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Biopower as Creator of Ethical and Legal Problems: Case of the Legal Status of a Human Embryo

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The aim of this article is to address the current risk of the increasingly progressive development of biomedicine, which, due to the passivity of the legislator, transforms itself into the form of biopower, which is a new form of regulation of society. However, this type of power is represented by private clinics or companies, which focus their attention primarily on the rapid scientific development and economic prosperity. The result is that, on the one hand, modern procedures in the field of reproductive medicine and prenatal care are presented as rescuing individuals or societies from the problem of low birth rates, but, on the other hand, they lead to the overproduction of human embryos, which are then frozen as biological material that can be used, donated or even destroyed. Consequently, we can assert that the right to life is no longer respected as a basic or sacred value, but as an obstacle to scientific development, whose borders are not restricted even by the protection of life itself and the need of preserving its naturalness.

Keywords: biomedicine, biopower, human embryo, assisted reproduction, human embryo research, surrogacy.

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Introduction

As a part of the historical development of society, medicine has always been closely intertwined with the area of law and ethics. It is a natural consequence of the fact that the object of its knowledge is human health, respectively, the therapeutic effect on its physical integrity. However, in the context of the development of science and modern technologies, especially in the second half of the last century, we can talk about an entirely new set of problems of bioethical and then of legal character,

related to the concept of the value of an unborn life and human nature. Knowledge brought by science disciplines such as genetics or embryology allows scientists to influence the previously completely natural process of child's conception and its development during the prenatal period. Under this relatively broad definition, we can then address not only the continuously discussed problem of abortion, but also the manipulation of human genetic equipment in performing assisted reproduction and human embryonic research.

The main problem is that the area of medicine is not properly regulated, which leads to the promotion of biopower, respectively, to spontaneous creation of biomedical rules that replace the legislative activity of the legislator. The aim of this paper is to analyze the specific ethical and legal problems in the conditions of reproductive medicine in order to point out that the concept of the inviolability of human life is thereby questioned. At the beginning of development, contrary to biological status, human life is still degraded to a mere person in a potency, who is not a bearer of human rights, in order to secure the imaginary protection and good of society.

In the following interpretation, we will first focus on defining the basic concept of biopower, which is closely connected to progressive development of biomedicine and which produces new forms as never before. In this context, we will then present the fundamental, ethical and legal problems associated with the current state of prenatal care and reproductive medicine. Our attention will be directed, in particular, to the instrumentalisation of human life, which at the beginning of its development is purposely considered to be merely biological material or an object of a contractual arrangement. This knowledge will then be confronted with the biological status of the human embryo, which is, from our point of view, absolutely crucial in relation to the construction of personal identity and legal protection. Finally, on this basis, we will formulate considerations *de lege ferenda*, which will reflect the need of flexibility of law, which should not only advocate traditional legal doctrines in the area of protection of human life and dignity, but should, on the contrary, effectively reflect the modern findings of scientific development and set certain borders and unbreakable limits.

1. What is Biopower?

If we wanted to find a single-word equivalent or a translation of the word "biopower" in a discourse, it would be very problematic. Therefore, if we look further at the etymology of the term, it is obvious that it is essentially a composition of the terms bio and power. From this, we can conclude that this is a specific form of power, which is closely connected not only with the social but also with the biological life of man. Nowadays, we live in a world holding some form of therapy or treatment for almost every disease. Similarly, human health is generally considered to be a priority not only by individual members of society but also by states and their institutions. This is called the general cult of health which, over time, influences more and more areas of human life and its quality. The consequence of this condition is that it is practically not only an interest, but also the moral or even legal duty of every individual to be a part of medical education and public health care.

