

Some Comments on Human Rights and Bioethics

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Abstract

The article examines the new generation of human rights related to bioethics. Some basic documents of the UN, UNESCO, Council of Europe and the European Union are mentioned. Undoubtedly, the emphasis is laid on the regional acts. Some emblematic decisions of Strasbourg Court have been analysed with strong connection to the bioethics and the beginning of the right to life. The article also takes into account 2011 amendments to the Art.II of the Hungarian constitution.

In spite of the great number of convicting decisions of the European Court of Human Rights against Bulgaria in the previous two decades, our country is still in the introductory phase of development of mechanisms and capabilities for implementation of the decisions. Unfortunately, Bulgaria is among the states which could be expected to draw the attention of the Court in Strasbourg even after the reform of the European Court of Human Rights in accordance to Protocol No. 14¹. It is necessary that measures be undertaken, since the problems connected to human rights in the 21st century, after the entry into force of both of the Lisbon Treaty and Protocol No. 14 to Convention on Human Rights and Fundamental Freedoms, will continue to develop in a completely new environment. Regretfully, most of Bulgarian Strasbourg cases are beyond the legal debate about human rights and Bioethics.

Human Rights and Bioethics

The development of science and technology, especially in the second half of the 20th century, is one of the major achievements of human society. It has both positive and negative sides. On one hand, the inventions in the scope of chemistry, biology, and genetics, contribute to the increase of the quality of life of individuals, but on the other hand they create a possibility for a person to discontinue their life or the lives of other persons (euthanasia, abortion), to use human embryos as a source of stem cells. The question is posed not only about the recognition of same-sex marriage, but also about child adoption by same-sex parents. Will the research of the human genome lead to genetic discrimination, at which, on the basis of “bad” genes, individuals might be refused employment or bank credits? The above-stated attests

¹ On a conference, held in Interlaken in 2010, it has been reported that, in 2008, 86% of the deeds of the Court relate to only twelve states: Turkey, the Russian Federation, Romania, Poland, Ukraine, Italy, Greece, Bulgaria, Hungary, Great Britain, France, and Moldova.

that a tendency might stand out towards the differentiation of rights related to the human body integrity, as well as change of the functional possibilities of the organism. This category of rights is referred to as “*somatic rights*” (derived from the Greek word “*soma*” meaning body). Authors relate to this category euthanasia, possibilities related to human reproductive capabilities (in vitro fertilization, abortion, sterilization, and contraception), change of gender, the right of cloning the entire organism or individual organs, etc. In international legislation, these problems are known as “*protection of human rights in the field of bioethics*”. As some researchers point out (Крыцк, 2000), in these cases the individual wishes not only a definite alteration (in most cases this being a radical alteration) of their birth body entirety, but in this connection, the individual had certain claims to society.

The term “*bioethics*” appears for the first time in scientific literature in 1970, in an article of Van Rensselaer Potter, an American oncologist working in the University of Wisconsin-Medison, entitled “Bioethics, the Science of Survival” (Potter, 1970). One year later, his book was printed (“Bioethics: A Bridge to Future”), in which he defines the term “bioethics” as “a new discipline that combines knowledge gained from biology with the knowledge of human value systems”. Its task is to determine and contribute to the creation of an optimally changing environment, as well as an optimal adaptability of humans to it, so that the civilized world we live in may be preserved and elaborated. In the name of this task, Potter proposes a “novel science of survival” that represents a novel bio-cybernetic approach to human self-evaluation that aims at evolutionary, physiological and cultural adaptation. The notion of “bioethics” finds its place in the media by means of an article published in the Time magazine from April 19, 1971, entitled “Man into Superman: The Promise and Peril of the New Genetics” where there are references to the books of Potter.

Thus, bioethics is determined as a novel multi-discipline field of science that combines the biological knowledge and the knowledge of the system of human values, which researches the consequences of the application of technical progress in biomedicine. In this sense, bioethics seems capable of combining and comparing legislation and moral, to outline the limits before the development of the so-called somatic rights.

