

WHEN DOES (FOETAL) PROTECTION START FROM CONCEPTION

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Abstract: *Pre-natal existence has been protected in some way by every age, by every society, and mapped out in its system of rules. This is still the case today, but man's knowledge today is incomparably more complex than in previous ages due to the advances in medicine and biology of the last few decades. Through the practitioners of medicine, knowledge of the ontogenesis of man spans the entire period from conception to death. Life conceived but not yet born is protected by the State's duty to protect life. However, can the State today, with the instruments and concepts of the law, fully discharge this duty of protection? While medical science can account for almost every minute of the biology of embryonic development, jurisprudence cannot do the same for the objective institutional protection of the whole period of embryonic life. Catching up in this area is essential because the backlog is enormous.*

Keywords: *embryo, foetus, fetus, foetal rights, fundamental rights, bioethics, state institutional protection, protection of life*

THE TOPIC AS A LEGAL PROBLEM

The problem of the legal status of a *potential human life*, called embryo or foetus, lies not only in the definition of the status, but also in the precise definition of the beginning and end of this status. The latter takes a back seat to the former. Under the Oviedo Convention¹ “The interests and welfare of the human being shall prevail over the sole interest of society or science.”² But what do we mean by “individual”, “human”, “human being”? Even if the concept of human being does not extend to the pre-natal period, the life resulting from the fusion of gametes is protected, if not as a subject, by law. The nature of this legal protection is an age-old dilemma in jurisprudence. The end of this stage of life has never been a question: *birth* or *death*, the date of which can be determined beyond doubt. Even today, the beginning is still not clear, but just as Roman private law had to determine the time of conception in order to settle property relations, so today constitutional law, in order to determine the beginning of the right to life and the obligation to protect an objective institution, must also define the beginning of the formation of a potential human being, for which the rebuttable presumption established in Rome is already inadequate, since it can only be established backward from birth.³

The development of medical science has urged the shapers of the law, which has made the biology of embryonic life known and sometimes visible to anyone. The early stages of the individual's development are taking place almost before our eyes, while embryonic research and medical science are the daily business of those who work on this subject.

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¹ Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Act VI of 2002.

² Act VI of 2002, Article 2.

³ See MOLNÁR, I., JAKAB, É. *Roman Law*. Szeged: Copyright Diligens Bt., 2001, pp. 121–122. (MOLNÁR, I., JAKAB, É. *Római jog*. Szeged: Copyright Diligens Bt., 2001, pp. 121–122).

Jurisprudence must therefore also clarify the boundaries of embryonic life and, where necessary, the stages within it.

I. FUNDAMENTAL RIGHTS PROTECTION BEFORE BIRTH

While the Constitution⁴ does not, the Fundamental Law⁵ already contains provisions on bioethics, so that, unlike before, national legislation has elevated to constitutional level certain provisions in an area where previously there was only lower-level regulation. This is certainly an improvement in the legal regulation of state-of-the-art scientific procedures.

The provision mentioned above on the protection of the unborn child, which has been elevated to the constitutional level, together with the right to life and human dignity as special personal rights, which are manifestations of general personal rights (i.e., not new fundamental rights),⁶ has been placed by the Constitutionalist in Article II⁷ of the Fundamental Law,⁸ in the same sentence as the right to life and human dignity since it falls within the scope of special cases closely related to them.⁹

The commentary on the Fundamental Law states that there is a significant difference between the wording of the previous Constitution¹⁰ and the current Fundamental Law. The former Constitution first mentioned the right to human life, which was defined as an innate right of man.¹¹ This implied that the right to life, like the capacity to have rights, was conditional on being born alive. According to the Fundamental Law, on the other hand, the right to life of the foetus begins at conception, and the first right highlighted by the Fundamental Law is human dignity, which it identifies as inviolable.¹² This explanation of the commentary seems to justify the concerns of Judit Sándor, who argues that the wording of Article II “[...] *could become a serious basis for the prohibition of abortion in judicial interpretation.*”¹³ However, I believe that the normative text clearly separates the concepts of “human” and “foetus”. The legislator clearly attaches different entitlements to the two concepts. If this were not the case, it would be sufficient to simply declare the subjective right of man from conception, thereby extending the concept of man to life before birth. This grammatical interpretation is also supported by the current legislative context in force after the regime change.

