



Pázmány Law Working Papers
2023/4

Katarina Krasić
**The Legal and Philosophical Criteria
of Personality of the Human Embryo
and Fetus**

Pázmány Péter Katolikus Egyetem
Pázmány Péter Catholic University Budapest
<http://jak.ppke.hu>
<http://www.plwp.eu/>

THE LEGAL AND PHILOSOPHICAL CRITERIA OF PERSONALITY OF THE HUMAN EMBRYO AND FETUS

Katarina KRASIĆ
Doctoral student (Pázmány Péter Catholic University)

Abstract

There is no consensus at the European level on the nature and status of the human embryo and fetus and there is no legal definition of the beginning of life. In order to determine the legal status of human embryo and fetus, it is necessary to analyse a series of a previous legal, social and philosophical-anthropological questions, such as the concept of a man, human nature and person. The paper aims to offer a more detailed picture of a mentioned philosophical concepts and relate them to the moral and legal status of the human embryo and fetus. The conclusion is drawn as to whether the human embryo and fetus is a legal subject.

Keywords: Man, person, human embryo and fetus, moral status, legal status

1. Introduction

Determining the legal status of human embryo and fetus requires clarification of his biological and philosophical - anthropological status and analysis of normative concepts such as man, person, human nature and the relation between human nature and person. Does the term „everyone“ refer to every human being and at the same time every person, or does it refer to some human beings, some of whom would not be persons? Is belonging to human nature sufficient to recognize a person as a legal subject? It would be worth trying to determine which criteria can be taken as crucial for determining the status of a moral and legal subject of each human being, as well as the human embryo and fetus.

2. Man

Philosophical anthropology or philosophical discourse about man deals with man in all dimensions, which include spiritual, mental and physical. The question about the nature of man is present throughout history, since Socrates and Plato. In *The Human Place in the Cosmos*, Scheler states that „no time has known so much about man as today, and so little about who man really is and what he should be.“¹ The question of who man is and whether he contains an inner unity or is a set of elements also requires an answer to the complex question of the relationship between spirit and matter, which has been discussed throughout history. Some of the famous philosophers who dealt with the problem of the relationship between body, mind and spirit in man are Descartes, Hobbes, Locke, Spinoza, Leibniz, Hume, Kant, James, Russell, Wittgenstein, Ryle, Strawson, Parfit.² Discussions about the understanding of the relationship

¹ As cited in Nikola SKLEDAR: Bioetika, etika i antropologija. In: Skupina autora (ed.), *Bioetika u teoriji i praksi*. Zagreb. Globus, 1st edition, 2001. 103.

² From the Pythagoreans and the idea of the power of the soul as the most important part of man, to the scholastics and the Orphic teaching about the mystical duality of soul and body, through the scholastic reconciliation of ancient philosophy with Christian theology, all the way to the rationalist Descartes, the empiricist Locke, who mark the beginning of modern philosophy.

between spirit and matter have historically been divided into two groups: physicalists, on the one hand, argue that living organisms can be reduced to the laws of chemistry and physics, and vitalists, on the other hand, believe that living organisms have properties that cannot be found in immovable substance.³

Modern science is characterized by the naturalization of man, which implies the reduction of man to biological elements, and when researching the question of who is man, the dominant and even the only methodology is the experimental method. Natural sciences are limited in answering the question of what it means to be human. As Haeffner points out, „what man is, can and should be, cannot be reduced to an empirical theory of the natural sciences“.⁴ Similarly, Matulić claims that „the methods of science have caused everything that does not belong to reality to be denied, so metarealities, which are not subject to new methods, have been declared unknowable and progressively marginalized.“⁵

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

3. On human nature as an unchanging reality or construct

The question of whether human nature can be explained exclusively by physical, chemical and biological methods, and whether human nature is a philosophical-anthropological concept or construct at all, is especially significant today in the time of accelerated biotechnological development, within which man is often the subject of experiment. The concept of human nature has changed throughout history, and in different periods it has excluded or included the view of its immutability and universality and the innate dignity that distinguishes the human being from other living beings.⁶ In today's postmodern era, the understanding of human nature in accordance with philosophical anthropology has been questioned. Theorists like Pinker argue that „we cannot interpret human nature as a natural phenomenon because the history of human nature sets limits to naturalistic explanations of what it means to be human.“⁷ Post-structuralists Foucault, Derrida, Lyotard, Irigaray advocate an *aposteriori* rather than an *apriori* determination of human nature, with an emphasis on deconstruction. The concept of human nature as a variable construct calls into question not only the metaphysical dimension of human nature, but also biological-genetic facts, which is significant for all human beings, including for determining the status of human embryo and fetus. By denying the foundations of philosophical anthropology, we deny the determinants of man with regard to his essence and being, which have their roots in the pre-Socratics. If human nature is a construct, which means it is not universal and consistent, then it contains nothing that would make us claim that the human being deserves the protections inherent in intrinsic dignity. Also, then there is no reason why man would be on a higher value level than animals and plants.

