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## THE INFLUENCE OF CULTURAL CONTEXTS OF BIOETHICS ON THE LEGAL LANGUAGE

### 1. Relations between language and cultural reality

Culture constitutes a set of norms, values and human behaviour established in accepted forms of symbolic expression or in popular consciousness. Within the framework of the broader sense of the notion three categories are distinguished: entity culture (reality), social culture (societal) and symbolic culture (value)<sup>1</sup>.

Legal culture is tightly connected to the culture of a given community. Definite legal solutions adopted by a state are a consequence of legal way of thinking shaped during the centuries under influence of specific philosophical orientations dominating in a given area.<sup>2</sup>

In the last century an increase of interest in linguistic aspects in the domain of philosophy is being noticed. R. Sarkowicz supposes that this is a consequence of a crises of centuries-long philosophical research; it is connected to depreciation of ontological and epistemological studies.<sup>3</sup>

Dynamic development of linguistic studies has lead to popularisation of a hypothesis that language is a mirror image of reality. According to Sarkowicz *'if attempts of philosophers to grasp the reality directly did not succeed during centuries, people started to believe that we could say more about the world studying its mirror image, the language'*<sup>4</sup>. It was interrelated with the

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<sup>1</sup> A. Gryniuk, *Kultura prawna a świadomość prawna*, (in:) "Państwo i Prawo" No 1/2002, pp. 15–20.

<sup>2</sup> A. Breczko, *Wpływ wartości chrześcijańskich na polską kulturę prawną i system prawa*, (in:) S. Wronkowska (ed.), *Polska kultura prawna a proces integracji europejskiej*, Zakamycze 2005, p. 269.

<sup>3</sup> R. Sarkowicz, *Uwagi o współczesnej interpretacji prawniczej*, (in:) S. Wronkowska (ed.), *op. cit.*, p. 13.

<sup>4</sup> *Ibidem*.

conviction that structure of the world and its rules are reflected in the structure of language which accumulated generations of experience. Because of its creative-performative character it is an instrument organising social life.<sup>5</sup> Linguistic breakthrough in human sciences influenced the transformation of understanding and the role of language. There was a turn in direction of pragmatic approach to language and accentuation of its contextual character.

Attainments of legal sciences and linguistics are used by legal linguistics the research subject of which are languages of law (legal and juridical).<sup>6</sup> An outlook is popularised in this field that the source of meaning of notions is not a language itself (as a system in linguistic sense) but a broadly understood cultural context. Notions used to classify important questions from the point of view of philosophy of the law, are shaped under the influence of tendencies taking place in 'culture reality'. This reality should be taken into account while creating and interpreting the law.

## 2. Progress as a source of changes in language

Analysis of reality makes us ascertain that progress in general (evolutionary, scientific etc.) and also progress in the field of medicine contributes to changes in language. In practice, creation of new terms may be observed. It seems justified by the need of national identification of new phenomena and problems. If a language is an instrument used for naming the reality then modifications of reality related to new possibilities of experimenting on human organism force changes in language. Specificity of inter-disciplinary relations of medical issues and philosophy, ethics and the law creates a need for a legal and juridical language equipment in a given state. According to J. Sarkowicz *when adopting, for legal research a 'foreign' apparatus and terminology from other disciplines we have to take into account whether it is explicatively and heuristically effective, namely whether it allows to formulate certain phenomena and indicate new research perspectives and what we want to achieve.*<sup>7</sup>

Frequently the stock of notions in languages of a given country (common, legal, juridical) turns out to be insufficient to name problems induced

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<sup>5</sup> Ibidem, p. 14.

<sup>6</sup> J. Zajadło, *Leksykon współczesnej teorii i filozofii prawa. 100 podstawowych pojęć*, Warsaw 2007, pp. 142–143.

<sup>7</sup> R. Sarkowicz, op. cit., p. 18.

by progress. Existence of appropriate terminology is significant from the legal point of view. It creates a need to look for new notional distinctions which would turn out, fully or to a certain degree, adequate to name these problems. Creation of neologisms and usage of borrowed words from other languages seems to be well-founded in such cases. It mainly concerns issues which have already been studied on the ground of scientific disciplines of other countries (Anglo-Saxon for instance), whereas they do not have native equivalents in Polish.

To sum up, dealing with new problematic within a specific discipline of knowledge implies a need to create an appropriate national apparatus which is created according to changes outside the language itself and appearing in culture.

