

VERA LÚCIA RAPOSO,  
CATARINA PRATA & ISABEL ORTIGÃO DE OLIVEIRA  
(University of Coimbra, Portugal)

## Human Rights in Today's Ethics: Human Rights of the Unborn (Embryos and Foetus)?

The consequences of recent advances in medical science and biologic technology are changing our understanding of personhood, human life and human being. The unborn, that is, the embryo and the foetus –until the end of the second month of pregnancy the unborn child is referred to as embryo and after the beginning of the third month as foetus– are in the centre of all this discussion.

It's almost impossible to separate our acknowledgments in the scientific field from our humanistic, moral and religious beliefs, since «[w]hat can be done turns into what will be done before there is time to ask what should be done». <sup>1</sup>

### I. THE BIOLOGICAL PROCESS

Human beings begin with two single cells: the spermatozoa and the egg, that is, the male and female gametes. These two cells join together during the fertilization process, at the end of which they form a single cell, called zygote, which has its complete set of chromosomes, forming a unique genetic patrimony. Immediately after the zygote begins to divide in two, then four, afterwards eight and soon it will arrive to a group of cells, by means of a mechanism called mitosis, until it gives origin to a group of cells similar in appearance to grapes, named morula. After approximately three days of cell division we assist the formation of an inner mass of cells and an outer mass, which will become the placenta. Until the fifth and sixth days the hollow ball of cells (called a blastocyst) contains cells which are totipotent, that is, wholly undifferentiated and capable of becoming any of the specialized cells in the human body. Each of these cells is equivalent to the others so, if the cells were separated, they could develop independently. By the end of day seven we will have a blastocyte, and this qualification lasts until nidation (also

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<sup>1</sup> Robert L. Stenger: «Embryos, Foetuses, and Babies: Treated as Persons and Treated with Respect», *Journal of Health & Biomedical Law* No. 2 (2006), p. 34.

called implantation) is complete, in other words, until the embryo is attached to the mother uterus in order to follow his development. That happens by the ninth or tenth day, when the blastocyst moves to the mother's uterus.

During this first days, and until the 2nd week, some authors prefer to use the term «pre-embryo» than embryo, arguing that before nidation we have an entity that is not an embryo yet, namely because it lacks two fundamental characteristics: unity and unicity, notes that would transform it in an individual. Because of the absence of these characteristics, and because of the reproductive mechanism of the human specie in itself, the existence of this creature is very fragile and uncertain, and in fact is not unusual that pregnancies fail prior to nidation without the women acknowledgment that they were even pregnant. Attending to the flimsy subsistence of these creatures, some laws provide to the pre-embryo a legal treatment that is different, and more unprotected, than the one established to the embryo.

## 2. EMBRYOS, HUMAN DIGNITY AND HUMAN RIGHTS

The main discussion should not be about when human life begins –even because is almost consensual, at least in biological terms, that it begins when fecundation is completed–<sup>2</sup> but about when we should recognize to that human life the dignity attributed to each human person and therefore, grant it human rights that should be respected.<sup>3</sup>

There is absolutely no consensus about the ethical and juridical value of an embryo.<sup>4</sup> In one of the sides of this dispute we have authors sustaining that the status of the embryo should be no different from that of any other human tissue, in other words, mere property, a possible object of any kind of use, only dependent of the owner's consent. Peter Singer is a good example of this position: he holds that, in order to recognize rights and some kind of dignity to a creature,

<sup>2</sup> Though some authors do believe that there is no scientific answer to this problem (see Daniel Callahan: *Abortion: Law, Choice and Morality*, Macmillan, New York, NY, 1970, p. 352, 354).

<sup>3</sup> Robert L. Stenger: «Embryos, Foetuses, and Babies...», cit., p. 41

<sup>4</sup> About this controversy, Pedro Femenia López: *Status jurídico del embrión humano, con especial consideración al concebido in vitro*, McGrawHill, Madrid, 1999, p. 65; Teresa Iglesias: *IFV and Justice*, The Linacre Centre for Health Care Ethics, London, 1992, p. 7 ss; Helena Pereira de Melo: «O Embrião e o Direito» in Rui Nunes & Helena Pereira de Melo (coords.): *A Ética e o Direito no Início da Vida Humana*, Serviço de Bioética e Ética Médica da Faculdade de Medicina da Universidade do Porto, Gráfica de Coimbra, Coimbra, 2001, p. 65; J. N. Missa: «Le Statut de L'Embryon Humain In Vitro: Terminologie et Approche Philosophique», in Yvon Englert & Alfons Van Orshoven (eds.): *L'Embryon Humain in Vitro*, De Boeck Université, Paris-Brussels, 2000, p. 17 ss.; Carlos Alberto da Mota Pinto: *Teoria Geral do Direito Civil*, 4.º ed. (António Pinto Monteiro, Paulo da Mota Pinto eds.), Coimbra Editora, Coimbra, 2005, p. 342, Luís Zarraluqui: «La Naturaleza Jurídica de los Elementos Genéticos», *Revista General de Derecho* No. 501 (1986), p. 2463; G. de Wert: «Recherches sur l'Émbryon In Vitro : Considérations Étiques», in Yvon Englert & Alfons Van Orshoven (eds.): *L'Embryon Humain in Vitro*, cit., p. 78.

we should demand self-consciousness. This implies that the life of senile people, people in stages of coma, embryos, and even little infants, is not worth of real value, since each one of them lacks an appropriate degree of brain functions.<sup>5</sup> Evidently, in his line of argumentation, abortion should not be prohibited, since at the time it is usually performed embryos have not yet achieved any consciousness.

