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| Qualifying academic research in a form of a manuscript |

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**THESIS**

**Rights of the child in prenatal stage:**

**scientific and legal research**

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The thesis contains results of own research. Usage of ideas, results and texts of other authors is followed by the references to the relevant sources

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# АНОТАЦІЯ

*Шрамова О.С.* Права дитини на пренатальній стадії розвитку: теоретико-правове дослідження. – Кваліфікаційна наукова праця на правах рукопису.

Дисертація на здобуття наукового ступеня доктора філософії в галузі знань 08 «Право» за спеціальністю 081 «Право». – Київський національний університет імені Тараса Шевченка, Страсбурзький університет. – Київський національний університет імені Тараса Шевченка. Київ, 2021.

Перший розділ дисертації включає дослідження термінології, огляд літератури та огляд релевантної практики міжнародних судів. Визначено, що на відміну від термінів «ненароджена дитина», «дитина до народження» («pre-born child»), «ембріон», «плід» чи «насцітурус», термін «дитина на пренатальній стадії розвитку» є таким, що найбільше підходить для позначення дитини на часовому проміжку від зачаття до народження, оскільки він є одночасно точним, нейтральним та таким, що легко перекладається іншими мовами. Термін «дитина на пренатальній стадії розвитку» не суперечить даним інших наук та не дегуманізує дитину.

У другому розділі дисертації виявлено, що у праві з моменту народження загалом виникає не людське життя, а правоздатність. Початок людського життя біологічно, – і право цього не заперечує – виникає при заплідненні яйцеклітини людини, а весь його подальший перебіг має розглядатися як неперервний процес. Деякі віхи пренатального періоду (імплантація, завершення до ембріональної стадії, початок серцебиття, досягнення життєздатності, поява свідомості) можуть мати юридичне значення.

У доктрині можна виокремити два основні підходи до питання правового статусу дитини на пренатальній стадії розвитку *de lege ferenda*: 1) дитині на пренатальній стадії розвитку не потрібно надавати статус суб’єкта права, оскільки об’єктивне право може охороняти дитину на пренатальній стадії в достатній мірі; 2) дитині на пренатальній стадії потрібно надати статус суб’єкта права. Встановлено, що охорона засобами об’єктивного права (за допомогою максими *infans conceptus* чи категорії охоронюваного законом інтересу) в деяких юрисдикціях розвинуто до рівня загального принципу права і в результаті має широке застосування, включаючи право отримувати дарунки чи компенсацію за шкоду, заподіяну протягом пренатального періоду, кримінально-правову та адміністративно-правову охорону, доабортне консультування, встановлення родинних зв’язків тощо. Однак відсутність статусу суб’єкта права як така на практиці спричинює вразливість до порушень, а засоби об’єктивного права недостатні для отримання захисту у судах з прав людини.

Було встановлено, що надання дитині на пренатальній стадії статусу суб’єкта права є можливим. В деяких державах світу (Республіка Ель Сальвадор, Італійська Республіка, Республіка Перу) дитина на пренатальній стадії має статус суб’єкта права. Визнання дитини на пренатальній стадії суб’єктом права на практиці не означає заборони абортів та загалом передбачає виникнення у пренатальному періоді суб’єктивних немайнових прав, тоді як більшість суб’єктивних майнових прав можуть виникати до народження, але реалізовуватися вже після народження. Виявлено, що охорона засобами об’єктивного права за умови поступового посилення може досягнути того рівня щільності, коли держава вважає об’єкт захисту таким, що набув ваги суб’єкта. Таким чином, охорона дитини на пренатальній стадії засобами об’єктивного права може спричинити визнання її як суб’єкта права.

У зв’язку з цим у дисертації підтримано та розвинуто попередньо пропоноване поняття пренатальної правоздатності. Виявлено, що пренатальна правоздатність за своїм обсягом і змістом не є тотожною правоздатності вже народженої людини. При визначенні обсягу і змісту пренатальної правоздатності необхідно зважати на співвідношення пренатальних прав з правами батьків, насамперед вагітної матері, а також враховувати гестаційний вік дитини, зважаючи на юридично значимі віхи пренатального розвитку. Пренатальна правоздатність не передбачає обов’язкової реєстрації пренатального існування, хоча теоретично така реєстрація і не є виключеною. Факт початку пренатального існування може визначатися за допомогою законодавчо встановлених презумпцій.

У третьому розділі дисертації запропоновано базовий рівень охорони прав дитини на пренатальній стадії розвитку (пренатальних прав), який визначено насамперед через призму співвідношення з правами вагітної матері. Базовий рівень охорони пренатальних прав включає ті права дитини на пренатальній стадії, охорона яких не ставить під загрозу права вагітної матері, а навіть посилює їх. Це право на людську гідність, право на життя, право на здоров’я, право на сімейне життя та майнові права.