### **3. Medical progress and new notional distinctions in philosophy of the law**

Biotechnology is nowadays one of the most far-reaching fields of industry (next to IT and telecommunications). It constitutes an integration of natural science and engineering in order to exploit living organisms or their parts to obtain goods and services.<sup>8</sup> Biotechnological progress covers multiple fields, food industry, agriculture, pharmaceutical industry, environmental protection etc. To define progress in the field of medicine it would be relevant to introduce a new, slightly narrower term 'biotechnomedical progress'. This notion includes exclusively biotechnological progress related to medical experiments on human organism. It concerns such techniques as genetic diagnostics, medically assisted procreation, cloning and other experimental medicine procedures.<sup>9</sup>

In the middle of the 20<sup>th</sup> century alongside with biotechnological progress the importance of new scientific discipline, which separated from philosophy of the law and was named 'bioethics', increased. Bioethics originated from a practical need of public debate on accessibility of new and frequently very expensive medical techniques.<sup>10</sup> The name itself was originally an abbreviation of *biomedical ethics*, and with popularisation of the

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<sup>8</sup> T. Twardowski, A. Michalska, *Dylematy współczesnej biotechnologii. Z perspektywy biotechnologa i prawnika*, Toruń 2000, p. 14.

<sup>9</sup> A. Brezcko, *Podmiotowość prawna człowieka w warunkach postępu biotechnomedycznej*, Białystok 2011, p. 24.

<sup>10</sup> J. Hartman, Czym jest dzisiaj bioetyka?, (in:) "Archeus. Studia z Bioetyki i Antropologii Filozoficznej", No 3/2002.

term 'biotechnology' it was considered to be an abbreviation of *biotechnological ethics*. It was used for the first time in 1970 by R. Potter, an American scientist, the author of *Bioethics: Bridge to the Future*.<sup>11</sup> Animated scientific activity concerning bioethical problematic did not lead to crystallisation of one commonly accepted way of understanding bioethics. In the literature there are many approaches to bioethics which frequently are very different. It results from the fact that bioethics is actually defining its material and formal subject as well as its methods. In the field of Polish jurisprudence R. Tokarczyk defined bioethics noticing that bioethics describes, analyses and estimates, in the light of moral values, the consequences of artificial interference in natural processes of human birth, life and death and nature as well. It does that for own normative goals showing a need of new ethics adequate to problems resultant from artificial interference in natural processes of birth, life and death.<sup>12</sup> From the above-definition it follows that bioethics becomes a premise for creating legal notions. Therefore its function is to shape the legislation within a specified field.

Due to R. Tokarczyk, in Polish philosophy of law, appeared other terms, significant from the point of view of biotechnological progress: 'biojurisprudence' and 'biolaw'. According to the author they are the most spectacular phenomena of jurisprudence in the sense of legal thought and legal practice, in the sense of creation and application of the law in the last years of the 20<sup>th</sup> century.<sup>13</sup> Tokarczyk predicts that their importance will become fundamental in the 21<sup>st</sup> century.<sup>14</sup>

The notion of biojurisprudence clearly indicates the interrelationship of biology and broadly understood jurisprudence (for instance theory of the law, legal philosophy, legal thought). Biojurisprudence looks for legal methods of solving dilemmas resulting from artificial interference in natural processes of life.<sup>15</sup> The subject of biojurisprudence embraces the fields of human activity related to technical possibilities which concern human life and nature and require legal regulation to protect them from risky experiments and doubtful and yet unpredictable results.<sup>16</sup>

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<sup>11</sup> V. R. Potter, *Bioethics: Bridge to the Future*, New Jersey 1971, pp. 13–23.

<sup>12</sup> R. Tokarczyk, *Biojurysprudencja. Nowy nurt jurysprudencji*, Lublin 1997, pp. 28–29.

<sup>13</sup> R. Tokarczyk, *Prawa narodzin, życia i śmierci*, Cracow 2010, p. 19.

<sup>14</sup> R. Tokarczyk, *Biojurysprudencja. Podstawy prawa dla XXI w.*, Lublin 2008, pp. 101–106.

<sup>15</sup> R. Tokarczyk, *Biojurysprudencja. Nowy...*, op. cit., pp. 11–13.

<sup>16</sup> Ibidem.

## *The Influence of Cultural Contexts of Bioethics on the Legal Language*

R. Tokarczyk creates a basic national network of biojurisprudence isolating within its framework three areas: biojusgenesis, biojustherapy and biojusanatology.

Biojusgenesis englobes the prenatal period of human life considered from normative, religious, moral and, above all, legal points of view, focusing on questions of legal status of human embryo and the right to birth. The principal element of biojusgenesis becomes the issue of abortion and prenatal experiences (e.g. medically assisted procreation in form of *in vitro*, prenatal diagnostics, foetal therapy, etc.).