³ Cfr. Marko MARINIĆ: *Matematika ljudskog života*. Zagreb. Institut društvenih znanosti Ivo Pilar, 1st edition, 2017. 21.

⁴ Cfr. Gerd HAEFFNER: *Filozofska antropologija*. Zagreb. Naklada Breza, 1st edition, 2003. 23.

⁵ Tonči MATULIĆ: *Bioetika*. Zagreb. Glas Koncila, 1st edition, 2012. 238.

⁶ Cfr. Marija SELAK: *Ljudska priroda i nova epoha*. Zagreb. Naklada Breza, 1st edition, 2013. 15.

⁷ As cited in Kenan MALIK: What science can and cannot tell us about human nature. In: Robin HEADLAM-WELLS - Johnjoe MCFADDEN (ed.), *Human nature: fact and Fiction, Literature, Science and Human nature*. London. Continuum, 1st edition, 2006. 130 - 131. Malik explains naturalism as a concept developed during the 17th and 18th centuries by which phenomena are explained by natural laws. Over time it began to mean liberation from the dogmas of religion.

4. Person

Ever since the time of Cicero, people have been considered to have a common, rational nature on the one hand, and their own nature as individuals on the other.⁸ Human being is a general term that denotes all members of the species *homo sapiens*, and then also belonging to human nature, while an individual biological organism represents a unique specimen of the human species.⁹ A person belongs to the common human nature, but as an individual. She is a single human specimen.¹⁰ The humanity of people is equal, but there are different ways of its realization. Every subject that exists as a person is different. „Personality is not found in abstract purity, but in an individual, a concrete, special man, and where there is a being belonging to the human species, there is also a person.“¹¹

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

The concept of a person is a concept of conceptual jurisprudence.¹² Person is one of the concepts, like human rights, human being and man, whose content determination is a methodological problem of normative and naturalized jurisprudence. The disagreement between these two jurisprudences exists over the question of whether conceptual analysis is metaphysical in character. According to the normative, conceptual truths have a metaphysical character. Naturalized jurisprudence, on the other hand, reduces conceptual analysis to empirical sciences, in contrast to the normative one whose postulate is a philosophical approach, which implies „open mental observation“.¹³ And that is why the question arises as to whether we should limit ourselves to one of those two approaches to conceptual analysis. Metaphysics, which is beyond the possibility of empirical knowledge, opens the complex question of the limits of our knowledge and the existence of a reality that is empirically unprovable. Metaphysics takes as its starting point the possibility of arriving at unconditionally valid statements about reality that cannot be known empirically. The claim that it is not possible to demonstrate that there are true statements about reality that is empirically inaccessible, expresses knowledge about what is empirically inaccessible, knowledge about the principle reach of metaphysical knowledge.¹⁴ Denying metaphysics also implies that being cannot be known because what is knowable, legitimate and possible are only empirical facts, not things

⁸ Cfr. Angelo SCOLA - Gilfredo MARENGO - Javier PRADES LOPEZ: *Čovjek kao osoba – teološka antropologija*. Zagreb. Kršćanska sadašnjost, 1st edition, 2003. 166. Seneca distinguishes between the general concept of humanity - *homo* and the term *persona*, to denote an individual human individual.

⁹ Likewise Borislav DADIĆ - Ivana KNEŽIĆ: *Metafizička istraživanja o osobi*. *Riječki teološki časopis*, vol. 34. no. 2. 2009. 561 - 562. Man as an individual of human nature shares common characteristics with other members of the human species, while man as a person is a concrete entity that has all the characteristics of human nature, but present in a unique way because if a person were not an individual and concrete reality, it would not be a problem to destroy one individual and replace it with another.

¹⁰ Cfr. Aryeh KOSMAN: *Aktivnost bitka u Aristotelovoj metafizici*. In: Pavel GREGORIĆ - Filip GRGIĆ (ed.), *Aristotelova Metafizika: Zbirka rasprava*. Zagreb. Kruzak, 1st edition, 2003. 313.

¹¹ MATULIĆ (2012) op. cit. 81.

¹² Cfr. Kenneth EINAR HIMMA: *The nature of Law: Philosophical Issues in Conceptual Jurisprudence and Legal Theory*. New York. Foundation Press, 1st edition, 2011. 2.

¹³ Cfr. Luka BURAZIN: *Brian Leiter i naturaliziranje filozofije prava*. In: Bojan SPAIĆ - Damir BANOVIĆ (ed.), *Suvremeni problemi pravne i političke filozofije*. Sarajevo. Šahinpašić, 1st edition, 2016. 55, and Nikola SKLEDAR: *Filozofija i život: filozofijske i metodološke rasprave*. Zagreb. Hrvatsko filozofsko društvo, 1st edition, 2007. 105.