⁴ Act XX of 1949 on the Constitution of the Republic of Hungary.

⁵ The Fundamental Law of Hungary, 25 April 2011.

⁶ See KISS, B. *Guide to the Fundamental Law*. Budapest: ORAC Kiadó Kft., 2023, pp. 282–283. (KISS, B. *Útmutató az Alaptörvényhez*. Budapest: ORAC Kiadó Kft., 2023, pp. 282–283).

⁷ Article II *Human dignity shall be inviolable. Every human being shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception.* The Fundamental Law of Hungary (njt.hu).

⁸ The Fundamental Law of Hungary, 25 April 2011.

⁹ See KISS, B. *Guide to the Fundamental Law*, p. 283.

¹⁰ Act XX of 1949 on the Constitution of the Republic of Hungary.

¹¹ Act XX of 1949 Section 54 (1) *In the Republic of Hungary, every human being has the inherent right to life and human dignity, of which no one may be arbitrarily deprived.*

¹² ÁRVA, Z. *Commentary on the Fundamental Law of Hungary*. Budapest: Wolters Kluwer Kft., 2013, p. 98. (ÁRVA, Z. *Kommentár Magyarország Alaptörvényéhez*. Budapest: Wolters Kluwer Kft., 2013, p. 98).

¹³ SÁNDOR, J. Bioethics in The Fundamental Law. In: *Szuverén* [online]. 14. 4. 2011 [2023-12-29]. Available at: <<https://szuveren.hu/vendeglap/sandor-judit/bioetika-az-alaptorvenyben>>.

However, in the case of the protection of the rights of embryos created outside the body, the conflict with the mother's right to self-determination is, of course, not taken into account. Thus, one of the unquestionable competing rights in the classic abortion debate is eliminated as a factor, or at least modified as a right of disposal of the parents or third parties. However, regardless of this, or precisely because of it, the issue is not yet simplified, partly for reasons beyond the law. The ethical, religious, and cultural dilemmas raised in the classic abortion controversies are also at stake here, all over the world. Thus, [...] in the absence of international consensus, there are relatively few international standards on this issue, and they are narrow in scope. On the one hand, the UN and Council of Europe charters do not provide complete human rights protection for embryos, as they would have to recognize their legal personality, i.e., their human status. On the other hand, however, they do seek to express a special legal status, notably by limiting the scope of scientific research, which takes the embryo out of the realm of treatment as a mere object or body part.

The definition of “human being” in the various conventions is inherently unclear, and international fora leave it to national legislation. Accordingly, the scope and content of embryo protection is uncertain.”¹⁴ It is therefore difficult to find an international point of reference on this issue.

With regard to legal status, Zoltán Gyöngyösi outlines four theoretically conceivable options: the legal status of *the human being*, the legal status of *the foetus*, the classification as *a thing* and *the sui generis* status.¹⁵ According to Judit Zeller, however, two opposing arguments can be imagined in this area. The first is that in vitro embryos do not even enjoy the institutional protection of the state, since, without implantation, they cannot develop, and the second – in stark contrast – is the possibility of ensuring much greater protection than that of the uterine foetus, since the right to life of these embryos – due to their existence independent of the mother's body – does not compete with the woman's right to self-determination. It is important to note, however, that the latter is not present in the constitutional law and jurisprudential argumentation, presumably for moral, philosophical, and socio-political reasons. In his view, in vitro embryos should also be covered by the state's objective obligation to protect institutions, but the legislator must also keep a close eye on other fundamental rights competing with embryonic life for two reasons. On the one hand, new health opportunities arising from embryo research and its results would positively impact the quality of health care. On the other hand, the compatibility of the destruction of embryos created but not implanted, in many cases under certain conditions, with the objective protection of life must be considered.¹⁶

For the sake of completeness, it should be mentioned that László Székely, the Commissioner for Fundamental Rights, made it clear that “[...] *there is a real difference between*

¹⁴ Case No AJB-4874/2016, ajbh.hu.

