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THE CONSTITUTIONALISATION OF THE RIGHT TO LIFE AND THE LEGAL STATUS OF THE HUMAN EMBRYO

1. The doctrinal debate concerning the legal status of the human embryo

Considerations concerning human birth arise in the fields of biology, theology and philosophy, from where they also enter the domain of jurisprudence. The question of the legal status of the human embryo is becoming a key issue. The answer to this question affects the extent to which the law will allow biotechnological intervention in the nature of human procreation.

Doubts arise in bioethical discussions as to whether the law should in any way regulate issues relating to this type of medical intervention. An overview of the arguments for and against legal regulation of bioethics is given by M. Safjan, who notes that the reasoning in favour of legal intervention has the advantage[2]. He writes that: *"In the contemporary world the law cannot remain silent in the most sensitive questions relating to a human being – today and with respect to future generations. Acceptance of the view that the law should intervene does not yet answer the question of how and to what extent it should do so"*[3]. This observation would appear to be particularly valuable in view of the fact that the phenomenon of the creation of human life has lost its classical natural character. Biotechnomedical progress makes it possible to observe the development of a human being from the very beginning. It provides a basis for precise planning of the moment of conception, also in entirely artificial conditions *(in vitro)*, for the selection of appropriate sex cells, and the like. The conception of a child need not involve intimate relations between two people, even of a transitory nature. It may take the form of a medical service, as a procedure performed with the use of sex cells from the future parents

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2 M. Safjan, *Jakiego prawa bioetycznego potrzebujemy?*, (in:) *Współczesne wyzwania bioetyczne*, ed. L. Bosek, M. Królikowski, Warszawa 2010, pp. 1–8.

3 *Ibidem*, p. 8.

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or from anonymous donors; it may also become the subject of a contract of surrogate motherhood.

As a result of the development of medicine, the problem of the human embryo's status as a legal subject is becoming more and more clearly defined, while the controversies arising in the field of human procreation are often of the nature of a *casus perplexus*[4]. If it is accepted that the embryo is a human and has a subjectivity equal to that of a human who is already living, then it should be subject to the same legal protection, which would exclude any possibility of abortion or artificial procreation, as all such actions violate the dignity of "one who is to be born". For this reason it is desirable to seek a new legal definition of a human which would differentiate the concept of "human being" from "human person", and would define the scopes of the legal protection given to such subjects.

Generally, legal theorists denote a foetus in its mother's womb – conceived by a natural biological process – by the Latin name *nasciturus* ("he who is to be born"). Classically, this term is applied to different developmental phases of a human before birth (embryo and foetus). With biotechnomedical progress, however, doubts arise more and more often as to whether the term *nasciturus* should include embryos, or should it apply only to a specific (later) developmental phase. And what is the appropriate treatment of a human embryo conceived outside the mother's body? It is necessary today to define a separate legal status for an embryo, which would have a limited status as a legal subject, with a decidedly narrower scope than in the case of a "human person" ("natural person"). These distinctions would certainly help to avoid many doubts of a legal nature. It also seems important to define a separate status for a human embryo obtained outside the mother's body, a so–called *pre–embryo*. In legal doctrine two separate categories are proposed for such embryos: *surronasciturus* and *pronasciturus*[5].

In the bioethics literature various arguments are cited from supporters and opponents of allowing experiments on human embryos. A comprehensive survey of these has been made by M. Machinek. He makes a critical analysis of arguments based on secularist views: 1) the "functionalist" definition of a person; 2) the autonomy of the individual; 3) the need for progress and self–creation; 4) the autonomy of science; 5) the ethos of specialists; 6) the balance of benefits and losses; 7) the argument of therapeutic benefits. Against these secular–based views he cites

4 These are connected with the fact that it is hard to find one "good" solution in new situations; there do not exist unambiguous answers which would satisfy everyone.

5 The term *surronasciturus* is intended to define an embryo produced by fertilization outside the body, using an *in vitro* method, and implanted into the womb of a surrogate mother. *Pronasciturus* is a name given to an embryo before it is implanted into the womb of the genetic mother, and for a frozen embryo. Consideration ought to be given to the boundaries of the status of such entities as legal subjects, which cannot be equalized with the legal status of a *nasciturus* as a foetus in the mother's womb, nor also with that of a "normal" embryo.

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the main theses of opponents of experiments on human embryos, coming out clearly against treating them as "biological material". He cites arguments based on: 1) the dignity of a person; 2) an "immeasurable" good; 3) the importance of the natural order; 4) the "dam burst" scenario; 5) the danger of eugenics; 6) voluntary prohibition[6].