¹⁴ Cfr. Bela WEISSMAHR: *Ontologija*. Zagreb. Filozofsko-teološki institut Družbe Isusove, 1st edition, 2013. 30 – 35. Weissmahr states that the claim that we are unable to determine the true statements of the metaphysical can only be true under the tacit assumption of an empirically never reached knowledge about the limits of what can be asserted.

as they are in themselves and their value.¹⁵ That is why any reductionism that would limit conceptual analysis either to *apriori* truth or to exclusive empiricism, is not satisfactory in revealing the definition of a human being and has practical consequences for dealing with bioethically sensitive issues. Reductionism is also problematic when determining the content of the concept of a person. Biology and genetics study the empirical dimension of the person, not the person as a philosophical concept. Not even logic itself, the science of the correctness of thinking, can solve the ontological mystery contained in the concept of a person (human rights and dignity), relevant to legal philosophy.¹⁶ The bioempirical method is not able to answer the question of being a person because the scientist does not find evidence in experiments about the beginning of the individuality of human life, which is a meta-empirical determinant.¹⁷ „The descriptive, empirical approach to a person, according to the laws of semantics, remains at the level of external manifestations, while the metaphysical, ontological and ethical character, which practically means normative, pervades in the intrinsic structure of a person.“¹⁸ That is why the concept of a person is, as one of the fundamental concepts in the legal structure and necessary for determining the legal status of every human being, the subject of both naturalized and conceptual jurisprudence.

The Latin name for the noun person is *persona*. In ancient Greek dramaturgy, a person meant a mask, a *prosopon*, which ancient actors used in theatrical performances. Subsequently, complex, deep-minded philosophical-speculative templates emerged, based on which the Western-civilizational understanding of the person was shaped.¹⁹ Boethius, a writer of the Western intellectual circle, defined a person as an individual substance of a rational nature. English empiricism fragmented the ontological consistency of the human person, claiming that consciousness does not possess substantiality (J. Locke) and unity (D. Hume), which reduces the person to reason, as a set of experiences and ideas, in which the roots of Anglo-Saxon bioethics are found.²⁰ Marxism, Nietzsche's anti-humanist philosophy, structuralism, various behaviorist theories and some currents of analytical philosophy, contributed to the strengthening of the anti-personalist orientation of contemporary philosophy.²¹ Attempts to reconceptualize the person through dialogic personalism, came at the end of the First World War with M. Buber and F. Rosenzweig (along with the predecessors of B. Pascal and S. Kierkegaard), and in the Catholic area with F. Ebner, R. Guardini, E. Mounier, G. Marcel and J. Mouroux.²² The advancement of various personalisms did not help to resolve the crisis of the concept of person, embedded in the general crisis of the subject, as well as the crisis of reason itself, which characterizes contemporary philosophy.²³ Postmodern philosophy breaks with the previous vision of the unitary subject and with the teleological view of history, in such a way that the unitary vision of the subject does not coincide with the rational subject, but the subject is a dynamic concept.²⁴ Ever since the Enlightenment, there has been a clear disdain

¹⁵ Cfr. Elio SGRECCIA: *Manuale di Bioetica – Fondamenti ed etica biomedica*. Milano. Vita e Pensiero, 1st edition, 1994. 72 - 73.

¹⁶ Cfr. Tonči MATULIĆ: Je li ljudski embrij osoba ili jež (2). *Vladavina prava*, vol. 4. no. 2. 2000. 16 - 17.

¹⁷ Cfr. Tonči MATULIĆ: Je li ljudski embrij osoba ili jež. *Vladavina prava*, vol. 3. no. 6. 1999. 18.

¹⁸ MATULIĆ (2012) op. cit. 237 – 246.

¹⁹ Cfr. ibid. 249. Likewise Ramon LUCAS LUCAS: Antropološki status ljudskog embrija. In: Ana VOLARIĆ – MRŠIĆ (ed.), *Status ljudskog embrija*. Zagreb. Centar za bioetiku, 1st edition, 2001. 70. Lucas states that in theological discussions it lost the ancient meaning of the mask and was identified with the Greek term *hypostasis*, which is translated directly into the Latin word *substantia*.

²⁰ SCOLA, MARENGO, PRADES LOPEZ op. cit. 170.

²¹ Cfr. Michele ARAMINI: *Uvod u bioetiku*. Zagreb. Kršćanska sadašnjost, 1st edition, 2009. 172.

²² Cfr. SCOLA, MARENGO, PRADES LOPEZ op. cit. 170.

²³ Cfr. ibid.

