

LEGAL STATUS OF HUMAN EMBRYO

Junior assistant Ph. D candidate **Ramona Dumnică**, University of Pitești, Faculty of legal and administrative sciences

In this article I tried to present a point at issue in the field of human rights protection: the legal situation of the human embryo. In doctrine it is said that there is much ambiguity on this level due to a lack of a legal definition of the right to life and to the impossibility to establish its exact limits. Taking into consideration the progress of the medical sciences and the possibility of abuses, it is preferable that the human embryo is acknowledged with a legal status that can effectively insure its safety. For these reasons there is a preoccupation at a European level. That is why it is worth mentioning the Recommendations of the European Council regarding the protection of the fetus and prevention of the abusive use of the genetical manipulation, as well as The Convention for the human rights and the biomedicine.

Confused by the multitude of different opinions, the legal sciences try to establish the legal status of the embryo, in the center of the issue being the "potentiality" of the embryo to become a human being. During the gestation period, the embryo is part of another body, more precisely part of the mother's body. Therefore, it does not have a legal personality distinct from the mother's, although in some of the situations the law acknowledges some of its rights.

At present, there is no unitary position towards the legal status of the embryo, an elaboration of provisions that are precise and with real legal force being necessary.

Key words: human rights, right to life, human embryo, European Council, fetus, genetical manipulation, biomedicine.

A controversial issue in the human rights field is represented by the determination of the limits of the right to life. The right the life, although makes up the *sine qua non* condition for the exertion of the remainder of the rights, does not benefit from clearly defined boundaries. Doctrine¹ considers that this aspect comes as a result of the absence of a legal definition of the concept of *life*, since such a uniform definition is not yet accepted in international documents.

Thus, article 3 of the Universal Declaration of Human Rights² clearly states that: "*Everyone has the right to life, to freedom and security of person.*" In a similar way, the International Covenant on Civil and Political Rights³ states in article 6: "*Every human*

¹ Mona-Maria Pivniceru, Florin Dorian Dăscălescu, *Limita inferioară a dreptului la viață: între protecția fetusului uman, dreptul la avort și progresul științelor biomedicale*, (*Lower Limit of the Right to Life: between Protection of the Human Foetus, the Right to Abortion and the Progress of Biomedical Science*), published by the Revista Română de Bioetică, (*Romanian Bioethics Magazine*), volume 1, no. 4, Iași, 2003

² The Universal Declaration of Human Rights, published in *Drepturile omului - Documente adoptate de organisme internaționale* (*Human Rights – Documents adopted by International Bodies*), (text book), Adevărul Publishing House, Bucharest, 1990, p. 13

³ The International Covenant on Civil and Political Rights privitor la drepturile civile și politice, published in *Drepturile omului - Documente adoptate de organisme internaționale* (*Human Rights – Documents adopted by International Bodies*), (text book), Adevărul Publishing House, Bucharest, p. 77 and subsequent.

being has the inherent right to life. This rights shall be protected by law. No one shall be arbitrarily deprived of his life." Consequently, one may notice that in these documents there is no clear definition of the concept of *life*, the provisions thereof only stipulate the right to life and they hesitate in clarifying the concept. Neither does speciality literature provide further explanation in this field, it merely records legislative ambiguities in this respect⁴ or it merely states that the right to life is a fundamental principle, a prerequisite conditioning the exertion of the other guaranteed rights⁵. But indirectly a clarification of the notion may be derived from the Universal Declaration of Human Rights that establishes the supremacy of the spiritual life criterion over the biological life criterion, stating as may be seen from article 1: "*All human beings [...] are endowed with reason and conscience.*"⁶

Hesitations in this field generated varied interpretations and undesired uncertainties with respect to the protection of this vital right. As a matter of fact, this issue may be discussed from a double perspective: the acknowledgement of the right to abortion and the protection of the foetus. In this area, medical and legal sciences are confronted with numerous ethical controversies resulting from scientific progress.⁷