Different documents are adopted in international legislation that settles separate aspects of the new generation of human rights within international organizations such as the UN, UNESCO and the Council of Europe. In the frame of UN the following have been adopted: ECOSOC Resolution 2001/39 Genetic Privacy and Non-Discrimination from July 26, 2004, and Commission on Human Rights Resolution 2003/69 Human Rights and Bioethics from April 25, 2003. It has to be

highlighted, therefore, that after the year 2001, within the Sixth Legal Committee of the General Assembly of the UN, a project has actively been discussed regarding an international convention of the UN against human cloning. Due to a lack of consensus among the states, in 2005, not a convention but a Declaration of the UN has been adopted about human cloning (by the UN General Assembly Resolution 59/280 from August 8, 2005). The major debate has mainly been related to whether all types of human cells cloning must be forbidden, including cloning for therapeutic purposes, or whether only cloning with a view to human reproduction must be prohibited. European states, Bulgaria being among them, propound the position of partial prohibition of cloning and allowing cloning for therapeutic purposes. In this sense is also the regulation of Art. 3, par. 2 of the Charter of Fundamental Rights in the European Union², which, in accordance to Art. 6, par. 1 of the Lisbon Treaty, in its TEU part, assumes the same legislative force that is assumed by primary European Union legislation.

The program of UNESCO in bioethics was established in 1993, and after 2002 it has become one of the priority in the activity of the organization. Within the program, there are two consulting units, one at an expert level and one at an intergovernmental level – International Bioethics Committee, consisting of 36 independent experts who observe the conduction of scientific research for respect of human dignity and human rights, as well as an Intergovernmental Bioethics Committee, consisting of representatives of the 36 Member States of UNESCO, which convenes at least two times per annum in order to analyze the recommendations of the International Bioethics Committee. An important practical outcome of the implementation of the program of UNESCO are the adoption of a Universal Declaration on the Human Genome and Human Rights at the 29th session of the General Conference of UNESCO in 1997, the adoption of the International Declaration on Human Genetic Data in 2003, as well as the adoption of the

² Art.3 of the Charter is entitled „Right to the Integrity of the person” and contemplates the following:

1. Everyone has the right to respect for his or her physical and mental integrity.
2. In the fields of medicine and biology, the following must to be particularly respected:
 - a) the free and informed consent of the person concerned, according to the procedures laid down by law;
 - b) the prohibition of eugenic practices, in particular those aiming at the selection of persons;
 - c) the prohibition on making the human body and its parts as such a source of financial gain;
 - d) the prohibition of reproductive cloning of human beings.

Universal Declaration on Bioethics and Human Rights. The latter document adopted by Resolution No. 36 of the General Conference of UNESCO during the 33rd session of the Conference, represents a novel approach in matters such as the access to quality medical service, the inviolability and confidentiality of personal life, social responsibility and mutual use of welfare.

In 2011, within UNESCO, a special collection of cases on the matters of human dignity and human rights has been published (UNESCO, 2011). The cases, which have been proposed as a teaching material, are based on situations from real life, as well as concrete cases that have been reviewed by different judicial instances in different countries. Some of them raise a specific interest not only due to the fact that they are comparatively new, but also due to the fact that they are based on concrete cases in the new Member States of the European Union³.

Within the Council of Europe, over 40 recommendations have been approved from the Committee of Ministers and the Parliamentary Assembly under different matters connected to bioethics. The only document which has legal binding force in

³ *Child Medical Treatment* – decided 20th August 2004 – III. US 459/03, Czech Republic. The facts on the case are the following: D is six years old. He has been diagnosed with malignant tumor which in principle leads to a lethal outcome. The existing methods of treatment give hope for healing but they presuppose blood derivatives. Both parents of D have been informed of these circumstances. Although they are members of the Jehovah Witnesses, they are aware of the seriousness of their son's illness and they give their consent for treatment. Three months later parents are informed that one more cycle of chemotherapy was necessary for treatment of the disease. Several days later the condition of the juvenile aggravates. He is admitted to the University Hospital where a decision has been made that additional blood transfusion was necessary. This time, his parents make a statement in which they say that they are aware of the seriousness of the disease but in spite of that they could not give their consent if the treatment of the juvenile requires additional blood transfusions. On the basis of their religious belief, as well as health reasons, they are prejudiced as regards the risks of blood transfusion, and they insist that their juvenile child is treated only by means of painkillers. The case is sent to the Constitutional Court of the country. The Court confirmed the resolution of first instance. By this resolution, the conclusion is reached that by refusing additional treatment by chemotherapy, the parents of the juvenile child take away his only hope for healing, thus seriously threatening his health and life. Thus, they violate their parental duties. The right of respect of private and family life is not unlimited, since the respective authorities may interfere in practicing this right, although such intervention may be only in accordance to legislation, and is necessary in a democratic society to the interest of health protection and the protection of other individual's freedom.