¹⁵ See GYÖNGYÖSI, Z. *The law of provisions over life and body*. Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2002, p. 290. (GYÖNGYÖSI, Z. *Az élet és test feletti rendelkezések joga*. Budapest: HVG-ORAC Lap- és Könyvkiadó Kft., 2002, p. 290).

¹⁶ ZELLER, J. *The moral and legal status of embryos created outside the body in the light of the right to reproduction and scientific research*. Pécs: Ph.D. thesis, 2009, pp. 55–56. (ZELLER, J. *A testen kívül létrejött embriók morális és jogi státusa a reprodukcióhoz való jog és a tudományos kutatás tükrében*. Pécs: Ph.D. értekezés, 2009, p. 55–56).

*an embryo outside the body and an embryo created outside the body but already implanted. However, the State fulfills its objective obligation to protect institutions when, in establishing rules on extra-embryos, it establishes, while recognizing their protection, precise provisions on their storage, their treatment, research and, ultimately, their possible destruction.”*¹⁷ It should be noted that the appropriateness of these can, of course, be a matter of debate. However, it is important to note that “[...] *an embryo transferred into the uterus as a result of the active conduct of an external person (implantation) is given a different status, that of a foetus in utero, at the time of implantation, i.e. its legal status is governed by different rules.*”¹⁸ The intention of the legislator was therefore to “[...] *declare an embryo created outside the body to have the same status and protection as an embryo conceived naturally from the moment of implantation.*”¹⁹

II. BEYOND THE LAW

II.1 Ethical Aspects of the Status of the Embryo

The question arises, therefore, whether the objective institutional protection of embryos is properly developed, whether it can be properly justified, whether on biological, ethical or other grounds beyond the law. Undoubtedly, there is an ethical dimension to the regulation of embryos and fetuses, and ultimately to the vast majority of all other legislation. In the case of the embryo, however, this is perhaps most striking, since we are talking about the development of a human being, as Barnabas Lenkovics put it, an “*unborn human being*”.²⁰ Therefore, it is essential to discuss the moral status of the embryo, i.e. the ethical implications of embryo regulation, for which there are several theories.²¹

According to *the argument of belonging to the human species*, fertilization is the beginning of moral status since fertilization creates the embryo, which has the genetic makeup of the human species, and the resulting genetic code is unique and unrepeatable. There have been several criticisms of this approach. On the one hand, the onset of moral status is explained by biological reasons and, on the other hand, uniqueness is refuted, since at a particular stage of embryonic life cells can be separated, resulting in genetically identical individuals. Furthermore, the fertilized egg cell not only develops into a human being but also into the amniotic sac, placenta, and umbilical cord. It can, therefore, be seen that the development of a unique genome does not necessarily provide the basis for the development of individuality. However, there is a so-called „functional individual genome” that already controls and influences individual development. Its onset is likely to be about one week after fertilization. It seems more appropriate to align the onset of moral status, according to this argument, with the latter’s development.

¹⁷ Case No. AJB-4874/2016.

¹⁸ Case No. AJB-4874/2016.

¹⁹ Case No. AJB-4874/2016.

²⁰ See LENKOVICS, B. On the Right to Life of the Foetus. In: *Man and law, Selected thoughts*. Budapest: Dialóg Campus Kiadó, 2018, pp. 64–71. (LENKOVICS, B. A magzat élethez való jogáról. In: *Ember és jog, Válogatott gondolatok*. Budapest: Dialóg Campus Kiadó, 2018, pp. 64–71).

²¹ ZELLER, J. *The moral and legal status of embryos created outside the body in the light of the right to reproduction and scientific research*, pp. 41–48.

The potential or developmental capacity argument is that the embryo has the potential to become human. According to this view, the process of becoming human is only a quantitative gain and not a qualitative change. This approach has been criticized in several ways. Among other things, based on this principle, gametes should also be regarded as potential human beings since they can also develop into human beings if the right conditions are met. But the argument has also been criticized on logical grounds. Actual status – and hence status rights – cannot be derived from a situation in which there is even the possibility of the qualities that are indispensable for that status.