²⁴ Cfr. Rosi BRAIDOTTI: Of Poststructuralist Ethics and Nomadic Subjects. In: Marcus DUWELL - Christoph REHMANN – SUTTER - Dietmar MIETH (ed.), *The Contingent Nature of Life*. Berlin. Springer, 1st edition, 2008. 25 - 27.

for metaphysics and the concept of the human being as one with an ontological substrate, but the denial of the biological essence of man comes only with the postmodern theories of the 20th century, and that is confirmed in the gender theory. Gender theory is an example of deviation from the anthropological understanding of man.²⁵

4.1. Interpretations of the concept of person

Boethius' definition of a person includes all human beings, which means that it precludes the definition of some human beings as non-persons. But the term person is a source of widespread social disagreement. Today's interpretations of the concept of person are philosophical, but also sociological and ideological. In the modern and postmodern era, the person is most often understood either in the Lockean way, as a capacity for self-awareness, or in the postmodern way, as a matter of construct. The modern notion of the person denies substance as a constitutive element of the person, which is consistent with the disdain for metaphysics encouraged by the Enlightenment. In modern philosophy, self-awareness becomes a key component of the concept of a person, in accordance with Locke's definition. For Locke, consciousness is the key criterion of a person, so an individual who has not yet developed consciousness or has lost it, is not a person. The above implies that whether a human being is a person depends on the state in which he is.²⁶ According to Locke's dualistic understanding, two different persons could exist in one person, one during the day, the other during the night.²⁷ A person can lose consciousness in various circumstances during life, permanently or for a longer or shorter period, therefore Locke's definition deprives a number of human beings of the status of a person. By mentioned criterion, a number of human beings in different stages of development and life circumstances who lose or have no consciousness, such as human embryos and fetuses, but also people in a coma, all people when they are asleep, human beings under opiates, mentally retarded human beings as well as newborns, can remain outside of legal and perhaps moral protection.²⁸ Philosophers who, directly or indirectly, promote Locke's definition of a person, and then consciousness as a key criterion of a person, are P. Singer, M. Tooley and H.T. Engelhardt, D. Dennet, S. Veca, S. Maffettone.

Today, there are also many theoreticians who state their own „set of criteria“ for the concept of a person.²⁹ Thus, the concept of a person becomes a matter of interpretation and subjective

²⁵ Cfr. Dubravka HRABAR: What is Local and What is Global in the Legal Regulation on Human Reproduction?, *Donald School Journal of Ultrasound In Obstetrics and Gynecology*, vol. 14. no. 3. 2020. 273.

²⁶ Cfr. Darija RUPČIĆ: *Status ljudskog embrija pod vidom bioetičkog pluriperspektivizma*. Zagreb. Pergamena, 1st edition, 2013. 244.

²⁷ Cfr. Ivan KOPREK: Treba li u bioetici govoriti o čovjeku ili osobi?, *Socijalna ekologija: časopis za ekološku misao i sociološki istraživanja okoline*, vol. 16. no. 4. 1997. 395.

²⁸ Likewise Thomas FINEGAN: A Matter of Consistency: Dignity and Personhood in Human Rights. *Medical Law International*, vol. 14. no. 12. 2014. 84. Likewise Don MARQUIS: Why Abortion is Immoral. *The Journal of Philosophy*, vol. 86. no. 4. 1989. 186 - 187. Marquis concludes that the definition of a person according to psychological characteristics called into question the protection of a number of mentally ill and temporarily unconscious people.

²⁹ Daniel Dennett finds that conditions for a person are: rationality, awareness, respect, perception of others as persons, possibility of communication, and concludes that those who lack any of the determinants are not persons. As cited in Michael D. RIVARD: Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species. *UCLA Law Review*, vol. 39. no. 5. 1992. 1486. English argues that the concept of personhood includes biological, psychological, rational, social and legal factors, and although people are usually rational, one who is irrational could not be considered a person. Jane ENGLISH: Pobačaj i pojam osobe. In: Snježana PRIJIĆ - SAMARŽIJA (ed.), *Pobačaj – za i protiv*. Rijeka. Analytica Adriatica, 1st edition, 1995. 74. Berg lists the following characteristics of a person: biological life, genetic code, development of the brain, the ability to feel pain, awareness, the ability to communicate, the ability to form relationships, rationality. Jessica BERG: Of Elephants and Embryos: A Proposed Framework for Legal Personhood. *Hastings Law Journal*, vol. 59. no. 2. 2007. 375. Anne Warren excludes human embryos and fetuses from the moral

criteria that can lead to arbitrating the right to life of a human being. The concept of a person thus depends on the circumstances and the one who decides on the concept, based on arbitrary qualitative and quantitative criteria. Only Boethius' definition of a person makes it impossible to understand some human beings as non-persons, which would mean that it includes the human embryo and fetus, newborns, people with disabilities, people in coma.

5. Status of the human embryo

In theory, three fundamental understandings of the legal status of the human embryo have been established. According to the first, a human embryo and fetus is an object, that is, it has the legal status of a thing (like a cluster of cells or any human organ). The aforementioned legal understanding is a consequence of the moral understanding according to which a person is not the same as a human being, and consequently, a human embryo, although a human being, is not a person. According to the second, the human embryo and fetus is also an object, but at the animal level, it has a specific value and right to respect like higher mammals, which means that it can be used for the benefit of man. It is also based on a moral understanding that a person is not the same as a human being. The third position considers the human embryo and fetus as a legal subject, a person, and is based on the moral understanding that a human being is the same as a person from the moment of fertilization. In the first two cases, it is about the use of the term person in a philosophical context, which reduces the person to the empiricist - manifestative - functionalist dimension, while the third term implies the indivisible biological - ontological dimension of the person. The third attitude is characterized by Tom and Le Roy as „conservative“, while the first two are „liberal“. ³⁰ In the first two cases, the status of the embryo is assigned, while in the third it is ascertained. ³¹ In order to determine whether one of the three stated positions is correct, it is necessary to analyze the bio-genetic and philosophical-anthropological facts about the human embryo and fetus.