the scope of international legislation, is the Convention for the Protection of Human Rights and Dignity of Human Being, in connection to the implementation of the achievements of biology and medicine (known as the Convention on Human Rights and Biomedicine), prepared in Oviedo on April 4, 1997, in force from December 1, 1999. As of the present moment, the convention has been ratified by 34 states. Three protocols accompany the Convention: Additional Protocol which prohibits human cloning and which has been signed in Paris on January 12, 1998, in force as from March 1, 2001; Additional Protocol regarding the transplantation of human organs and tissues, signed in Strasburg on January 24, 2002, in force as from May 1, 2006; Additional Protocol in the field of biomedical research, signed in Strasburg on January 25, 2005, in force as from September 1, 2007.

The Convention on Human Rights and Biomedicine recognizes the right of human dignity in the conditions of the scientific-technical progress. The Convention establishes the general rule that intervention in the field of health may be realized only after the respective individual has presented their voluntary and informed consent for it (emergency situation are presented as an exception from the general rule). The individual has the right to receive the relevant information for the purpose and nature of the intervention, and also the consequences and risks pertaining thereto. The individual has the right, in each moment of time, to withdraw their consent. Articles 13, 14, and 18 of the Convention establish the right of genetic identity. Article 13 states that an intervention that aims at altering human genome may be undertaken only for prophylactic, diagnostic or therapeutic purposes, and only provided that it is aimed at the introduction of alterations in the genome of heredity. Article 14 prohibits the use of medical approaches for the provision of aid for continuation of the genus with the aim of selection of a gender for the child, except for the cases in which this is done with a view to avoiding a severe hereditary disease connected to gender. Article 18 provides the due protection of embryos by prohibiting the creation of human embryos with the aim of research. In accordance to Article 1 of the Additional Protocol from 1998 regarding the prohibition of human being cloning, every intervention aimed at the creation of a human being who is genetically identical to another human being – alive or deceased – is prohibited. For control of the implementation of the obligations of the Member States under the Convention, a Steering Committee on Bioethics has been created.

Case Law of the European Court of Human Rights

Often, in their decisions, the European Court of Human Rights refers to aspects which are connected to bioethics and human rights, even when the Court pronounces under cases related to basic human rights, which is exactly what the

right of life is. One of the emblematic cases of the Court in Strasburg is *Vo v. France*⁴. The facts on the case are the following: two patients are admitted to the gynecologic ward of a hospital, and the two of them bear identical surnames. Mixing their names, the physician performs actions, as regards the appellant who was admitted to the hospital for monitoring of the progress of pregnancy, which actions have been aimed at the removal of contraceptive spiral. This led to the necessity of performing an abortion under medical indications. The Cassation Court in France refuses to qualify the actions of the physician as manslaughter irrespective of the fact that, due to negligence or gross negligence, these actions have brought to the death, in the womb of the mother, of a human embryo which, even though it has not been viable, has been close to turning to a viable embryo. The Court also refuses to acknowledge the fetus in the mother's womb as a human being that may use the protection of criminal law. The appellant states that the situation, under which protection of the fetus lacks from the national legislation of France, is inadmissible and represents a violation of Article 2 of the European Convention of Human Rights. The Court in Strasburg, however, rejects such an extensive interpretation of the right to life as regards the fetus. The decision on the case of *Vo v. France* has been adopted by 14 votes in favour and 3 votes against of the judges: Mr. Ress from Germany, Mrs. Mularoni from San Marino, and Mrs. Strazhnichka from Slovakia, which evidences for the complexity of the matter (Pichon, 2006).

The case of *Vo v. France* is related to an important dimension of the right of life – which moment life begins at and which moment life is to be protected from. The problem is that this matter has not been specified in the international legal acts. The only exception is the American Convention on Human Rights from 1969, Article 4.1 of which states that each individual has the right of respect of their life. This right is protected by law, as a rule, from the moment of conception. Unlike the American Convention, Article 2 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) only states that the right to life of each individual shall be protected by law. Similar is the approach adopted in the African Charter on Human and Peoples Rights from 1981. Under the case of *Vo v. France*, first mention is made of the matter for the possibility of use, by a human fetus, of the rights granted by ECHR, but the majority of judges adopt a negative approach.