Considering the progress made in the medical sciences area and the possibility to occur abuses it is preferable to acknowledge to the benefit of the human embryo a legal status that efficiently ensures the protection thereof. The consequences of the experiments carried out on human embryo or of those regarding medically controlled births may sometimes be serious and the protection of the child that is about to be born becomes as important as the protection of the child that has already been born. In the light of these considerations, the concern expressed at European level in this field may be classified according to two stages of evolution. The first stage is composed of the Recommendations of the Council of Europe regarding the protection of the foetus and the prevention of abusive use of genetic manipulation, the same being characterised by a limited legal power. These Recommendations include proposals made by the Parliamentary Assembly and addressed to the Committee of Ministers, while the implementation of the proposals falls under the competence of the national Governments. The second stage involves the adoption of the Convention on Human Rights and Biomedicine (Oviedo, Spain, April 4th 1997). One Recommendation of the Council of Europe regarding genetic engineering (number 934 from 1982) defines this notion as the application of new scientific techniques of artificial recombination of the genetic material coming from living organisms.⁸ As far as the influence of experimental research on security and environment is concerned, the Parliamentary Assembly of the Council of Europe takes into account aspects such as: the fact that the techniques of genetic engineering offer an immense industrial and agricultural potential that may help solve world problems regarding food and energy production and raw materials over the course of the following decades; the identification and improvement of these techniques represent a fundamental step forward in the direction of scientific and medical knowledge. Thus, the Assembly recommends to the Committee of Ministers

⁴ Turpin D., *Theorie generale des libertes publiques, (General Theory of Public Freedoms)*, Armand Colin, Paris, 2000, p. 49.

⁵ J.F. Renucci, *Droit europeen des droits de l'homme, (European Law of Human Rights)*, L.G.D.J., Paris, 2002, p. 77

⁶ Sudre F., *Droit international et europeen des droits de l'homme, (International and European Law of Human Rights)*, Presses Universitaires de France, Paris, 1999, p. 199

⁷ Mona-Maria Pivniceru, Florin Dorian Dăscălescu, *Limita inferioară a dreptului la viață: între protecția fetusului uman, dreptul la avort și progresul științelor biomedicale, (Lower Limit of the Right to Life: between Protection of the Human Foetus, the Right to Abortion and the Progress of Biomedical Science)*, published by the Revista Română de Bioetică, (*Romanian Bioethics Magazine*), volume 1, no. 4, Iași, 2003

⁸Internet Site of the Bioethics Department of the Council of Europe: <http://legal.coe.int/bioethics/html/autre.htm>.

(paragraph 7) a series of efficient measures in the above-mentioned field and the most important measures are as follows: the elaboration of an European agreement regarding the legal use of genetic engineering techniques on human beings, the aligning of national legislations in this respect and the promotion of the conclusion of similar agreements worldwide, the express acknowledgement in the European Convention on Human Rights of the right to a genetic heritage that suffers no manipulation, rather than those resulting from the application of certain principles admitted as being compatible to the observance of human rights.

The most complete Recommendation regarding the protection of the child that is about to be born is Recommendation 1046 / 1986 regarding the use of human embryos and foetuses for therapeutic, scientific, industrial and commercial purposes. It includes rules that govern the use of the human embryo or of the human foetus and the collection of their tissues for therapeutic purposes.

Parliamentary Assembly of the Council of Europe believe that the human embryo and the human foetus must be treated in all situations with respect for the human dignity and that the use of tissues must be strictly limited and regulated with a view to achieving therapeutic purposes for which there are no other available means (paragraph 10)⁹. The need to cooperate at European level in this field is brought to the fore, given the fact that a mere isolated national regulation has no effect since any activity performed in this area could be easily carried out in another country, where legal provisions with respect to this issue are absent (paragraph 12). The most important Recommendations expressed and brought to the attention of the Committee of Ministers are in connection with: the prohibition of creation of human embryos by using the *in vitro* fertilisation, for the purpose of undertaking researches during life or after death, the establishing of an adequate sanction system in order to guarantee the observance of the rules mentioned, the creation of national records of medical centres authorised to put into practice these techniques for scientific purposes.

Moreover, it is pointed out the fact that there are deviations from the use of human embryos and human foetuses strictly for therapeutic purposes, such as: the creation of an identical human being through cloning or other methods, including for the purpose of performing racial selection, the implantation of a human embryo inside the uterus of an animal or the other way around, the creation of an autonomous human being outside a woman's womb, in a laboratory, the selection of the child's sex through genetic manipulation, in the pursue of non-therapeutic purposes, etc. Paragraph 15 of the above-mentioned document establishes the direction to be followed in case there are contradictions in the bioethical field. While using human embryos or human foetuses, one must take into account the balance that needs to be preserved between the principle of freedom of scientific research and the respect for human life and for human rights.