This social state, which, in our opinion, has positive, as well as negative consequences, is the result of a long-standing historical and constantly endless

process, which is referred to as medicalization.¹ Its beginnings can be found in the 18th century. Ever since, it is possible to speak about professional development in the field of medical science, which has, far more than previously, been focused on the rescue and individual therapy of a sick individual.² As a result, there has been a general change in the approach to the education of medical staff, the education of the society and the creation of specific health facilities, which have not only served as a central place for all patients, regardless of the nature of their disease, but also targeted toward permanent treatment of patients, including consideration of the importance of prevention.³ In the context of these changes, we can talk not only about the gradual construction of modern medical facilities and the development of healing procedures, but also about the increase in the authority of medical staff and the “politicization” of medicine as such.⁴ The growing interest of the state in the public health of the population had its essential reasons associated with the conception of power or, particularly, biopower from the well-known French philosopher and sociologist, Michel Foucault.

From Foucault’s point of view, biopower cannot be perceived only in the sense of the traditional concept of power “as a commodity or a badge of honour supervening on life and the living, something one either has or lacks. Operating in a top-down manner, the bearer of power dictates, on possible penalty of death, what those not in power may and may not do.”⁵ Its essence is slightly different. The primary objective is to maintain, respectively to improve life. Therefore, the task of medicine is perfect scientific knowledge of the human body so that it can subsequently be optimized.⁶ This approach, in the conditions of modern medicine, cannot be confined to the treatment of the affected part of the body, because we can actually talk about transplantation or even artificial production of human tissues and organs.⁷

Is the protection of the health and life of an individual the primary purpose of that? According to Foucault, this is essentially a tool for achieving the goals of the society or state and its institutions. If we talk, for example, about infectious diseases,

¹ From the modern point of view, we can talk about the transition from medicalization to pharmaceuticalization. See: *Maturo, A.* Medicalization: Current Concept and Future Directions in a Bionic Society. *Mens Sana Monographs*, No. 10, 2012. Available: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3353591/> [last viewed 27.09.2017].

² Part of this process was also the development of a private market in medicine. See: *Foucault, M.* Power/Knowledge: Selected Interviews & Other Writings. New York: Pantheon Books, 1980, ISBN 0-394-51357-6, pp. 166–167.

³ For more information on the development of medical science and the formation of clinics during the 18th and 19th century, see: *Foucault, M.* The Birth of Clinic. Taylor & Francis e-Library, 2003. Available: https://monoskop.org/images/9/92/Foucault_Michel_The_Birth_of_the_Clinic_1976.pdf [last viewed 27.09.2017].

⁴ Some authors point out that it is not possible to separate medical and technical science in modern society. Therefore, especially in the conditions of computer development and modern technologies, they use the term biomedicalization or biotechnology. See: *Clarke, A. E. et. al.* Biomedicalization: Technoscientific Transformations of Health, Illness, and U.S. Biomedicine. *American Sociological Review*, No. 68, 2003, ISSN: 1939-8271, pp. 161–162. Available: http://www.jstor.org/stable/1519765?seq=1#page_scan_tab_contents [last viewed 27.09.2017].

⁵ *Cisney, Wernon W., Morar, N.*, Biopower: Foucault and Beyond. Chicago: University of Chicago Press, 2015, ISBN 9780226226620, p. 1.

⁶ Foucault spoke about a new form of anatomical policy that produces “obedient bodies”. See: *Foucault, M.* Discipline and Punish. New York: Vintage Books, 1995, ISBN: 978-0679752554, p. 138.

⁷ For this purpose, research is currently under way to create hybrids made up of both human and animal cells. See: *Blakemore, E.* Human-Pig Hybrid Created in the Lab – Here Are the Facts. *National Geographic*, 26.01.2017. Available: <http://news.nationalgeographic.com/2017/01/human-pig-hybrid-embryo-chimera-organs-health-science/> [last viewed 27.09.2017].

they pose a danger not only to the individual but also for a wide circle of people in his or her surroundings. Of course, this is related to the potential threat of spreading disease and disability of a large part of the population, as in the past.⁸ The consequences of these situations influence not only the health of the population and the mood in society, but also the functioning of the state and economic prosperity. It is, therefore, in the logical interest of the state to prevent these situations. This leads to an increased effort to obtain as much data about the health of our own citizens as possible, including the processing of this data. This is related to strengthening of the normative concept of medicine in form of compulsory medical examinations, vaccination, health documentation, etc. In this context, Foucault talked about biopolitics, which expresses the fact that human health and the health of the society as a whole become a part of government programmes. The aim is to ensure the existence of a healthy population and individuals, who can be beneficial and productive for society.⁹