In fact, as the European Court of Human Rights has had the opportunity to state in one of their earlier cases of *McCann v. the United Kingdom*⁵: “Article 2 is one of the most important regulations of the Convention which, in times of peace, does not permit derogation in accordance to Article 15. Together with Article 13

⁴ *Vo v. France*, decision of the European Court of Human Rights from July 8, 2004.

⁵ Decision from September 5, 1989, par.147.

(prohibition of torture), it supports some of the basic values of democratic society...” Since the Convention does not present a definition of human life, in the absence of European legal and scientific consensus regarding the limitations of human life, the Court also refrains from making specifications. “... The matter of when life starts is connected to limits of assessment which the Court in principle considers to be exercised by the states; nevertheless, evolutionary interpretation of the Convention must be sought in the light of contemporary conditions...”⁶ The Court are convinced that it is neither desirable, nor possible for the Court to present an answer to the question of whether an unborn child is an individual in the sense of Article 2 of the Convention (i.e. it is covered by the notion of “everyone’s right to life”) ⁷. Instead of proposing a unified standard, the Court preferred to evaluate matters related to the beginning of human life separately on a case-by-case basis, leaving a significant level of freedom to the Member States under the Convention. The Court refrains from taking a position also on the relation “pregnant woman-fetus” in connection to the problem of abortions, by underlining, on the case of *X v. the United Kingdom*⁸, that the extension of Article 2 of the Convention in respect of unborn child or the fetus would mean giving it a higher value than the one of the life of a pregnant woman (Korff, 2006). In the decision on the case of *Vo v. France*, the Court repeats that in such cases an evaluation is necessary of “different, sometimes contradictory rights and freedoms, claimed by the mother and father toward each other or toward the unborn child” ⁹. In a special opinion of Judge Mularoni supported by Judge Strazhnichka, the thesis is adopted that the fetus has a right of life in the light of contemporary conditions and evolutionary interpretation of the Convention. According to Judge Mularoni, the interpretation of Article 2 has to be developed in a manner that would allow for reception of serious dangers threatening human life, such as genetic manipulations, as well as the risk that scientific research is used for purposes that undermine human dignity and identity¹⁰.

According to Judge Mularoni, new threats against human life require also a new legal concept for its protection, and it is possible that the debate about the problems of bioethics and contemporary medicine requires interpretation of Article 2, including, at certain circumstances, the right of life of the fetus.

The European Court of Human Rights has had the possibility to pronounce again under the legal relations that arise on the occasion of assisted reproduction.

⁶ *Vo v. France*, decision from July 8, 2004, Par. 13.

⁷ *Vo v. France*, decision from July 8, 2004, Par. 82 and 85.

⁸ Appl. No.8416/79, admissibility decision of 13 May 1980.

⁹ *Vo v. France*, decision from July 8, 2004, Par. 80.

¹⁰ See Special Opinion of Judge Mularoni, Par. 30.

The case of *Evans v. United Kingdom*¹¹ poses a question that has not been raised until then. Until that moment, the matter of the right of life of the embryo/fetus has always been reviewed within a normal pregnancy. While at the *Evans* case, the observance of Article 2 of ECHR has been reviewed in a situation where the embryo was located out of the body of the appellant, which presupposes an assessment of more complex legal relations and interests of the parties involved¹².

In all cases, the creation and preservation of embryos is a problem which poses a number of ethical and juridical questions whose resolution requires deliberate and balanced approach.

¹¹ *Evans v. The United Kingdom*, № 6339/05

¹² The appellant – Natalie Evans – together with her partner Mr. Johnson, has sought treatment of infertility. About three months after the beginning of treatment, the couple has been informed that Ms. Evans has primary tumor formations in the ovaries which necessitated their surgical removal. The couple has been offered the opportunity for several egg cells to be separated before the surgery for use in in vitro fertilization. The procedure has been coordinated with the couple and they have been informed that the consent of each of them may be withdrawn at all times before the implantation of the embryo. Mr. Johnson has ensured Ms. Evans that he wished to be a father of their children and that he agreed that the egg cells be fertilized immediately with his spermatozooids. (Ms. Evans has been informed that the clinic does not have the possibility of freezing only egg cells; moreover, this method has less chance of success). One month later, six embryos have been successfully created and frozen. Ms. Evans has undergone surgery for removal of the ovaries, and she has been advised to wait for two years before making attempts for implantation of some of the embryos in the uterus.