Without going deeper into the details of the arguments cited, it should be pointed out that supporters of the definition of "person" which Machinek called "functionalist"[7] also regard the dignity of a human as a fundamental value. They assert, however, that an embryo in an early developmental stage cannot be ascribed the status of a "human person", because it does not display the qualities and abilities which belong to someone as a person. It could be granted at most some kind of "symbolic value" – as a being which might become a human in the future. Personal dignity is thus a gradable category. This results from the very differentiation of the concepts of "human person" and "human being". Since a "human being" (a foetus in the mother's womb, a conceived child) does not have subjectivity equal to that of a "human person" (one who is already living), it should also not be ascribed the same dignity, just as the dignity of an animal cannot be held equal to that of a human. Supporters of this type of argument also propose the "gradability of a hierarchy of embryos", suggesting that so–called "surplus embryos", "embryos produced by cloning", "embryos produced by natural conception", etc. be treated by the law in different ways.

The argument of the autonomy of the individual refers to freedom in the area of procreation, not to discretion in the treatment of embryos. It merely indicates the potential parents as subjects having a higher moral and legal status than their as yet unborn child (or embryo prior to implantation). In considering autonomy, it is hard to speak of the "will" of a human embryo. The right to self–determination ascribed to a "human person" – a woman as future mother and man as future father – is fundamental. P. Singer appears to have been justified in stating that the significant interests of a woman take precedence over the not yet fully formed interests of the foetus[8].

It would seem that the legal acceptability of certain actions in the field of medicine ought to be measured by their social acceptability. Social consensus is supposed to be the outcome of the autonomous views and choices functioning within a given group. Perhaps with time there will be a revaluation of the Christian para-

6 M. Machinek, *Modele argumentacji etycznej w dyskusji o dopuszczalności eksperymentów na ludzkich embrionach*, www.jezuici.pl/genetyka/new/artykuly/Machinek.doc, accessed 18 May 2010.

7 Other descriptions – pejorative *a priori* – are also used for this concept, such as "reductionist".

8 See P. Singer, *O życiu i śmierci. Upadek etyki tradycyjnej*, Warszawa 1997; *Etyka praktyczna*, Warszawa 2007.

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digm that every person is a "full" legal subject even from the moment of conception.

It is important to consider issues of medical experiments not only from the standpoint of the individual, but also from the general social perspective, which raises the status of the argument of the need for progress and self–creation. A human has the right and duty to think in terms of the future. He has the moral obligation – on a global scale – to "improve" the quality of the species. In the face of possible medical interventions, there is at the same time a widening of the scope of responsibility for specified actions[9]. It is the responsibility of legislators to prevent the creation of a "eugenic state" in which life would be subject to deindividuation through the complete subordination of the individual to society[10].

Human knowledge is constantly developing, and so the argument of the autonomy of science is most definitely a legitimate one. It does not seem that "blocking" progress would be appropriate. The autonomy of science means coming to terms with the basic laws of nature which bring about the desire to broaden our knowledge. Scientific research has an independent status, and there is no point in setting up barriers to it which cannot be rationally justified. It is generally considered that certain experiments on human embryos should not for the moment be carried out. However the possibilities of human learning advance along with the improvement of the available tools of research; something that is prohibited today may with time become permissible.

We should not overlook the significance of the arguments which refer to the ethos of specialists. In the end it is doctors, as experts, who have the greatest understanding of particular procedures and their consequences[11].

Also particularly important are the strictly utilitarian and consequentialist arguments which refer to a balance of benefits and losses. The gradability of the "quality" of human life is woven into these lines of thought. From this point of view it is the general social good – taking account of the individual good – that should decide about the bounds of permissibility of medical experiments on embryos. The utilitarian principle of usefulness is inextricably connected with the concept of human dignity. Thus considerations on this subject cannot be based on a "pure" economic balance. Moral arguments also play a significant role here[12].

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9 See H. Jonas, *Zasada odpowiedzialności. Etyka dla cywilizacji technologicznej*, Kraków 1996.

10 Such concerns are expressed by, *inter alia*, J. Hartman, *Klonowanie człowieka jako wyzwanie*, "Medycyna Wieku Rozwojowego" 1999, no. 3, supplement I, p. 35.

11 It can be assumed that if some social group were to achieve the status of an authority giving orders in the field of medicine, it would be them (rather than, for example, theologians, priests or politicians).