„The results of bio-medical research can be evaluated objectively, they are not culturally and temporally conditioned, so in a legal and logical sense they represent an *argumentum ad veritatem*.“ ³² It has been scientifically proven, and by the facts of embryology and genetics (DNA, blood and tissue) all doubts are removed that fertilization does not create a new human being with a genetic code and undeniably human characteristics. There are many medical articles about this. ³³ The humanity of the embryo and fetus is biologically proven and accepted by theoreticians who consider it a person from conception, as well as by those who separate its biological humanity from a person. ³⁴ Ultrasound is one of the proofs that a living human being develops in the womb from the beginning. A human embryo/fetus is not a thing, an object, but a living organism. It is neither an animal, nor a plant, nor a spiritual creature. It is a living being with a human nature. It has been scientifically proven and historically

community by defining a moral person through a number of factors such as: consciousness, opinions, self-initiated action, ability to communicate, self-awareness. Mary ANNE WARREN: O moralnom i zakonskom statusu pobačaja. In: Snježana PRIJIĆ SAMARŽIJA (ed.), *Pobačaj – za i protiv*. Rijeka. Analytica Adriatica, 1st edition, 1995. 54.

³⁰ Cfr. Tom L. BEAUCHAMP - LeRoy WALTERS: *Contemporary issues in Bioethics, Abortion and maternal fetal relations*. Belmont. Thomson, 8th edition, 2013. 265.

³¹ As cited in Carson STRONG: The moral status of preembryos, embryos, fetuses, and infants. *The Journal of Medicine and Philosophy*, vol. 22. no. 5. 1997. 458.

³² Dubravka HRABAR: *Istanbulska konvencija i zamke rodne perspektive*. Zagreb, Vlastita naklada, 1st edition, 2018. 9.

³³ Many authors on it: Janetti SIGNORELLI - Emilce S DIAZ - Patricio MORALES: Kinases, phosphatases and proteases during sperm capacitation. *Cell and Tissue Research*, vol. 349. 2012. 3. See also: Bernard NATHANSON: *Iz smrti u život*. Zagreb. Verbum, 1st edition, 2009. 143.

³⁴ Likewise Christopher KACZOR: *The Ethics of abortion: Women's rights, human life and the question of justice*. New York. Routledge, 2nd edition, 2011. 7.

established that nothing other than man has ever been created from human DNA. The embryo matures, it is more mature in the biological and personal sense, but its human nature does not become either animal or vegetable. It is clear that the bearer of human nature will never become, for example, a dog or a pansy.³⁵ At no stage does the human embryo and fetus change its nature, nor is there a breaking point between humanity and inhumanity. Nor is there a transition from the human organism as a living being to a thing. *Recommendation 1100 (1989) of the Council of Europe* states that „a human embryo at all stages of development retains its own biological and genetic identity.“³⁶ Therefore, it is determined that it is a human embryo that contains a human identity. We will agree with Nathanson that „those who still doubt his humanity should say what an embryo is“³⁷, because if a human embryo and fetus is not a human being, what is it?

At the end of fertilization, each of us contains a genetic code whose identity and uniqueness justify the claim that human life begins at conception. A zygote or single-cell embryo acts as an individual system, a complete and unique organism. An embryo is a separate organism, not part of a larger organism. It controls and directs its own development from the organism itself. Although there appears to be biological confusion at the beginning of embryo development, that is, apparently chaotic cell division, Nathanson explains that it is an „orderly and completely programmed and logical arrangement of rapidly dividing cells, which is controlled by a set of genes and enzyme systems contained in the chromosome of an embryo not yet implanted.“³⁸ The new genome is the main information center, a codified program, inherently directed and committed to a specific further development.³⁹ The development of the embryo takes place in a coordinated and continuous manner, with each subsequent stage of development arising from the previous one, and the final form is achieved gradually.⁴⁰ Not a single external event is needed to stimulate a new direction of development.⁴¹ Scientists have determined that around the 8th week of pregnancy, organogenesis, the process of developing organ systems, usually ends. In the period of organogenesis, limbs develop, the bases of internal organs, ossification and the nervous system (reflexes and motor skills) begin. An embryo is

³⁵ Cfr. Robert P. GEORGE: Embryo Ethics: Justice and Nascent Human Life. *Regent Law Review*, vol. 17. 2004. 2. George explains the humanity of embryos and fetuses in such a way that it is clear that it is neither a rock, nor a potato or any other species, but a living member of the *homo sapiens* species in the earliest stage of development. Similarly, Francesco Comagnoni states that the biological and genetic definition proves that the human embryo is a human being, a member of the *homo sapiens* species, and that the biological and genetic nature once established lasts until death. Adriano Bompiani talks about the human embryo as a biologically directed and oriented development process, that does not allow changing the biologically defined nature of the human embryo. As cited in Tonči MATULIĆ: *Pobačaj: Drama savjesti*. Zagreb. Filozofsko-teološki institut Družbe Isusove, 1st edition, 1997. 120 - 121.