Biojustherapy focuses on problematic of human life from the moment of birth until death. It is interested in the issue of protection of life and of improvement of its quality. Biojustherapy deals with problems connected to medical treatment of humans with new medication. It is interested in reflection about new methods of treatment which may influence human behaviour and identity (especially psychosurgery, psychopharmacology and *ex vivo* transplantation).

Biojusanatology is concerned with normalising the end of human life. Death becomes the issue of considerations. Different definitions of death are analysed in this domain. Such phenomena like euthanasia, suicide, death penalty, necessity of defence, the right of self-defence or war, how corpses are treated, chronicle, transplantation *ex mortuo* etc.<sup>17</sup>

The notion of 'biolaw' according to R. Tokarczyk is to determine the range of legal profits from biological discoveries by means of technique, medicine, establishing necessary limits of artificial human interference in nature.<sup>18</sup> As a result biolaw should embrace a complex of norms issued or accepted by state and regulating the legal situation of individuals in relation to health protection.<sup>19</sup>

On the basis of jurisprudence, there is an epistemological assumption that human life is, as formulated by R. Tokarczyk, 'a prevalue' and 'a prenorn' of everything which exists especially the law, according to Tokarczyk it '*is a prevalue since it has a self-contained, original and fundamental value in view of any other values as their source. It is a prenorn because it shapes itself, self-regulates and self-arranges and at the same time indicates conditionings and limits of any other regulation.*'<sup>20</sup>

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<sup>17</sup> R. Tokarczyk, *Prawa narodzin...*, op. cit., pp. 21–22.; ibidem, *Biojursprudencja. Podstawy...*, op. cit., pp. 9–11.

<sup>18</sup> R. Tokarczyk, *Prawa narodzin...*, op. cit., p. 31.

<sup>19</sup> R. Tokarczyk, *Biojursprudencja. Nowy nurt...*, op. cit., pp. 11–13.

<sup>20</sup> R. Tokarczyk, *Biojursprudencja. Podstawy...*, op. cit., p. 19.

Cognitive meaning of biojurisprudence depends from cultural context of human life. This life is determined by a defined reality (entity culture), social conditionings (societal culture) and values (symbolic culture). The problematic of the sense of human life which has different dimensions: religious, moral and legal shall also be taken into account. Economic factors are also significant. It is various types of local conditionings that should decide about the ways of solving bioethical dilemmas by courts, as well as about the trends in legislation. The decisions of biojurisprudence impinge on the form of biolaw the foundations of which have already been laid in Poland and which requires new institutions and rules and especially at the beginning, new notions and terms.

#### 4. Linguistic chaos and terminological problems as the source of bioethical dilemmas

Admittedly ethical dilemmas are eternal as if they took '*decidedly new and profound character under the influence of the effects of development of biotechnomedical achievements*'.<sup>21</sup> Biotechnomedical progress contributes to development of legal gaps since the law often does not keep pace to reality. Not only conflicts between the law and other normative systems are particularly distinctive but also substantial inconsistencies within the framework of legal system itself. In practice of application of the law it results with exposure of the so-called hard cases.

Linguistic problems are one of numerous reasons of occurrence of bioethical dilemmas. They are related above all to polysemantic, unclear terms applied often in different fields. People employ various terms to describe same phenomena or understand completely distinct content under the same term.<sup>22</sup>

Linguistic controversies characterise the attempts to define phenomena connected to limit points of human life, its beginning (e.g the problem of abortion, *in vitro*) and end (euthanasia and medical futility care). Lack of unambiguous and commonly accepted definition of criteria of life and death, definition of the man, the essence of humanity, give rise to this dispute.

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<sup>21</sup> R. Tokarczyk, *Czy paradoksy bioetyki prawniczej – uwagi polemiczne*, <http://rtokarcz.nazwa.pl/eseje/paradoks.html>; on 26.06.2012.

<sup>22</sup> A. Latawiec, *W poszukiwaniu istoty dylematów moralnych*, (in:) K. Kalka, A. Papuziński (ed.), *Etyka wobec współczesnych dylematów*, Bydgoszcz 2006, pp. 21–23.