According to the identity and continuity argument, an adult, fully developed human being can be considered essentially identical to the embryo from which it evolved. On this basis, we can also infer the existence of the human dignity of the embryo. The embryo and the adult are, therefore, ontologically identical. Furthermore, the embryo has moral status from the beginning. A good refutation of the identity of the embryo and the human being is the possibility of the formation of identical twins and chimeras²² which can occur until the embryo reaches a stage where its cells differentiate. This is around day 14. Only then can the embryo be considered a single organism.

The person argument is the work of Warren,²³ who denies the embryo's moral status on the grounds that it is not a person. In his view, only a person can have moral status. A human being, on the other hand, can only be conceived of as a human being in the biological sense, or as a full member of a "[...] *moral community, that is, a person.*"²⁴ Warren also defines criteria of personhood, which I will not go into here. However, it is important to stress that, according to Warren's criteria, the embryo cannot be considered a person. The theory has, of course, been the subject of much criticism. On the one hand, according to the theory, only a person can have moral status. On the positive side, however, it can now be somewhat independent of biological determination.

Warren gave rise to the theory of the "ever-conscious view." According to this view, the moral status of a living being can be said to exist if at any time during its life it has had consciousness, even if only for a short period. Thus, the subsequent fate of the embryo implies that there is one that has and one that does not have moral status, i.e. one will have the possibility (through implantation) to develop into an individual and the other will not. The circumstances will be the factors that create the possibility of moral status. It is precisely this factor that has led to criticism of the theory, saying that it cannot be a function of an external factor, since moral status must arise from the very essence of the

²² "A chimera [...] is an organism that has two or more sets of DNA. There are several possible ways to create a human chimera. Mothers who have undergone multiple pregnancies have DNA left over from their children, and in this sense they are chimeras, but chimeras can also be created in twin pregnancies where two embryos fuse, or as a result of organ transplantation, for example." SÁNDOR, J. Chimeras and hybrids are coming, it's time to break down the 20th century barriers to genetic experimentation. In: *Qubit* [online]. 22. 1. 2020 [2023-12-29]. Available at: <<https://qubit.hu/2020/01/22/jonnek-a-kimerak-es-a-hibridek-ideje-lebontani-a-genetikai-kiserletek-20-szazadi-korlatait>>. SÁNDOR, J. Jönnek a kimérák és a hibridek, ideje lebontani a genetikai kísérletek 20. századi korlátait. In: *Qubit* [online]. 22. 1. 2020 [2023-12-29]. Available at: <<https://qubit.hu/2020/01/22/jonnek-a-kimerak-es-a-hibridek-ideje-lebontani-a-genetikai-kiserletek-20-szazadi-korlatait>>.

²³ Mary Anne Warren (1946–2010); American writer and professor of philosophy at San Francisco State University. In: Wikipedia [online]. [2024-05-30]. Available at: <https://en.wikipedia.org/wiki/Mary_Anne_Warren>.

²⁴ ZELLER, J. *The moral and legal status of embryos created outside the body in the light of the right to reproduction and scientific research*, p. 46.

thing. Of course, what gives a thing its essence is debatable. It also happens to be contributed to by the properties they possess during their existence.

According to *interest or perception theory*, an embryo has moral status if it is capable of experiencing pleasure or pain. The question is when that time comes. This is a controversial question. It certainly cannot be earlier than six weeks, but 18–20 weeks is more likely. A criticism is that the theory sets the moral status requirement too low, so it fails to separate humans from animals.

The gradualist approach is the theory that the embryo acquires moral status gradually during its development.

Judit Zeller started from the principle of gradualism and the theory of “ever conscious view”, based on Mary Anne Warren’s person-argument. Very simply put, an embryo less than 14 days old has moral status only “[...] *insofar as it is regarded as such by concrete persons in their concrete social environment, in the social relations functioning with the participation of the embryo and itself, i.e. insofar as it is attributed moral status.*” After the 14th day, it may even have moral status in its own right. Not before, “[...] *since it cannot be conceived of as a single organism in biological terms.*”²⁵

A review of the theories shows that most of the moral and ethical theories of pre-natal life could not (or perhaps did not want to) detach themselves from the biological characteristics of human life in the development process. It sought to place its moral and ethical standards on a biological basis, and this is not far from my approach, which is relevant to the present topic. I, too, believe that there is no justification for a discourse on moral or any legal status if ‘the life that has come into being’ contains the unique and unrepeatable, biologically detectable characteristics of the human being. Well, it is precisely on the basis of these biological characteristics that we now know that conception and the emergence of uniqueness occur at different times.