<sup>6</sup> Tristram Engelhardt also shares this premises, refusing the qualification of «person» to embryos, as well as to newborns, and even to mentally handicapped and persons in coma.<sup>7</sup>

On the opposite site, other authors (mainly catholic ones) consider the embryo, not only a human life, but also a human person, just like the already born. This perspective forbids any kind of use of the embryo, which is considered as an instrumentalization of the human person, so censured by the Kantian philosophy. Therefore, the embryo ought to be granted the entire list of human rights, just as a human born person, and its destruction should be qualified as a homicide.<sup>8</sup> Similar to this position is the one that, although denying the embryo the qualification of person, reaches that same result by assuring it an absolute protection, in the name of the ontological solidarity between human beings.<sup>9</sup>

And finally we have all the remaining positions in between. The common ground to all of them is the denial to the embryo of the respect accorded to actual persons but, nonetheless, the proposal that it deserves more respect than the one accorded to human tissues, for the reason that it has the potential to become a person. To express this idea the concept of «potential person» was coined.<sup>10</sup>

Ronald Dworkin's point of view is similar to this intermediate position. He believes that neither the embryo nor the foetus have rights and interest of their own in being kept alive. However, Dworkin believes that developing human life is

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<sup>5</sup> Peter Singer, D. Wells: *The Reproduction Revolution*, Oxford University Press, Oxford, 1984, p. 98: «We suggest that the embryo be regarded as a thing rather than a person, until the point at which there is some brain function».

<sup>6</sup> «The Revolutionary Ethics of Embryo Research», Peter Singer, December 2006, available on-line at [www.utilitarian.net/singer/by/200512-.htm](http://www.utilitarian.net/singer/by/200512-.htm) (retrieved 11.10.2008).

<sup>7</sup> Tristram H. Engelhardt: *The Foundations of Bioethics*, Oxford University Press, 2.º ed., New York, NY–Oxford, 1976.

<sup>8</sup> Diogo Leite de Campos «O Estatuto Jurídico do Nascituro», *Separata da Revista da Ordem dos Advogados* Ano 56, III (1996), p. 881, 885; Sérgio Ferraz: *Manipulações Biológicas e Princípios Constitucionais: Uma Introdução*, Sérgio António Fabros Editor, Porto Alegre, 1991, p. 47; João Carlos Loureiro: «Os Genes do nosso (Des)Contentamento (Dignidade Humana e Genética: Notas de um Roteiro)», *Boletim da Faculdade de Direito da Universidade de Coimbra* No. LXXVII (2001), p. 193, Daniel Serrão: «A Defesa da Vida: Um Direito da Pessoa, Um Dever da Sociedade», *Acção Médica* No. Julho/Setembro, 1999, p. 38/39.

<sup>9</sup> Jean-François Malherbe: «The Personal Status of the Human Embryo: A Philosophical Essay on Eugenic Abortion», in *Human Life: Its Beginning and Development*, L'Harmattan, Paris, p. 106.

<sup>10</sup> John A. Robertson: «Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction», *South California Law Review* No. 59 (1986), p. 971/976 (although this author assumes a very liberal position regarding the scientific use of embryos and the employment of scientific techniques, ideas that he expresses in his famous *Children of Choice: Freedom and the New Reproductive Technologies*, Princeton University Press, Princeton, NJ, 1994.

sacred even before it conquers the status of personhood. That is to say, while rejecting a subjectivist approach, he considers the objective value of human life from its very beginning, even before the acquisition of rights and interests, even though he is an advocate of abortion rights.<sup>11</sup>

### 3. PERSONHOOD AND HUMAN RIGHTS

Personhood is traditionally the cornerstone of human rights doctrine, for the reason that the possession of rights is conditioned by the previous legal qualification as person. Therefore, our first problem will be the characterization of juridical personhood: <sup>12</sup> is the «person» a broader category than the «human being» or are both terms just synonyms?

Even in Philosophy the term «person» has had various meanings. Descartes defined the person as the result of the union between body and soul (*res extensa* and *res cogitans*). The first element distinguishes a person from a machine, which lacks the soul, while the second element separated persons from divinities, where the soul is missing. Very similar is the thesis of John Locke, who defines the person as an intelligent and consciousness being. Opposite to this perspective there are the ones that adopt a naturalistic definition of person, as a simple biological organism, though with some particular psychological characteristics.<sup>13</sup> Hence, even among the philosophical doctrines we can find no consensus about the characterization of person.

Returning now to the juridical point of view, it's crucial to distinguish between «human beings» and «persons», and also both of them from the concept of «juridical personality».<sup>14</sup>

The law corroborates this distinction. In fact, Civil law usually restricts juridical personality to the ones already born. In the Portuguese case, the law reserves the classification of a «person» to creatures born alive and only after the

<sup>11</sup> Ronald Dworkin: *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*, Alfred A. Knopf, New York, NY, 1993, p. 13 ss.

<sup>12</sup> Some authors believe that the concept of «person» in the human rights doctrine obscures more than it clarifies, and in this perspective it ends up being unuseful, and even problematic, for the human rights theory (Jens David Ohlin: «Is the Concept of the Person Necessary for Human Rights?», *Columbia Law Review* No 105, pp. 211, 212).

<sup>13</sup> Jens David Ohlin: «Is the Concept of the Person Necessary for Human Rights?», cit., pp. 213, 214.