12 See D. Probucka, *Utylitaryzm. Aksjologiczno–etyczne aspekty kategorii użyteczności*, Częstochowa 1999.

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In discussing the arguments for permitting experiments on human embryos, we cannot omit the argument of therapeutic benefits. The maintenance of health and full physical and mental fitness even at an advanced age is among the generally shared desires which, thanks to the progress of biotechnology, are becoming entirely realistic. Experiments on embryos may become a key to revolutionizing therapeutic methods. The view must therefore be accepted that if improvement in the quality of human life can be achieved thanks to human embryos, then this should be done; though naturally not at any price[13].

In the bioethics literature, particularly from the perspective of religion, we encounter the "dam burst" argument or, similarly, references to "playing God" or the "domino effect". This is connected with the fear that man may lose control of the products of his genius, even though at the beginning he was able to control the processes which he had initiated. Man should not therefore encroach on the competences of the Creator in relation to matters of life and death, as this may result in a catastrophe for humanity. Fears of this type are not entirely justified, considering that ever since the beginnings of human history the progress of civilization has been associated with risk. In order to minimize the related threats, it is necessary to behave rationally and according to defined procedures. The law, for its part, ought to define clearly which of the technically possible actions are actually impermissible, because of consequences which are not yet foreseen, or are projected, but are unfavourable. It becomes a kind of contract: a "convention of consciences", something like a "vote of no confidence" for moral choices, laying down limit points for human action.

It would seem that legal experts ought to take into account the argument – commonly encountered in the bioethics literature – of the danger of eugenics. Medical experiments on human organisms (including on human embryos) are significantly linked with numerous dangers. This concerns in particular reproductive cloning and germ–line therapy. Subjecting embryos to "quality control", or the creation of "designer babies", ought for the moment to be against the law. Such a prohibition is justified by, among other things, a clear social consensus against actions of this type.

It can be noticed that in legal theory it is becoming more and more common to make the legal status of the human foetus dependent on its stage of development, capacity for life, and so on. The "gradability of the status of legal subject" also does not cause particular disputes. It is harder to find a consensus from a moral perspective, and particularly a religious one – when the moral and legal subjectivity of a human from the moment of conception is taken as dogma. However, al-

13 B. Stanosz, *Bioetyka i socjotechnologia*, "Medycyna Wieku Rozwojowego" 1999, no. 3, supplement I, p. 61.

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though a moral consensus is not possible (considering the pluralism and relativism of values in modern democratic states), on a legal level defined standards for the treatment of the embryo should be developed, providing unambiguous guidance concerning the carrying out of experiments on human embryos[14].

2. European standards of human embryo protection

European standards lay down only minimal requirements in relation to the protection of human rights in the process of medically assisted procreation, including protection of the conceived child itself. The provisions indicate a direction for the interpretation of particular regulations. The overriding interpretative directive must be taken to be the duty to protect human dignity, and the precedence of the welfare of a human being over the social interest or the interests of science.

Of fundamental significance is the *Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine* (called the *Bioethics Convention*). This provides an expression of a kind of consensus in the area of bioethics in a united Europe. In accordance with Article 1 of the Bioethics Convention, definition of the concept of a "person" is left up to national law. Degrees of legal protection are differentiated. Every "human being", regardless of personal status, is subject to protection at least in its dignity and identity; however a guarantee of integrity and other basic rights and freedoms is given exclusively to a "person". A minimal level of protection is therefore provided by the obligation to respect the dignity and identity of every human being. Article 2 gives priority to the interests and welfare of a human being over the sole interest of society or science[15]. Article 14 prohibits the use of techniques of medically assisted procreation to choose the sex of a child. If a country's law permits such tests on an *in vitro* embryo, it must provide the embryo with appropriate protection. The convention permits scientific research on human organisms provided that the following conditions are met: 1) there is no alternative method of comparable effectiveness; 2) the risk borne by the patient is proportional in comparison with the potential benefits resulting from the research; 3) the research project has been approved by the appropriate institution; 4) the patient has been informed of his or her rights and the extent of legal protection; 5) the free and informed consent of the person concerned has been obtained (Article 18). The terms of the Bioethics Convention are a clear expression of a compromise between the secular and reli-

14 M. Łączkowska, *Etyczne i prawne aspekty powoływania ludzkiego życia*, (in:) *Prawne, medyczne i psychologiczne aspekty wspomaganej medycznie prokreacji*, ed. J. Haberko, M. Łączkowska, Poznań 2005, p. 132.