Пренатальне право на людську гідність включає: свободу від катувань, нелюдського та такого, що принижує людську гідність поводження; охорона від комерційного використання фетальних матеріалів; охорона права на гідне поховання у випадку мертвонародження, нежиттєздатності при народженні чи аборту.

Пренатальне право на життя не є абсолютним і має обмеження, склад яких відмінний від обмежень права на життя вже народженої людини: а) у випадку загрози життю матері пренатальне право на життя може бути обмежене; б) пренатальне право на життя не може бути обмежене смертною карою вагітної матері; в) пренатальне право на життя може бути обмежене законними абортами. Охорона пренатального права на життя має включати кримінально-правову охорону від нападів і шкоди з боку третіх осіб, від примушування до переривання вагітності, підбурювання до нелегального переривання вагітності та нелегального переривання вагітності. Законодавством має бути забезпечене інформування споживачів контрацептивних засобів про їх можливу абортивну та/або таку, що перешкоджає імплантації ембріона, дію. Охорона пренатального права на життя може здійснюватися шляхом забезпечення належного доабортного консультування, яким, зокрема, регулюється: а) обсяг, зміст, форма інформації, яка надається вагітній жінці; б) суб’єкти, уповноважені проводити доабортне консультування; в) форма та порядок надання вагітною жінкою, іншими особами згоди на переривання вагітності; г) необхідність залучення батька дитини до процесу доабортного консультування ґ) період очікування, що має пройти з моменту отримання жінкою інформації до здійснення операції з переривання вагітності.

Пренатальне право на здоров’я повинне включати: а) права пацієнта, обмежені правами та інтересами вагітної матері, якщо тільки вагітна матір не вирішить інакше; та б) охорону здоров’я дитини при виконанні вагітною жінкою трудових обов’язків.

Пренатальне право на сімейне життя включає: а) можливість пренатального визнання батьківства щодо дитини; б) можливість встановлювати родинні зв’язки з дитиною у пренатальний період безвідносно факту народження живою (та життєздатною); в) захист від розлучення батьків протягом вагітності матері; г) захист від встановлення родинних зв’язків з ґвалтівником у випадку, якщо дитину було зачато в результаті зґвалтування; ґ) захист від провокування батьків до здійснення відмови від дитини, що знаходиться на пренатальній стадії розвитку.

Визнання за дитиною на пренатальній стадії майнових прав не означає, що всі вони можуть бути приведені в дію до народження дитини. Право спадкувати та отримувати дарунки приводиться в дію вже після народження дитини живою (та життєздатною). Однак пренатальне право на аліменти має бути таким, що входить до базового рівня охорони прав дитини на пренатальній стадії розвитку, а також таким, що може приводитися в дію вже в період пренатального розвитку дитини. Зобов’язання утримувати дитину може бути приведене в дію до моменту її народження живою (і життєздатною) та навіть без визнання дитини на пренатальній стадії суб’єктом права за умови, що: а) законом передбачено право дитини на пренатальній стадії на аліменти та механізми реалізації цього права; б) юридично встановлено родинні зв’язки між дитиною та платником аліментів. Прикладом держави, де так регулювання існує, є Сполучені Штати Америки.

**Ключові слова**: пренатальні права, права дитини, права людини, права плоду, права ембріону, права ненародженої дитини, пренатальна правоздатність, початок людського життя, насцітурус, дитина на пренатальній стадії, пренатальна стадія, людська істота, людська особа, право на життя, право на здоров’я.

# SUMMARY

*Shramova O.S.* Rights of the child in prenatal stage: theoretical and legal research. Qualifying academic research in a form of a manuscript.

The thesis submitted for a scientific degree of Philosophy Doctor in the field of knowledge 08 "Law" on a specialty 081 "Law". – Taras Shevchenko National University of Kyiv, University of Strasbourg. – Taras Shevchenko National University of Kyiv. Kyiv, 2021.

The first section of the dissertation includes research of the terminology, the literature review and the review of relevant jurisprudence of international courts. It is found, that in contrast to the terms "unborn child", "pre-born child", "embryo", "foetus" or "nasciturus", the term "the child in prenatal stage" is most suitable for designating a child from fertilisation till birth, as it is сoncurrently accurate, neutral and translatable into other languages. The term "the child in the prenatal stage" does not contradict other sciences and does not dehumanize the child.

In the second section of the dissertation it was found that what generally starts in law from the moment of birth is not a human life, but legal personhood. The biological beginning of human life – and law does not deny this – occurs at the moment of fertilisation of a human ovum, whereas its entire course should be considered as a continuous process. Some landmarks of the prenatal period (implantation, completion of the embryonic stage, the beginning of the heartbeat, the achievement of viability, the emergence of consciousness) may have legal significance.