II.2 Outline of Embryonic Development

For the study of the subject, it is therefore essential for legal scholars to have a level of knowledge of the biology of embryonic development that enables them to understand the process of conception and the biological processes and changes that occur between conception and birth that are relevant to the formation of an opinion on legal status.

Human ontogenesis begins with the process of fertilization, which is the fusion of two gametes, the oocyte and the *spermatozoon*. The ovum is surrounded by spermatozoa, only one of which can enter the egg inside the membrane of the egg. This is followed by the so-called *pronuclear stage*. This means that both the nucleus of the ovum and the nucleus of the male cell are separately transformed into pronuclei, which are the “two halves” of the nucleus of the subsequent zygote. At this stage, fertilization has not yet been completed. There is no uniformity as to whether or not we can speak of zygotes at this stage, as cell fusion is not yet complete, but they are already an inseparable unit. This is followed by

²⁵ See ZELLER, J. *The moral and legal status of embryos created outside the body in the light of the right to reproduction and scientific research*, pp. 48–50.

the fusion of the two nuclei to form the zygote. Fertilization is finally completed when the zygote starts to divide.

At the beginning of the zygote division process, the *morula* is formed by *blastomeres*, which are uniform cells that have not yet differentiated. These are *totipotent* cells, i.e. they can give rise to any of the cells that make up the human organism. The morula further divides to form the *blastocyst*, at which stage the first differentiation of the embryo cells takes place. Here there are two types of cells, the *trophoblast*, which, after implantation, form the amniotic membrane and placenta, and the *epiblast*, also known as the *inner cell mass* (ICM), from which the embryo itself develops. These are in fact *embryonic stem cells* that retain their totipotency or pluripotency, so they can develop into any kind of tissue. They are therefore capable of forming all adult cell types, but cannot form any cell type outside the embryo. This stage of differentiation is the last stage at which zygotes can become identical twins. During further differentiation of the ICM, the germ layers of the embryo, the *ectoderm* (outer), *mesoderm* (middle) and *endoderm* (inner), are formed, which give rise to the tissues that will later build the organs. The ectoderm forms the skin and nervous system, the mesoderm the skeletal system, muscles and the haematopoietic system, and the endoderm the intestinal system and lungs. The stem cells of these three cell layers are *multipotent cells*, i.e. they can only form into any kind of cell within the boundaries of a given germ layer.²⁶

The figure below shows the different stages of the entire embryonic period. The figure is not to scale, but the labeling indicates the approximate time boundaries.²⁷