<sup>14</sup> Defending the coincidence between the concepts of «human being» and «person», João Carlos Loureiro: «Os Genes do nosso (Des)contentamento (Dignidade Humana e Genética: Notas de um Roteiro)», *Boletim da Faculdade de Direito da Universidade de Coimbra*, Vol. LXXVII (2001), p. 193; Diogo Leite de Campos: «O Estatuto Jurídico do Nascituro», *Separata da Revista da Ordem dos Advogados*, Ano 56, III (1996), p. 885.

However, defending our same position, Carlos Alberto da Mota Pinto: *Teoria Geral do Direito Civil*, 4.º ed. (António Pinto Monteiro, Paulo da Mota Pinto eds.), Coimbra Editora, Coimbra, 1996, p. 98

complete birth, that is, the cut of the umbilical cord (art. 66.I of the Portuguese Civil Code). Some other civil laws are even more demanding, requiring human form and a period of survival outside the mother's body, as in arts. 29 and 30 of the Spanish Civil Code. Nonetheless, both these juridical systems end up recognizing some juridical status to the embryo, at least for patrimonial purposes. On the opposite, with can also find laws that report juridical personhood to the moment of conception (art. 70 of the Argentinian Civil Code), consequently considering the unborn as a person. Once again, consensus is missing.

Another mechanism directed to recognize a personal status to the unborn in the field of Civil law is to allow civil suits to be brought on behalf of foetuses for wrongful life claims. In the Unites Sates, the Federal Department of Health and Human Services regulations considers as children eligible for health insurance under the federal State Children's Health Insurance Program «an individual under the age of 19 including the period from conception to birth». <sup>15</sup>

Of course, the concept of «person» that we have been talking about is exclusively referred to the idea of juridical personality, adopted by Civil law with the aim of attributing rights and obligations, but unable to resolve all the intricate juridical problems, in particular the ones generated in the field of public law because of the recognition of human rights to someone. Nevertheless, we cannot ignore that the cited norms also represents a taking of position about the beginning of human life in a more general juridical sense.

On the other hand, Criminal law discerns the crime of abortion (against unborn human beings) from the crime of homicide (against already born human beings), once again underlying the moment of birth as the frontier between the two criminal offences (actually, the frontier is not the complete birth, but the beginning of delivery, in order to be able to punish mistakes committed by doctors during delivery as negligent homicides, given that they could not be punished by an abortion crime, since negligent abortion is not criminalised). However, some counties have passed laws that punish pregnant women for conducts during pregnancy that harm the foetus, even with criminal sanctions, which may signify a turning point also in criminal doctrine. <sup>16</sup>

Since Constitutional law is the most connected field with our problematic of human rights –seeing that the general rule is that the ones holding fundamental rights in internal law coincide with the ones holding human rights in international law– we will deal with this topic a more detailed way in the following section.

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<sup>15</sup> Caitlin E. Borgmann: «The Meaning of «Life»: Belief and Reason in the Abortion Debate», (available on-line at [works.bepress.com/context/caitlin\\_borgmann/article/1005/type/native/viewcontent/](http://works.bepress.com/context/caitlin_borgmann/article/1005/type/native/viewcontent/) retrieved 10.11.2008).

<sup>16</sup> Caitlin E. Borgmann: «The Meaning of «Life»: Belief and Reason in the Abortion Debate», cit.

#### 4. THE EMBRYO IN NATIONAL CONSTITUTIONS

If we take a glance to Constitutional law, and despite the various formulas used by constitutional texts, the common ground in the decisions of Constitutional Courts around Europe is that «only persons can be the subject of fundamental rights». <sup>17</sup> In other words, the life of the unborn, though recognized as a constitutional value which deserves juridical protection, is not equal to that of a person, since it only becomes one with birth.

In terms of internal law, the Fourteenth Amendment the U.S. Constitution adscribes rights to persons, which, according to the jurisprudence of the Supreme Court since the famous case *Roe v. Wade* <sup>18</sup> is a term that refers exclusively to post-natal life. <sup>19</sup> However, some scholars argue that that abortion should be permissible even if the unborn is a person, <sup>20</sup> by comparing abortion to self-defence, though this argument is far from convincing, since the requisites of self defence are not fulfilled here.

Conversely, European Constitutions are not so explicit, and while some of them use the concept of «person» in the attribution of rights, others prefer the more enigmatic version of «everyone» and «all».

For instance, art. 24 of the Portuguese Constitution states that human life is inviolable; however, according to the Portuguese Constitutional Court this formula does not intend to grant the right to life to the unborn, although it does provides objective protection to human life, either to the born and to the unborn, since all human life is considered having a constitutional value. This same position is shared by many Constitutional Courts around Europe, after being inaugurated by the German Constitutional Court. According to the Portuguese doctrine, the right to life –as any other fundamental right– can only be claimed by human persons. <sup>21</sup> Besides the protection of this subjective right, it's commonly understood that the norm also defends human life as a value, in what's called an objective protection. In this second dimension it includes no only the life of born creatures, but also that of unborn creatures, no matter the specific way of their genesis (by sexual intercourse or by reproductive techniques). On the other hand,

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<sup>17</sup> For instance, and among many others, the decision No. 85/85 of the Portuguese Constitutional Court.

<sup>18</sup> 410 U.S. 113 (1973).