We can see that Foucault perceived biopower as a specific form of power vested in the hands of the state. In this concept, extensive medical regulation is used as a public tool to control the population and cultivate the physical health of an individual to ensure its productivity and the benefits for the system. It is not medicine, but it is a state, which creates restrictive rules and interferes with the areas of human life that in the past have been the part of his private life and discretion, without the involvement of state power. Foucault criticized this approach as leading to the restriction of autonomy of the will and freedom of the individual, who can no longer make independent decisions regarding his physical integrity. Thus, in line with the concept proposed by Foucault, biopower was understood as a way to instrumentalize a person whose health had become an object of interest to political concepts or an object of extensive legal regulation.

From our point of view, however, it is also possible to define the concept of biopower in another way. In this regard, we must first point out that our approach is only based on the current state of medicine and science. Foucault, of course, lived in a time when we could talk about the development not only of standard medical care, but also of specific areas of biomedicine, such as genetics, embryology and biotechnology, etc. Revealing the nature and significance of DNA in the second half of the 20th century was a crucial step, which has progressively led to the use of this knowledge for the purposes of prevention and diagnosis. Then, in 1978, we were able to talk about the first successful use of Assisted Reproduction Methods, respectively about the first child who was conceived in a laboratory. Since then, we have been able to see widespread use of this reproductive medicine, not only in relation to

⁸ In the context of the historical development of Europe can we talk for example about the plague, which was a societal problem with regard to its infectious and expansive nature. The proof of this was, for example, the Great Plague of Vienna, which in 1679 claimed around 76,000 victims. See: *Alfani, G. Plague in seventeenth-century Europe and the decline of Italy: an epidemiological hypothesis. European Review of Economic History*, No. 17, 2012. Available: <https://academic.oup.com/ereh/article/17/4/408/499216/Plague-in-seventeenth-century-Europe-and-the> [last viewed 27.09.2017].

⁹ Health policy thus concentrates not only on individuals but also on the entire population. See: *Nilsson, J., Wallenstein, S. (eds.). Foucault, Biopolitics, and Governmentality*. Stockholm: E-print, 2013, ISBN 978-91-86069-59-9, pp. 85–86.

the treatment of infertility, but also in the use of redundant embryos for research purposes.¹⁰

So why are we talking about biomedicine in a different sense than Foucault? We believe that these very fundamental advances in science cannot even be sufficiently reflected at present by law and its regulation. As a result, many modern medical practices are only generally regulated, or we can even talk about the absence of legal regulation, which is associated with the considerable legal uncertainty and problems of application. Therefore, it is science, not the legislator, which determines the precise course and conditions of procedures that fundamentally influence the beginning of human life, including its nature. This leads to the disruption of the traditional concept of law, which should produce binding and enforceable regulations of social relations, especially when we discuss the concept of a man as a moral person, who is the bearer of the right to life and human dignity. The risk lies primarily in the fact that most clinics operating in the area of reproductive medicine are currently in the hands of private owners or companies, which, unlike the state or public institutions, are also motivated by their own interest in achieving a high financial profit, which logically follows from the nature of the business.¹¹

Consequently, our concept of biopower is based on the fact that the state no longer completely uses medicine as a tool for cultivating human health and its use for the benefit of society. On the contrary, the state is unable to fully reflect and control the progressive development of modern biomedicine technologies, as it has been in the past. As a result, it is a biomedicine that sets its own rules and determines what will be banned and allowed. Of course, it cannot be said that there would be a formal transfer of power from the state to a doctor or scientist, but there is undoubtedly much more discretion in the field than in the past. This is the fundamental difference between Foucault's approach and ours, because ours is based on the fact that biomedicine should be far more regulated in some areas that directly affect the genetic essence and nature of man. We think that the state should regulate clear and unbreakable borders that will prevent man from being used only as a tool for the development of science and knowledge, even though he is the holder of indisputable human rights and fundamental freedoms. These issues are mainly concerned with the field of prenatal medicine because genetic modification and scientific use of human potential takes place mainly at the stage of embryo development, which is so often the object of scientifically beneficial, but destructive and undignified, medical procedures.

