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## BIOTECHNOLOGICAL ADVANCEMENT VERSUS INTEGRAL CONCEPT OF AN INDIVIDUAL (IN THE CONTEXT OF THE CONSIDERATIONS REGARDING DIGNITY AND AUTONOMY)

### 1. Main directions of the discussion regarding the human subjectivity versus biotechnological advancement

A dispute regarding human subjectivity has been a subject of the analysis in the framework of philosophy since the beginning of mankind. A huge discourse on the subject results from the considerations involving many aspects of the problem. Philosophers' interests take different directions, for example, ontology of human existence, a phenomenon of human duration, human individual identity, etc. Some researchers consider the issue of human subjectivity in a normative way establishing certain norms of humanity; others head towards the establishment of objective and independent criteria of subjectivity.<sup>1</sup>

A panorama of modern philosophical trends reveals two principle ways of capturing a human being as a subject. On the one hand, these are approaches which are classified as "classic" (e.g. philosophical personalism). On the other hand, there are some approaches which are classified as new – "non-classic" (e.g. postmodernism).<sup>2</sup>

Christian anthropology has a significant role among philosophical concepts of a "person". Apart from that, there exist different concepts including the so-called "moral concept of a person" (frequently described as

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<sup>1</sup> J. Górnicka-Kalinowska, *Wstęp*, [in:] *Filozofia podmiotu. Fragmenty filozofii analitycznej*, Warszawa 2001, p. 5.

<sup>2</sup> A. Szadek-Bartuń, M. Bartuń, *Personalizm filozoficzny a kultura prawna*, [in:] G. Dammacco, B. Sitek, O. Cobaj (ed.), *Człowiek pomiędzy prawem a ekonomią w procesie integracji europejskiej*, Olsztyn – Bari 2008, p. 79.

a neo-Kantian approach). Recently, the so-called trend of “developmental ontology” has been gaining more and more significance.<sup>3</sup>

A human subject is sometimes understood as “a virtuous animal” (person), “manifestation of a divine spirit” (a divine child, *imago Dei*, a spiritual man), “me thinking” (*cogito*), “a mortal witness of his own lot” (mortal), “sensory-motor center” (a rational and feeling body), “surface of unconsciousness” (*ego*), and “appearance of a subject”.<sup>4</sup>

Analyzing certain philosophical concepts, one can notice that the very notion of “subjectivity” is not fixed enough. It is frequently discussed from perspectives other than a philosophical one, for example, sociology, psychology, or jurisprudence. Independently from the surface of considerations, a lack of sharpness is visible regarding who or what the subject is and what meaning subjectivity should be ascribed.

On the ground of philosophy, human subjectivity is frequently understood as a certain individuality and integrality as well as a capability of an individual direction to some degree. Apart from the differences, it always links with the awareness of the individual “me”.<sup>5</sup> Without it, it is impossible to be “a subject”. Regardless whether the definition of a person is taken from the Roman law or the works of St Thomas Aquinas, Descartes or Kant, one will always find: “(...) some thread of independence, autonomy, belonging to oneself, existence because of oneself, life from one’s interior, acts from oneself, determination of oneself; in short, some modification of being oneself.”<sup>6</sup> Although the character of the discourse of the modern liberalism is different from the doctrines of the religions origins, a necessity to search for the terms for our subjectivity indicates its essential function in the process of thinking about ourselves; what is more, it has significant moral and legal repercussions.

Different ways of the realization of “being oneself” result in the appearance of various formulae capturing *homo sapiens* as a subject performing different tasks aiming at the fulfillment of his humanity. A human being is an existing and functional whole where one can notice different levels of humanity. Apart from the basic terms used to describe a human being, that is *homo sapiens*, there are many others: *homo symbolicus*, *homo religiousber*, *homo ludens*, *homo viator*, *homo creator*, *homo economicus*, *homo politicus*,

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<sup>3</sup> M. Safjan, *Prawo wobec ingerencji w naturę ludzkiej prokreacji*, Warszawa 1990, pp. 319–330.

<sup>4</sup> J. Hartman, *Wstęp do filozofii*, Warszawa 2008, pp. 124–126.

<sup>5</sup> L. Witkowski, *Tożsamość i zmiana*, Toruń 1988, p. 11 and following.

<sup>6</sup> J. F. Crosby, *Zarys filozofii osoby. Bycie sobą*, Kraków 2007, p. 11.

*homo noumenon*, *homo electronicus*, *homo artificialis*, *homo bionicus*, and finally, *homo continuus*.

The newest definitions of humanity are connected with the concept of the so-called “bionic human” (*homo bionicus*) and “continuous human” (*homo cocontinuos*). The essence of *homo bionicus* is that a new hybrid is being created with the help of what is natural and artificial. A human being is being manipulated according to the expectations of the creators and the society. *Homo continuus* wishes to stay alive and fit as long as possible. Some people claim that in the near future *homo sapiens* will be replaced by a new species of man created by science and technology defined as *homo scientificus*, who will be: “(...) to some degree genetically an animal, to some degree a plant, but mainly the creature will be a human supplemented by electronic elements (...).”<sup>7</sup> According to this vision, which is currently treated as science-fiction, in some future a human species, which is classically defined as *zoon logon echon*, will totally disappear. As a result of the biotechnological development, a human being will become a *homo artificialis* (technobiont, superrobot).<sup>8</sup> F. Fukuyama, an American researcher of bioethics, claims that mankind is inevitably approaching a temporary era leading to a new species which could be defined as *homo supersapiens*. In such a “post-human” world “(...) the notion »common humanity« will lose its sense because human genes will be mixed with the genes of so many species that it will not be possible to know what a human being is.”<sup>9</sup>