15 L. Bosek, *Opinia prawna odnosząca się do zmian w polskim ustawodawstwie zwykłym, które są niezbędne dla zapewnienia ochrony godności i podstawowych praw istoty ludzkiej w okresie prenatalnym sferze zastosowań biologii i medycyny wyznaczanej przez standardy międzynarodowe*, (in:) *Konstytucyjna ochrona życia*, Druk Sejmowy no. 993, Sejm V Kadencji, p. 60; P. Sławicki, *Ingerencje genetyczne w postanowieniach prawa międzynarodowgo*, (in:) *Współczesne…*, *op. cit*.

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gious perspectives, this being all that could be achieved in a Europe where different world views are prevalent. In spite of the guaranteeing of legal protection to the human embryo (at all stages of development), controversy may arise as to how to understand the very principle of protection of the dignity and identity of a human being, particularly when it is adopted as a fundamental principle that every human life is sacred. It therefore seems right to leave an open path to the defining of the concept of "human person" in national law, depending on cultural conditions existing in the country in question.

Among the fundamental regulations concerning human embryos, particular attention should be paid to the recommendations of the Parliamentary Assembly of the Council of Europe dating from 1986 and 1989. These protect, to an adequate degree, the dignity of human embryos and foetuses[16]. The first concerns ways of using human embryos for diagnostic, therapeutic, scientific, industrial and commercial purposes; the second addresses issues relating to their use for scientific research.

Attention should be also be drawn to the terms of the European Union's *Charter of Fundamental Rights*, which under Article 1 of the Lisbon Treaty became an act of primary law, meaning that all legal regulations, including those relating to biomedicine, must respect the obligation to protect human dignity as expressed in Article 1 of the Charter. They are also subject to the prohibition of commercialization of the human body and parts thereof, of eugenic practices having as their aim the selection of persons, and of reproductive cloning. A basic principle is the autonomy of the individual, who must consent to being made the subject of medical intervention (Article 3, paragraph 2).

Detailed regulatory guidelines relating to artificial procreation are laid down in the Directive of the European Parliament and of the Council dated 31 March 2004 "on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissue and cells"[17].

We should also not overlook the importance of the implementing directives to the above directive: 1) "as regards certain technical requirements for the donation, procurement and testing of human tissues and cells"[18]; 2) "as regards traceability requirements, notification of serious adverse reactions and events and certain technical requirements for the coding, processing, preservation, storage and distribution of human tissues and cells"[19].

16 No. 1046, 24 September 1986, and No. 1100, 2 February 1989

17 No. 2004/23/EC; OJ L 102/48.

18 No. 2006/17/EC; OJ L 348/38.

19 No. 2006/86/EC; OJ L 294/32.

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The above directives obligate member states to guarantee health safety by introducing legal regulations and monitoring the circulation of sex cells[20].

European standards are intended to provide only a minimum of protection for the human embryo. Because of the freedom still allowed in the legal regulation of matters relating to human procreation, it is possible to take account of the main directions of the bioethical discussion in a given country and the dominant values of that country.

3. Legal status of the human embryo and legal models for the protection of human life in national law (model solutions)

From a global (world) perspective it is possible to observe four theoretical models for the protection of life, reflected in the constitutions of modern states. These are: 1) a model based on a "right to life and protection of life at different stages of development"; 2) a model setting out "general guarantees of right to life"; 3) a model based on the absence of constitutional regulation of the "right to life", but with references to acts of international public law; 4) a model based on a complete absence of regulation of the "right to life".

The first of these models has not gained great worldwide popularity, as it contains a very broad–ranging definition of the "right to life" even at the constitutional stage. The constitutional protection of life also relates here to "life before birth", guaranteeing the right to life and its protection in different phases of a human's development. This model is reflected in the constitutions of such countries as Andorra, Chile, Columbia, Croatia, the Czech Republic, Ireland, Portugal and Slovakia. The European countries which have adopted this solution make up a minority.

Vastly more popular is the second of the models listed above, involving the constitutionalisation of general guarantees of protection of life. This is linked to the view that every human has a "right to life", and also the right to physical and moral inviolability and to freedom. This model operates in Albania, Armenia, Belgium, Brazil, Bulgaria, Canada, the Democratic Republic of the Congo, the Republic of the Congo, El Salvador, Estonia, Finland, Germany, Greece, Hungary, India, Indonesia, Iran, Israel, Japan, Latvia, Lithuania, Macedonia, Malta, Nicaragua, Nigeria, Pakistan, Russia, Romania, South Africa, Spain, Switzerland, Tunisia, Turkey and Ukraine.

Some states have no constitutional rules concerning the protection of life, although their constitutions contain explicit reference to acts of international public

20 L. Bosek, *Opinia…*, *op .cit.*, p. 157.

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law which guarantee such protection. Solutions of this type are found in countries including Austria, Bosnia and Herzegovina, and Sweden.