## *The Influence of Cultural Contexts of Bioethics on the Legal Language*

In discussions concerning the beginning of life of a man various terms are used coming from biological language 'inseminated cell', 'embryo', 'zygote', 'foetus', 'conceived child' etc. Legal theorists, in general, define foetus in woman's womb with a latin name *nasciturus* (the one who is to be born). This classical notion is related to different phases of human development before birth. Along with biotechnomedical progress doubts appear whether this term should also relate to embryo (foetus in germinal form) or should concern a specific (later) development phases. A separate definition is being created for human embryo which developed outside mother's organism: 'preembryo', *surrnasciturus*, *pronasciturus*.<sup>23</sup> At the same time, in considerations relating to human subjectivity, adequate terminology of the language of philosophy is used: 'human person', 'human being'. Notions used in bioethical discourse have various messages: '*information concerning the state of biological development (biological language) or indicating the phenomenon of being a human. In the second case, reduction to only biological level is avoided. Moreover, in definitions connected to the phenomenon of humanity, emotional nuance is often sensed*'.<sup>24</sup>

Modern medicine reveals an abundance of definitions of human death like 'brain death', 'biological death', 'neocortical death'. From the perspective of social sciences, sociological death is being mentioned. R. Tokarczyk predicts that in the domain of biolaw a few definitions of death will be finally adopted: '*biolaw will be forced to use multiple definitions of death adopted to diverse factual situations. Static definition of death appearing up to now in jurisprudence and the law gives way to dynamic definition of death described by biojustanatology*'.<sup>25</sup> In the opinion of R. Tokarczyk from among definitions of death adopted by the law, only the one which is adequate to a definite factual situation would be chosen in practice e.g. transplantation, procreation *post mortem*, suicidal attempt, euthanasia, inheritance, death penalty.<sup>26</sup>

M. Safjan notices that if it is not possible to clearly describe the concept of death of a physical person in purely physical categories it becomes automatically a legal, ethical, philosophical category. Criteria referring to a specified concept of human life and the notion of a person should decide about the choice of final definition made by the legislator. Medicine may in fact answer the question whether a durable and irreversible brain damage

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<sup>23</sup> A. Brezko, *Podmiotowość...*, op. cit., p. 177.

<sup>24</sup> A. Latawiec, op. cit., p. 22.

<sup>25</sup> R. Tokarczyk, *Biojurysprudencja. Podstawy...*, op. cit., p. 11.

<sup>26</sup> R. Tokarczyk, *Prawa narozdin...*, op. cit., p. 33.

occurred, however, stating the fact does not have to be equivalent to establishing that in a given time the existence of a person as legal subject ended. Safjan claims that attempts to build parallel definitions of death with relation to particular types of relationships (e.g. inheritance, marital status, insurance etc.) are a consequence of the fact that medical arguments appear to be insufficient when it concerns legal definition of death.<sup>27</sup>

The end of human being is connected to multiple controversies concerning the way of understanding the notion 'euthanasia'. Alongside with biotechnomedical progress this notion becomes increasingly polysemantic. Different levels of consideration on this subject may be noticed and that is why such terms as: 'cripthonasia', 'dysthanasia', 'orthothonasia', 'neonatal euthanasia', 'eugenic euthanasia', 'economic euthanasia' appear. There exist also 'active euthanasia', 'passive euthanasia', 'voluntary euthanasia', 'non-voluntary euthanasia', 'legal euthanasia' and 'illegal euthanasia'. Some mention also 'suicidal euthanasia', 'murder euthanasia', 'accompanied suicide', 'assisted suicide', 'death assistance'.<sup>28</sup> In a situation when a patient is deprived of sensual contact with the world such terms as: 'vegetative state', 'terminal state', 'state of unconsciousness' etc. are used. Terminological chaos and important moral controversies related to the problem of euthanasia certainly do not facilitate public debate on this subject.

Together with new biotechnomedical possibilities there is a doubt about what sense to confer nowadays to such terms as: 'motherhood', 'fatherhood'. Such a need is clearly visible with relation to popularisation of in vitro fertilisation and contracts of surrogacy. Until recently these terms did not require to be precisely explained since they were intuitively understood. Practice of medically assisted procreation is connected to erosion of the concept elaborated through centuries of family systems and doubts concerning parenthood. In case of surrogacy contracts, it remains unclear which woman should be recognised as mother. Is it the donor of egg cell or maybe the one who ordered the service (even though she is not a donor) or the one who gives birth to a child? The question of fatherhood complicates the matter especially if there was an anonym sperm donor.<sup>29</sup>

Similar problems are connected to the issues of legal definition of 'human sex'. It is crucial from the point of view of the possibility to change sex

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<sup>27</sup> M. Safjan, *Wyzwania dla państwa prawa*, Warsaw 2007, pp. 166–167.

<sup>28</sup> A. Breczko, *Podmiotowość...*, op. cit, p. 307.