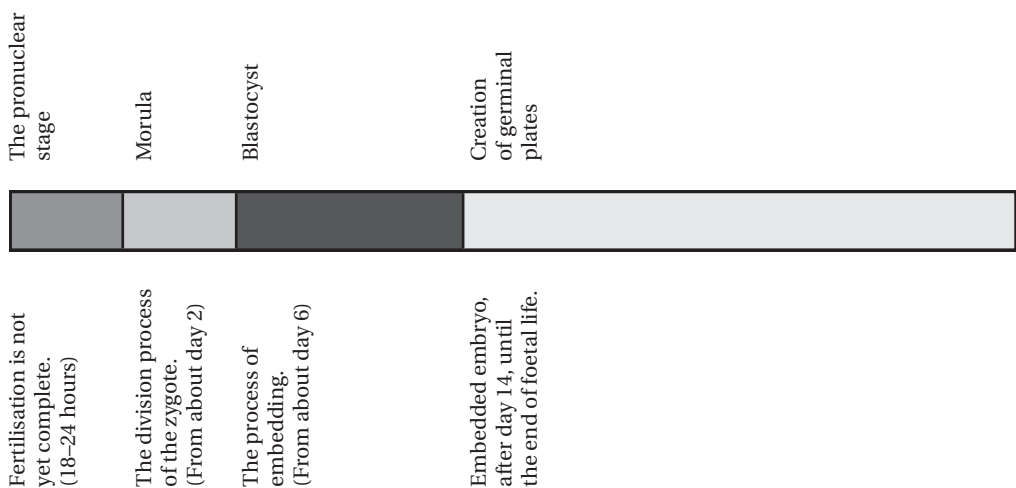


Figure 1 The stages of embryonic development

²⁶ See ZELLER, J. *The moral and legal status of embryos created outside the body in the light of the right to reproduction and scientific research*, pp. 40–41.

²⁷ See PAPP Zoltán (ed.). *The Textbook of Obstetrics and Gynaecology*. Fourth Edition. Budapest: 2009. Semmelweis Kiadó. pp. 127–135. (PAPP Zoltán (szerk.). *A szülészeti-nőgyógyászati tankönyve*. Negyedik kiadás. Budapest: 2009. Semmelweis Kiadó. 127–135. o.).

From the process of embryonic development, it can be seen that knowledge of the biological properties, processes and changes that take place does not make it much easier to recognize the phase (let alone the time, if we can even speak of such a time) in the process of development in which we expect to discover the cells that have become “unborn human being”, both medico-biochemically and morally, in the period following the meeting of the gametes. The question, therefore, arises as to the extent and content of protection at what stage of the developmental process and whether protection should be triggered by the meeting of gametes, the fusion of nuclei, the first, initial differentiation of cells, or the formation of an organism by the formation of embryonic and germ cells.

In this context, it is essential to mention that Barnabas Lenkovics, the then Ombudsman, investigated the - possible - injustice raised about the right to life in the context of the foetus, in the view that emergency contraceptives, by their mechanism of action, do not cause contraception but abortion, as “[...] *they prevent the implantation of the »already conceived and living, developing human being« in the womb, thus »causing its death«.*”²⁸ According to the findings of the *Report*, the Ombudsman asked the medical professional body According to the findings of the *Report*, the Ombudsman asked the medical professional body that was contacted whether “[...] *according to the current state of medical science and Hungarian scientific thinking, an egg that has been fertilized but not implanted can be classified as a foetus.*”²⁹ The secretary of the body contacted considered the question to be only partly medical-professional, rather legal and ethical. Still, after consulting several professional colleges and bodies, he sent the following reply:

*“A fertilized egg that has not yet implanted is not considered a foetus. The accepted view in obstetrics and gynecology is that the pre-embryo is the stage in the development of the fertilized egg from the completion of fertilization to the appearance of the primitive streak. This period is defined as 14 days (12 to 16 days are the limits of the developmental period). The diploid cell formed by the fusion of the nuclei of two haploid gametes is the zygote. During migration, the zygote enters the uterine cavity and begins implantation about 6-7 days after conception, which is completed in 5-6 days by the primary fluff of the developing trophoblast penetrating the decidual endometrium. The pre-embryonic period extends from the completion of fertilization until the time when the fertilized egg is certain to develop into a single (single) biological individual. There is currently no consensus on when fertilization is complete, as fertilization is not a momentary event, but a process that begins when the sperm reaches the egg, the outer surface of the zona pellucida. The genetic material of the two gametes is then fused over at least 24 hours. Within this, it would be difficult to decide where to draw the line, but there is certainly no basis for using the term and concept of »moment of fertilization.« [...]”*³⁰

“Emergency contraception should not be considered as medical abortion. According to a gynecological position statement (the International Federation of Gynecology and Obstetrics [FIGO] position statement), pregnancy can only be considered to have occurred when the pre-embryo developing from a fertilized egg has implanted and started to develop in

²⁸ OBH Case No. 2203/2005.

²⁹ OBH Case No. 2203/2005.

³⁰ OBH Case No. 2203/2005.

*the mother's body. This is the 14th day after ovulation and conception. From this time onwards, we can only talk about pregnancy and therefore abortion can only occur from this time onwards. [...]*³¹ It is therefore legitimate to ask how, and if at all, the objective institutional protection of the state is enforced in the period between conception and embedding.