In the doctrine, there could be distinguished the two main approaches to the legal status of a child in prenatal stage *de lege ferenda*: 1) the child in prenatal stage does not need to be granted the status of a subject of law, because objective law can effectively protect the child in the prenatal stage; 2) the child in prenatal stage should be given the status of a subject of law. It has been established that protection by objective law (by the means of a maxim *infans conceptus* or a category of legally protected interest) has been elevated in some jurisdictions to the level of a general principle of law and is widely applied, including the right to receive gifts or compensation for prenatal harm, protection by the means of criminal and administrative law, pre-abortion counselling, establishing filiation etc. However, the lack of legal personhood as such in practice leads to vulnerability, and the means of objective law are insufficient to obtain standing in human rights courts.

It has been established that granting a status of a subject of law to the child in prenatal stage is possible. In some countries (Republic of El Salvador, Italian Republic, Republic of Peru) the child in prenatal stage is endowed with the status of a subject of law. Recognition of a child in prenatal stage as a subject of law in practice does not imply prohibition of abortion and does generally imply the emergence of subjective non-property rights, whereas most subjective property rights may arise before birth but can be exercised already after birth. It has been found that protection by the means of objective law, subject to gradual increasement, can reach such level of density when the state considers that the object of protection have already gained the weight of a subject. Thus, the protection of a child in prenatal by the means of objective law may lead to further recognition as a subject of law.

In this regard, the previously suggested concept of prenatal personhood is upheld and developed in this dissertation. It was found that the scope and content of prenatal personhood is not identical to the personhood of an already born human. When determining the scope and content of prenatal personhood, it is necessary to take into account the relationship of prenatal rights with the rights of parents, especially a pregnant mother, as well as to take into account the gestational age of the child, bearing in mind the legally significant landmarks of prenatal development. Prenatal personhood does not inevitably require registration of prenatal existence, although such registration in theory is not excluded. The fact of beginning of prenatal existence can be determined by the means of legally established presumptions.

In the third section of the dissertation the baseline level of protection of the rights of the child in prenatal stage (prenatal rights) was suggested. It was determined primarily through balancing prenatal rights with those of the pregnant mother. The baseline protection of prenatal rights includes those rights of the child in prenatal stage, which do not compromise the rights of the pregnant mother, but even reinforce them. These are the right to human dignity, the right to life, the right to health, the right to family life and property rights.

The prenatal right to human dignity includes: freedom from torture, inhuman or degrading treatment; protection against commercial use of foetal materials; protection of the right to a decent burial in the event of stillbirth, non-viability at birth or abortion.

The prenatal right to life is not absolute and is subject to limitations, which differ from the limitations inherent to the right to life of an already born person: a) the prenatal right to life may be limited in the case of threat to the life of the mother; b) the prenatal right to life cannot be limited by the execution of a death penalty on a pregnant mother; c) the prenatal right to life may be limited by legal abortion. Protection of the prenatal right to life should include criminal protection against assault and harm of third parties, from coercion to abortion, incitement to illegal abortion and illegal abortion. Legislation should ensure that consumers of contraceptives are informed of their possible abortive and/or anti-implantation effects. The protection of the prenatal right to life may be exercised by providing appropriate pre-abortion counselling, which, in particular, regulates: a) the amount, content and form of information provided to a pregnant woman; b) entities authorised to provide pre-abortion counselling; c) the form and procedure for giving consent to abortion by a pregnant woman, other persons; d) the need to involve the child's father in the process of pre-abortion counselling.

The prenatal right to health should include: a) the rights of a patient, limited by the rights and interests of the pregnant mother, unless the pregnant mother decides otherwise; and b) the protection of the health of the child at work.

Prenatal right to family life includes: a) the possibility of prenatal recognition of paternity as regards the child; b) the ability to establish filiation with the child in prenatal stage regardless of the fact of live (and viable) birth, c) protection against divorce of the parents during the mother's pregnancy; d) protection against the establishment of filiation with the rapist in the event that the child was conceived as a result of a rape; e) protection against provoking parents to abandonment of their child in prenatal stage.

Recognition of a child's prenatal property rights does not mean that all of them can be enforced before the child’s birth. The right to inherit and the right to receive gifts can be exercised after the child is born alive (and viable). However, the prenatal right to support (alimony) should be included in baseline protection of the rights of the child at in prenatal stage, and should be enforceable already during the prenatal development of the child. The obligation to maintain a child may be enforced until the moment of his live (and viable) birth and even without the recognition of the child in prenatal stage as a subject of law, provided that: a) the law provides for the prenatal right to support (alimony) and for mechanisms for its enforcement; b) filiation between the child and the alimony payer is legally established. An example of a jurisdiction where such regulations exist is the United States of America.