<sup>29</sup> M. Soniewicka, *Prokreacja medycznie wspomagana*, (in:) J. Stelmach, B. Brożek, M. Soniewicka, W. Załuski, *Paradoksy bioetyki prawniczej*, Warsaw 2010, p. 101 and the following pages.

offered by medicine and its possible family-legal consequences. Purely medical criteria appear to be insufficient for legal definition, however, they should not be omitted. Sex constitutes an element of marital status established on the basis of self-determination of each person. Settlement of a dispute demands taking into account diverse arguments relating to the concept of the law and privacy.<sup>30</sup>

It may be noticed that the notion of privacy itself becomes increasingly unclear. It is of semantically open character which makes possible its broad interpretation. Defining the notion 'private life' is actually impossible. That is why courts have to evaluate *ad casum* what falls within its scope. Such flexibility enables to adopt a more or less precise standpoint of the court in view of social, technological and normative changes, on the other hand, however, considerably reduces predictability of judicial decisions.<sup>31</sup>

Terminological chaos together with philosophical controversies concerning fundamental questions of bioethics of life and death causes that in bioethical debate, on the linguistic level, a specific manipulation appears. Rational discourse becomes hampered, simply in connection with the fact that diverse argumentation techniques are applied relating frequently not to rational arguments but to bottom-up social feelings, ludic factors. For instance definition 'crime of assassination' is used with reference to abortion. In discussions on the subject of in vitro in the background of parents' and doctors' efforts for a desired child, an ideological discussion is carried concerning the 'good of embryo'. It is suggested that artificial insemination opens the way to 'civilisation of death' etc. One may get the impression that such a model of public debate is for many politicians a way to get the popular support and to develop a political career. Relating to religious arguments in a catholic country decidedly makes it easier. Religion is therefore used for absolutely individual political purposes.

Irrational character of the debate is connected to visible lack of tolerance for other people's views which are simply rejected since they are not compatible with dogmatically adopted assumptions. T. Pietrzykowski is right when he says that *'the worst method of participation in an ethical discourse is having on one's side the only and imperturbable 'truth' to which appropriate arguments should be matched (rejecting a priori everything which could give evidence against it). If such a strategy is adopted*

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<sup>30</sup> M. Safjan, *Wyzwania...*, op. cit., pp. 167–168.

<sup>31</sup> J. Kapelańska-Pręgowska, *Informacja genetyczna jako kategoria chronionych danych osobowych. Uwagi na tle orzecznictwa Europejskiego Trybunału Praw Człowieka*, (in:) C. Mik, K. Gałka (ed.), *Między wykładnią a tworzeniem prawa*, Toruń 2011, p. 255.

lecture is reduced to 'chasing' in the text for information and views confirming the adopted position and intransigence of own opinion is to be inversely proportional to selectivity and perception of facts and arguments. Intellectual honesty towards oneself and others, whose fate depends from accuracy of courts determining the content of binding legal regulations requires however, criticism and readiness for verification of own beliefs in a rational discourse, open for arguments and open-minded.<sup>32</sup>

## 5. Lawyer confronting bioethical cases

Notion *hard cases* has a broader sense than *bioethical cases*, even though both relate to ambiguous situations for legislators and authorities applying the law.

*Hard cases* are associated to different spheres of social relations and concern various issues. They are the origin of difficulties in acquiring a clear and not controversial decision. They are accompanied by legal gaps or 'bluntness' of terms in legal language and conflict between different normative systems as well as lack of possibility to predict a legal solution. These matters cause a social and moral unrest and provoke the legal order to take a position in the matter of argument.<sup>33</sup>

J. Zajadło emphasises that *hard cases* are characterised by multiple variants of legal solutions. He is convinced that possible solutions are possible to be justified in practical discourse basing on adopted criteria of rationality and rightness. He notices that *hard cases* occur not only in the sphere of application of the law and related interpretation but may also concern the remaining dimensions of the phenomenon of the law namely creation, validity and observance. Sometimes a creator of law has to enter a field which so far was *terra incognita*. Legislator deciding on regulating the sphere of social relations may encounter argumentation problems. Then appears a difficult case on the ground of law creation.<sup>34</sup>

D. Bunikowski identifies *hard cases* with the most controversial cases from the social and moral point of view. Such cases are covered to a different degree and scope by legal arrangements which provoke arguments. They constitute a category relative to time, culture and even social consciousness

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<sup>32</sup> T. Pietrzykowski, *Wyzwania moralne. Etyczne problemy prawa*, Katowice 2010, p. 8.

<sup>33</sup> D. Bunikowski, *Wykładnia i stosowanie prawa a moralność*, (in:) "Jurysta", No 9/2006, p. 12.