*“However, the ETT³² President acknowledged that the obstetric-gynecological positions adopted based on knowledge of biological events are certainly not acceptable to everyone. Fertilisation is the beginning of the possibility of life. Overall, he noted that it is impossible to give a satisfactory answer to the questions raised. Here, as in many other cases in the medical profession, the profession believes that the lesser of two evils should be followed, as opposed to a philosophical, moralistic approach. The use of emergency contraception is 80% effective in avoiding unwanted pregnancies, most of which would result in actual termination of pregnancy.”*³³

There is an apparent problem with the different terminology used in medicine and law. The State's objective obligation to protect life is enjoyed by the foetus from conception, but it is only realized after implantation. According to the current Fundamental Law, the protection of foetal life is granted “*from conception*”.³⁴ However, the conceived zygote at the morula stage is not yet a fetus in biological terms. In addition, the Fetal Protection Act provides for the protection of foetuses “*developing in the womb*”,³⁵ which can be discussed from about day 14. However, the Health Act³⁶ links the concept of embryo to the period from fertilization to week 12 and the concept of foetus – only for the purposes of Chapter IX – from week 12 to the end of foetal life – only in the case of an intrauterine human being.³⁷

The inconsistent use of the term was also pointed out by László Székely, the Commissioner for Fundamental Rights, in the Report as mentioned above. Although he stressed that, with a correct interpretation of the law, the use of the term is clear [in relation to the Health Act and the Fetus Protection Act – *author*], he nevertheless asked the Minister to “[...] *consider clarifying the provision examined and analyzed in the report.*”³⁸

The difference in the use of legal terminology in matters concerning medicine makes it difficult to ensure that medical expert opinions are compatible with the law. I also think it would be desirable to standardise them in the future.

CONCLUSIONS

It can be concluded from the above that jurisprudence is in many respects out of step with medical science on this subject, with the former lagging far behind the latter. This lack of synchronization is more than the natural lag that results from the need to adapt the legal framework to a new situation resulting from scientific progress.

³¹ OBH Case No. 2203/2005.

³² Hungarian acronym for the Health Science Council.

³³ OBH Case No. 2203/2005.

³⁴ The Fundamental Law of Hungary, 25 April 2011, Article II.

³⁵ Act LXXIX of 1992 on the Protection of Fetal Life.

³⁶ Act CLIV of 1997 on Health Care.

³⁷ See Act CLIV of 1997 on Health Care, Section 165.

³⁸ Case No. AJB-4874/2016.

In the present case, the difference in terminology mentioned above is merely a “symptom” of the gap between the provisions of the legislation codifying the situations that arise in the context of human life before birth (potential) and the medical-biological knowledge that medical science has accumulated in recent decades about this stage of life, about embryonic development, about the process of fertilization itself, about the cellular transformations that take place. In the last half century, medical science has gained more knowledge about “becoming human” than Hippocrates³⁹ has gained in well over two millennia. In comparison, jurisprudence seems to ignore the biology of embryonic development, which medical scientists take as evidence. An excellent example of this is the *state’s obligation to protect life from conception*, which has been referred to several times above. A review of the sources of law and legal instruments on the subject, and of the biology of the subject, clearly shows that the *process of conception*, which is “mapped” from a physiological point of view, and thus the initial period of human ontogenesis, is a dynamic one. The initial period of human ontogeny is a dynamic period of continuous change in the formation of the unique and unrepeatable human individual, as often claimed by lawyers, and, from a medical point of view, it is not unproblematic to determine when we can speak of “completed conception.”

