout the entire development process. There is also no moment in the development of a human embryo/fetus that represents the leap from an impersonal to a personal human being. Every human being develops in a continuum, from the moment of conception to as long as they exist, because even a 70-year-old person does not look or function the same as a 90-year-old, 20-year-old or 15-year-old. We concluded that a person cannot simply emerge from a biological physicality at some point in the development of a human embryo/fetus. If a person is defined by a biological ability, then that ability exists in the beginning because everything biologically necessary for the development of that ability is present in the new genome, the embryo. If, on the other hand, a person is not a biological capacity, but is reduced to an ontological substrate that cannot be empirically proven either at the beginning or later, then there is no reason for it to exist later and not at the beginning. The research results indicate that, apart from the moment of conception, there are no criteria that can be taken as crucial for determining the status of a moral and legal subject, according to which a human embryo/fetus would ‘‘jump’’ from an object to a subject. The external manifestations of the embryo cannot be a condition for its existence as a person, because it is a holder of human nature that may or may not manifest that nature, depending on its own capabilities. We pointed out the difference between being as

a person and acting as a person. We concluded that the moral status of the human embryo as a subject derives from its philosophical-anthropological status as a person as an individualized individual member of the nature of the species *homo sapiens* with intrinsic dignity.

In relation to the second result of the research, we concluded that every human being is a legal subject and holder of personality rights, and the reason for this is that every human being is a member of human nature, which contains intrinsic dignity, including the human embryo/fetus, which is a bio-medically proven human being. If we deny the existence of a universal human nature from which human rights arise, we question the fundamental fact that all human beings are holders of human rights. The lack of consensus on human nature was the reason for the violation of the fundamental rights of countless groups of human beings in history, and in the 20th century, the reason for the creation of the international system of human rights. As human beings, we have fundamental rights regardless of the qualities we possess, and we also have them as ''weaker'' members of any society. Human beings have internationally guaranteed human rights as individuals, not just as citizens of individual states. This especially applies to first-generation human rights, the fundamental right to life and liberty, and related rights such as the prohibition of torture and cruel and degrading treatment, which arise from human nature, recognized more or less throughout the world and which should be valid as unchanging in all times and circumstances. These are fundamental, natural rights that precede the state regulation of rights. Of course, natural right as a pre-state, human right, should not be derogated by the positivist system, in accordance with the conclusions of the Nuremberg process. However, not all constitutional rights, that is, human rights, are at the same time personality rights in the sense of civil law, but only those constitutional rights that can be constructed as subjective civil rights pass into civil law. Human rights, mostly of the first generation, are constituted as subjective rights due to their importance, but also the possibility of enforcement, and are guaranteed in the civil law sphere, while other human rights, such as the right to work, due to their dependence on social circumstances, i.e. the pronounced positive-legal aspect, are not subjective civil rights in the sense that they are enforceable. That is why the status of a legal subject is important, which allows every person to be the holder of the right of personality. In this context, the question whether the legal status of a human being can be exclusively naturalized or a fictional concept, aimed at achieving

some purpose, was analyzed. We concluded that the fictional legal subjectivity of a human being can be problematic in the part that regulates subjective non-property (and not property) rights, if it conditions fundamental rights or is used for the purpose of achieving some goals that imply the denial of fundamental human rights. In today's postmodern society, biotechnological development causes changes in everyday life, which in various dimensions bring the possibility of improving human life and nature, but at the same time bring the danger of dehumanization and denaturalization of human beings, in which postmodernist and poststructuralist philosophy plays a significant role, therefore the fictional status of human beings could be a legal tool for implementing biotechnological goals, and then conditioning the ‘‘negative’’ status of the unborn human.

We have concluded that the legal status of the human embryo/fetus is a factual, not a political issue. We concluded that the human embryo and fetus should be recognized with a status in accordance with the specific legal and natural situation in which he is located, as we do in all other situations in which human beings are legal subjects, although not with the full scope of rights and obligations. The right to personality is an integral part of a person's legal capacity, even though human beings differ from each other both in the scope of personality rights and in the scope of property rights. However, fundamental personal rights are recognized for every human being, which prevents treating a person as a thing or an animal. The possibility of abilities being a legal parameter for the existence of legal subjectivity of a human being opens the door to potentially endangering the rights of all human beings who, in some stages of development and circumstances, lack some abilities to be taken as a criterion for legal subjectivity. People with disabilities, people in a coma and children are legal subjects as human beings with intrinsic dignity, regardless of their abilities. Animals and artificial intelligence are not, although they may have value status. There is no criterion by which a human embryo would be separated from the category of a human being in the *Constitution of the Republic of Croatia*. A human embryo is a human being, a *sui generis* legal subject whose protection of personality rights does not require developed abilities, and as a human being with intrinsic dignity is suitable for the recognition of legal capacity that includes several personality rights, which include the personality's right to life, i.e. the right to is born, the right to bodily integrity steming from his biological existence and the right to health. The specified limited number of rights is in accordance with the *Convention on the Rights of the Child*.