There appears a question regarding the limits of scientific research in the age of biotechnological progress. Law has to take into consideration challenges in the areas of the problems connected with human existence. Perhaps today a legal definition of a man as a physical person, understood somehow intuitively and assuming that the subject of law is every person from the moment of birth till the moment of death, is not sufficient. It is necessary to highlight that various medical actions taken so far have been realized basing on the principle, typical for a democratic state under the rule of law, which states that if something is not legally proclaimed or prohibited, it is allowed. The majority of medical interference has occupied the so-called sphere of “legal indifference” so far. However, nowadays people face a clear need of the construction of the explicit legal definition of the notion “human being”. Together with the development of medicine, a number of doubts

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<sup>7</sup> B. Debre, *Ostatnie dni homo sapiens*, “Wprost” dated 25.02.2001, pp. 76–78.

<sup>8</sup> L. Ostasz, *Rozumienie człowieka. Antropologia filozoficzna*, Olsztyn 2003, p. 503.

<sup>9</sup> F. Fukuyama, *Koniec człowieka*, Kraków 2004, p. 286.

dealing with human reproduction and the end of mankind is constantly growing.

A new legal definition oscillates between the differentiation between a “human person” and a “human creature”. Basically, it is connected with the concept of human as a “person”, derived from Christian anthropology and basing on the recognition of a man being a certain mental potential (unity between body and soul) capable of collecting experiences, feeling happiness, pain, etc. Here the holiness of every life is *a priori* assumed paradigm. At the same time, there is a reference to the concept of “man-the body”, developed by Descartes,<sup>10</sup> and continued by J. O. del La Materie.<sup>11</sup> According to this approach, it is acknowledged that a human organism is a body, constructed according to some unique genome. Parts that are used should be replaced with the new ones to guarantee a life as long and satisfactory as possible. To make it general, it is possible to state that a dispute on legal subjectivity of a human being oscillates between the concepts of “holiness” and “quality of life” elaborated on the ground of the European culture.

## **2. Human dignity and the principle of human life protection as determinants of legal and extra-legal regulations of the biotechnological advancement**

One of the most significant discriminants of the western civilization on the turn of the twentieth Century is a “devotion” of almost all aspects of human existence, starting from birth and finishing with death, to medicine. This process is referred to as a process of “medicalization”. It deals with biological, social and spiritual aspects of human existence. Biotechnological advancement is captured by the majority of researchers as a promise to combat illnesses that are thought to be incurable and to correct mistakes and defects of Nature. Others perceive it as a dangerous interference into Nature’s laws, which could result in a catastrophe.

It seems that certain legal and extra-legal regulations of biotechnological advancement should be based on a certain concept of human being. Moreover, it should come along with the consideration of not only philosophical and social issues but also values, customs as well as religious norms

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<sup>10</sup> R. Descartes, *Człowiek. Opis ciała ludzkiego*, Warszawa 1989, p. 79 and following.

<sup>11</sup> J. O. del La Materie, *Człowiek-maszyna*, Warszawa 1984.

that are prevailing in the state. At the same time, it is necessary to remember that, although the differentiation between “human creature” and “human person” is logical and coherent on the surface of a philosophical consideration, to be able to arrive at legal consequences, it is necessary to take into account the so-called “boundary states” (birth and death) which are not defined precisely at this stage. What is more, it is essential to consider a certain “cultural code” deeply ingrained into a given society. Such a code determines, for example, the recognition that a human embryo, just as a person with an irreversible mental retardation, is a subject who demands legal protection although some could doubt whether they deserve a status of “human” from an anthropological perspective, for example.

The appearance of new medical techniques is accompanied by the appearance of a number of new questions regarding the essence of humanity, which results in the necessity of an inevitable reaction of a state. Unfortunately, disputes which are connected with biotechnological advancement cannot be referred to traditional categories. Together with the progress of medicine, a range of known possibilities of human actions is extended. Boundaries between the nature of humanity and accessible (from the point technical point of view) possibilities of human manipulation of their own subjectivity are being washed away. It is inevitably connected with a risk of entering the sphere of dignity, integrality, identity and human autonomy. Consequently, it may lead towards a collision with individual and common interests. There appears a clear need of fundamental decisions regarding social, legal and political consequences resulting from the application of biotechnology.

A basis for solutions in the sphere of bioethics is undoubtedly the principle of protection of human life, accepted by the majority of ethical systems and interspersed with the so-called “European cultural code”. It is commonly recognized as a basic value which is a starting point for other human rights and freedoms. A right to life is treated as an innate right, whose axiological justification is deeply rooted in the order of the world.<sup>12</sup> Nevertheless, the content of this right results into a growing number of doubts. Soon one may face a necessity of its new defining. It is obvious even today that the norms which guarantee protection of life are acquiring a greater significance. They are also used in the attempts of justifying “a right to death”. Therefore, there is a significant change in the essence of the norms

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<sup>12</sup> A. Redelbach, *Natura praw człowieka. Strasburskie standardy ich ochrony*, Toruń 2001, p. 164.

protecting life, which consequently results into a change in a theoretical and factual range of this protection.<sup>13</sup>

Human dignity has to be a starting point for protection of human life. It has to be treated as a primary philosophical value and an axiological paradigm of law. Such an approach is closely connected with a legitimization of the above-mentioned “European cultural code” established in the western European culture. Human dignity has a clear status of an inviolable value; its protection and respect should be the duty of public authority. Generally, two notions have been highlighted: “personal dignity” and “individualistic dignity”. The former term has a significant role from the perspective of the theory of a democratic state. It has been recognized that personal dignity is revealed by every individual on the ground of being a human person. Individualistic dignity is referred to those properties which are under protection of a legislator.