<sup>34</sup> J. Zajadło (ed.), *Fascynujące ścieżki filozofii prawa*, Warsaw 2008, p. 13,

and human consciousness. They relate to factual status in a society which can be evaluated differently within different ethical systems and different moralities (as good or bad, correct or incorrect).<sup>35</sup>

A. Kozak thinks that *hard cases* are connected to lack of determinants of rules in 'hard' institutional reality. Only a reality elaborated by a discourse becomes the only and unquestionable. Hard cases when included within the limits of institutional reality determine new rules, which as a consequence of time make them *easy cases* and allow for routine activity.<sup>36</sup>

While recognising situations determined as *hard cases*, the role of philosophy of the law becomes visible. Solving them without philosophical-legal technique appears to be actually impossible. Decisions made in practice of law application have significant influence on legislation. By means of *hard cases* the creator of law may notice discrepancies subsisting in the process of application of law and undertake appropriate legislative activity which would terminate the state of legal uncertainty.

Bioethical context creates a special category of *hard cases*. They are defined as *bioethical cases*. Such cases have specific character as peculiar dilemmas appearing on the interface of law and medicine. These are often dilemmas on the line law-science, law-morality, law-religion, law-customs and law-economy. In legal proceedings bioethical cases are easily distinguishable from classical, typical arguments.<sup>37</sup>

According to J. Zajadło '*it is the most spectacular platform for formation of 'hard cases' which relates to fundamental problems of human life from human conception until death. In this sphere we deal with traditional, eternal and, in a sense, unsolvable arguments (e.g. concerning abortion or euthanasia). However, there are also dilemmas and challenges brought with development of science and technology (e.g. genetic engineering) and in this case we face the necessity to formulate new and so far unknown ethical and legal standards.*'<sup>38</sup>

Among the fundamental groups of morally and socially controversial cases mentioned by D. Bunikowski to *bioethical cases* may be included especially:

- tautological phenomena (e.g. abortion, euthanasia, burdensome medical treatment, suicide, death penalty etc.);

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<sup>35</sup> D. Bunikowski, *Podstawowe kontrowersje dotyczące ingerencji prawa w sferę moralności*, Toruń 2010, p. 65.

<sup>36</sup> A. Kozak, *Granice prawniczej wiedzy dyskrecjonalnej*, Wrocław 2002, p. 142.

<sup>37</sup> M. Safjan, *Wyzwania...*, op. cit., p. 199 and the following pages.

<sup>38</sup> J. Zajadło (ed.), *Fascynujące ścieżki...*, op. cit., p. 132.

- problems of human procreation (genetic engineering, cloning, genetic and prenatal therapy, embryo politics, contraception, human foetus status, *in vitro* fertilisation etc.)
- legal and medical problems connected to therapy and experiments on human body (conscience clause, biotechnology, compulsory medical procedure, refusal of medical treatment based on religious grounds, organ transplantation, gender reassignment etc.).<sup>39</sup>

*Bioethical cases* and vagueness of the law became the subject of the analysis of M. Safjan. In his opinion, for the development of the law in the field of bioethics, the best method is the ‘method of gradual approximation’. It consists in solving new bioethical problems regularly filling the appearing legal gaps and eliminating the bluntness of legal solutions.

In Safjan’s opinion, the most bioethical dilemmas are connected to the situation of ‘legal vacuum’ (*vide juridique*) which takes place when there is no clear legal norm and dominating ethical standards in a given field have not yet been developed.

M. Safjan notices that the burden of deciding the individual cases in bioethical instances is moved on the judge who is to recognise the case by means of interpretation and reference to principles and general values. The specificity of judicial system consists in finding a legal norm *in casu*, that is a norm which does not exist point-blank as a well-defined and unequivocal warrant of a defined behaviour. It is, at most, indirectly coded in normative general clauses and systemic values.<sup>40</sup>

Such situation determines the particularity of methodology adopted by the judge and the type of argumentation. The role of the judge in establishing a norm in force in bioethical matters is decisive. It is the judge who becomes a creator of law and participant of public debate. He translates legal language to language of ethics and philosophy attempting to solve difficult bioethical cases by means of the rules of legal system, non-legal systems and especially moral norms dominating in a given community.<sup>41</sup>

Legislative role of courts became visible in still important problems caused by biotechnomedical progress. It is reflected in most of European countries in multiple national court decisions and also in international and union jurisdiction which set the direction of legislative changes and made creators of the law aware of the necessity to design appropriate regulations.

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<sup>39</sup> D. Bunikowski, *op. cit.*, p. 66.

<sup>40</sup> M. Safjan, *Wyzwania...*, *op. cit.*, p. 199 and the following pages.

<sup>41</sup> M. Safjan, *Prawo wobec wyzwań współczesnej medycyny*, (in:) “Prawo i Medycyna”, No 5/2000; *ibidem*, *Wyzwania...*, *op. cit.*, p. 201 and the following pages.