**Key words:** prenatal rights, rights of the child, human rights, foetal rights, embryo rights, rights of the unborn, prenatal personhood, beginning of human life, nasciturus, child in prenatal stage, prenatal stage, human being, human person, right to life, right to health.

# RÉSUMÉ

*Shramova O.S.* Les droits de l’enfant au stade prénatal: recherche théorique et juridique. – Travaux scientifiques qualifiés sous forme de manuscrit.

La these est soumise pour obtenir le grade de docteur en philosophie dans le domaine de la connaissance 08 "Droit" sur une spécialité 081 "Droit". - L'université nationale Taras-Chevtchenko de [Kiev](https://fr.wikipedia.org/wiki/Kiev), Université de Strasbourg. - L'université nationale Taras-Chevtchenko de [Kiev](https://fr.wikipedia.org/wiki/Kiev). Kiev, 2021.

La première section de la thèse inclut la recherche de la terminologie, la revue de la littérature et la revue de la jurisprudence pertinente des tribunaux internationaux. On constate que, contrairement aux termes "enfant à naître", "enfant avant la naissance" ("pre-born child"), "embryon", "fœtus" ou "nasciturus", le terme "enfant au stade prénatal" est le plus approprié pour désigner un enfant de la fécondation à la naissance, car elle est à la fois exacte, neutre et traduisible dans d'autres langues. Le terme "enfant au stade prénatal" ne contredit pas les autres sciences et ne déshumanise pas l'enfant.

Dans la deuxième section de la thèse, il a été constaté que ce qui commence généralement en droit à partir du moment de la naissance n'est pas une vie humaine, mais la personnalité juridique. Le début biologique de la vie humaine - et la loi ne le nie pas - se produit au moment de la fécondation d'un ovule humain, alors que tout son déroulement doit être considéré comme un processus continu. Certains points de repère de la période prénatale (implantation, achèvement du stade embryonnaire, début du rythme cardiaque, aquisition de la viabilité, émergence de la conscience) peuvent avoir une signification juridique.

Dans la doctrine, on pourrait distinguer les deux principales approches du statut juridique de l'enfant au stade prénatal *de lege ferenda*: 1) l'enfant au stade prénatal n'a pas besoin de se voir accorder le statut de sujet de droit, car la loi objective peut protéger efficacement l'enfant au stade prénatal; 2) l'enfant au stade prénatal devrait avoir le statut de sujet de droit. Il a été établi que la protection par une loi objective (au moyen d'une maxime *infans conceptus* ou d'une catégorie d'intérêt légalement protégé) a été élevée dans certaines juridictions au niveau d'un principe général de droit et est largement appliquée, y compris le droit de recevoir des cadeaux ou une compensation pour préjudice prénatal, une protection par le biais du droit pénal et administratif, une consultation pré-avortement, l'établissement de la filiation, etc. Cependant, l'absence de personnalité juridique en tant que telle conduit dans la pratique à la vulnérabilité, et les moyens du droit objectif sont insuffisants pour obtenir la qualité pour agir devant les tribunaux des droits de l’homme.

Il a été établi que l’octroi du statut de sujet de droit à l’enfant au stade prénatal est possible. Dans certains pays (République d'El Salvador, République italienne, République du Pérou), l'enfant au stade prénatal est doté du statut de sujet de droit. La reconnaissance d'un enfant au stade prénatal comme sujet de droit en pratique n'implique pas l'interdiction de l'avortement et implique généralement l'émergence de droits subjectifs non-patrimoniaux, alors que la plupart des droits subjectifs patrimoniaux peuvent [apparaître](https://context.reverso.net/%D0%BF%D0%B5%D1%80%D0%B5%D0%B2%D0%BE%D0%B4/%D1%84%D1%80%D0%B0%D0%BD%D1%86%D1%83%D0%B7%D1%81%D0%BA%D0%B8%D0%B9-%D0%B0%D0%BD%D0%B3%D0%BB%D0%B8%D0%B9%D1%81%D0%BA%D0%B8%D0%B9/fait+appara%C3%AEtre) avant la naissance mais peuvent être exercés dès après la naissance. Il a été constaté que la protection par la loi objective, soumise à une augmentation progressive, peut atteindre un tel niveau de densité lorsque l’État considère que l’objet de la protection a déjà acquis le poids d’un sujet. Ainsi, la protection d'un enfant pendant la période prénatale au moyen d'une loi objective peut conduire à une reconnaissance supplémentaire en tant que sujet de droit.