Although the idea of dignity has a very long history in philosophy and theology, considerations on the subject, taken from a legislative perspective (especially from the point of view of the constitutional law and the theory of law), are rather new.<sup>14</sup> They started to be developed under the influence of the enlightened thought. A modern constitutional and legal history of protection of human dignity started just after the end of World War II. It was at that stage that a position of human dignity in the axiological center of values of principle laws became a distinct feature of constitutional systems. Hence, the category was situated at the highest point of the legal system.<sup>15</sup> Currently, the majority of the EU states make human dignity the foundation of a social and political harmony especially of the constitutional system.<sup>16</sup>

From a semantic point of view, the term “human dignity” (*dignitas humana*) is connected with an abstract capturing of a man, who is perceived

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<sup>13</sup> R. Grabowski, *Opinia prawna do projektu ustawy o zmianie Konstytucji RP z uwzględnieniem pytania, czy możliwa jest inkorporacja art. 4a ust. 1 ustawy o planowaniu rodziny, ochronie płodu ludzkiego w warunkach dopuszczalności przerywania ciąży do art. 38 Konstytucji*, [in:] *Konstytucyjna formuła ochrony życia*, Seminarium Biura Analiz Sejmowych, Warszawa 2007, p. 32.

<sup>14</sup> O. Luchterhandt, R. Bruscske, *Godność człowieka – aktualne kwestie sporne w niemieckim prawie państwowym*, “Państwo i Prawo”, Nr 2/2005, p. 34.

<sup>15</sup> F. F. Segado, *Godność człowieka jako najwyższa wartość porządku prawnego w Hiszpanii*, [in:] K. Complak (ed.), *Godność człowieka jako kategoria prawa (opracowania i materiały)*, Wrocław 2001, p. 169.

<sup>16</sup> K. Complak, *Uwagi o godności człowieka oraz jej ochrona w świetle nowej konstytucji*, “Przegląd Sejmowy”, Nr 5(28)/1998, p. 41.

as a specific and central existence.<sup>17</sup> It emphasizes the highest significance of a human being over other creatures independently from his behavior. It means that a human being is distinguished as a “fundamental value” for other values; this value cannot be violated by any subjects who make the state authority.<sup>18</sup>

Nevertheless, it is essential to highlight that the notion of “human dignity” is very difficult to be captured in a precise and explicit way.<sup>19</sup> A way of understanding this term has been changing for years accompanied by the development of societies. It keeps changing, being dependent not only on cultural conditioning and moral, religious and political norms and customs but also on various economical and mental functors. Legal norms have a significant role here. A legal perspective guarantees that people can expect at least an average level of respect from others.<sup>20</sup>

A theoretical basis of human dignity may be found in the thought of the Catholic Church. Individual rights are treated on its ground as a consequence of human dignity resulting from a man’s existence as modeled on God.<sup>21</sup>

Secular views on human dignity are deeply rooted in the beginnings of the modern era.<sup>22</sup> It was then that a qualitative dissimilarity of a human being and human superiority in the world of Nature due to human consciousness, reason and freedom of act were emphasized. A contemporary comprehension of the idea of dignity was significantly influenced by Kant’s idea that a human being, “the end in himself, has been given the highest value based on the ability to establish a moral law and proclaim common rights.<sup>23</sup>

In a modern formulation, human dignity does not allow for discrimination of anybody for any reason. It is attributed to every human being and

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<sup>17</sup> S. Retterer, *Pojęcie godności w obowiązującym i przyszłym prawie wspólnotowym*, [in:] K. Complak (ed.), *Godność...*, op. cit., p. 89.

<sup>18</sup> A distinct between personal dignity and individualistic dignity was introduced by J. Krukowski, *Godność człowieka podstawą konstytucyjnego katalogu praw i wolności jednostki*, [in:] L. Wiśniewski (ed.), *Podstawowe prawa jednostki i ich sądowa ochrona*, Warszawa 1997, pp. 39–42.

<sup>19</sup> M. Surkont, *Cześć i godność osobista jako przedmioty ochrony prawnokarnej*, “Nowe Prawo”, Nr 4/1980, p. 48.

<sup>20</sup> M. Surkont, *Cześć...*, op. cit., pp. 54–55.

<sup>21</sup> Compare *Katechizm Kościoła katolickiego*, Poznań 1994, p. 405 and following.

<sup>22</sup> M. L. Pavia, *Odkrycie godności osoby ludzkiej we Francji*, [in:] K. Complak (ed.), op. cit., p. 135.

<sup>23</sup> M. J. Mayer, *Idea godności u Kanta a współczesna myśl polityczna*, [in:] K. Complak (ed.), op. cit., p. 51.

is an absolute, timeless and stateless value. What is more, it constitutes the basis of every human freedom and constitutional right. It provides constitutional freedoms and civil rights with unity. Moreover, it is the foundation of a democratic state. It also protects the society against a transformation of an individual into the subject of public authority's activity.