³⁶ <http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=15134&lang=en>, (accessed: 1 November 2023), point 7. Likewise Darija RUPČIĆ, op. cit. 51, states that the body develops with the power of the internal potentialities that it carries within itself and that strive for seriousness, actualization, and the subject is always the same and matures, bringing its own abilities to reality.

³⁷ Cfr. NATHANSON op. cit. 140 - 143. Nathanson quotes Dr. George W. Corner who concludes that the hidden nature of human development is the reason for its underestimation.

³⁸ Ibid. 151. The biological development of the embryo and the medical evidence of the existence of a new human being from conception are described in the medical literature, and will not be repeated here, but we are referring to the following authors: Thomas W. SADLER, *Langman's Medical Embryology*. London. Wolters Kluwer, 14th edition 2018; Keith MOORE - Trivedi VIDHYA NANDAN PERSAUD - Mark TORCHIA: *The developing human – clinically oriented embryology*. Philadelphia. Saunders, 11th edition, 2019.

³⁹ Cfr. Angelo SERRA - Roberto COLOMBO: Biološka osnova identiteta i statusa ljudskog embrija. In: Ana VOLARIĆ-MRŠIĆ (ed.), *Status ljudskog embrija*. Zagreb, Hrvatska biskupska konferencija, 1st edition, 2001. 40.

⁴⁰ Cfr. RUPČIĆ: op. cit. 56. Likewise Ivan FUČEK: *Osoba, savjest*. Split. Verbum, 1st edition, 2003. 31, and Anton ŠVAJGER: Status ljudskog embrija. In: Željka ZNIDARČIĆ (ed.), *Medicinska etika 1*. Zagreb. Hrvatsko katoličko liječničko društvo, 1st edition, 2004. 26.

⁴¹ GEORGE op. cit. 3 - 4.

considered to become a fetus when it begins to move freely in the amniotic fluid. An essential difference between a human embryo and a fetus is the complex brain function of the fetus, which is also important from a psychological point of view. It has been proven that the fetus and its development are affected by music, noise, food and drink, light, smoke, drugs, physical fatigue, emotional states of the mother such as anxiety, fear and depression.⁴² Scientists have observed the existence of the prenatal psyche, which represents the primitive formation of the child's personality and has a strong influence on later development.⁴³ Due to all of the above, it is clear why Nathanson considers the period of 9 months of pregnancy „perhaps the most important formative period in the development of a human being“,⁴⁴ as well as J. M. M. W. Slack who concludes that „neither birth nor development after birth is the most important period of life, but it is gastrulation in which there is a division of the mass of embryonic cells from which structures, organs and other various anatomical phenomena arise.“⁴⁵

In contrast to that, there are numerous medical and philosophical criteria of theoreticians with which the importance of the moment of fertilization is denied and consequently the subjectivity of the human embryo and fetus. Iglesias considers the primitive streak as the criterion on the basis of which the human embryo would become a subject, Sass speaks of the beginning of brain activity, Mulkay of resembling a human being, Durand and Reichlin speak of the human embryo as a potential person.⁴⁶ Other criteria include the primitive streak, the implantation of the human embryo in the uterus, the moment when the mother feels the movement of the child, desire and hope for the future, possibilities of feeling pain, self-determination, i.e. expression of will, socialization, birth. It is very questionable whether some of the criteria mentioned can be taken as crucial for determining the status of a legal subject, that is, the moment that would represent a jump from a biological human being to a personal one, and thus from a thing to a subject. The fact is that complex biological processes are divided into stages but there is no stage of biological development that would carry a certain moral and then legal significance. Not a single point in development would represent a turning point according to which a human embryo and fetus would become a person because there is neither an internal nor an external cause that would give such a point of development such legitimacy. If any of the mentioned criteria represents a legal parameter for the existence of legal subjectivity, then we open wide doors to the possibility of endangering the fundamental human rights of all human beings who, in some stages of development and circumstances, lack one of the above-mentioned criteria. Arbitrarily determining whether someone is a person, that is, a subject, practically means that the subjectivity of all human beings can be called into question, and so, for example, a typical adult who has some personality characteristic that is not in accordance with the subjective beliefs of the one who decides on the definition.