2. Reproductive Medicine: Human Embryo as a Commodity?

If we want to demonstrate the risks associated with the progressive development of biomedicine, it is then appropriate to talk about the specific parts of medicine which, in general terms, deal with the issue of conception and development of the unborn child during the prenatal period. This, of course, is a broad definition that can further be specified. Specifically, we can talk about assisted reproduction, whose definition and application depends on the particular medical, cultural or legal environment. Therefore, we cannot talk about the existence of a binding definition,

¹⁰ Immediately after that, the use of assisted reproduction expanded to other countries. See: *Cohen, J. et. al.* The early days of IVF outside the UK. *Human Reproduction Update*, No. 11, 2005, ISSN 1355-4786, pp. 439–440.

¹¹ *Frith, M.* You're big business now, baby. *Telegraph*, 19.10.2014. Available: <http://www.telegraph.co.uk/women/womens-health/11171311/Youre-big-business-now-baby.html> [last viewed 27.09.2017].

but from an authoritative point of view, we can quote a definition from the World Health Organization, which considers assisted reproduction as “*all treatments or procedures that include the in vitro handling of both human oocytes and sperm, or embryos, for the purpose of establishing a pregnancy.*”¹²

From the above definition, it is clear that assisted reproduction cannot be referred to as one particular procedure. On the contrary, this is a complex medical process, which can be implemented in several ways.¹³ They all have a common goal, namely, the treatment of infertility, which is currently perceived as a very serious societal problem that affects particularly advanced areas of the world.¹⁴ However, we will only deal with the artificial fertilization method, which is often called fertilization in the tube. This process includes increased egg production, which are further removed and artificially fertilized. As a result, a zygote or fertilized egg is formed, which is further cultivated and transferred into the womb of a woman.¹⁵ What is the fundamental ethical and legal problem of this procedure? It should be recognized that, at present, some problems with pregnancy cannot be solved in a natural way. From our point of view, however, the implementation of these procedures is crucial.

We have already said that artificial insemination involves the targeted overproduction of human embryos in order to increase the treatment's success. Therefore, a large number of embryos are often implanted into the female organism, which brings many health risks and complications. In particular, a multiple pregnancy may occur in a woman resulting in a targeted termination of the development of one of the embryos in order to protect the woman's life or to resolve a developmental deformity.¹⁶ This is, from our point of view, a somewhat paradoxical situation, because the goal is conception, not the termination of human life. In this context, however, we are talking about the situation where embryos are used for assisted reproduction. Another case occurs when they are not used and become redundant. How can we deal with them further? This is, of course, a question, the answer to which is related to national legislations, which vary, as in

¹² Zegers-Hochschild, F. et. al. The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology. In: *Human Reproduction*, No. 11, 2009, ISSN 0268-1161, pp. 2683–2684. Available: http://www.who.int/reproductivehealth/publications/infertility/art_terminology.pdf [last viewed 27.09.2017].

¹³ Sometimes, surrogate motherhood is also included in the list of these methods. See: Desai, A. et. al. Assisted Reproductive Technology (ART): Combating Infertility. *Asian Journal of Pharmaceutical and Clinical Research*, No. 4, 2011, ISSN-0974-2441, pp. 19–22. Available: <http://www.ajpcr.com/Vol4Issue1/204.pdf> [last viewed 27.09.2017].

¹⁴ This, of course, is mainly related to the way of life, such as smoking, overweight, stress, or the formation of a family at a later age, also for the purpose of building a working career and so many other examples. See: Kubo, H. Epidemiology of Infertility and Recurrent Pregnancy Loss in Society with Fewer Children. *Japan Medical Association*, No. 52, 2009, ISSN 1346-8650, pp. 25–28. Available: https://www.med.or.jp/english/journal/pdf/2009_01/023_028.pdf [last viewed 27.09.2017].