A constitutional notion of dignity has a character of a gradation category, functioning as a connection between *ius* and *lex*; a specific "bridge" between justice and the law: the natural law and the positive law. It becomes a determinant of the constitutional interpretation. Moreover, it is an indication of a range of certain human freedoms and rights. M. Kordela has accurately captured this function stating that the imperative of humanism, identical with the principle of protection of human dignity, nowadays has to be recognized as a specific "principle of the principles" of the constitutional catalog of rights, whereas protection of dignity should be recognized as a basic aim of the community organized into a state.<sup>24</sup>

To sum up, human dignity is a foundation of a constitutional order in a logical, ontological and hermeneutical senses. Other principles should be interpreted in its background. Individuals applying law should be aware of its specific burden and the possibility of using the category of dignity in their jurisdiction practice. Facing conditions of a biotechnological progress and new possibilities of manipulation in the spheres of biojurisprudence and biojustanatology, it becomes a necessity. A dispute regarding protection of human dignity in the starting and finishing phases of life seems to be fundamental.

Following legal discussions on the subject, one may state that the issues of the relations between human dignity and a right to life nowadays seem to be the most controversial ones in the dogmatics of law. What is more, possible biotechnological interferences result in a growing number of ethical and legal doubts. Hopefully, the Polish legal system will be extended by instruments which are already present in western democratic states. These instruments prohibit taking actions which could result into a risk put on human genetic legacy and future generations.<sup>25</sup> At the same time, it is not advisable to "close" new possibilities brought by contemporary medicine, especially when the arguments against are of a mere religious nature.

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<sup>24</sup> M. Kordela, *Zarys systemu aksjologicznego w orzecznictwie Trybunału Konstytucyjnego*, "Studia Prawnicze", Z. 1-2/2000, pp. 77-81.

<sup>25</sup> A conversation with M. Safjan, *Prawo nad prawami*, "Rzeczpospolita", Nr 18/2002.

### **3. Moral implications of the integral concept of a human being**

A discussion regarding human integrality and identity should be placed within a contextually wider analysis of the notion of a “person”. From a historical perspective, two basic concepts of a human being can be noticed: a monistic concept, rooted in religion; and a dualistic concept, connected with a secular perspective. The former concentrates on capturing a man as an individual, integral substance of a rational soul. It establishes the meaning of human dignity. The latter is reflected by secular considerations started by Descartes and adopted on the ground of utilitarianism, consequentialism or deontological theories of rights.<sup>26</sup> It clearly separates the body from the soul and propagates a principle of autonomy.<sup>27</sup>

Nowadays one may observe a growing process of separating the fact of “being a person” from the fact of “being a human creature”. Consequently, there appears an additional determinant differentiating individuals of the *homo sapiens* species. More frequently, apart from “persons”, some subjects are mentioned that could not be acknowledged to be persons. It means that one “is” a human being whereas one “could be” a person. In a traditional sense, a person (“me” – individual, capable of autonomous and free choices), is frequently interpreted as a specific “product” of genetic, social and psychological conditioning.<sup>28</sup> A distinct between the fact of being “a person” and the fact of being “a human creature” indicates a need of a new insight into the issue of human identity and integrality.<sup>29</sup>

In case of experimental works in the sphere of medicine, the indication of the degree of admissibility of certain intervention becomes necessary which has to be dependent on the way of defining the so-called “humanity criterion” highlighting the beginning where an individual is given a moral right to life and the moment when this rights stops working.<sup>30</sup> It is not easy, bearing in mind prevailing methodological and philosophical views on life. Integrality and identity are a complicated phenomenon whose essence cannot be revealed by a short and synthetical formula.

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<sup>26</sup> F. Ricken, *Etyka ogólna*, Kęty 2001, pp. 194–218.

<sup>27</sup> M. Safjan, *Granice autonomii człowieka w prawie współczesnym*, [in:] E. Kamińska (ed.), *Uniwersyteckie wykłady na koniec starego i początek nowego stulecia*, Warszawa 2004, p. 203 and following.

<sup>28</sup> B. Wójcik, *Spór o tożsamość w polskiej literaturze bioetycznej*, [in:] T. Biesaga, *Bioetyka polska*, Warszawa 2004, pp. 209–210.

<sup>29</sup> B. Wójcik, *Bioetyka i tożsamość człowieka*, Tarnów 2007, p. 121.

<sup>30</sup> K. Szewczyk, *Bioetyka kulturowa wobec sporu o aborcję*, [in:] M. Gałuszko, K. Szewczyk, *Narodziny i śmierć. Bioetyka kulturowa wobec stanów granicznych życia ludzkiego*, Warszawa 2002, p. 101.