5.1. Philosophical status of the human embryo/fetus

The understanding according to which the human embryo as a human being has intrinsic dignity, which means that it is also a person, a moral subject, is shared by authors such as Lee, Damshcen and D. Schoenecker, Finnis, Lejeune, Ramsey, Noonan, P. George, Moraczewski, Cazor, Liest⁴⁷ The aforementioned authors consider all human beings, due to the fact of their

⁴² Cfr. RUPČIĆ op. cit. 131, and Ivan FUČEK: *Život – Smrt*. Split. Verbum, 1st edition, 2008. 94 – 97.

⁴³ Cfr. Ivan MILAKOVIĆ: *Kada su majka i njeno dijete bili sami*. Sarajevo. Svjetlost, 1st edition, 1986. 7. Milaković states that Peerbolte's school represents the thinking that psychic life begins already in the fertilized egg.

⁴⁴ NATHANSON op. cit. 143, 151.

⁴⁵ Ibid. 151.

⁴⁶ Cfr. Joao GONCALVES LOUREIRO: A European Status of the Embryo. *Boletim da Faculdade de Direito de Universidade de Coimbra*, vol. 74. 1998. 761.

⁴⁷ Cfr. Patrick LEE: *Abortion and unborn human life*. Washington. The Catholic University of America Press, 2nd edition, 2010. 104 - 105. KACZOR op. cit. 167; Jason T. EBERL: The Moral Status of 'Unborn Children' Without

human nature, to be intrinsically valuable persons, with full moral and legal status from conception, including the human embryo/fetus.

Natural science cannot prove that an embryo is a person, but neither can it prove that it is not. The question of the nature of the embryo cannot be solved by biology and medicine alone. The fact that the ontological substrate cannot be empirically proven does not imply that it does not exist. Classical ontology takes the position that there are no intermediate states, intermediate stages or intermediate levels between not being a person and being a person. The possibility of a moment of „jump“ from a non-personal human being to a personal has been discussed since Titus Lucretius Carus in the philosophical poem *De rerum natura*, in which it was pointed out that it is ontologically impossible for such a moment to exist in the time after conception.⁴⁸ A human embryo and fetus is or is not a person because it cannot both be and not - be a person or be a thing and then a person. „Since it is impossible to determine the moment when a human being would pass from an impersonal or pre-personal state to a personal state, it is difficult to assert that an embryo is not a person.“⁴⁹ If the nature, the person, the body and the self are an inseparable unity, then the belonging of the individual to the human species requires unlimited recognition of human dignity, and being a person does not mean a property that joins the determinant of being human.⁵⁰

The embryo is corporeal from conception, with the biologically unique identity of a human being. A subject, that is a person who exists in a new organism, cannot just emerge from biological physicality at some point. „In the human embryo, there are biological and personal identities that are different, but they are inseparably connected, and their separation would create two identities, so the early one would be biological, and the later personal, which is why the subject would have two identities in the later stage, and one in the first.“⁵¹ Furthermore, if a person is biology and its main element is some biological criterion such as consciousness, in accordance with Locke's definition, then it exists in the beginning because the new genome has everything biologically necessary for the development of consciousness. If it is not biology, but we reduce it to ontology, which cannot be proven empirically either in the beginning or later, there is no reason why it exists later and not in the beginning. If a person is only body or only spirit, we return to Descartes' dualism. If only the spirit, what is the body of the human embryo and fetus?

On the other hand, there are theoreticians who separate a human being from a person. Tolley, Singer, Boonin, Engelhardt, Donceel, Mori, Falmigni and Anne Warren are some of the theoreticians who consider the embryo to be a human being, but deny that it is a person. Many authors condition the question of whether a person is the same as a human being with the consequences arising from one or another understanding (separation or equating a human being and a person) or they start from the position that equating a human being and a person represents a religious approach. Tolley calls the equating of person and human being „philosophically unfortunate“ because it „provides cover for anti-abortion positions.“⁵² Similarly, McCullough and Chervenak problematize the biological-ontological approach to the

Rights. *The American Journal of Bioethics*, vol. 8. no. 7. 2008. 44 - 46. The same is claimed by Eberl, who, in accordance with the theory of natural law, relates the moral status of beings with inherent values, so the status of the human embryo as a being with a rational nature justifies its moral status as a person, and then the right to life. Ivan MARKEŠIĆ - Ingrid MARTON - Josip MARKEŠIĆ: The human embryo and its right to live: a contribution to the sociology of death. *Periodicum biologorum*, vol. 3. no. 3. 2009. 373 - 380. Anton Liest bases the moral status of the human embryo from conception on the arguments of species, identity, potential, interest.

⁴⁸ Cfr. Marko PETRAK: Ex nihilo nihil fit. *Informator*, no. 432. 2017. 3.

⁴⁹ MATULIĆ (1997) op. cit. 88 - 97. Erich Blechschmidt claims that man does not develop *towards* man, but *as* man. Cuyas claims that man's prenatal development does not know dialectical leaps.

⁵⁰ Tonči MATULIĆ: *Oblikovanje identiteta bioetičke discipline*. Zagreb. Glas Koncila, 1st edition, 2006. 20 - 21.