Another document that is worth mentioning is the Recommendation 1100 / 1989. It states that it is right that legal protection be granted to human embryo from the moment the egg cell is fertilized.

Recommendation 1160 / 1991¹⁰ regarding the preparation of a Bioethical Convention established from the very beginning of paragraph 1 the importance of this new field: combined applications of biology, biochemistry and medicine give rise to universal problems that require efficient solutions and that have determined the birth of a new discipline called bioethics.

⁹Ibidem

¹⁰Internet Site <http://www.unav.es/cdb/acoerec91-1160.html>.

Last but not least, Recommendation 1240 / 199411 regarding the protection and the patentability of products of human origin states in its paragraph 1: "*The Assembly reminds that human beings are subjects – not objects – of law, the human body is inviolable and inalienable by virtue of its relationship to a person endowed with rights, and limits must therefore be set as to how it is used.*"

All five recommendations represent an important evolution towards the performance of an efficient protection of the human foetus and towards the prevention of abuses carried out in the field of genetic manipulation and they constituted a source of inspiration for the adoption of national legislation in the field of bioethics.¹²

On April 7th 1997, in Oviedo (Spain) the Convention on Human Rights and Biomedicine was adopted. It includes 14 chapters and 38 articles and it is deemed to be the first legal document destined to protect the human dignity, human rights and human freedoms. The Convention entered into force on December 1st 1999, and laid down in article 18 a fundamental principle in the field of protection of human embryo: "*Where the law allows research on embryos in vitro, it shall ensure adequate protection of the embryo. The creation of human embryos for research purposes is prohibited.*"

Chapter IV on *Human genome* presents two cases of genetic modification. Thus, an intervention on human genome is not possible unless it is performed for preventive, diagnosis or therapeutic purposes, and only if its aim is not to introduce any modification in the genome of any descendants (article 13). Researches undertaken in this field may lead to significant advantages to the benefit of humanity, but the wrongful use of genetic engineering may threaten not only the individual, but also the entire human species. Deliberate modifications carried out on human genome may lead to the creation of an individual or of an entire selected group, endowed with certain features and special qualities.¹³ Article 14 of the Convention shows that the use of medical techniques is not permitted for the purpose of determining the sex of the child that is about to be born, except for the cases when the intention is to prevent a serious hereditary disease (article 14). The establishing of the exact meaning of the notion *serious hereditary disease* is found in the prerogatives of domestic legislation of each state and of the European law of human rights. For the purpose of achieving this target, the law-making body must address specialised medical institutes, national or international ethical bodies or even public opinion.

Over the course of time, the legal status of human embryo has generated and continues to generate strong disputes in areas such as philosophy, religion, science and law. Jurists and ethics committees seem to retain one apparently eloquent definition: human embryo is "*an organism whose development is underway, from the fertilized egg to the realization of a form capable of sustaining an autonomous and active life.*" More precisely, although it is a body in the making, the embryo or the foetus (according to the stage of evolution of the pregnancy) is not a person after birth¹⁴.

Philosophical and religious opinions are extremely diverse. Religions adopted positions that are entirely different from the status of human embryo. Consequently, the

¹¹Internet Site of the Bioethics Department of the Council of Europe: <http://legal.coe.int/bioethics/html/autre.htm>.

¹²For instance, French Law number 94-653, dated July 29th 1994 on the respect for the human body, the Internet site of the French National Centre for Scientific Research: <http://www.cnrs.fr/SDV/loirespectcorps.html>.

¹³ Mona-Maria Pivniceru, Florin Dorian Dăscălescu, *Limita inferioară a dreptului la viață: între protecția fetusului uman, dreptul la avort și progresul științelor biomedicale, (Lower Limit of the Right to Life: between Protection of the Human Foetus, the Right to Abortion and the Progress of Biomedical Science)*, published by the Revista Română de Bioetică, (*Romanian Bioethics Magazine*), volume 1, no. 4, Iași, 2003

¹⁴ E. Chelaru, *Drept civil. Persoanele, (Civil Law. The Person)*, Second Edition, C. H. Beck Publishing House, Bucharest, 2008, p. 5

position adopted by Islam is much more relaxed than the one adopted by the Catholic Church. The researches undertaken on human embryo are accepted to the extent to which they are carried out before the embryo receives a soul, namely the fortieth day from fertilization.