¹⁵ For a more detailed description of IVF fertilization process see: Hoeger, K. et. al. In Vitro Fertilization Process, Risk, and Consent. In: *UR Medicine*. Available: <https://www.urmc.rochester.edu/MediaLibraries/URMCMedia/fertility-center/documents/In-Vitro-Fertilization-4-29-15-updated.pdf> [last viewed 27.09.2017].

¹⁶ Launslager, D. Multiple Births: The Possible Risks. Multiple Births Canada, 2011. Available: http://multiplebirthscanada.org/mbc_factsheets/FS-PN_RisksforMothersPart1.pdf [last viewed 27.09.2017].

the area of abortions or other biomedical interventions.¹⁷ Therefore, we can meet different conditions for the use of reproductive medicine tools. Essentially, the current knowledge of science allows us to freeze embryos for storage purposes. Already at this moment, in our opinion, human life is deprived of dignity and degraded to mere biological material. However, the legislation in some European countries is even more liberal, especially in relation to redundant embryos, which were not used during the statutory period and were provided for research purposes.¹⁸

This type of research is something like an ethical dilemma. Its aim is to protect society by acquiring new knowledge for the development of healing practices and methods. On the other hand, it is demonstrable that the embryos are destroyed during their execution. The reason is that the object of interest of this scientific knowledge is not the human embryo itself but embryonic stem cells, which have a unique property of pluripotency up to the stage of development of human life at the level of the blastocyst, and which have the ability to develop themselves in any type of adult tissue. Therefore, they are very attractive in relation to the implementation of cell therapy, which is currently a very popular branch of medicine.¹⁹ Despite the existing positive aspects, we still point to the unethical killing of human embryos, especially because we can now see the successful development of treatment with adult stem cells, which are obtained from, for example, the skin of a potential patient.²⁰ It is clear, therefore, that the issue of assisted reproduction and research on human embryos is very closely connected. This situation perhaps motivates some states to regulate these areas only in a framework manner. The result is the spontaneous development of biomedicine, where the clinics of assisted reproduction alone decide how many embryos will be generated, how many embryos will be used, and how many embryos will only serve as consumables for destructive research.²¹

However, this is not the only problem of ethical-legal nature, which is currently associated with the application of reproductive medicine. The phenomenon in the form of surrogate motherhood is also considered very current. We can say with exaggeration that it is a specific form of assisted reproduction, because it uses artificial fertilization methods. The essence of the whole process is that a woman cannot become pregnant or carry the child up to the time of childbirth. For this reason, another woman called the surrogate mother is involved, who, on the basis of a prior agreement, undergoes the conception of a child and agrees to

¹⁷ Präg, P., Mills, M. C. Assisted reproductive technology in Europe. Usage and regulation in the context of cross-border reproductive care. *Families and Societies*, No. 43, 2015, pp. 9–12. Available: <http://www.familiesandsocieties.eu/wp-content/uploads/2015/09/WP43PragMills2015.pdf> [last viewed 27.09.2017].

¹⁸ Eckman, J. The Ethical Dilemmas Associated with Frozen Embryos. *Issues in Perspective*, 30.05.2015. Available: <https://graceuniversity.edu/iip/2015/05/the-ethical-dilemmas-associated-with-frozen-embryos/> [last viewed 27.09.2017].

¹⁹ Douglas, T., Savulescu, J. Destroying unwanted embryos in research. *Talking point on morality and human embryo research*. *EMBO reports*, No. 10, 2009, pp. 307–312. Available: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2672894/> [last viewed 27.09.2017].

²⁰ However, scientists are already considering the future use of these cells for reproduction purposes. See: Murray, K. Could we one day make babies from only skin cells? *CCN*, 09.02.2017. Available: <http://edition.cnn.com/2017/02/09/health/embryo-skin-cell-ivg/index.html> [last viewed 27.09.2017].