In Poland biolaw is still fragmentary, with multiple gaps and inconsistencies. O. Nawrot claims that the weak points of the Polish biolaw translate to difficulties connected to its application especially to the possibility of reconstruction of legal norms: *‘a judge who is to decide a difference from the sphere of the so-called bioethical case, faces classical hard case, since he or she does not find an unequivocal legal norm on which their opinion could be based. Moreover, they cannot relate to juridical communis for it does not exist for the signaled problems’*<sup>42</sup> Development of biolaw in accordance with biojurisprudence indications, which demonstrates in creation of new institutions, rules, names and terms, would contribute to reduction of bioethical dilemmas.

## **6. Dispute over definition of a human as the heart of bioethical controversies**

The argument over the essence of humanity inevitably becomes a trouble spot of bioethical debates whereas appearing controversies are generally of axiological dimension. Undoubtedly the way of defining a human conditions the final form of legal solutions.

O. Nawrot is of the opinion that when solving bioethical dilemmas, in the absence of unequivocal legal norms, one should, above all, refer to axiology and also anthropology: *‘Legislator creating definite norms of biolaw adopts at all times a defined model of a man (often in an implied way). Therefore, when anthropology used by a definite legislator is reconstructed, another indication for reconstruction of legal norms functioning in a definite legal system, which are not directly expressed in its regulations, is obtained. Such way in the era of universalisation of ideas of human rights cannot be controversial since the sources of substantive rights are found in human nature, a complex vision of a man.’*<sup>43</sup> Nawrot emphasises that a coherent and complete anthropology may constitute a good hint for interpreter of law especially when conclusions of reconstruction of legal norms by means of traditional methods are equivocal.<sup>44</sup>

Traditional concept of legal personality is related to adoption of complex definition of a human. On the grounds of this concept it appears as

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<sup>42</sup> O. Nawrot, *Wykładnia antropologiczna bioprawa*, (in:) L. Bosek, M. Królikowski (ed.), *Współczesne wyzwania bioetyczne*, Warsaw 2010, p. 47.

<sup>43</sup> Ibidem, p. 49.

<sup>44</sup> Ibidem, p. 50.

a comprehensive psychophysical category subject to protection under the law from the moment of conception until death. Previous understanding of this notion from the point of view of the law was accepted intuitively. Diverse medical actions were undertaken generally on the basis of a principle typical for a democratic state saying that what is not forbidden is permitted. The majority of biotechnomedical interference fell within the field of legal indifference.

In the face of medical development classical legal definition of a man appears to be insufficient. Biotechnomedical progress caused a clear collapse of the traditional principle of legal personality. Alongside with progress the term 'man' requires clarifying. It is particularly visible with relation to appearance of instruments of artificial procreation and life sustaining possibilities.

The answer to the question whether the level of protection of a human should be the same independently of his development phase and how to differentiate the scope of legal protection not destroying the overall perception of a human, becomes necessary.

Diversification of legal personality seems to be nowadays unavoidable. Separation of two fundamental phases of human existence distinguishing two notions 'human person' and 'human being becomes indispensable for medicine. Together with biotechnomedical progress the above mentioned fundamental doubts concerning the beginning and the end of human life become visible.

The need to build a new unequivocal legal definition of the notion 'human' is increasingly clear. From its shape depends, inter alia, the scope of acceptability of medical experiments on human body and the right to dispose of your own body.

This definition should take into account decisions made in the course of development of European civilisation, resulting from two dominating visions of the essence of humanity which may be schematically classified as religious and secular.

From the point of view of religion a human is a subject of defined genetic and chromosome arrangement. It is an entirety composed of body and soul. The principle of sanctity of every human life is adopted independently of development phase and quality. Thus humanity is ascribed to foetus or neonates with congenital anomalies (e.g. children with anencephaly) as well as to people without consciousness (e.g. in persistent vegetative state).

From the perspective of secular approaches (without reference to religious doctrines), it is assumed, in general, that corporeality coexists with totality of the living organism. It is human mind that is treated as some-

thing which determines human nature. Consent to all medical activity good for health which do not injure cerebral area thus do not lead to personality changes results from this assumption. Here appears the criterion of the quality of life, on the basis of which it is assumed that not every human life is of equal value. A given being is a human exclusively when it functions as a human. Humanity depends from whether a human individual is able to think, whether it is conscious of its own existence etc. Autonomy of a human as far as disposal of one's own body is concerned, becomes a superior value.

In terminology of linguistic philosophy of the law the term 'human person' is referred to an alive human, 'physical person'. From the moment of birth until death it is a legal entity who is entitled to protection of dignity and autonomy. There is however another term 'human being'. It does not refer to 'physical person' which comprises e.g. embryos, human foetus, stem cells and even people in persistent vegetative state.