Jews' position with respect to this issue is determined by the fact that neither the Bible nor the Talmud establishes that the entire status of human being exists at the moment of fertilization, the status is acquired only after the development is carried out, subsequent to fertilization. Consequently, outside the uterus, the embryo has no legal status. In the opinion of the Catholic Church, the human being exists from the moment the fertilization is performed, while the embryo is deemed to represent a human being that has the right to be respected and that needs to develop and reach its term. No distinction between *in vivo* and *in vitro* embryos is accepted. Research on human embryo must be condemned.¹⁵

In philosophy opinions fall under two major views: utilitarian theory and Kant's theory. The utilitarian theory, found in Anglo-Saxon countries, believes that the purpose, namely the saving of lives by using the results of scientific and medical research, justify the research carried out on human embryos. On the other hand, Kant's theory states that the studies performed on human embryos must not be condemned as a whole; they must only be limited in order to respect the potential human being present inside the embryo.

Theoreticians believe that it is impossible to prohibit researches carried out on human embryos. They claim that through scientific research on embryos solutions to treat nervous system diseases (such as Alzheimer's disease, multiple sclerosis), immunodeficiency diseases, diabetes, myocardial infarction etc. may be identified.

For example, at the Cord Blood Registry Institute (CBR) of Tucson (Arizona), the United States of America, over 18,000 biological samples of new-born babies from 60 countries are preserved. On the morning of October 31st 2005, few minutes after the birth of the infant Leonor de Borbon (daughter of Prince Felipe of Spain), a gynaecologist from the Ruber Clinic of Madrid cut the umbilical cord of the heir to the throne of Spain, collected blood from the umbilical cord and sent it to the institute previously mentioned, where specialists separated the stem cells that they froze at minus 196 degrees C. These cells may be used for the treatment of possible diseases that may affect the infant Leonor.¹⁶

Confused by the multitude of various opinions, legal sciences make efforts with a view to establishing the legal status of embryos, and at the centre of the controversy is the *potentiality* of the embryo to become a human being. The potentiality of human being represents nothing else but a possibility that needs to be confirmed, otherwise the legal status of the human embryo may be denied and by way of consequence the embryo will be deemed to be a mere laboratory object. Given the fact that the status of the embryo may not be mistaken for the legal status of humans, the law created a "*legal person different from the human being*" (M.Herzog-Evans)¹⁷. The acquisition of the legal status requires that the human being be fit to hold some rights that will be exerted. The difference between human being and legal human being is emphasized as far as the embryo is concerned, because it is only a potential human being and the capacity thereof to hold rights that will be exerted may not be acknowledged. During pregnancy, the embryo is a part of another body, namely of the mother's body. Therefore it is not endowed with legal personality different from the

¹⁵ C. Voicu, *Teoria generală a dreptului, (General Theory of Law)*, Universul Juridic Publishing House, Bucharest, 2006, p. 287

¹⁶ Ibidem, p. 288

¹⁷ Sophie Bricca și Laurence Henry, *Introduction au Droit, (Introduction to Law)*, L.G.D.J. Publishing House, Paris, 2003, p. 83

legal personality of the mother¹⁸, although under certain circumstances the law does recognize some of the rights corresponding to the embryo. This statement is not contradicted by the *infans conceptus pro nato habetur quoties de commodi ejus agitur* rule (the conceived baby is deemed to be born every time the interests thereof are at stake). In order for this rule to be functional, two conditions must be jointly met: the child should be born alive and the rights of the child should be at stake. This is also the justification of the fact that the legislation allows the mother to terminate the embryo during the first months of life without asserting the grounds in order to substantiate her action¹⁹. If the law-making body had considered that the embryo constituted a person, then we would have been confronted with a case of homicide. Consequently, the lack of legal protection of the embryo is found in the legal provisions regarding the voluntary termination of pregnancy.