There are also countries whose constitutional rules make no mention at all of the issue of "protection of life". These include China, Cuba, Denmark, Egypt, France, Iceland, North Korea, Luxembourg, the Netherlands, Norway, Syria, Thailand and the USA[21].

Comparative analyses show that, based on constitutional measures, there exist in the world different legal approaches to the issues of artificial human procreation itself, and hence also to the legal status of the human embryo. These include: 1) the so–called "original model", with no legal regulations in this area; 2) the "autonomous (individualist) model", characterized by the basic legality of intervention in the nature of human procreation subject to state control and the consent of the person concerned; 3) the "naturalistic model" characterized by legal prohibitions on procreative processes; and 4) the "dignity model", legalizing procedures of artificial procreation while at the same time protecting human embryos and human genetic integrity[22].

As L. Bosek notes, in most countries the "original model" still operates. He points out that just 30 years ago there were no such regulations in the legal systems of any country. The legal gaps existing today in this area are either connected with biotechnological underdevelopment, or are deliberately left open by legislators in order to make the field of procreation subject to free market forces[23]. An absence of relevant regulations should be evaluated negatively, at least because of the possible dangers to human health and life. The situation cannot be allowed where anyone (without adequate medical knowledge and conditions) could offer procreative medical services, for example, even if this were in accordance with the principle characteristic of democratic states that everything is allowed if it has not been forbidden. Social relations of this type are sufficiently important for the individual and for society as a whole that they ought to be reflected in legal regulations. The "original model" cannot be reconciled with the European tradition and European Union law.

The autonomous (individualist) model has been implemented in the United Kingdom, through the Human Fertilisation and Embryology Act[24]. It visibly reflects a marked biotechnological optimism associated with the freedom of procreation and experimentation. This optimism is embodied by, for example, the legality

21 *Informacja porównawcza dotycząca modeli zapisu konstytucyjnej gwarancji ochrony życia* (in:) *Konstytucyjna formuła ochrony życia…*, *op. cit.*, pp. 95–101.

22 For this classification see: L. Bosek, *Modele regulacyjne wspomaganej prokreacji w świetle standardów konstytucyjnych*, (in:) *Współczesne…*, *op. cit.*, p. 156.

23 *Ibidem*

24 The Act came into force on 13 November 2008.

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of the creation of human–animal hybrids, and the possibility of destroying surplus embryos with the consent of the genetic parents, as well as their creation and preservation. The same model is reflected, at least in part, in the laws of Belgium, the Netherlands and Spain, although in none of the countries of Europe has it been implemented "directly", if only due to its incompatibility with the *Bioethics Convention*, which the United Kingdom has not signed. Similar solutions have been adopted by some US states (such as California)[25].

A "naturalistic model" mainly characterizes the countries of South and Central America. It involves an absolute prohibition on experiments on embryos, also ruling out *in vitro* methods of conception[26].

The last of the models listed – the "dignity model" – has a practical embodiment in German legislation. It results from a law on the protection of embryos (1990), and a law prohibiting trading in children and surrogate motherhood (1985). The solutions adopted in German law express the priority of human dignity from the time of conception. This is reflected in the approach to the legal status of the embryo, as a legal subject comparable to a "human person". The German model has also been transferred to the legal systems of Switzerland and Italy[27].

An extreme opposite approach is found in the laws of France. The measures adopted there lead to an open attitude to experiments on the human organism and a significant biotechnological optimism. The French rules might be classified as being closest to an "autonomous model", although they are not as radical as those of the United Kingdom. They can be considered to provide a good pattern for bioethical regulations in other countries of Europe. More appropriate to Poland – at least for the moment – is the "dignity model" as developed in Germany. Reproduction of the rules of that model would best reflect the dominant directions in the debate and social opinion in our country.

Irrespective of the divergence of opinions as to which of the above models is best suited to the situation in Poland, an agreement of positions in the question of techniques of medical intervention in the nature of human procreation has become an absolute necessity. Acceptance of such procedures should be hedged with conditions to ensure a minimum standard of protection for human dignity. The worst of the possible solutions would undoubtedly be to leave a legal vacuum, namely to remain with the traditional "original model".

25 L. Bosek, *Modele…*, *op. cit.*, p. 158.

26 K. Complak, *Godność człowieka w orzecznictwie konstytucyjnym Ameryki Łacińskiej*, "Przegląd Sejmowy" 2007, no. 3, p. 279.

27 L. Bosek, *Modele…*, *op. cit.*, pp. 159–161.

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