<sup>19</sup> Norman Redlich, John Attanasio & Joel Goldstein: *Constitutional Law* (4<sup>th</sup> ed.), Lexis Nexis, Newark, NJ, San Francisco, Ca., Charlottesville, Va., 2002, p. 550.

<sup>20</sup> Judith Jarvis Thompson: «A Defence of Abortion», p. 47 ss; Laurence Tribe: *Abortion: The Clash of Absolutes*, W. W. Norton and Company, London, New York, NY, 1990, pp. 129/130; Robin West: *Concurring Opinion*, in Jack M. Balkin (ed.): *What Roe v. Wade Should Have Said*, New York University Press, New York, NY, 2007, p. 137, 138.

<sup>21</sup> J. J. Gomes Canotilho and Vital Moreira: *Constituição da República Portuguesa Anotada* (vol. I, 4<sup>th</sup> ed.), Coimbra Editora, Coimbra, 2007, p. 199-200. This means that collective persons cannot claim it (Jorge Miranda: «Artigo 24.º», in Jorge Miranda and Rui Medeiros (eds.): *Constituição Portuguesa Anotada* (vol. I), Coimbra, Coimbra Editora, 2005, p. 223.

the protection guaranteed to unborn life is not the same in all stages of development, given that the safeguard provided to a zygote is not the same as the one granted to a foetus close to birth.

Nevertheless, the objective protection is not equivalent to the subjective one, particularly in cases where we are talking about conflicts with other rights or with constitutionally protected interests, as is the case of abortion.

## **5. THE EMBRYO IN INTERNATIONAL DOCUMENTS**

All international documents underline the most absolute respect for human rights and human dignity.

Let's take, for example, the Charter of the United Nations, from 1945, that proclaims:

«We, the Peoples of the United Nations, determined [...] to reaffirm faith in fundamental human rights, in the dignity and worth of the human person...»

Cumulatively, the Universal Declaration of Human Rights (UDHR), from 1948, powerfully proclaims that fundamental human rights apply universally without discrimination to any member of the human family. Art. 2.<sup>o</sup>/1 states that

«Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status».

The expression «everyone» can perfectly be understood as including the unborn, especially since the Declaration makes reference in some paragraphs to human beings (and the Portuguese version of this norm substitutes «everyone» by «human being») and the fact is that embryos and foetus, being human life, are clearly human beings.

The 1959 Declaration on the Rights of the Child asserts, in its preamble, that

«The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.»

This kind of statement leave the idea that by «child» the Convention intends to represent the born as well as the unborn, according to both of them the enjoyment of the rights announced in its text.

The Preamble to the 1966 International Covenant on Civil and Political Rights (ICCPR) affirms the following:

«Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, 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...».

As important as the norms that proclaim human dignity are the ones that decree the right to life.

Let's take a first glance to art. 2 of the European Convention of Human Rights (ECHR). Art. 2.1 announces that

«Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.»

Comparing the text of these other human rights documents with the text of the ECHR, we can conclude that the ECHR is the most confusing one. First, because it does not contain any restriction on the application of death penalty to pregnant women, as some other text do. Secondly, because the redaction of the norm –«[e]veryone's right to life shall be protected by law...»– seems to refer to some kind of subjectivity and personification (included in the term «everyone») that, in the absence of a subsequent explanation about the moment of protection, leads to legitimate doubts and hesitations.

In its earlier versions, art. 2 of the ECHR contained the expressions «each person» and «all individuals», but at some point the drafting committee choose the term «everyone», which, in our opinion, it's a more evasive concept than the previous ones, thought some authors defend exactly the opposite, sustaining that the expression refers unquestionably to the unborn.<sup>22</sup> Indeed, while the Convention was being drafted, governments discussed which would be the most appropriated expression to include in the text of art. 2. Because of the multiplicity of conceptions, finally the drafters elected a neutral version –the one that still remains to day– in order to attribute to contracting States some *carte blanche*, instead of trapping national legislators into a strict redaction that easily would create violations and, therefore, international responsibility. The confusion is even deeper when we realize that the Portuguese version of art. 2 of the ECHR employs the term «person».

Undeniably, this *grey area* has become essential in order to avoid continuous violations of art. 2 of the ECHR. Let's not forget that if presently States still enclose some divergences in their respective abortion laws and reproductive techniques laws, the fact is that in the first years of the Convention those discrepancies were even deeper. Still today we can find huge cleavages between national regimes, specifically between liberal laws that allow abortion until more developed stages of pregnancy; and more restrictive laws, that forbid abortion notwithstanding the particular situation, as Ireland, with a Constitution that

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<sup>22</sup> «...the provision «everyone's right to life shall be protected by law» in Article 2 protects the right to life of the unborn child. Therefore, any derogation to the right to life –including abortion– must be narrowly construed within the limits established by the Convention» (Katherine Freeman: «Comments: The Unborn Child and the European Convention on Human Rights: To Whom Does «Everyone's Right To Life» Belong?», *Emory International Law Review* No. 8 (1994), p. 618.

presents the singularity, unique in the European space, of granting embryos and foetus a right to life.

Curiously, nearly all Contracting States already had legislation permitting abortion before ratifying the Convention, and did not make any reservation under art. 64 of the ECHR with respect to its art. 2. This single fact can operate as a good argument in order to defend that from the very beginning art. 2 ECHR was always understood as not embracing the unborn.