Philosophical views on the essence of humanity influence approaches to legal personality of the man. On the one hand, it indicates that a human becomes a legal entity from the moment of birth (such thesis is reflected in decisions of the Polish Constitutional Tribunal), however, on the other hand, it is frequently assumed that the principle of subjectivity has to be connected to traits of a given subject as 'person'. In this context human efficiency in making decisions relating to a defined level of his self-consciousness, is especially stressed.

Distinction between 'human person' and 'human being' seems logical and cohesive on the level of philosophical reasoning. Its analysis from legal perspective indicates multiple controversies related to it and which have generally axiological basis (especially philosophical). When drawing legal consequences, cultural code (religion, morality, morals etc.) deeply rooted in a given society should be taken into account. It determines acceptance that human embryo just as a human in a state of irreversible brain damage are subjects which require legal protection even though it could be argued whether they deserve the status of 'a human'. This cultural code comprises tradition which cannot be limited exclusively to the cultural area of the European civilisation, it also embraces North America and Australia. Countries and people living in these areas are connected by commonly perceived world of values and especially Christianity. In new arrangements of legal personality of a human it is unquestionably significant to take into account the cultural conditionings and attainments of philosophical-legal thought in this scope.

It is necessary to emphasise that distinction between 'human person' and 'human being' seems justifiable particularly in the domain of medical

experiments on human body. It is connected to the sphere of the so-called 'biolaw' and as a consequence 'biopolitics' and 'biopower'. In other fields of the law the global notion of humanity defining a human as a psychophysical entirety may still be functioning.

Legal definition of a human should oscillate around the above-mentioned distinction. It is to take into consideration the concept of a human as a certain 'psychological potential' (capable of accumulating experiences, feeling happiness and suffering etc.) and also relate to the theory of a human as a 'body', a specific type of material. It would be good if it constituted an expression of compromise between the concept of quality of life and the concept of life sanctity.

It seems that at the basis of legal decisions taking into account philosophic tradition of European culture area, the concept of homo *bioiusteticus* should be adopted. It combines the approach to a human as a legal entity having regard to medical and ethical factors. This definition may be different depending on conditionings of a given state. However, it has to be based on a common root for all societies. These are superior, the most universal humanistic values obvious for any human with ethical sensitivity and reason. They constitute a 'core' of ethics connecting people in a pluralistic world.

Category of homo *bioiusteticus* accentuates the necessity of a new look on a human being a subject and an object of medical experiments, based on separation of two types of subjectivity, 'subjectivity of human person' and 'subjectivity of human being'.

The necessity of legal regulations in the sphere of limits and trends in biotechnomedical progress is connected to this category; which is indicated by the morpheme *iust*. It seems that appropriate legal norms could not only condition the development of medical sciences but also guarantee its proper use. The need for standardisation of the position of the law in this domain on a European level is clearly visible. However, it should be underlined that excessive tendency to codification of morality may also have negative implications. Difficulties in unequivocal establishing of the rules of action in bioethical questions result from philosophical, religious and cultural diversity typical for democratic states. It is thus necessary to elaborate a minimal consensus only to fundamental values.

Morphemes *bio* and *eticus* suggest the necessity to connect biological and moral criteria. During medical procedures on human body one has to take into consideration the most important civilisation values related to the essence of humanity. These are among other, subjective character of any human person, equality of all people, assumption that the limit of good

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of a man is other people's good. The origin of these values is, on the one hand, human dignity and on the other, his autonomy. Medical procedures concerning interference in human organism (of 'a human person' and 'human being') have to be subjected to legal regulations which should be created on the basis of the above-mentioned values.

Fundamental legal principles which have their distinct reference to biomedical sphere are: the principle of protection of human life, the principle of human dignity, the principle of psychological and physical integrity of a human, the principle of freedom and to the right of privacy. The above, fundamental legal rules are supported by recognised principles of biomedical ethics such as the principle of autonomy, justice, patient's good, non violation of freedom of scientific research et.

### S U M M A R Y

In the domain of bioethics we notice an increasing distance between what is offered by the law in its traditional formulas and solutions and the expectations towards the law itself which are originated by a high rate of development of science in the field of modern biotechnologies. Positive law does not keep pace with progress. The language which is used by a legislator to define bioethical phenomena is unclear and polysemic whereas the language of public debate is characterised by emotions. All this contributes to creation of new dilemmas which finish in courts as *bioethical cases*. It seems that unequivocal legal definitions of the key notions from the point of view of biojurisprudence would help to reduce arising doubts. Establishing unequivocally their semantic sense would solve a number of bioethical dilemmas. Therefore, there exists a clear need to create a complex biolaw with a new network of legal notions built on the basis of the chief value of life and adequately to changes brought by medical development.