À cet égard, le concept précédemment suggéré de la personnalité prénatale est confirmé et développé dans cette thèse. Il a été constaté que la portée et le contenu de la personnalité prénatale ne sont pas identiques à la personnalité d'un être humain déjà né. Pour déterminer la portée et du contenu de la personnalité prénatale, il est nécessaire de prendre en compte la relation entre les droits prénataux et les droits des parents, en particulier de la mère enceinte, ainsi que de prendre en compte l'âge gestationnel de l'enfant, en gardant à l'esprit les points de repère juridiquement significatifs du développement prénatal. La personnalité prénatale n'exige pas inévitablement l'enregistrement de l'existence prénatale, bien qu'un tel enregistrement en théorie ne soit pas exclu. Le début de l'existence prénatale peut être déterminé au moyen de présomptions légalement établies.

Dans la troisième section de la thèse, le niveau de base de protection des droits de l'enfant au stade prénatal (droits prénataux) a été suggéré. Il a été déterminé principalement en équilibrant les droits prénataux avec ceux de la mère enceinte. La protection de base des droits prénataux comprend les droits de l'enfant au stade prénatal, qui ne compromettent pas les droits de la mère enceinte, mais lès renforcent. Il s’agit du droit à la dignité humaine, du droit à la vie, du droit à la santé, du droit à la vie de famille et des droits patrimoniaux.

Le droit prénatal à la dignité humaine comprend: le droit de ne pas être soumis à la torture, aux traitements inhumains ou dégradants; protection contre l'utilisation commerciale de matériel foetal; protection du droit à une inhumation décente en cas de mortinaissance, de non-viabilité à la naissance ou d'avortement.

Le droit prénatal à la vie n'est pas absolu et est soumis à des limitations, qui diffèrent des limitations inhérentes au droit à la vie d'une personne déjà née: a) le droit prénatal à la vie peut être limité en cas de menace pour la vie de la mère; b) le droit prénatal à la vie ne peut être limité par l'exécution d'une peine de mort sur une mère enceinte; c) le droit prénatal à la vie peut être limité par l'avortement légal. La protection du droit prénatal à la vie devrait inclure une protection pénale contre les agressions et les préjudices causés à des tiers, contre la coercition à l'avortement, l'incitation à l'avortement illégal et l'avortement illégal. La législation devrait garantir que les consommateurs de contraceptifs sont informés de leurs éventuels effets abortifs et/ou anti-implantatoires. La protection du droit prénatal à la vie peut être exercée en fournissant des consultations avant l'avortement, qui réglementent notamment: a) la quantité, le contenu et la forme des informations fournies à une femme enceinte; b) les entités autorisées à fournir des consultations pré-avortement; c) la forme et la procédure de consentement à l'avortement d'une femme enceinte ou d'autres personnes; d) la nécessité d'impliquer le père de l'enfant dans le processus d’ une consultation pré-avortement.

Le droit prénatal à la santé devrait inclure: a) les droits du patient, limités par les droits et les intérêts de la mère enceinte, à moins que la mère enceinte n'en décide autrement; et b) la protection de la santé de l'enfant au travail.

Le droit prénatal à la vie familiale comprend: a) la possibilité de reconnaissance prénatale de filiation de l'enfant; b) la possibilité d'établir une filiation avec l'enfant au stade prénatal indépendamment du fait de la naissance vivante (et viable), c) la protection contre le divorce des parents pendant la grossesse de la mère; d) protection contre l'établissement d'une filiation avec le violeur dans le cas où l'enfant a été conçu à la suite d'un viol; e) protection contre la provocation des parents à l'abandon de leur enfant au stade prénatal.

La reconnaissance des droits patrimoniaux prenataux ne signifie pas que tous peuvent être appliqués avant la naissance de l’enfant. Le droit d'hériter et le droit de recevoir des cadeaux peut être exercé après la naissance d’un enfant vivant (et viable). Cependant, le droit prénatal à une pension alimentaire devrait être inclus dans la protection de base des droits de l'enfant au stade prénatal et devrait être applicable déjà au stade prénatal de l'enfant. L'obligation d'entretenir un enfant peut être exécutée jusqu'au moment de sa naissance vivante (et viable) et même sans la reconnaissance de l'enfant au stade prénatal comme sujet de droit, à condition que: a) la loi prévoie le droit prénatal à l’entretien (pension alimentaire) et à des mécanismes de mise en œuvre; b) la filiation entre l'enfant et le payeur de la pension alimentaire est légalement établie. Les États-Unis d'Amérique sont un exemple de juridiction où de telles réglementations existent.

**Mots clés:** droits prénataux, droits de l'enfant, droits de l'homme, droits du fœtus, droits de l'embryon, droits de l'enfant à naître, personnalité prénatale, début de la vie humaine, nasciturus, enfant au stade prénatal, stade prénatal, être humain, personne humaine, droit à la vie, droit à la santé.