The Council of Europe has recently created the European Convention for Human Rights and Biomedicine (ECHRBMed). Only one of the articles refers to the unborn: art. 18, that disposes a quite liberal solution to embryo experimentation, in the sense that the level of prohibition is very low. But the remaining text can also provide us some clues about the underneath principles. In fact, this Convention uses indistinctly the terms «human being» and «embryo», which may signify that the protection of the dignity of all human beings also includes embryos.

If we pay some attention to Comparative law, we can conclude that other international documents are much more unequivocal as to the protection offered to the unborn. Both the ICCPR (art. 6.5 ICCPR) and the American Convention on Human Rights (art. 4.5 ACHR) forbid the execution of death penalty in pregnant women, and this prohibition provides us a consistent base to deduce some safeguard to the human being that women are carrying in their uterus, since this creature is, obviously, the subject of the referred protection. Finally, the UDHR states, in art. 3, that «[e]veryone has the right to life, liberty and security of person». If the expression «everyone», by itself, already transmits the idea of the exclusion of the unborn (thought it can have multiple interpretations) the following term «person» corroborates this same conclusion. The Portuguese translation used the expression «every individual», what is even more «aggressive» in the sense of the exclusion.

The ACHR is the most unequivocal one, since art. 4 explicitly declares that human life is protected from conception:

«Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.»

As far as we know, is the only international text that achieves such a level of determinability in this particular issue, in accordance with the kind of protection granted to the unborn in the national laws of Latin American countries.

As to the ICCPR, although art. 6 is not that obvious as to the ACHR, it is clearer enough to serve as a plausible juridical base for the attribution of rights to the unborn. The norm states that

«Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.»

But afterwards it also makes reference to «persons», almost giving the idea that they are synonyms, thus creating some terminological confusion. And note that in the Portuguese version of the text of the Pact this norm of art. 6 says that the right to life is inherent to the human «person».

The *travaux préparatoires* of many of these international documents demonstrate the controversies lying underneath their approval. For instance, when art. 6 of the ICCPR was being drafted countries as Belgium, Brazil, Mexico and Morocco tried to include a specification in the sense that protection of the right to life applies from the moment of conception, but their proposal was rejected. In view of the present wording of this norm, the General Comments of the Human Rights Committee on art. 6 of ICCPR cannot be but neutral about the extension of the human right to life to the embryo.

The expression «human being» is broader than the expression «person» –we do believe that embryos are human beings but not persons–<sup>23</sup> therefore, theoretically, this last norm could perfectly include unborn children. At least, more easily than the correspondent norm of the ACHR, that employs the more restrict term «person» But the fact is that the subsequent silence of the ICCPR about the moment when protection begins leaves the question unresolved, and does not permit to deduce any specific protection to the unborn, while the ACHR does present a very plain statement about the attribution of human rights to the unborn.

But we do believe that many of the complexities raised by the interpretation of international documents are originated by specific meanings that are lost in translation. When we try to force coincidence between concepts –some of them unambiguous, but some others very indistinguishable– and use them indistinctively, we are actually instigating legitimate doubt as to the comprehension of the norms.

## 5.1 Strasbourg's jurisprudence

A final remark goes to the ECHR, in order to analyze the jurisprudence of the European Commission of Human Rights (ECommHR) first, and of the European Court of Human Rights (ECtHR) afterwards,<sup>24</sup> since it is the only document, in parallel with the ACHR, that can be used for an international court to effectively decide judicial litigation, with the difference that the ECtHR has a richer and wider jurisprudence than the American Court of Human Rights, mainly

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<sup>23</sup> Eduardo Osuna, Vera Lúcia Raposo: «Embryo Dignity: The Status and Juridical Protection of the *In Vitro* Embryo», *Medicine and Law* No. 26/4 (2007), pp. 737/746.

<sup>24</sup> For an analytical study of this norm and the relevant jurisprudence, Ireneu Cabral Berreto: *A Convenção Europeia dos Direitos do Homem Anotada* (2.º ed.), Coimbra Editora, Coimbra, 1999, p. 69 ss.; Vera Lúcia Raposo: «La Corte di Strasburgo e il Diritto alla Vita visto nell'Ottica del Minore» in Elena Urso (ed.): *I Minori e il Nuovo Diritto -Garanzie, Diritti, Responsabilità*, Wolters-Kluwer, (in the process of publishing).

because it is functioning for a longer time. This point will be discussed later on, but for now we can already state that the ECommHR and the ECtHR do not grant rights to the unborn being, and the majority of the doctrine believes that the unborn is excluded from art. 2 of the ECHR. This seems the more congruent reading of the text of the norm. Even the Austrian Constitutional Court held that decriminalizing abortion during the first trimester did not violate the Austrian Constitution nor the ECHR, which has the status of constitutional law in Austria.<sup>25</sup>

## 6. MAIN ISSUES ABOUT THE UNBORN IN TODAY'S ETHICS

### 6.1 Abortion

Though the unborn has an independent life from the mother, the fact is that presently we don't dispose the necessary technology for extra-corporeal embryonic and fetal development from about the fourteenth day after fertilization until viability (the so called ectogenesis). So, in order for the unborn to survive he needs the uterus of a woman. However, can a woman be forced to maintain a pregnancy she does not desire, in violation of several human rights, such as the right to privacy and to bodily integrity?<sup>26</sup>

In their decisions, either the ECommHR either the ECtHR persistently maintained that the respect for the woman's right to privacy (art. 8 of the ECHR) can justify her decision to abort, even because unborn life is not protected by art. 2 of the ECHR<sup>27</sup> (though it does not preclude some kind of protection). In *X v. United Kingdom*<sup>28</sup> the Commission gave preference to the rights of the pregnant woman, arguing that, if the conclusions were that article 2 of the ECHR included the unborn, granting it an absolute right to life, than, we would have to systematically forbid abortion, even in cases when the pregnancy involved a risk to the life of the pregnant woman, and

«[t]his would mean that the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant woman.»

