

The right to embryos during the divorce proceedings

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Abstract

World's fast development of medical technologies is not always followed by legal regulations adjustments and sometimes people find themselves somewhere between current medical possibilities and outdated legal provisions. When it comes to medically assisted procreation two main problems occur – who has the right to created embryos and what is their actual legal status. This work is based on Polish and international legal regulations, one of the most important cases in English legal system that has established a bright line rule in this matter and on the legal doctrine. The *Evans v. Kingdom* case was considered by the European Court of Human Rights in Strasbourg and gave one possible answer to a question that raises when it comes to parties rights to created embryos. Another issue that was decided in this case was whether British legal documents are consistent with the European Convention on Human Rights, and what is more important, whether these domestic legal provisions do not limit one's right to live. In Poland regulations on this matter can be found in the Constitution of the Republic of Poland, the Fertility Treatment Act as well as in the Civil Code. What needs to be decided in every case regarding the legal status of the embryos is that whether they can be treated like things, which would mean that they can be sold or destroyed by the owner or whether the embryos are considered as a part of human body and other, more strict regulations apply to them.

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Introduction

In current development of science and engineering the implantation of embryos created through the In Vitro Fertilization (IVF) is not an unusual scientific procedure, and storing embryos or using them in a specific purpose is a widespread medical practice. There are two standard procedures regarding medically assisted procreation - In Vitro Fertilization and Embryo Transfer that is said to be most effective form of assisted reproductive technology, and the In Vivo procedure that allows embryos to develop under more natural conditions [1,2]. Whereas the second method leaves no doubt about the birth parents of the child, the first situation is not as obvious. World's fast development of medicine and biotechnology is not always followed by legal regulations' adjustments, which leads to new disputes and problems with resolving issues based on medical law and creates an unclear system of embryos protection [3]. Until the marriage of two people who decided to go through the treatment lasts, mentioned uncertainties may not occur. The situation complicates when the procedure has been started, the embryos are being kept in the lab and the couple decides to get a divorce. This raises entirely new issues that are legally relevant – the matter of whom the embryos belong to, if they even can be someone's property and what is their legal status.

The aim of the work

The aim of this work is to analyze current legal regulations of the matter of the right to embryos and their legal status, as well as to find possible solutions of the dispute that may occur between the couple that went through a fertility treatment procedure, but in the end one party does not agree to implant created embryos. The analysis of embryo's legal status focuses on whether it can be considered to be a thing, which would mean that it has its owner or if the embryo is a part of human body and is protected by more strict legal regulations. In the legal doctrine and ethics and bioethics studies we find attempts to solve issues that arise from these unclear regulations.

Materials and methods

The analysis is based on British and Polish legal provisions and international legal documents and regulations. In addition, the attempt to solve the matter was based on legal doctrine and ethical studies, as well as one of the fertility treatment key cases that was considered by the European Court of Human Rights in Strasbourg. In this work the issue will be discussed from the perspective of formerly married couple and their rights to created embryos and from the point of legal and ethical status of the embryos.

Discussion

It seems that such important matter as the beginning of human life should be regulated in countries' fundamental legal acts [4], whilst in practice, it is often being left aside or regulated in other additional legal documents. All there is to find on the constitutional level in Poland is written in The Constitution of the Republic of Poland, in the Article 38., which states that “The Republic of Poland shall ensure the legal protection of the life of every human being” [5], without establishing from which point in human life the protection starts. Polish legal system has placed mentioned regulation in the Fertility Treatment Act that was passed in 2015. The article 4. states that “the fertility treatment is carried out with respect for human dignity, the human's right to private and family life, with special emphasis on the legal protection of life, health and rights of the child” [6]. The human rights are protected on a domestic and international level, but it is not clear what happens when the human rights of two different people are at stake.