The possibility to have an abortion is a component of the prerogative granted to a person to agree with a surgical intervention performed on the body thereof. This is the reason why the man with whom the embryo is conceived has no right to oppose abortion, even if he invokes the protection of own interests or claims to be undertaking the respective action in the interest of the unborn child.²⁰ On the other hand one may not deny the fact that the embryo carried by the mother is a person in the making, this being the reason why the life thereof is protected during the advanced months of pregnancy, while abortion is allowed only if the pregnancy endangers the health or the life of the mother. Current doctrine proposes a new analysis: an unborn child, even if not endowed with legal personality, may constitute the subject matter of a minimum protection, as potential human being, and as such the unborn child benefits from the right to physical integrity. Abortion, justified by an absolute imperative, the one connected to freedom and protection of the suffering woman, would be a mere exception.²¹

The debate was raised again by the Court of Cassation of France, through the delivery in plenary session held on November 17th 2000 of a ruling regarding the actions regarding civil liability lodged against doctors whose errors directly or indirectly contributed to the birth of a disabled child. The recitals of the ruling include the following: “*Since the errors committed by a doctor in a laboratory during the performance of an agreement concluded with a pregnant woman (non-detection of rubella) prevented her from exerting the right to terminate the pregnancy, for the purpose of giving birth to a child affected by a handicap, the latter may claim damages for the harm done resulting from this handicap and generated by the errors indicated.*” The child was granted a right to take legal action for the purpose of obtaining reparation for what is called “*detriment to life*” or *Wrongful life*, the cause thereof being a deed committed before the birth of the child.²² The evolution of jurisprudence and the discussions generated on this subject made the French law-making body adopt a law in 2002 that established that “*no one is allowed to make use of a prejudice resulting from his or her mere birth.*”

Therefore there is not yet a coherent, uniform position regarding the status of human embryo. Some countries (such as Hungary, Poland, Norway, Ireland, Switzerland,

¹⁸ Ph. Malaurie, L. Aynes, *Droit civil. Les personnes. Les incapacités*, (Civil Law. The Person. Incapacity), Fifth Edition, Cujas Publishing House, Paris, 1999, p.29

¹⁹ See the opinion of D. Bakouche, *Droit civil. Les personnes. La famille*, (Civil Law. The Person. The Family), Hachete Publishing House, Paris, 2005, p. 27 (supports the theory according to which an embryo is a thing)

²⁰ A. T. Moldovan, *Tratat de drept medical, (Medical Law Treatise)*, All Beck Publishing House, Bucharest, 2002, p. 257

²¹ A. Batteur, *Droit de personnes, de la famille et de incapacités*, (Rights of the Person, of the Family and Incapacity), L.G.D.J., Paris, 2007, cited by Eugen Chelaru in works cited, p. 6

²² A. Batteur, *Droit de personnes, de la famille et de incapacités*, (Rights of the Person, of the Family and Incapacity), L.G.D.J., Paris, 2007, cited by Eugen Chelaru in works cited, pp. 6-7

Italy) prohibit researches carried out on embryos. Germany and Austria prohibit the use of human embryos for purposes other than the implantation thereof within an AFMP (Assisted Fertilization Medical Procedure). Other countries, such as Spain, Sweden and Finland, allow the performance of researches on embryos. England authorises the use of embryos with a view to performing researches, but also authorises the creation of embryos for determined research purposes, such as the diagnosis of hereditary diseases. In France reproductive cloning is deemed to be an offence. Researchers consider that the embryo makes up an exceptional research material, since the cells of the embryo enable the curing of neurological or hereditary diseases. The difficult qualification of embryo represents only the image of cultural, sociological and religious differences regarding the status of embryo.

In the majority of democratic countries law-making bodies regulated issues regarding: abortion, *in vitro* fertilization, diagnosis before implantation, sex selection, researches on stem cells, cloning for reproductive and research purposes and engineering of germinal lines.²³

Doctrine²⁴ states that „*biotechnology is a complex and delicate theme when seen from a technical point of view, it changes every day, as a large diversity of groups of interests take action according to different directions. The biotechnology politics does not fit the classical political categories.*”

Human biotechnology is a field in which the state needs to intervene through clearly defined regulations. *“If biotechnology proves to exceed the control power of any individual state then it should be internationally controlled. We must begin now to think in a concrete manner about how to create institutions that may discriminate between the good uses and the bad uses of biotechnology and that may efficiently apply these rules, both nationally and internationally.”*²⁵

Excessive legislation constitutes one of the great obstacles in the way of achieving a political control over human biotechnology. Social and cultural, economic and political peculiarities of every state make even more difficult the task of adopting uniform regulations at an international level.