In the United States the turning point in this matter was the case *Roe v. Wade*, which presented the theory of the trimesters: i) during the first one abortion is declared free and only depends on the mother's will; ii) after that, and

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<sup>25</sup> Decision from 11 October 1974, VfSlg 39.

<sup>26</sup> See the controversial analogy of the violinist of Judith Jarvis Thompson: «A Defence of Abortion», *Philosophy and Public Affairs* No. 1 (1971), p. 47 ss.

<sup>27</sup> Case *X v. the United Kingdom*, ECommHR, No. 18416/79, Decision of 13 May 1980; case *R. H. v Norway*, ECommHR, No. 17004/90, Decision of 19 May 1992, among others. *Cfr.* Centre for Reproductive Rights: *Reproductive Rights in the European Court of Human Rights*, available online at [www.reproductiverights.org/pdf/pub\\_bp\\_RREuropeanCourt.pdf](http://www.reproductiverights.org/pdf/pub_bp_RREuropeanCourt.pdf) (retrieved 13.10.2008).

<sup>28</sup> *X v. the United Kingdom*, ECommHR, N.º 18416/79, Decision of 13 May 1980.

before the third trimester, the State may restrict abortion having in mind the safeguard of the mother's health; iii) finally, in the third trimester, and because at this point we are facing a viable unborn, abortion can only be allowed for reasons related with the foetus well-being. In this decision the Supreme Court refused to take a stance at the personhood of the unborn, and based the entire reasoning in the reproductive right (in the case, the right not to reproduce) of the woman, whose existence was found in the penumbra of the 14<sup>th</sup> Amendment and its privacy rights.

One of the most interesting theories about abortion is the one of Ronald Dworkin.<sup>29</sup> Dworkin believes that unborn life, at whatever stage, possesses an essential value, or, in his own words, «is sacred just in itself». What he calls the «detached» objection to abortion is exactly the perception that people have of that sanctity, and the designation derives from the fact that this objection is disconnected from any argument about the rights of the unborn. Conversely, the «derivative» objection is the one based on the supposed rights and interests of the unborn. Dworkin rejects such a suggestion, as he advocates that in order to have a right the entity must first have an interest, and for that it must be sentient, characteristic that, in the case of the unborn, only happens near the end of the second trimester, with the first hints of a nervous system. Therefore, the embryo and pre-sentient foetus cannot claim rights of their own, for the simple reason that they cannot even claim interests. After this point abortion should not be allowed, but before it abortion rights have prevalence. This distinction between the pre- and post-sentient unborn is comparable to the distinction operated in *Roe v. Wade* between abortions in the first two trimesters and abortions in the third trimester.

Although currently the general idea is in favor of the woman «right to choose», the viability criterion is still winning points. Viable embryo is the one that possesses the capacity to survive outside the mother's womb, this capacity being conditioned mainly by technological advances, which means that nowadays we can consider viable –and therefore, «non abortable»– embryos and foetus that some years ago would be unable to survive outside the woman's body.<sup>30</sup>

## 6.2 The death of the unborn against the mothers will

For an unborn, just like for a person, death is the end of biological life. But despite the fact that we have a human life that perishes, we don't have the death of

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<sup>29</sup> Ronald Dworkin: *Life's Domination: An Argument about Abortion and Euthanasia*, Harper Collins Publishers, London, 1993, p. 21 ss

<sup>30</sup> However, as Peter Singer well underlined, this criterion of viability cannot be understood in the exact same way in uterine reproduction and *in vitro* reproduction since in various aspects the viability of *in vitro* embryos is much less viable than the uterine one (Peter Singer Karen Dawson: «IVF Technology and the Argument from Potential», *Philosophy and Public Affairs*, Vol. 17, No. 2 (1988), p. 88 ss.

a person here. Therefore, it cannot be called a homicide and, on the other hand, legally there is no such a thing as an «embyocide» of a «foetuside».

However, in the last couple of years, we have assisted to an expansion of criminal liability for killing or injuring an unborn. One of the most paradigmatic innovations in this field is the US Unborn Victims of Violence Act, of 2004<sup>31</sup> (known as «Laci and Conner's Law»). This particular law creates a separate offense for the one who causes the death or bodily injury of a *in utero* child, that is, a member of the species *homo sapiens*, at any stage of development, who is carried in the womb. This disposition is particularly productive in crimes of violence committed against the mothers that ends up having consequences on the foetus.

Nevertheless, this approach is quite exceptional, and the majority of juridical systems still punishes offenses against the unborn indirectly, using for that result the legal protection allowed to the mother.

This was very notorious in a case decided by the ECtHR in 2004. In *Vo v. France*,<sup>32</sup> the plaintiff, a five month pregnant woman that hardly understood French, attended the hospital for a regular medical examination. However, the doctor misidentified her with another woman with a similar name, who had also entered the hospital that same day to have a contraceptive coil removed. Confronted with the inability of the woman to communicate, the doctor confused both identities and began the procedure of removal of the contraceptive coil, during which he negligently perforated the applicant's amniotic sac, provoking an involuntary abortion to a woman whose foetus was a healthy one and, besides, a much desired baby.