The rights of the parties to embryos during the divorce proceedings

Whereas Polish law lacks specified regulations on solving disputes that occur between the couple when it comes to one's right to embryos in the divorce proceedings, in other legal systems the issue has been decided in several cases. At the beginning of the 21st century, in the United Kingdom one of the biggest cases concerning the right to embryos took place. In

Evans v. United Kingdom, which was one of the key cases in medically assisted procreation matter that was considered by the European Court of Human Rights in Strasbourg, a decision was required whether a British Law requiring a consent of both parties that are involved in the IVF treatment is consistent with Articles 2, 8 and 14 of the European Convention on Human Rights [7]. The Article 2 focuses on everyone's life being protected by law, Article 8 is about one's right to respect their private and family life whilst in the Article 14 we find a prohibition of discrimination [8]. From the facts from the case we know, that Natalie Evans was examined at the clinic and doctors discovered that she was developing ovarian cancer, and realised that the only way for her to have a child in the future is for Evans and her partner, Howard Johnston, to undergo a IVF procedure, which in the end successfully created six embryos. British Law, as written in The Human Fertilisation and Embryology Act 1990 requires both parties to sign forms that indicated that they were informed about their right to withdraw their consent to the use of the embryos until they are used.[8] Natalie Evans started the procedure and in 2002 the relationship ended and Mr. Johnston informed the clinic that he decided to withdraw his consent and, according to the 1990 Act, since that moment, the embryos should not have been used. Evans filed an action in the Family Division in High Court of Justice of England and Wales in order to prevent the clinic from destroying created embryos and argued that the 1990 Act was incompatible with the European Convention on Human Rights regulations. On the other hand, Johnston argued that his right to withdraw the consent was given to him by the 1990 Act and he could take such action up to the point of "use" and "use" means the time of implantation. Both the Family Division and the Court of Appeal of England and Wales agreed that Johnston had the right to withdraw his consent and they dismissed Evans' claims. Having lost at trial, Evans appealed against the United Kingdom to the European Court of Human Rights, claiming, as earlier, that the British law regulations are incompatible with the Convention and she demanded a protection of her rights. [7] The European Court of Human Rights decided that the matter of establishing from which point the human life begins and what actions regarding created

embryos do both parties have should be regulated on a national level and the Member States have their right to do so. For this reason, the British Law is compatible with Articles 2, 8 and 14 of the Convention. The Court held unanimously that there had been no violation of Articles 2 and 14, whereas when it comes to Article 8 two judges dissented. [9] Judges stated that in this case the interests of both Evans and Johnston should have been balanced and if the domestic law allows to withdraw the consent, a party has their right to do it, unless it is impossible for the other party to have a genetically-related child. [7] As we can see, judges, rather than checking if the 1990 Act is consistent with the Convention, realised that it is morally and ethically correct to give the woman a right to keep the embryos in such critical situation.

In Poland, regulations similar to those in the United Kingdom we can find in the Fertility Treatment Act. According to Article 18. "in the medically assisted procreation the use of reproductive cells removed from the donor is forbidden, whether: 1) the donor, in written form, withdraw their consent to the use of the reproductive cells [...]" and, what is given in Article 19. is that the donor of the reproductive cells that were not used in the treatment is allowed to request to destroy them in any time or to donate them to medical science" [10]. It seems that the donor can change the decision in any suitable moment and by this action, they can stop the IVF procedure.

However, according to the regulation placed in Article 21.2. of the Fertility Treatment Act stating that "in the event of withdrawing a consent by the husband or the donor of the reproductive cells that had been removed in order to carry out the IVF procedure, and from which embryos were created, the permission for the implantation is given by the Family Court [10]". What is worth noticing is that the Article 21. of mentioned Act regulates what action is prohibited by the law and does not define what should be done with the embryos when the couple is in dispute [11]. Polish law allows to resolve the disagreement by leaving it to the decision of the Court, but it applies only to the situation when the cells were removed from the partner in order to carry out the IVF procedure for the couple that is married or at least cohabits and they both gave statements confirming that they are living

together on permanent basis [6]. This means that the dispute might be resolved with court's decision but only in case the parties live in cohabitation, but the legal system does not explain what should be done if the couple splits, which is the time when the problem occurs. Such situations are often very individual and morally problematic, so domestic legal systems avoid regulating the matter on national level. This raises a question on how to regulate the issue in general so the provisions can be used in every case regarding the right to embryos, but on the other hand, would be specified enough to resolve a complicated dispute.