We concluded that the human embryo/fetus is indirectly legally defined as a legal subject in many branches of Croatian legislation. Family law protects the emotional state of the mother due to the fact of pregnancy, thereby indirectly determining the human embryo/fetus as a subject. In the *Penal Code*, during pregnancy, the mother is especially protected from attacks by a third party, also due to the fact of pregnancy. It is the same in labor law, where the labor law status of a pregnant woman is protected. The human embryo/fetus is treated as a subject in medical procedures, especially in therapeutic ones. ORA protects the future property rights of the human embryo/fetus. Only in the abortion law is the human embryo/fetus defined as a thing up to the tenth week of pregnancy.

After analyzing the question of whether the legal status of a human being and thus of a human embryo/fetus can be conditioned by one's rights and interests, we concluded that if the legal status were conditioned, then the conditioning of the status of Jews or slaves in the United States of America becomes political, and not a question of fact. This was clearly proven in the Nuremberg Trials.

In relation to the third research result, we concluded that the status of the human embryo/fetus as a *sui generis* legal subject is in accordance with national legislation, regional and international documents. The international legal framework does not exclude the human embryo from the concept of human being and person, therefore is a person in accordance with the international legal concept of a person and intrinsic dignity, as well as a legal subject in development, a subject *sui generis*.

Furthermore, we concluded that the rights and interests of other persons, such as the mother's right to privacy, are different from the rights of personality that belong to the human embryo and fetus. The results of the research indicate that the right of personality to bodily integrity, as well as the right of personality to privacy, does not result in the right to abortion, but can only represent a medical procedure when medical difficulties related to the mother's pregnancy occur, that is, when her health and life are threatened, in accordance with medical criteria. We concluded that privacy is not a concept from which the right to abortion can stem because it implies non-interference in privacy (a negative aspect), therefore the refusal to provide a public abortion service does not imply

interference in privacy, but only the failure to enable the technique that leads to the end of the subject's life in the mother's womb. We concluded that the right to an abortion cannot derive from the concept of autonomy because if a woman is absolutely autonomous, then there are no restrictions on her actions towards others, which primarily refers to the father of the human embryo/fetus, the doctor who performs the abortion and the human embryo/fetus itself. We concluded that abortion is not even a human right because it does not stem from human nature, which contains intrinsic dignity.

With regard to the status of a man in making a decision on abortion, we concluded that the understanding that excludes a man from making decisions about an unborn human being during a woman's pregnancy is not justified and discriminates against men on the basis of biology, violating his rights by imposing only obligations. On the other hand, we concluded that if the equality of a woman with a men implies abortion, which would enable a woman to be biologically equal to a men within the framework of privacy requirements, then the woman's biological ability to give birth is treated as a disease, due to which the men's biology becomes a ‘‘means’’.

We concluded that abortion is not listed as a woman's right in any binding international or regional treaty. Analysis of ECtHR judgments shows that the competence and responsibility of member states to regulate the scope of provisions on abortion lies with the national authorities of member states. The analysis of judgments also ascertained that the ECtHR does not interpret Article 8 ECHR in such a way that the right to abortion derives from the right to privacy, nor Article 2 in a way that excludes the human embryo/fetus from its reach.

From the analyzed judgments of some EU constitutional courts related to abortion, we concluded that without answers to previous questions related to the status of the human embryo/fetus, as well as the nature of privacy, it is not possible to make a logical decision on abortion. In the judgments of the analyzed constitutional courts, with the exception of the judgment of the Federal Constitutional Court of Germany, not a single legal criterion was given to justify the so-called balancing the interests of the mother and the right to life of the human embryo/fetus, nor how it is practically possible.

The analysis of the decision of the Constitutional Court of the Republic of Croatia indicates that the Constitutional Court of the Republic of Croatia chose an activist approach when solving the issue of abortion, guided by the principle of justice in order to ‘‘reduce conflict’’ in society, without clarifying the previous concepts of autonomy and the status of the human embryo/fetus and without analyzes relevant to the topic of legal and moral theory. We concluded that certain provisions of the decision are contradictory, and the conclusions about the status of the human embryo/fetus remain unclear in application.

Abortion was and remains a complex social, philosophical, economic and legal issue, but not an unsolvable one. If it were an expression of a woman's autonomy, then it should be encouraged and given every possible support for the purpose of its implementation. Abortion is not. Abortion is the return of women to slavery, only in a more perfidious way, and at the first line of attack this time are women themselves, with the support of men. A human embryo/fetus is a child, a person, and only a woman is biologically privileged to give birth to it.

Therefore, we should all ask ourselves: will society once again add up the dark numbers of the unjustly killed? The owl of Minerva only takes its flight when the shadows of night are gathering.

11. LITERATURE

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Katarina Krasić

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