The applicant and her partner looked for a criminal remedy in the French legal system, and filed a criminal complaint alleging unintentional injury to the applicant and unintentional homicide of her child. Following a criminal complaint lodged by the applicant in 1991, the doctor was charged with involuntary homicide, but the Criminal Court of Lyon acquitted the doctor, declaring that there was no legal rule determining that a foetus is already a person in the sense of the French Criminal Code. In 1997 the Lyon Court of Appeal inverted this judgment, declaring that the issue of viability at birth is scientifically uncertain and consequently devoid of all legal effect. Considering a viable foetus as a person, the Court of Appeal convicted the doctor of involuntary homicide. However, later on, the Court of Cassation, France's highest court, reversed this decision, with the argument that homicide concern exclusively to «persons», category from which foetus (and obviously embryos) are disqualified, insofar as unborn children legal status is governed by special provisions. As a result, none of the criminal norms satisfied the last pretension: in one hand, negligent abortions are not punished in the French legal system; on the other hand, homicides (though criminalized even

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<sup>31</sup> For a comment on this act, see Colleen Jolicoeur-Wonnacott: «The Unborn Victims of Violence Act: Friend or Foe to the Unborn?», *Thomas M. Cooley Law Review* No. 17 (2000), p. 563.

<sup>32</sup> *Vo v. France*, ECHR (GC), No. 53924/00, 8 July 2004.

when merely negligent) don't apply to the unborn.<sup>33</sup> Recalcitrant with the lack of juridical protection, the applicants presented their case to the ECHR, accusing the French Government of leaving the foetus unprotected, in violation of art. 2 ECHR, arguing that France was in failure of the positive obligation of protecting life, by not punishing unintentional killing of a foetus. The Grand Chamber of the Court considered that since there was no conflict between the mother's life and the foetus' life, this last one could be adequately protected through the first one, because both lives are intimately connected and, in the particular case, there is no conflict between the two of them. Actually, the French juridical system does criminalize physical assault –involving pecuniary and non-pecuniary damages inflicted to the person of the mother– which is penalised even when involuntarily committed. So, according to the French Court, in the evaluation of the damages, her pregnant condition would necessarily be taken in account, which means that the destruction of the foetus would, in itself, be considered an indemnified damage. This scenario is pretty much the same in Portugal.

### **6.3 *In vitro* embryos: experimentation and destruction of surplus embryos**

In 1999 another convention of the Council of Europe entered into a force, addressing the legal issues raised by biomedicine and new technologies: the European Convention on Human Rights and Biomedicine (ECHRBM). Though it cannot be directly employed by the ECtHR in its decisions, the Court is not precluded to have in consideration its rules.

The most important norm for our discussion is art. 18, about research on *in vitro* embryos. It states the following: «[w]here the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo» (No. 1); «[t]he creation of human embryos for research purposes is prohibited» (No. 2).

Nevertheless, the text of the article is so purposely vague that no definitive solution can be inferred from it, except this one: the level of protection is basically decided by each Member State, as long as it respects a minimum. This ambiguity can be used by the ECtHR to justify its future resolutions (although only indirectly, because the legal base for its decisions is the ECHR), since the Court may look for a refuge in this uncertainty, and, just like in the previous decisions, leave to the national legislators the resolution of such an intricate issue.

The tendency is to put a ceiling on the number of embryos created by processes of *in vitro* fertilization, in order to make it possible the uterine transference of the majority of them and, consequently, to minimize destruction. The most restrictive law in this matter is the German one, the

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<sup>33</sup> The impunity of negligent abortions is quite common in criminal systems, and also exists in Portugal. J. M. Damião da Cunha: «Capítulo II –Dos Crimes Contra a Vida Intra-Uterina», in Jorge de Figueiredo Dias (dir.): *Comentário Conimbricense do Código Penal* (Parte Especial, Tomo I), Coimbra Editora, Coimbra, 1999, p. 150.

*Embryonenschutzgesetz*, from 1990, while some other laws, as the Portuguese law No. 32/2006, states that in the process of *in vitro* fertilization the medical team can only create the quantity of embryos deemed necessary for the success of the process, according to the *leges artis* and the informed consent of the patients and, cumulatively, the number of oocytes to inseminate must also take in consideration the medical situation of the couple and the danger of multiple pregnancies (art. 26.º of Law No. 32/2006).

When the embryo is transferred to a woman uterus, and after that very moment, the doctrine tends to, at least, recognize it some constitutional value, even if not as a person. On the contrary, for embryos that are not in position to develop because their destiny seems to be eternal cryopreservation, it's difficult to claim for protection.<sup>34</sup> *In vitro* embryos generate much controversy. On the one hand, we cannot force a woman to receive an embryo in the uterus against her will. On the other hand, ectogenesis is not still available. Therefore, the only existing solution is to keep them frozen everlastingly, leaving their fragile existence in stand by. From this perspective, it was considered a more respectful attitude, and more congruent to the human dignity that unquestionable assists to embryos, to allow them to give some kind of positive contribution to the humanity to which they would belong and, in some sense, already do. Embryo experimentation and the extraction of stem cells seems the best way to demonstrate the respect they deserve in the context of the solidarity ties existing between human beings. At least, a better solution than the pure and simple destruction.<sup>35</sup>

In 2001 President George Bush stated that the North-American government would not release funds from stem cells research, by invoking that «like a snowflake, each of these embryos is unique, with the unique genetic potential of an individual human being». But, if this assertion were true, then we could always<sup>36</sup> say that the extraction of one cell of the embryo still preserve its genetic uniqueness. Therefore, the reason to forbid it must be some other, most compelling.