²¹ Srov. World Health Organization. Assisted reproduction in developing countries. *Progress newsletter*, No. 63, 2004, p. 2. Available: http://www.who.int/reproductivehealth/publications/infertility/progress_63.pdf?ua=1 [last viewed 27.09.2017].

renounce the rights of a parent in favour of the ordering couple.²² Of course, once again, it depends on specific legislation, which is inconsistent in the European legal environment. Unlike abortions, however, we can find a somewhat restrictive approach in this area. This is due to the fact that in the context of international law, this issue raises many unresolved problems. In particular, it is called “baby tourism”, meaning that the infertile couple travels to another country, where the legislation is more liberal. Traditionally, India, Russia, Ukraine etc. even allow the commercial form of surrogate motherhood.²³ The problem often occurs after childbirth and a return to the birthplace. A couple wanting to return to their home country have a different nationality from their child. As a result, the European Court of Human Rights has already dealt with these cases. The consequence was that no travel documents were provided to the child,²⁴ parents were not enrolled in the register of birth,²⁵ or the child was removed from the couple and placed in alternative care in another family due to a breach in the adoption conditions.²⁶

However, we believe that these issues cannot only be resolved *ex post* by the case law of the European Court of Human Rights. Surrogate motherhood is based on the fact that it considers the unborn child to be an object of a commercial or courtesy contractual arrangement. In this context, it is not possible to speak about one particular type of contract that would be valid across the international community, because each country has its own conditions for the implementation of surrogate motherhood. However, it is fundamentally at least a *sui generis* contractual relationship, which is carried out on the basis of a contractual freedom in the area of private law. The main problem with this issue is that an unborn child does not have the status of a subject but of an object of legal relationship.²⁷ This is the same situation as in the case of other biomedical interventions, where we can see the signs of instrumentalisation of human life, which is inconsistent with the current conception of law, because the legislator differentiates between things and persons in the legal sense.

²² In addition to commercial forms, altruistic forms can also be distinguished, if the surrogate mother is genetically related to the child. See: *Söderström-Anttila, V. et. al.* Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review. *Human Reproduction Update*, No. 22, 2016, ISSN 1460-2369, p. 261. Available: <https://academic.oup.com/humupd/article-lookup/doi/10.1093/humupd/dmv046> [last viewed 27.09.2017].

²³ On the contrary, we can see a significantly restrictive approach in Germany, Italy, France and Sweden, as well as in other countries. See: *Armour, K. L.* An Overview of Surrogacy Around the World. *Nursing for Women's Health*, No. 16, 2012, ISSN 1751-486X, p. 234. Available: <http://www.familiesthrusurrogacy.com/wp-content/uploads/2015/12/Overview-of-Surrogacy-Around-The-World.pdf> [last viewed 27.09.2017].

²⁴ Compare: Judgment of the European Court of Human Rights of 8 July 2014, *D. and others v. Belgium*, No. 29176/13.

²⁵ Compare: Judgment of the European Court of Human Rights of 26 June 2014, *Labassee v. France*, No. 65941/11 a Judgment of the European Court of Human Rights of 26 June 2014, *Mennesson v. France*, No. 65192/11.

²⁶ Compare: Judgment of the Grand Chamber of the European Court of Human Rights of 24 January 2017, *Paradiso and Campanelli v. Italy*, No. 25358/12.

²⁷ Surrogate Motherhood: A Violation of a Human Rights. European Centre for Law and Justice, 26.04.2012, p. 5. Available: <http://icolf.org/wp-content/uploads/Surrogacy-Motherhood-ECLJ-Report.pdf> [last viewed 27.09.2017].

3. Unborn Child: Someone or Something?

In the previous explanation, we pointed out specific areas of medicine that in essence degrade unborn life as a mere means of realizing the right to family life or the development of scientific knowledge. However, is it in line with the current state of scientific knowledge and with the values of a democratic state, when human embryos are degraded to mere biological material? The answer to this question cannot only be sought in the field of law but primarily in the fields of genetics and embryology. These sciences give us empirical knowledge about the beginning and development of human life in the prenatal period.