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# LIST OF NOTATION KEYS

|  |  |  |
| --- | --- | --- |
| ACHR | – | American Convention on Human Rights |
| CoE | – | Council of Europe |
| Commission | – | European Commission of Human rights |
| CRC | – | Convention on the Rights of the Child |
| Directive 92/85/EEC | – | Council Directive 92/85/EEC of 19 October 1999 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) |
| Directive 98/44/EC | – | Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions |
| ECHR | – | Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECJ | – | The Court of Justice of the European Union |
| ECtHR | – | European Court of Human Rights |
| e.g. | – | *exempli gratia* (for example) |
| EU | – | European Union |
| I/A Court | – | Inter-American Court of Human Rights |
| I/A Commission | – | Inter-American Commission on Human Rights |
| ICCPR | – | International Covenant on Civil and Political Rights |
| ICJ | – | The International Court of Justice |
| i.e. | – | *it est* (that is) |
| ILO | – | International Labour Organization |
| UN | – | United Nations |
| USA | – | United States of America |
| WHO | – | World Health Organization |

# INTRODUCTION

**Reasoning for selecting the research topic.** Children in prenatal stage are generally not regarded as subjects of law endowed with legal personhood. Consequently, they are usually not recognised as bearers of subjective rights. While their legal status remains uncertain in most jurisdictions worldwide, in effect they are thrown in the conditions of lawlessness.

However, the Preamble of the Convention on the Rights of the Child (hereinafter – CRC) stipulates, *inter alia*, that ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’.[[1]](#footnote-1) Children before birth are not a group of beings isolated from the human society, they are the same children which are consequently being born and receive legal personhood and subjective rights. Legal disregard of prenatal period leaves children in prenatal stage vulnerable in front of all the variety of possible violations of their rights, which can deeply affect their developing nervous systems and the overall state of health in the period when most crucial formations take place, and can impede their development to full potential in the future. The long-term impact of this disregard on individuals and societies in whole is immense.

One of the most prominent researchers in the field, Aude Bertrand-Mirkovic, was wondering: ‘Est-il admissible qu’une question aussi importante, ayant des conséquences aussi graves pour les individus, ne puisse recevoir que des réponses douteuses?’[[2]](#footnote-2) (Is it admissible that such an important question, having such serious consequences for individuals, can only receive dubious answers?). Admittedly, a considerable effort has been made by the authors worldwide in order to resolve the issue or particular aspect thereof, including works of the said Aude Bertand-Mirkovic, Nathalie Massager, Bohdana Ostrovska, Suliman K. Ibrahim, Gerard Casey, Anna Walsh and others. These studies, as well as recent developments in jurisprudence and legislations have contributed to the qualitatively new level of conceptualisation of the problem. Now we are one step from total reconsideration of existing approaches to the issue.

According to Hans Rosling, people tend to binary thinking, separating everything into two almost opposing groups with emptiness between them, whereas in reality there is a smooth transition, diversity, similarity and agreement.[[3]](#footnote-3) In the same vein traditional confrontation of those who support personhood and subjective rights of children in prenatal stage and those who strongly oppose them in view of women’s reproductive rights, – is unnecessary. It radicalises the discussion and makes it contra-productive, when the point of departure and that of culmination is that the consensus is impossible.[[4]](#footnote-4) Instead, it is necessary to seek common ground, to find convergencies and to overcome prejudices which impede development of the field.

**Object of research.** Children’s rights as a legal phenomenon.

**Subject matter of research**. Legal status of the child in prenatal stage and his rights *de lege lata* and *de lege ferenda*.

**Aim and objectives of the research.** The aim of this research isto identify, on the basis of the study and the systematisation of existent theoretical and jurisprudential approaches, international law regulations and national legislations of individual states, the approach which allows to ensure at least baseline protection of the rights of children in prenatal stage in the way which is consistent with recent developments and best practices, as well as interests of all the stakeholders. The said approach is aimed to be universal to the extent which allows its applicability both within legal systems of individual states and internationally.

Achievement of the said aim shall be attained by the means of fulfilling the following objectives:

* analysis of terminology which is used to denote the child in time period between fertilisation and birth and to define which part of it can be most appropriately used for legal purposes;
* review of literature dedicated to the legal issues of the child in prenatal stage;
* review of relevant jurisprudence of international courts, namely the Institutions of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – ECHR), the Inter-American Court of Human Rights (hereinafter – I/A Court) and the Inter-American Commission on Human Rights (hereinafter – I/A Commission), the Court of Justice of the European Union (hereinafter – ECJ) and the International Court of Justice (hereinafter – the ICJ);
* determination of the moment when human life begins in biological and legal terms, identification of landmarks of prenatal development which are legally relevant;
* analysis of the approach of “objective law protection”, its scope and deficiencies;
* analysis of “personhood” approach, distinctions between legal personhood, human personhood, and human beinghood, experience of states which have already pioneered recognition of personhood in prenatal period;
* reconsideration of the concept of prenatal personhood;
* suggesting the baseline level of legal protection of the rights of children in prenatal stage, namely in the ambit of the right to human dignity, the right to life, the right to health, the right to family life, and the property rights.