Apart from some difficulties which may appear, the author of this article will try to arrive at a basic terminological settlements starting from the notion of “personal identity”. There have been numerous attempts to arrive at a semantic meaning and elementary units of this notion. Continuity and certainty of human existence are such basic units.<sup>31</sup> The ability to identify oneself and others seems to be another necessary condition.<sup>32</sup> A human being differs from animals by a degree of his mental capability, rationality and self-awareness. These features are treated as an adaptable characteristic of the *homo sapiens* species. They function while an interaction with a certain biological basis.<sup>33</sup>

The acceptance of the principle of personal identity is connected with a recognition of the fact that a human being is always a human being and while he exists, he can never lose his human properties and dignity. At the same time, he is subjected to a continuous evolution; he is changing, getting older, unwell, etc. Hence, a question arises: are these ongoing changes interfering with a human nature, if yes, to which degree? As it was noticed by a prolific Polish philosopher B. Skarga, “it is there where any time and spacious change takes place that the statement regarding identity becomes of high significance.”<sup>34</sup>

If human existence is always connected with “corporality” and “substance”, to some degree, personal identity becomes a consequence of the awareness of a human body. According to common assignations, “substance” constitutes a non-material part of a human personality. It is complementary with a body. Primarily, it was easy to define by the reference to the invariable habitation of a spiritual life. An empirical critique questioned a legal validity of that approach. It was acknowledged almost on a common basis that “substance” was not an autonomous idea, verified only through experience. It has to be attributed a status of a metaphysical assumption. Nevertheless, even if the notion of substance is abandoned, a problem of personal identity in the experience of “me” remains.<sup>35</sup>

An integral part of personal identity is that a human being “remembers” his body regardless of the changes which he has been through from the moment of his birth. Through memory people experience a continuity of

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<sup>31</sup> L. Kołakowski, *Moje słuszne poglądy na wszystko*, Kraków 1999, pp. 157–160.

<sup>32</sup> K. V. Wilkus, *Real People. Personal Identity without Thought Experimentes*, Oxford 1988, p. 183.

<sup>33</sup> B. Wójcik, *Bioetyka...*, op. cit., p. 122.

<sup>34</sup> B. Skarga, *Tożsamość i różnica. Eseje metafizyczne*, Kraków 1997, p. 169.

<sup>35</sup> L. Kołakowski, *Moje słuszne...*, op. cit., p. 157.

the organism to which they belong. However, personal identity does not only require the awareness of the past, but it also demands being directed to the future, and a conscious anticipation in a social life. A human being belongs to a specific collectivity whereas collective identity constitutes an indispensable binder of human solidarity.<sup>36</sup>

The ability of self-identification and identification of others results in certain consequences in the biotechnological sphere. Biomedical procedures should consider the issue of personal identity of the people to whom they are to be directed. However, it is difficult to establish explicit criteria of this range. Extending the limits of therapy and introducing its standards, contemporary medicine creates new cases which constantly demand a new interpretation. A search for more adequate formulations of the phenomenon of personal identity emphasizing the complementarity of the empirical and personalistic approaches still remains a starting point.<sup>37</sup>

Nowadays the notion of integrality enveloping a whole complex of laws remains equally controversial. The Latin word *integer* means “intact”, “inviolable”, “total”, “absolute”, and “complete”. Integrality can be analyzed in the exterior and interior aspects. The former is connected with physical and mental human identity, expressed in his autonomy. It comprises a prohibition of the state interference into that sphere of human life where an individual should have the ability of free choice as to his lot and can be independent in his relations with the environment. Integrality in the interior aspect is revealed by a specific harmony of mental and physical human components which constitute a kind of totality including human freedom of control over one’s body as well as personal and corporal immunity.

A concept of integrality serves to highlight the aspects of human existence which are especially essential for human dignity to be respected. Protection of integrality leads to the inviolability of values which became constituent for life and human development in a mental and physical sense. Regulations regarding human rights are its normative expression.<sup>38</sup>

A problem of moral subjectivity of humans as well as philosophical disputes regarding its integrality and identity shed some light on jurisdiction. It is not clear how these issues should be approached by the legislation of democratic states. A variety of views results in uncertainty and lack

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<sup>36</sup> For more information see, for example: A. Gołdanowa (ed.), *Tożsamość człowieka*, Kraków 2000.

<sup>37</sup> T. Nagle, *Pytania ostateczne*, Warszawa 1997, p. 183.

<sup>38</sup> Z. Kędzia, *Prawo człowieka do integralności*, “Ruch Prawniczy Ekonomiczny i Socjologiczny”, Nr 3/1997, p. 28.

of consensus in the sphere of defining. These doubts are exemplified by A. Szczeklik who poses a question: “How (if at all) does the human mentality change after a stroke? Does a man still remain himself when, after a period of weeks, he regains his consciousness or, after months or years, he regains his ability to speak, is he still himself? If he is not himself, who is he then? What a trial this must be for our »me« which is intuitively perceived as something permanent, as a core, which makes us be ourselves! But is it true? Especially after a serious illness, are we not going to become somebody else, being only closed in our old wrapping?”<sup>39</sup>

In a classification of contemporary solutions to the problem of human integrality and personal identity there appears a clear problem which could be illustrated with the use of a famous analogy of the “ship of Theseus”. The essence of this problem is revealed by the question: to which moment can the parts of a given object (body) be replaced so that it is still the same object (body) identical with itself? Is it really like D. Partif claims that, to be able to survive, one does not have to be exactly oneself; it is enough to stay oneself to a certain degree? The above-mentioned author argues that “Our view on identity in time should be revised. It is not significant that there will exist somebody alive who will be me; rather it is significant that there will exist at least one living person who will be mentally continuous with me as I am now or who has a respectively big part of my brain”.<sup>40</sup>

The author of this paper shares the opinion that human integrality and identity cannot be limited to “mental continuous” of a man. The most reasonable solution would be the assumption that a qualification of necessary and sufficient criteria of their preservation should consider the dimensions of both biological and mental life. At some moments of human existence these criteria may overlap; sometimes a greater meaning would only be ascribed to one of them. Nonetheless, any absolutizing decisions of a medical character may lead to doubts of a moral character.<sup>41</sup>

This is the unity of material and spiritual elements that has become the basis for the “integral concept of a human being” established in the European cultural circle. It has been acknowledged under its influence that a human being constitutes an individual and autonomous corporal and spiritual unity capable of rational and free actions.<sup>42</sup> It seems, therefore, that

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<sup>39</sup> A. Szczeklik, *Kore. O chorych, chorobach i poszukiwaniu duszy medycyny*, Kraków 2007, p. 33.