So, when does human life begin? In general terms, we can say that each person's life begins at the moment of conception, but that can be realized at present not only in the natural way, but also by the methods of assisted reproduction. Theoretically, we could also think about the artificial creation of human beings through reproductive cloning, which is currently considered not only ethically but also legally unacceptable.²⁸ We can say that human life begins when the maternal and paternal sex cells are mixed and a zygote or a fertilized egg is created. This is a crucial moment because from this instant we can talk about the creation of a completely unique combination of genetic information that will never be repeated.²⁹ This fact in itself disproves the often-used argument that an unborn child is, especially at the beginning of development, only a part of the mother's body, and she is the only one who decides about her body through abortion. An unborn child has its own genotype since the moment of conception, which determines all the further development. From a biological or genetic point of view, it is hardly questionable that conception leads to the creation of a unique being belonging to the human species. However, problems arise when we want to establish whether a human embryo is already a person in a philosophical sense. This is a question that does not fall within the field of empirical sciences, for which it is typical to verify the results from a methodological point of view. As a part of the discourse, we can distinguish the perception of the person in the ontological and functional sense. If we first focus on an ontological approach, this refuses to take into account psychological arguments in forming the moral status of an unborn child. This means that this approach is based on the fact that each human life has evolved naturally and continuously, not only during the prenatal period but throughout its existence. In this sense, the human embryo already has the presence of consciousness or ability to establish interpersonal relationships but only within the meaning of possibility, which will become reality over time.³⁰ From the legal point of view, in the context of these conclusions, we can say that the embryo is not only the bearer of the right to life but also of other human rights and freedoms. It is true that it is not temporarily able to exercise them if we talk for example about the right of freedom of expression or association, but it does not mean that it is not the same bearer of these rights and freedoms as a newborn or a person in a coma.

²⁸ Compare the prohibition of reproductive cloning contained in Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings.

²⁹ Scott, F. When Does Human Life Begin? In: Gilbert's Site on Developmental Biology. Available: <http://science.jburroughs.org/mbahe/BioEthics/Articles/Whendoeshumanlifebegin.pdf> [last viewed 27.09.2017].

³⁰ Hubert, J. P. Defending Human Embryonic Life. In: *CatholicCulture.org*. Available: <https://www.catholicculture.org/culture/library/view.cfm?recnum=7183> [last viewed 27.09.2017].

Supporters of the functional approach who, in relation to the concept of a person, demand that he/she must be the bearer of certain qualities, are of the opposite view. Thus, they differentiate between a man and a moral person, who must have the specific qualities that are related to the question of individuality and autonomy.³¹ In this regard, a number of arguments are used, such as the absence of the embryo's nervous system, the potential formulation of twins, the course of embryogenesis or dependence on the mother's body.³² From our point of view, it is necessary to formulate the moral and legal status of an unborn child at all stages of development in the context with empirically verifiable knowledge which, in the genetic sense in particular, shows that we can talk about a unique human being from the moment of conception. Within this context, we can also take into account the natural law concept of human rights, which in a certain sense is built on the fact that human rights, and in particular the right to life, belongs to a person regardless of positive legal regulation simply because he is a human being.³³ It is considered discrimination, when a state legalizes the killing of human embryos or their undignified use occurs for science only because they are at an early stage of natural development, despite these facts. This treatment with human embryos are then in conflict with the basic democratic requirement for equality of all people in dignity and rights without any exemptions. In fact, there is no reason why an unborn child, at every stage of development, should have a lower legal status than an already born human being.

