The Legal Status of the Human Fetus from a Theoretical, Historical and Comparative Legal Perspective

Theses of the doctoral dissertation

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I. Summary of the Research Tasks to Be Achieved

The *European Convention for the Protection of Human Rights and Fundamental Freedoms* of the Council of Europe prescribes in Article 2 that ''*Everyone's right to life shall be protected by law*''. The European Court of Human Rights 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.

The 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 the content and scope of the term human being in international legal acts - 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.

This scientific research aims to explore various aspects of the unborn child's personality in order to conclude about its legal status.

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, 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. The importance of the concept of person as a prerequisite for determining the legal status of every human being is further 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, together with the modern and postmodern definition of a person, 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 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 relationship between law and morality is being 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 analyzed, referring to philosophers and lawyers such as Greenberg and Fuller in order to conclude about the status of a human being and the question of his life. The (co)relationship of law and morality is shown through historical examples of evil ideologies that have been condemned through international law (i.e. the Nuremberg process in which natural law was opposed to positive laws). 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.

The chapter on human rights analyzes theories that deal with the root, that is, the source and then the holders of human rights. The question which human rights are universal and which are cultural relative is explored in order to conclude about the rights that we have as human beings in accordance with our human nature, which 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 discussed. At the end of the chapter on human rights, the relationship between democracy and human rights is briefly reviewed.

In the chapter on personality rights, personality rights and their holders (i.e. legal subjects) are analyzed. The core of certain personality right is briefly explored: the right to life, to dignity, to physical integrity, to bodily integrity, privacy, identity. The relationship between human rights and personality rights is analyzed and the complex concept of the subject of personality rights, especially the definition of a person, with fundamental social values is related. The legal subjectivity of a natural person, the Roman legal interpretation, the comparability of the philosophical-anthropological point of view with the legal one (legal subjectivity) is presented, 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, citing numerous examples throughout history that illustrate the negation of personality rights.

In the chapter on the human embryo and fetus, the biogenetic facts about the human embryo and fetus, the medical and philosophical criteria of the personality of human embryo and fetus, its philosophical and theological status will be studied. 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). The danger that legal subjectivity, and even personality rights, are associated with some of the mentioned criteria are elaborated. The philosophical status of the human embryo/fetus is analyzed and 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.

In the chapter on positive law 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, together with arguments of proponents of abortion. The legal position of doctors, the legal status of men in the abortion debate and jurisprudence on the abortion issue is studied.

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.

II. Research Methods

In order to assert the hypothesis that the unborn child (embryo/fetus) is a person and therefore has limited personality rights, the methods of analysis, synthesis, concretization, generalization, analogy, comparative and partly historical method are used. The analyzes are descriptive, functional and causal, material and ideal.

The sensitivity of the personality analysis in this specific case, implies a legal analysis, an analysis of the facts represented by biology, ie medicine and anthropology, and then the viewpoints of philosophy, psychology and sociology, and finally law. While considering the diversity of fields and their scientific legalities that investigate issues of human being, person, dignity, etc. it is appropriate to distinguish the methods of social and natural sciences. Therefore, the natural and social science methods are integrated, that include the transcendental method, a priori analysis of philosophy, as well as empirical evidence of natural sciences. The application of pluriperspective methodology makes reduction impossible, that is, an absolutist approach and dogmatism from any side, whether of natural or social sciences.

The values and legal principles related to the status of women, man, human embryos and fetuses in the context of abortion are elaborated by the axiological method.

The dogmatic method is used for linguistic, formal-logical and systematic analysis of normative concepts such as person, legal subject, dignity, autonomy.

The sociological method is 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 are elaborated by the historical law method.

The comparative method is used to analyze the international legal framework on embryo status, research on embryos, interests and rights of women in the context of abortion,

status of man, the concept of dignity and person, status of children and persons with disabilities in the international legal framework.

III. Summary of Jurisprudential Results of the Doctoral Dissertation

The academic results of the dissertation can be divided into three parts, of which first part refers to the question of the personality of the human embryo/fetus and the existence or non-existence of the biological separation of the human embryo/fetus from its personality; second part refers to the question its legal protection provided by European and international documents and third part refers to the question of 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/fetus.

Regarding the first part, 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. Regarding the second part, the results of the research indicate that the protection of the human embryo's personal rights derives from regional and international law. Regarding the third part, the results of the research indicate 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.

First part:

In relation to the first stated result of the research, it is concluded 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.

It is concluded 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. It is concluded 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. In order to determine who is the unborn being whose life is at stake in the context of abortion, the previous questions of the parameters of the relationship between human nature and the person, the biological-ontological relationship, were analyzed.

It is concluded 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.

Second part:

In relation to the second result of the research, it is concluded 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. It is further concluded 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. It is concluded 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.

It is concluded 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.

Third part:

In relation to the third mentioned research result, it is concluded 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. It is concluded 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. It is further concluded 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.

It is concluded 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 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, it is concluded 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, it is concluded 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 man on the basis of biology and violates his rights by imposing only obligations.

It is concluded 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.

It is concluded 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 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, it is concluded 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. It is concluded that certain provisions of the decision are contradictory and that conclusions about the status of the human embryo and fetus remain unclear in practice.

IV. List of Publications

Peročević Katarina: *Multidimensional European system of human rights protection*, INTEREULAWEAST, Faculty of Economics and Business Zagreb, vol. 2, 2015, no. 2.

Peročević Katarina, Budislav Vukas: *The process of the establishment of independence of the Republic of Croatia and the foundation of its national policy in culture and art*, Santander Art and Culture Law Review, vol. 2, 2015, no. 1.

Peročević Katarina: *Pojam "radnika" u pravu Europske unije/The Concept of "Worker" in European Union Law*, Collected Papers of Zagreb Law Faculty, vol. 67, 2017, no. 2.

Peročević Katarina: *EU as sui generis - a platypus like society*, INTEREULAWEAST, Faculty of Economics and Business Zagreb, vol. 4, 2017, no. 2.

Peročević Katarina: *The Relationship between the Concept of a Person in the Philosophical Anthropological Sense and a Legal Subject as a Holder of Personality and Human Rights*; Pázmány Law Review; vol. 9, 2022, no. 1.

Krasić Katarina: *The Legal and Philosophical Criteria of Personality of the Human Embryo and Fetus;* Pázmány Law Working Papers, Nr. 2023/4.

Peročević Katarina: *Pobačaj – politički konstrukt ili moralno pitanje?/Abortion – Political Construct or Moral Issue?*; Collected Papers of Zagreb Law Faculty, vol. 73, 2023, no. 4, 2023.

Dubravka Hrabar, Katarina Peročević: *Abortion as a Natural or Political Issue in Croatian Constitutional Judicial Practice*, Bogoslovska smotra, vol. 93, 2023, no. 5.

V. Summary of Academic Achievements

Katarina Krasić graduated from the Faculty of Law at the University of Zagreb in 2011 and completed her Postgraduate specialist studies in Rijeka in 2014.
Since 2019, she has been participating as a member and deputy member in the work of the Children's Council of the Republic of Croatia and since 2021, she is a member of the National Board of International Humanitarian Law in the Republic of Croatia.
She wrote eight scientific and expert articles on various topics, including human rights, abortion and the status of the unborn child. She participated in workshops, summer school and doctoral symposium on the topics of abortion, appeal of conscience and human rights.