⁵¹ MATULIĆ (1997) op. cit. 39.

⁵² Michael TOOLEY: Abortion and Infanticide. *Philosophy and Public Affairs*, vol. 2. no. 1. 1972. 42.

status of the human embryo and fetus because „it is used by opponents of abortion to confirm its status as a subject, and thus his inalienable fundamental rights“.⁵³ According to Hicks, everyone should „individually determine who a person is, taking into account their own interests and beliefs, which is why a person would not be a matter of definition but of personal decision because there is no objective morality that determines an absolute principle and values that define a position about our perspective of a person, and then about the human embryo.“⁵⁴ Olivia Little claims that the point of view about the human embryo and fetus as a person from conception is based on metaphysics, so it is necessary to turn to the Enlightenment and the dominant criterion of rationality for the purpose of determining status.⁵⁵ Slabbert, on the other hand, claims that „reasons in favor of the moral status of the embryo as a subject are based on animation, that is, religion, which can potentially threaten secularity and pluralism.“⁵⁶ The aforementioned criticisms do not take into account the fact that religious reflection belongs to the realm of dogmatics, from which there is no automatic transition to moral truths, while moral reason represents the eminently practical dimension of man, so it is used to assert moral status rationally, with the arguments of logic.⁵⁷ The rational basis for the status of the human embryo as a subject, that is, a person, can be found in biological evidence, but also in the absence of empirical evidence that it is not a person, a subject. Metaphysics is part of philosophy, not religion. Any equating of the metaphysical dimension with religion in a pluralistic society leads to its denial. In this way, one dimension of man, discussed since the ancient Greeks, is neglected. By analogy, one could argue that the question of whether persons are slaves, natives, Jews and other historically disenfranchised groups is a religious question. The argument according to which it is wrong to kill an embryo and a fetus, like any other adult being, does not rely on theological and religious premises.⁵⁸ Although the issue of the personhood of the human embryo and fetus is problematized in such a way that the integrative approach, which also includes the metaphysical, is identified with the Christian one, the inclusion of the metaphysical dimension in the „substrate of the person“ is also the point of view of many non-Catholics.⁵⁹ Writers such as Noonan, O. J. Brown, Schaeffer, Koop, Moraczewski, and Lee regard the human embryo and fetus as a person from conception, staying outside traditional theological understanding and basing their views on biological and philosophical arguments. Proponents of the view that a human embryo and fetus is not a person should prove that it is not, using the same methodology they require to prove that it is. Since the division of the human being from the person is based on the negation of metaphysics, it is a reductive, empirical approach to the analysis of the personality of the human embryo and fetus. An embryo cannot exist other than as a person, therefore the definition does not depend on human decision because it is not something that man invents, but what man discovers and that requires our ascertainment and acceptance.⁶⁰

⁵³ Laurence B. McCULLOUGH - Frank A. CHERVENAK: Critical Analysis of the Concept and Discourse of ‘Unborn Child’. *The American Journal of Bioethics*, vol. 8. no 7. 2008. 35.

⁵⁴ Stephen C. HICKS: The Right to Life in Law: The Embryo and Fetus, the Body and Soul, the Family and Society. *Florida State University Law Review*, vol. 19. no. 3. 1992. 844.

⁵⁵ Cfr. OLIVIA LITTLE: Abortion and the Margins of Personhood. *Rutgers Law Journal*, vol. 39. no. 2. 2008. 338.

⁵⁶ Melodie NOTHLING SLABBERT: The Fetus and Embryo: Legal Status and Personhood. *South African Journal of Bioethics and Law*, vol. 1. 1997. 241 - 242.

⁵⁷ Cfr. Tonči MATULIĆ: *Život u ljudskim rukama*. Zagreb. Glas Koncila, 1st edition, 2006. 243.

⁵⁸ See also: LEE: op. cit. 60.

⁵⁹ See also: KACZOR: op. cit. 15.

⁶⁰ MATULIĆ (2006) op. cit. 214.

6. Conclusion

It is medically indisputable that the human embryo is a member of the species *homo sapiens*, which means that it is also human. This means that the human embryo has the right to protection based on its own intrinsic value and independently of others. An embryo and fetus is a human being that should be treated equally in humanity, but differences exist in relation to a child, as well as an adult, exclusively in the stage of development. It has not developed the typical capacities of an adult and the rights and obligations associated with these capacities. Therefore, the human embryo and fetus should be accorded status in accordance with the specific legal and natural situation in which it is located, as we do in all other situations in which human beings are legal subjects, although not with the full scope of rights and obligations.

Not a single „deficiency“ of a human being is sufficient reason to affect the recognition of a human being as a person and consequently a legal subject. The recognition of the human embryo and fetus as a legal subject means that as a member of the human community it is considered a moral subject, which primarily implies treating every human being with respect, as well as the prohibition of killing. Any other treatment of human embryo would mean venturing into dangerous and inhumane waters.