4. Right to Life versus Right to Use Life

The title of this chapter might seem controversial because the respect for human rights and freedoms and especially for the absolute protection of human life and its dignity is declared and guaranteed in a number of international treaties and constitutional laws of democratic states.³⁴ On the other hand, it does not correspond to the current state in biomedicine, which demonstrably uses some human beings as a means of achieving scientific progress in the field of assisted reproduction and cell therapy, only because they are at early stages of development. It is clear, therefore, that the prohibition of any destructive and undignified interference with the natural development of a person in the prenatal period could produce a reasonable concern that this scientific development will slow down or even stop. It is a crucial argument, because these medical procedures can provide society with new procedures or medications which can possibly be solutions or prevention to many different types of illness.³⁵

³¹ According to this approach, the embryo is only a potential person. See: *Wildman, J.* Substance, Nature, and Human Personhood. *CedarEthics: A Journal of Critical Thinking in Bioethics*, No. 7, 2007, pp. 1–3. Available: <http://digitalcommons.cedarville.edu/cgi/viewcontent.cgi?article=1035&context=cedarethics> [last viewed 27.09.2017].

³² An overview of the most common functional access arguments can also be found in the publication *Pascal, I.* *Le zygote est-il une personne humaine?* Paris: Pierre Téqui, 2005, ISBN 978-2740311592 (available also in Czech language).

³³ *Raymond, G. et. al.* *The Global Future: A Brief Introduction to World Politics.* Boston: Cengage Learning, 2013, ISBN 9781285605852, p. 224.

³⁴ Compare, for example, the preamble to the Universal Declaration of Human Rights of 1948, which was the basis for further codification: "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*"

³⁵ On the other hand, we know that scientists are already able to use adult stem cells for these purposes.

In this context, it is possible to work on the theory that this fact or concern motivates legislators to provide ample space to biomedicine for “self-regulation” and “self-realization”. Thanks to the absence of detailed legal regulations, scientists can flexibly decide as to how to implement the relevant experiments or assisted reproduction procedures. However, this is associated with the risk of the uncontrolled development of biopower, which interferes with many areas of human life and its naturalness. Ultimately, by this approach, we may come to a stage where certain areas of social relations or situations will not primarily be regulated by the law but by the spontaneous development and application of medicine. This would not only be a denial of the primacy of the law in the field of binding and enforceable regulation of social relations but would also threaten the existing democratic values in society. Human life would no longer be protected as a sacred and inviolable value³⁶ but would be used as a mere tool to gradually create the “ideal” prototype of a person, who will be able to face any health barriers with the help of genetic modification. In fact, it is the purpose of medical science to act preventively and to achieve the maximum possible level of a healthy population.

The question remains, whether this goal is realistic or not, especially if it is necessary for these purposes to disrespect the right to life of an unborn child or to use human embryos as spare parts. From our point of view, this approach violates the fundamental value of the democratic concept of society, which also consists of protecting the right to life and human dignity without any form of discrimination. We therefore believe that it is first necessary to change the approach of the legislator, who should reformulate the legal status of an unborn child in accordance with modern biological knowledge and take this fact into account when amending the relevant legal regulations. In our opinion, the legislator should allow only those therapeutic treatments that respect the dignity and right to life of every human being. Therefore, there must be unbreakable borders, which may motivate scientists to seek or develop morally and legally more acceptable ways of protecting the individual and society as a whole.

Conclusions

The legislator is actually not able to reflect the very progressive development of biomedicine which is uncontrollable. There is a general regulation, but this regulation does not set clear boundaries, which must be respected. The consequence is not only the risk of instrumentalisation of human life, but sometimes also his destruction during the implementation of various types of biomedical research. This fact has a major impact on the level of legal protection of the unborn child, who is used as an object of a (surrogacy) contract or as an instrument which can be used or even destroyed for the potential good of the whole society. We showed, that also Michel Foucault has pointed out the risks of uncontrolled development and abuse of medicine in the field of public control of the society. It is a paradox, that many years later the situation is not better, but even worse, because scientists are able to influence the beginning and the development of a human life more then ever before. After some time, we will see if the legislator will change his reserved approach or if he will understand, that the respect for a human life and its dignity is one of the essential aspects of democracy.

³⁶ To the question of the sacredness of human life compare: *Dworkin, R. Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedoms*: New York: Knopf, 1993, ISBN 9780394589411.

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