In comparison, jurisprudence defines the date of conception in civil law as a rebuttable presumption linked to the date of birth.⁴⁰ This rule, which has been in operation for thousands of years, is suitable for settling classical personal and property relations in the private law context since the legal situation of capacity to contract is such that it is irrelevant what the exact date of conception is if, for some reason, the birth does not take place. On the contrary, however, in the case of the right to the fetus, which is the subject of the constitutional law analysis, and specifically in the context of the right to life, the critical issue is, in my view, the knowledge of the time of conception. As an example of this, I would mention the Ombudsman’s Report⁴¹ on emergency contraceptives, mentioned above, because it is clear that jurisprudence has no defined concepts of the different stages of embryonic life, still less of the boundaries of the stages. The question was therefore answered entirely on the basis of the terminology of medicine. This, however, *leads to the conclusion* – looking at the specific case – of the *dysfunctionality of the obligation to protect life as declared from conception*. This was also perceived by Barnabas Lenkovics, as he stated in his *Report. In point 3.5 of the Report*, under the heading “*Other findings of the investigation*”, he states that “[i]n order to reach a different conclusion from the present investigation with regard to the facts set out in the complainant’s complaint, it would either be necessary or a paradigm shift in medical science, which would lead to the zygote being a fetus after the fusion of cells, or that the group of concurrent groups of differing beliefs which can provide sufficient and valid arguments for such a change should be the group which shares the views of the complainant.”⁴² I disagree with the statement to the extent

³⁹ Hippocrates (island of Coss, 460 BC – Larissa, Thessaly, c. 377 BC): physician, naturalist, philosopher. He purified and systematized for the first time the traditional knowledge of medicine, based on observation and careful examination. His works, the *Corpus Hippocraticum*, consists of 72 works of varying size. In: lexikon.katolikus.hu [online]. [2024-05-30]. Available at: <http://lexikon.katolikus.hu/H/Hippokrat%C3%A9sz.html>.

⁴⁰ See Act V of 2013 on the Civil Code, Section 2:2 (Beginning of legal capacity). Civil Code of Hungary (njt.hu).

⁴¹ OBH Case No. 2203/2005.

that what is needed is not a paradigm shift in medicine, but a paradigm shift in law to enable it to “handle” the natural scientific truths that medicine reveals. Looking at the process of the embryonic period as described above, it can be seen that conception is not, in biological terms, the creation of a foetus. In this case, the term *foetal existence protected from conception* is inappropriate, since foetal existence does not come into being at conception. If fertilisation is completed with the beginning of cell division of the zygote and implantation takes place on the 14th day after fertilization, it is for the law to determine the cellular state or stage from which the protection of life by the State can be defined. The *Report*, relying on a medical expert’s opinion and fully applying the logic and language of medicine, did not consider a fertilized but not yet implanted ovum as a foetus, but only an implanted ovum.⁴³ The time from fertilization to implantation is 14 days, and in biological terms we cannot speak of a foetus during these 14 days. In my opinion, therefore, it is not medicine that should classify the zygote as a foetus, because it is not medicine that should adapt to jurisprudence, but the other way round. If the state wishes to protect the fertilized zygote, the law should not call it a foetus.

In this context, it is worth mentioning the different terminology used in the Fetus Protection Act⁴⁴ and the Health Act⁴⁵ already mentioned, in the context of the interpretation of the terms “fetus” and “embryo”. Although this is a purely technical legal issue, which has been clarified by the Commissioner for Fundamental Rights,⁴⁶ it undoubtedly complicates the legal practitioner’s understanding of the issue, in addition to the already problematic interpretations of the terms.

In my view, therefore, it is timely to develop a new, expanded and unified set of concepts capable of decoding a medical-expert position according to the logic of jurisprudence while retaining the substance of truths beyond the law. In this context, it is necessary to define the state of the cell from which the state wishes to protect it and how it would do so. In the absence of this, the protection of life from conception, in the case of intra-bodily conception in any case, is only delayed, from the formation of what is biologically called a foetus.

The road from *portio mulieris* to *in vitro embryo* has been a long one, which will never end in the future, but the sciences must go together on this road, so that they can provide law-makers with proposals for newly produced life situations, equipped with up-to-date knowledge. This can only be achieved through close cooperation between experts in the natural, social and human sciences, and it is therefore desirable that the results of their work reflect a harmonious balance between the scientific requirements of the times and the real needs of society.

⁴² OBH Case No. 2203/2005.

⁴³ OBH Case No. 2203/2005.

⁴⁴ Act LXXIX of 1992 on the Protection of Fetal Life.

⁴⁵ Act CLIV of 1997 on Health Care.

⁴⁶ Case No. AJB-4874/2016.