**Research methods.** Dialectical method is underpinning the whole research in terms that it considers the issue of rights of the child in prenatal stage as a product of interaction of contradictory opposites, which are to be reconciled by the means of finding the convergencies.

Another method which is used extensively throughout the whole research is comparative method. Experience of regulation of the rights of children in prenatal stage is rather limited in each country. Comparative method is applied in order to identify existing approaches in laws and practices of their application, to collate them and to choose therefrom the most sustainable and promising ones.

The subject matter of the research touches upon the other disciplines which have in their disposal more precise data. Thus the study inevitably refers to other sciences relevant for its object and subject matter. During the study of terminology and that of the issue of beginning of human life extensive references were made to biological sciences, mainly embryology. The inquiry on the prenatal right to health is made with the help of relevant data from medical science. There are dispersed references to the sources of the said sciences in the other parts of this thesis.

**Scientific novelty.** The research constitutes an attempt to compile the previous studies and developments in the field, to use them as a baseline and to build upon them. *The new findings which were revealed or articulated for the first time include*:

* it was substantiated that biological beginning of human life is independent from the legal concept of personhood. While biologically human life begins at fertilisation, there are landmarks of prenatal development which are legally relevant, which include implantation (nidation), completion of the pre-embryonic stage, beginning of heartbeat, attaining viability and attaining consciousness;
* it was identified that objective law approach, which was described by Aude Bertrand-Mirkovic, has inherent deficiencies, namely: a) it is not consistent with the absolute right to be recognised as a person before the law and thus leaves the child in prenatal stage extra-vulnerable in front of violations of his rights; and b) it deprives the child in prenatal stage of a possibility to be represented in legal relations during the prenatal period as such. Thus needs of the child which can arise during the prenatal period cannot be met within a legal framework. In addition, within this approach a child in prenatal stage cannot be recognised as a victim of human rights violation in human rights courts;
* it was established that legal personhood is synthetic, evolutive, divisible and variable. The synthetic character of legal personhood stems from the fact that it is a purely intellectual construction, *don de la loi*. Evolutive character of legal personhood is conditioned by the fact that the concept evolves with development and sophistication of legal systems. Legal personhood is divisible, because it can be divided into elements - ability to enjoy rights and capacity to act, and sometimes other elements. To count as a person before the law it is sufficient to be legally endowed with ability to have subjective rights. The legal personhood is also variable, because the number of rights and their scope vary depending on a particular situation of a group to which the subject belongs;
* it was revealed that states which have already recognised children in prenatal stage as persons before the law, for example (hereinafter – e.g.) El Salvador, Peru, Italy) do not necessarily outlaw abortions, and do not endow children in prenatal stage with the full-fledged personhood, equivalent to legal personhood of already born people. Instead they associate beginning of non-property rights with the biological beginning of human life, wherefrom lawful abortion can be an exception. The property rights even in these states commence with the live birth;
* it was revealed that “objective law” and “personhood” approaches are interdependent, as the latter can eventually stem from the former. When the density of objective norms protecting the interests of the children in prenatal stage gradually increases, it can eventually reach the point where the doctrine, courts or legislators decide that the child in prenatal stage has arrived to be treated as a subject of law and recognise her legal personhood;
* it was suggested to establish baseline protection of the rights of the child in prenatal stage, which is to include the prenatal rights which do not conflict with maternal rights but reinforce them, thus benefiting both the child and the mother. The baseline protection of the rights of children in prenatal stage can be implemented in any jurisdiction regardless of the chosen approach (“objective law” or “personhood”) and shall include: a) prenatal right to dignity, namely protection from ill-treatment during abortion, protection from commercial use of foetal tissues and protection of the right to decent burial in the event of stillbirth, non-viable birth or abortion; b) prenatal right to life, namely protection from the third party assaults (except lawful abortions), from coercion and/or incitement to termination of pregnancy, as well as proper protection from illegal termination of pregnancy, caution for abortifacient and anti-implantation contraceptives and pre-abortion counselling; c) prenatal right to health, which is to include prenatal patient rights and the right to safety at work during the mother’s pregnancy; d) prenatal right to family life, which is to include filiation rights (legally recognised relation of paternity and maternity regarding the child), protection from parents’ divorce during pregnancy and the right to be protected from paternity relations in the event that the child was conceived resulting from a rape; e) prenatal property rights which are to include the right to inherit and the right to receive gifts, as well as the right to alimony;
* it was substantiated, that prenatal right to life is not absolute and is subject to limitations, which differ from the limitations inherent to the right to life of an already born person: a) the prenatal right to life may be limited in the case of threat to the life of the mother; b) the prenatal right to life cannot be limited by the execution of a death penalty on a pregnant mother; c) the prenatal right to life may be limited by legal abortion.