The arguments formulated by Ronald Dworkin in relation to abortion can be engaged to justify our position.<sup>37</sup> In fact, Dworkin defends the preservation of the embryos' life because of all the resources that were invested in its creation, by nature, parents and medical doctors. Translating this argument for *in vitro* embryos, we can conclude that here the investment is even bigger, because

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<sup>34</sup> Kathleen V. Wilkes: *Real People: Personal Identity Without Thought Experiments*, Clarendon Press, Oxford, 1988, p. 69-72.

<sup>35</sup> Sharing this position, Karen Lebacqz: «On the Elusive Nature of Respect», in Suzanne Holland et al. (eds.): *The Human Embryonic Stem Cell Debate*, MIT Press, Cambridge, 2001, p. 149 ss. (concluding that an embryo should be respected as an entity with value even if it falls short of full personhood, although maintaining that embryonic research is consistent with this respect).

<sup>36</sup> And this is the argument of Peter Singer («The Revolutionary Ethics of Embryo Research», December 2006, available on-line at <http://www.utilitarian.net/singer/by/200512-.htm>, retrieved 11.10.2008).

<sup>37</sup> Cfr. Ronald Dworkin: *Life's Domination...*, cit., p. 213 ss. Commenting Dworkin's opinions, John Harris: «Ética ad Embrioni», *Bioética* No. VI/1 (1998), p. 34.

reproductive techniques claim a higher investment, since it involves a huge amount of money and several years of intents by the parents. Therefore, destroying directly and immediately the *in vitro* embryo invalidates all the effort put into its creation, and violates the dignity of the embryo in itself, because it takes away any chance it might have of bringing benefits to humanity, to which even if it doesn't belong yet, it could belong within a short period of time. It is unreasonable, undue, even immoral, to destroy the embryo in the name of a hypothetical respect for its dignity, rather than let it contribute for saving human lives.<sup>38</sup>

#### 6.4 The disputes over frozen embryos

The dilemma of the legal status of an embryo rises again when the dissolution of marriage also involves the disposition of the frozen embryos that the couple had stored, in the expectation of a happy life together as a family.

After the marital rupture courts have to decide who gets to keep the embryos, and in order to make that decision we need, previously, to establish if we are splitting patrimony or distributing parental rights over children, even if they are future children only.<sup>39</sup>

There is a well-accepted theory defending that when any part of the human body is separated from us we lose the faculty of controlling his destiny. It was indeed our property when attached to our body, but we lose that right after separation. Since the embryos result from an element of our body –the gametes– that belonged to us while inside the body, we could deduce that *in vitro* embryos don't belong to us anymore because they don't present any physical link with our body (differently, this solution does not apply to uterine embryos, for the indicated reasons). Other hypothesis would be making an analogy between embryos and fruits, because embryos are the product of our gametes just like fruits are products of a tree. In this perspective, and since fruits belong to the owner of the tree, the same would happen with the embryos. The common aspect of both theories is the conceptualization of embryos as things, hence, a possible subject of property rights, and not as persons, title-holders of rights.

Nonetheless, in a juridical system where is not even admissible property over body parts or over gametes,<sup>40</sup> it is even more unconceivable to allow property over embryos.

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<sup>38</sup> Eduardo Osuna, Vera Lúcia Raposo: «Embryo Dignity: The Status and Juridical Protection of the *In Vitro* Embryo», *Medicine and Law* No. 26 (4) 2007, p. 737/746.

<sup>39</sup> For a comment on several of these disputes, Vera Lúcia Raposo: «Os Embriões do Rei Salomão –Resolução dos Conflitos Parentais Acerca do Destino dos Embriões *In Vitro*», *Lex Medicinæ* No. 5/9.

<sup>40</sup> Accepting property rights over sperm, and considering it capable of testamentary succession, see the case judged by a Californian court, *Hecht v. Superior Court* (20 Cal. Rptr. 2d 275, 283 (Cal. 1993).

## 7. CONCLUSION

We may therefore conclude that the embryo is not just a thing (in view of the fact that he cannot be an instrument for the realization of our purposes) but, on the other hand, that he is not still a person (as birth is an essential condition to reach the status of «person»). Nevertheless, the embryo is indeed a human being for the reason that his life is human.<sup>41</sup> Not only juridical persons are human beings (look at corporations, for instance), but it is also truth that not all human beings can be classified as persons.<sup>42</sup>

After rejecting the qualification of the embryo as a person, but also as a thing, the only possibility is a third modality of existence, somewhere between a person and a *res*: the so called *tertium genus*. Still using personhood as a reference, we can say it is a potential person, but not an actual one.

As a result, the embryo cannot hold any human right, but this restriction does not mean that it cannot aspire to some kind of protection, which we can designate as an «objective protection». And certainly it does not mean that embryos are excluded from human dignity, given that the mere fact of belonging to human species is enough to extend them the value and respect inherent to human dignity.

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<sup>41</sup> Eduardo Osuna, Vera Lúcia Raposo: «Embryo Dignity...», cit., p. 737/746.

<sup>42</sup> «Person is a notion created for legal use which must never be mistaken for a human being...» (Cosimo Marco Mazzoni: «Real Protection for the Embryo», *Revista de Derecho y Genoma Humano* No. 22 [2005], p. 121).