<sup>40</sup> D. Partif, *Tożsamość nie jest ważna*, [in:] P. Gutowski, T. Szubka (ed.), *Filozofia brytyjska u schyłku XX w.*, Lublin 1998, p. 464.

<sup>41</sup> B. Wójcik, *Bioetyka...*, op. cit., p. 122.

<sup>42</sup> M. Safjan, *Prawo wobec ingerencji...*, op. cit., p. 320.

this assumption should be of the greatest importance when considering legal regulations of biotechnological interference.

It can be noticed that all contemporary bioethical discussions regarding human subjectivity are concentrated on the principle of autonomy. In the sphere of biotechnology it generally states that a rational man has the right to take medical decisions which influence his life.<sup>43</sup> The principle of autonomy has been accurately captured by I. Berlin: "I wish myself that my life and my decisions are dependent on me and not on any external forces of any character. I want to be the tool of my, and not somebody else's will. I want to be a subject, not an object; I want to be directed by my own opinions and intentions rather than surrender to causative factors, affecting me externally. I want to be somebody, not nobody; somebody who takes decisions for himself and not the one who is being decided for by somebody else; I want to be self-regulating and not directed by the laws of Nature or by other people as if I were an object, an animal or a slave incapable of handling the role of a human being, that is, to set my own aims and directions of my actions."<sup>44</sup> In the medical field autonomy has become a legal fact: "a patient has the right to decide about himself as comprehensively as he can (and not as he is allowed by authority), he has the right to agree or disagree as to a medical procedure in every case (...)." <sup>45</sup> This principle is practically realized in a patient's agreement or disagreement as to a medical operation to be conducted.

Autonomy seems to be a feature which constitutes something which is called "human life". It gives the sense and meaning to the reality surrounding people. A quality of life is not only judged by a human organism; first of all, it is judged by human capability of autonomous acting. Autonomy or its potential possibility is a necessary condition to make somebody's life deserve the status of being a human life.<sup>46</sup> Considerations regarding autonomy oscillate around human privacy. In a medical sphere it is connected among all with a duty to keep a medical secret. An order to respect a patient's dignity and his right to autonomy justifies a respect for an intimate sphere of life.<sup>47</sup>

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<sup>43</sup> D. B. Ingram, J. A. Parks, *Etyka dla żółtodziobów, czyli wszystko, co powinieneś wiedzieć o...*, Poznań 2003, p. 229.

<sup>44</sup> I. Berlin, *Cztery eseje o wolności*, Warszawa 1994, p. 192.

<sup>45</sup> J. Hartman, *Bioetyka dla lekarzy*, Warszawa 2009, p. 100.

<sup>46</sup> W. Chańska, *Nieszczęsny dar życia. Filozofia i etyka jakości życia w medycynie współczesnej*, Wrocław 2009, p. 106.

<sup>47</sup> B. Chyrowicz, *Bioetyka i ryzyko. Argument "równi pochyłej" w dyskusji wokół osiągnięć współczesnej genetyki*, Lublin 2002, p. 59.

An integral part of the principle of autonomy is the “right to control one’s body”. It is connected with a possibility of a state what is going to happen to us when we stop existing as “persons”. It seems that in the context of the considerations regarding an integral concept of a human being one cannot ignore the resolutions included in the so-called “directives for future”. Autonomous decisions should preserve their validity even after a person who has taken them has lost his capability of autonomous acting. Such choices have to be valid even for the reason that they have not been annulled.

#### 4. Legal implications of the integral concept of a human being

A difference between the notion of “a human being” and the notion of “a human creature” has a great significance in the language of law. To be a human being means to possess a moral and legal subjectivity, that is, to be the subject of the laws and responsibilities. By the acceptance of the above-mentioned distinction, there is an attempt to reconcile discrepant visions of who a human being is and, above all, when a human life starts and finishes. Significant from the subjectivity point of view, notions such as dignity, identity, integrality, autonomy and privacy are reflected in the legal regulations.

A term “dignity” is revealed by many regulations of the public international law, the EU law and national laws. *The Universal Declaration of Human Rights* emphasized that human dignity is the basis of freedom, justice and peace in the world. *The International Pact of Civil and Political Rights* and *the International Pact on Economic, Social and Cultural Rights* have had a great significance. Human dignity is directly referred to by *The Charter of Fundamental Rights of the European Union* and a project of *The Treaty establishing a Constitution for Europe*.

It is necessary to highlight that the above-mentioned documents do not reveal a detailed description of the essence of dignity. Indeed, it is not possible to define this term precisely on the basis of normative acts. Nonetheless, human dignity has gained a status of being basic in the public international law and the EU laws. In accordance, *the Constitution of the Republic of Poland* has accepted that the notion of human dignity has to be given a central category in the legal system: “The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.”<sup>48</sup>

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<sup>48</sup> Art. 30 Constitution of the RP.