In the meantime however, the relations of the appellant with Mr. Johnson fell down, and he notified the clinic in writing that he wished the created and frozen embryos to be destroyed. On their part, the management of the clinic notified Ms. Evans that the clinic is obliged to execute the will of Mr. Johnson that the embryos be destroyed. Ms. Evans ceased the British High Court with a request that the Court obligated Mr. Johnson to restore his consent for preservation and use of the embryos. She also states that the embryos are under the protection of Article 2 of the ECHR, and, at the same time, her rights have been violated in the sense of Article 8 and Article 14 of the Convention. The Court issued a temporary order for the preservation of the embryos until finalization of the case, but overrules the claim of Ms. Evans. Her complaint before second instance in Great Britain has also been overruled, after which she turned to the European Court of Human Rights. Initially, on March 7, 2006, the complaint was rejected by a seven-member staff of ECHR by five to two votes, after which the Great Chamber pronounced. In the decision from April 10, 2007, the Great Chamber of the European Court of Human Rights in Strasburg announced their interpretation of Article 2, Article 8 and Article 14 of ECHR.

A new stage in the discussion regarding the right of life has most surprisingly been formed in connection to the adoption of the new Hungarian Constitution and its entry into force on January 1, 2012. Article II of the new Constitution of Hungary states the following: “Human dignity is inviolable. Everyone has the right of life and human dignity; embryonic and foetal life shall be subject of protection from the moment of conception”. In its opinion, however, the European Commission on Democracy through Law (Opinion, 2011), known as the Venice Commission, stated that the obligation for protection of the embryo/fetus may, under certain circumstances, get in conflict with Article 8 of ECHR. Legislation concerning termination of pregnancy, concerns a field of personal life since the pregnant woman is intimately connected to the developing fetus. ECtHR which always searches for the balance between personal and public interest, in case of the lack of standards in a certain area, leaves the answer to the question “When does human life start?” to the judgment of the states with a view to the specific circumstances and needs of the states’ own population. At the same time, the Venice Commission refers to the preamble of the UN Convention on the rights of the child (adopted by the UN General Assembly on November 20, 1989), where it is stated that “the child, taking into consideration his/her physical and mental immaturity, needs special protection and care, including legal protection, both before and after his/her birth.” However, the cited text can hardly be reviewed as recognition of the absolute right of life of the fetus. If the interpretation of Article 2 is extended to the fetus, taking into consideration that the right to life falls into the category of absolute rights, abortion would have to be prohibited, even in the cases when continuation of the pregnancy seriously endangers the life of the pregnant woman. In accordance to the interpretation of the Court on the case of *X v. the United Kingdom*, this would mean that the life of the fetus will be of higher value as compared to the life of the pregnant woman. The Venice Commission underlines that the judgment of the different, sometimes contradictory rights and freedoms of the mother and the fetus is made by the states. In case such a judgment has been done and there is a balance of interests at hand, the extension to the scope of Article II from the Hungarian Constitution could be in correspondence with the requirements of ECHR. At the present moment, it is not clear whether the Hungarian legislator shall modify the regulation connected to abortions in the future, but there is concern that this constitutional regulation may be used for limitation or even prohibition of abortions. Due to the above stated arguments, the Venice Commission recommend that the Hungarian authorities are to pay attention to the legal practice of the Court in Strasburg, including the practice under one of last cases in this field, *A, B and C v. Ireland* (decision of the European Court of Human Rights from December 16, 2010).

As a conclusion, it may be noted that in the beginning of the 21st century a tendency is present toward the differentiation of a new generation of human rights, but at the same time the international society in the face of the UN and the Council of Europe holds on to the approach that certain limitations must be placed. It is a fact that some states changed their legislative regulations to the benefit of allowing same-sex marriages, human cloning, allowing euthanasia, legalization of different manipulations with human embryos. The specifics of the problems connected to human rights and bioethics consists in the fact that the encouragement and further development of certain areas of science would have irreversible and hard-to-predict consequences for humanity.

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