Ethical and legal status of embryos

Another problem that occurs when discussing the matter of the right to embryos is their legal and ethical status. When it comes to this issue it is necessary to refer to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine 1997 (signed by the Republic of Poland in 1999, unratified) and to the Directive 2004/23/EC of the European Parliament and of the Council of 31 March 2004 on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells [12], regulations of which are implemented to Polish domestic law in the Fertility Treatment Act. An act in law that could apply to embryos is a sell contract, but only if they were considered as things, but according to Polish legal doctrine, separated parts of human body cannot be treated like things and they remain in person's personal interests [13]. One of thing's feature is the possibility of its disposal, and according to Article 21 of the 1997 Convention "the human body and its parts shall not, as such, give rise to financial gain" and Polish Fertility Treatment Act regulates in Article 79 that a person, in order to gain material or personal incentives, acquires or disposes the embryo, serves as an intermediary in an acquisition or a disposal of the embryo or takes part in the use of the embryo obtained against the provisions of the Act, is liable to imprisonment for between three months and five years." [14] For these reasons, considering embryos to be things or someone's

property is questionable. Embryos are functionally linked to the human body, even if they are physically separated from it. They were collected in order to serve its physiological function, which is the function of procreation, and that is why they are protected by the personal inviolability [13]. In Polish legal system the protection of human body and a claim for remedying damage caused to a person are provided by Article 24, together with Article 445 and 448 of the Civil Code, as well as by Articles 444 and 445 of the Civil Code [15]. Additionally, the legal protection of embryos is given by the Convention of Bioethics. In Article 18.1. we can find a regulation that states that "where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo." [14] Unquestionably it is right to say, that the legal status of embryos is unique, but unfortunately not entirely specified by the domestic legal systems. Parliamentary Assembly of the Council of Europe decided that the protection of human life should be provided by law already in the prenatal development, at least because of its influence on the postnatal period [3]. The international regulations are not enough and provisions on the domestic level are needed, mainly because it is impossible to regulate any matter on an international level and be sure that it will fit the domestic legal system. A country has to give some specified rules that would cooperate with regulations in other legal acts and documents that apply to the citizens of a country. If a country wants to provide a complete protection of human rights, it has adjust its provisions to its standards.

Conclusions

From a moral point of view, regardless whether the embryo is considered a human being or only as a part of human body, it is protected by law and it is unacceptable to use it in any commercial manner. The generality of regulations on domestic and international level creates an issue that the solution of any dispute cannot be predicted and is not regulated by law, so every time a court's decision is needed. On the other hand, it does not always indicate a weakness in country's legal system, because cases regarding family law, especially those connected to the matter of fertility

treatment, are exceptionally individual and the court considers every case differently, so its decision can reflect the rights and obligations of the parties in the most accurate way. The final result of the *Evans v. Kingdom* case did not include the actual needs of the plaintiff and as a result of which she lost her chance to become a mother. The legal status of embryos has been the subject of many legal cases throughout the years, but the matter still cannot be properly regulated in Polish legal system. According to rules that apply to Polish legal system, when a court decides about rights and obligations of the parties, it always has to consider the welfare of the child. For this reason, it is justified to protect it already in the prenatal development. In current improvement of medical technologies such conflicts as parties' rights to embryos created in the IVF procedure may occur more often, so an appropriate system of balance of parties' interests is required. The matter of identifying who has a right to decide about the embryo's fate has its beginning in establishing embryo's legal status. If it is considered to be a thing, the owners have to cooperate in the same matter when deciding about the embryos. This would also mean, that the embryos can be sold, destroyed or in other way used, because legally, they would only be someone's property. However, such opinion does not seem to be entirely right. When we think about the embryos we have to consider human rights to live and start a family, and when we add those rights to medical technologies and engineering, the solution is more complicated. If in such case the court's decision is needed, the judge has to thoroughly analyze the facts in the case, so in the end, the human rights are protected completely.

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