The principle of human dignity respect is to be found in the justification of the decisions taken by *the European Court of Human Rights*, constituting one of the foundations of *the European Convention on Human Rights*. It was constructed on the basis of the concept of human being with a great emphasis on human freedom.<sup>49</sup> *The European Court of Human Rights* has frequently referred to human dignity to state individual rights in the relations with another subject. "Human dignity" has always been treated as personal dignity with a reference to a certain person.

In connection with biotechnological advancement in the sphere of medicine it is possible to observe an evolution of the interpretive way of the principle of human dignity respect. It clearly heads to the recognition that human dignity cannot be limited exclusively to the attributes of the so-called "person". It becomes more and more commonly accepted that "human dignity also represents a certain collection of norms and values, commonly accepted and acknowledged to be fundamental, which refers to a human life in the most general sense."<sup>50</sup> In the newest jurisdiction of *the European Court of Human Rights* it is possible to notice the necessity of the human life protection in a prenatal phase apart from the fact that *the Convention* leaves a margin of freedom for the nations-sides to establish the standards of human life protection at this stage. It has been acknowledged that an embryo (foetus) belongs to the human species and should be protected in the name of human dignity protection.

The above-mentioned international documents, which qualify legislative directives for the states-members of the European Council (including the Polish legislator), complement and specify various recommendations and resolutions of the *the Committee of Ministers and the Parliamentary Assembly of the Council of Europe*.<sup>51</sup> They confirm that embryos and human foetus should be treated with a rightful respect of human dignity in all circumstances.<sup>52</sup> Although a human embryo undergoes different developmental stages (zygote, morula, blastula, pre-embryo, embryo, foetal) and stages of

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<sup>49</sup> Protection of dignity is closely connected with the regulations of the art. 2, comprising a guarantee to the right to life, and the regulations of the art. 3, which prohibits the use of tortures and inhuman ways of treating.

<sup>50</sup> M. Grzymkowska, *Standardy bioetyczne w prawie europejskim*, Warszawa 2009, p. 273.

<sup>51</sup> For instance, the Recommendation 1046 (1986) of the *Parliamentary Assembly of the Council of Europe* regarding the use of human embryos and foetal for diagnostic, therapeutical, scientific, industrial and commercial purposes or the Recommendation 1100 (1989) of the *Parliamentary Assembly of the Council of Europe* regarding the use of human embryos and foetal for scientific purposes.

<sup>52</sup> Point 10 of the Recommendation 1046 (1986).

differentiation, it has been pointed out that it keeps a continuous biological and genetic identity.<sup>53</sup>

A formulation of this kind is visible in *the Biomedical Convention*, which clearly refers to the notion of “human dignity” and not the traditionally formulated “dignity of a person”. Therefore, the protection resulting from the regulations of this document also envelopes a human embryo. Apart from the term a “human being” there also appears a term a “human creature”.<sup>54</sup> Thus, the creator of law concentrates on the notions of human dignity and identity. Human dignity constitutes an identifier of the inadmissibility of certain practices (e.g. manipulations on the human genome are forbidden). It is understood as an attribute of the humanity itself, which is connected with the acknowledgment that an interest of an individual has a priority over the interest of the society.<sup>55</sup>

What is more, *the Charter of Basic Rights* in its regulations also uses the *human dignity* formulation. Therefore, dignity, captured in this way, is treated as an autonomous value. A further confirmation that the principle of human dignity respect is understood in its broad sense, not only as a mere personal dignity, in the EU jurisdiction is revealed by the decisions of *the European Court of Justice*.

It is possible to state that in the light of the newest scientific research in the field of biology and medicine the principle of human dignity respect has been interpreted in a new way. Human dignity is not merely a personal dignity but also a certain collection of values acknowledged as basic in the society. The principle of human dignity respect should be considered in a cultural and civilization sense, referring it to a broader context of a social life. The above-mentioned regulations lead to the statement that inborn dignity is not only an ethical category but also a legal one. Human dignity is a normative feature, possessed by everybody, even by a human in a prenatal phase. The term “human being” has been used to highlight the necessity of protection of dignity and identity of all human beings (in every phase of life) and not only “persons”.<sup>56</sup>

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<sup>53</sup> Point 7 of the Recommendation 1100 (1989).

<sup>54</sup> A reference to the notion which is wider than a “person” takes place in case of art. 14, 15 and 18. Also the preamble of the document clearly indicates a need to protect every form of human life in its biological dimension, regardless its ontological status.

<sup>55</sup> M. Grzymkowska, op. cit., p. 277.

<sup>56</sup> L. Bosek, *Opinia. Jakie zmiany w polskim ustawodawstwie zwykłym są niezbędne dla zapewnienia ochrony godności i podstawowych praw istoty ludzkiej w okresie prenatalnym w sferze zastosowań biologii i medycyny, wyznaczane przez standardy międzynarodowe?*, [in:] *Konstytucyjna formuła...*, op. cit., p. 50.