The Romanian Penal Code establishes in article 193 that the deliberate alteration of human genotype, in any way, is an offence and article 194 thereof states that the use of genetic engineering in order to produce biological weapons or other mass extermination weapons constitutes an offence. Genotype alteration is the manipulation of human genes for the purpose of removing or of reducing malformation or serious infirmities that may lead to genotype alteration. Moreover, the provisions of article 195 condemns two offences: the offence that resides with creating human embryos for purposes other than procreation and the offence that resides with creating, through cloning, of a human being that is genetically identical to another living or dead human being.

The performance of collection and transport of human organs, tissues and cells for therapeutic purposes are regulated by the Law on health reform, adopted by the Romanian Parliament in 2006.

Therefore, the issue of protection of the human embryo remains a controversial subject, both at national level and at international level. In order to clarify its legal status

²³ C. Voicu, works cited, pp. 288-289

²⁴ Francis Fukuyama, *Viitorul nostru postuman, (Our Posthuman Future)*, Humanitas Publishing House, Bucharest, 2004, p. 243

²⁵ Francis Fukuyama, *Viitorul nostru postuman, (Our Posthuman Future)*, Humanitas Publishing House, Bucharest, 2004, p. 22

express provisions are required that should be stated by means of a document that would benefit from real legal power.

Bibliography:

I. Courses, treatises, monographies, speciality magazines:

1. Bakouche, D., *Droit civil. Les personnes. La famille*, (Civil Law. The Person. The Family), Hachete Publishing House, Paris, 2005
2. Bricca, S., Henry, L., *Introduction au Droit*, (Introduction to Law), L.G.D.J. Publishing House, Paris, 2003
3. Chelaru, E., *Drept civil. Persoanele*, (Civil Law. The Person), Second Edition, C. H. Beck Publishing House, Bucharest, 2008
4. Fukuyama, F., *Viitorul nostru postuman*, (Our Posthuman Future), Humanitas Publishing House, Bucharest, 2004
5. Malaurie, Ph., Aynes, L., *Droit civil. Les personnes. Les incapacites*, (Civil Law. The Person. Incapacity), Fifth Edition, Cujas Publishing House, Paris, 1999
6. Moldovan, A. T., *Tratat de drept medical*, (Medical Law Treatise), All Beck Publishing House, Bucharest, 2002
7. Pivniceru, M. M., Dăscălescu, F., D., *Limita inferioară a dreptului la viață: între protecția fetusului uman, dreptul la avort și progresul științelor biomedicale*, (Lower Limit of the Right to Life: between Protection of the Human Foetus, the Right to Abortion and the Progress of Biomedical Science), published by the Revista Română de Bioetică, (Romanian Bioethics Magazine), volume 1, no. 4, Iași, 2003
8. Renucci, J. F., *Droit europeen des droits de l'homme*, (European Law of Human Rights), L.G.D.J., Paris, 2002
9. Sudre F., *Droit international et europeen des droits de l'homme*, (International and European Law of Human Rights), Presses Universitaires de France, Paris, 1999
10. Turpin D., *Theorie generale des libertes publiques*, (General Theory of Public Freedoms), Armand Colin, Paris, 2000
11. Voicu, C., *Teoria generală a dreptului*, (General Theory of Law), Universul Juridic Publishing House, Bucharest, 2006

II. Legislation:

1. The Universal Declaration of Human Rights, published in *Drepturile omului - Documente adoptate de organisme internaționale* (Human Rights – Documents adopted by International Bodies), (text book), Adevărul Publishing House, Bucharest, 1990
2. The International Covenant on Civil and Political Rights privitor la drepturile civile și politice, published in *Drepturile omului - Documente adoptate de organisme internaționale* (Human Rights – Documents adopted by International Bodies), (text book), Adevărul Publishing House, Bucharest, 1990

III. Sites:

1. Internet Site <http://www.unav.es/cdb/acoerec91-1160.html>.
2. Internet Site of the Bioethics Department of the Council of Europe: <http://legal.coe.int/bioethics/html/autre.htm>.
3. Internet Site of the French National Centre for Scientific Research: <http://www.cnrs.fr/SDV/loirespectcorps.html>.