Furthermore, from the point of view of this paper, another key notion – “human integrality” – is nowadays revealed in the international law although it was understood somehow intuitively for a long time. Influenced by biotechnology, especially by genetic engineering, a legal principle of human integrality protection has been introduced into an international normative order. It is expressed by, for example, *the Bioethics Convention*, *the Universal Declaration on the Human Genome* and *the Charter of Basic Rights*. Nonetheless, it is necessary to highlight that nowadays there is no tendency (neither on a universal scale nor on an European one) to establish a right to integrality as a separate human right.<sup>57</sup> However, any attack on human physical integrality can be subjected to appeal to *the European Court of Human Rights*. A state has a right to provide every person who faces a medical interference with a respect of human integrality.<sup>58</sup>

In connection with the principle of human identity, it is necessary to note that no act of the international law obliging in Poland guarantees than an embryo has a protection in the shape of any subjective right to life. *Nasciturus* is not given a right to life that could be equal to the international and constitutional right of every human being. Nonetheless, it deserves to be under a suitable subjective protection. In a prenatal phase a human being is protected in accordance with general rules of human rights.<sup>59</sup>

Apparently, the international law provides a human being in a prenatal phase (embryo and foetal) with a sufficient protection of human dignity and basic rights in the fields of biology and medicine.

The European Union regulates protection of human being from the application of medicine and biology only in an indirect way. Among the regulations, art. 6 of *the Treaty establishing the European Union* deserves a special attention. It obliges the EU institutions and states-members to respect basic rights and freedoms. *The European Court of Justice* in its jurisdiction recognizes a principle of inborn human dignity as a basic right of the EU legislation which unquestionably obliges to respect human

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<sup>57</sup> A. Michalska, T. Twardowski, *Prawo człowieka do integralności genetycznej*, “Państwo i Prawo”, Nr 5/1999, p. 40.

<sup>58</sup> M. Grzymkowska, op. cit., p. 165.

<sup>59</sup> It was already stated in the *International Pact of Civil and Political Rights* that every human being has an inborn right to life and this right should be protected by law. Also in *the Universal Declaration on the Human Genome* accepted by the General Conference UNESCO on November 11, 1997 it was recognized that all members of the human species had an inborn dignity (art. 1). A right of every human being, that is a man at every stage of his development, to dignity respect is independent from genetic features (art. 2). Practices which contradict human dignity should be banned.

dignity.<sup>60</sup> Numerous directives of *the European Parliament* and *the Council of the European Union*, which emphasize the significance of the principle of human dignity, constitute essential acts in the field of biotechnology. They exclude the possibility of using embryos for industrial and commercial purposes. What is more, they highlight a prohibition of an instrumental treatment of a human body and its parts.<sup>61</sup>

It is necessary to highlight that the European standards mark only the minimum requirements in the field of protection of human rights in the process of the reproducing which is medically enhanced, including the protection of an embryo. Normative formulations define only a direction for the interpretation of certain regulations. A duty to protect human dignity and the primacy of human good over a social and scientific interest should be recognized as a primary interpretive directive.

## 5. Bioethical issues in the regulations of the Polish legislation

The Polish legislation regulates bioethical issues only partly and indirectly. It is subjected to the critique of both supporters of protection of subjectivity and human dignity and its opponents. The majority of theorists of law highlight an absolute necessity of the ratification of *the Biomedical Convention* which (together with additional records) defines the minimum of the European requirements in the field of protection of human being in a prenatal phase. The ratification will not limit a legislative freedom of Poland to establish higher standards of protection of human being if they are necessary. A necessity of changes of the Constitution of Poland, widely discussed in the media, aiming at the verbalization of protection of human life starting from a prenatal phase, seems to be unjustified. Adding a few expressions would result in a fundamental change of the status of an embryo and foetus in the system of the Polish law; additionally, legal consequences referring to the fields that are difficult to anticipate would appear.

Nowadays it seems that a human embryo cannot have a status equal to the status of a physical person. Unquestionable protection of a human embryo does not find support in the international norms. It contradicts the

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<sup>60</sup> Decision dated 14 October, 2004, C-36/02, point 34; decision dated 9 October, 2001, C-377/98, points 37–38.

<sup>61</sup> E.g.: Directive dated 6 July, 1998 nr 98/44 regarding a legal protection of biotechnological discoveries; Directive 2004/23/WE of the European Parliament and Council dated 31 March, 2004 regarding the establishment of norms of quality and safe giving, taking, testing, processing, conserving, preserving, and distribution of human tissues and cells.

minimum European standard of protection of rights of a born person which also results from the jurisdiction of the court.

The author of this paper claims that in the Polish legal system a life of a person before birth is protected in accordance with the international and EU law. Undoubtedly, it is protected in a weaker way than the life of a born person. Nonetheless, it is absolutely in accordance with the canons established on the ground of theoretical considerations and reflected in the legislations of modern states.

Apart from the fact that the Constitution of Poland does not discuss a legal protection of an inborn life directly, it does not mean that such a protection is not given to *nasciturus*. *The Polish Constitutional Court* pronounced for the recognition of its existence in 1997. It stated that a human life has a character of a constitutional value also in a prenatal phase and should be protected as such. At the same time, it recognized that it does not mean that the intensity of such a protection should be the same in every phase of life and in all circumstances.

Abstracting from the constitutional protection of a human embryo, nowadays it is necessary to provide a precise regulation at the legal level of the principles of medically supported reproduction. In this respect gaps in law may appear to be highly destructive. Apart from the fact that worldwide *in vitro* is a standard method of treating infertility, in Poland it is subjected to a public debate highlighting huge differences connected with people's outlook on life and dividing the Polish society into its supporters and opponents. An absolutist religious justification, growing in the Polish legal system and rooted in the consciousness of the Poles under the influence of the Catholicism, contributes to the lack of rationality of the discourse in this field. International standards should be subjected to a correction especially at the level of legislation, including the Polish civil and penal laws.