*The previously articulated ideas and approaches which were further developed include*:

* the notion “child in prenatal stage” firstly suggested in legal context by Ihor Ponkin and others in 2014 is identified as the most pertinent for legal purposes due to its: a) accuracy – it denotes the child exactly from the moment of fertilisation and till the moment of birth; b) translatability – it is easy to translate in other languages without distortion of meaning; c) neutrality – it does not bear neither positive nor negative connotations. It also does not compromise other sciences and, most importantly, avoids dehumanisation;
* the idea of continuity of human life, which has been repeatedly suggested by the authors from different parts of the world (Claude Sureau, Natalia Besedkina, Gerard Casey, Laura Westra, Aude Bertrand-Mirkovic) was upheld and further developed with the help of inter-disciplinary approach. The reference was made to the biological science, where categorical thinking (taking a continuum and breaking it into categories for simplification of studying and evaluation process) is considered to be capable of misleading. In a similar way taking a continua of human life and categorically separating it into periods before and after birth for legal purposes, where legal existence is associated with birth, can be misleading because: a) when the legislators and judges are focused on the moment of live birth, they often do not differentiate between, e.g., the child in prenatal stage who is viable and the one who is not, or the child who is conscious and the one who is not; b) it is not seen or regard is not given to the fact how similar children are just before birth and shortly thereafter;
* the previously suggested[[5]](#footnote-5) concept of prenatal personhood was upheld and further developed, namely: a) it was further promoted that prenatal personhood does not equal full personhood, as it has inherent particularities which exclude some elements, such as capacity to act, ability to be held responsible for wrongs, and certain scope of subjective rights; b) it was found that civil registration of prenatal existence as such is not a necessary prerequisite of prenatal personhood, although it would be helpful for making the legal status of children in prenatal stage more certain and would enable them to become the full-fledged bearers of property rights before the moment of birth; c) the starting point of prenatal existence for legal purposes can be well defined with the help of legally established presumptions (following experience of France or El Salvador); d) prenatal personhood shall be articulated with due regard to interrelations with rights of the child’s mother and those of the child’s father; e) due regard must be given to legally relevant landmarks of prenatal development and appropriate differentiation between the children of different gestational age.

**Thesis approbation.** Conclusions and suggestions of this research were discussed and approved at: the International scientific and practical conference “Perspective directions of economic development, management and law: theory and practice” (Poltava, 12 March 2018, materials have been published); the cadet and student conference “Trends and priorities of reforming the private law of Ukraine” (Lviv, 26 April 2018, materials have been published); International scientific and practical conference “Law, legal science and education: achievements and perspectives” (Kyiv, 25 April 2019, materials have been published); round table in Kyiv regional Centre of the National Academy of Legal Sciences of Ukraine “Legal regulation of temporal limits of human life” (Kyiv, 22 October 2019, materials have been published); International scientific and practical conference of students, aspirants and young scientists, devoted to the Day of science of the faculty of law “Topical issues of legal science and practice” (Kyiv, 15 November 2019, materials have been published).

**Structure and volume of the thesis.** The dissertation comprises of the list of notation keys, introduction, three sections divided into eleven subsections, which are further divided into paragraphs and sub-paragraphs, conclusion, and bibliography. The total volume of the thesis is 204 pages.

# SECTION 1. TERMINOLOGICAL, THEORETICAL AND JURISPRUDENTIAL FRAMEWORK

## 1.1. Notion of the child in prenatal stage

Legal literature employs diverse terminology to refer to the child in the period starting from fertilisation and ending with the baby’s birth. In this paragraph, these terms will be scrutinised and the term *child in prenatal stage* will be upheld as the most suitable for the use in the legal context, including internationally.

### 1.1.1. Unborn child

One of the most common terms being used to connote a child before birth is *unborn child*, or *unborn baby*, or *the unborn* for such children as a class.

Linguistically, *unborn* is a complex word, made up of two morphemes: adjective *born* and prefix *un-*. In its turn, adjective *born* is derivative from the verb *to bear*. It is a so called participial adjective, because it has the same form as a Participle II of the verb *to bear*. Adjective *born* is passive and non-progressive, it signifies a finished action, which was performed by somebody else.

Prefix *un-* can be reversative or privative.[[6]](#footnote-6) According to Ronald Carter and Michael McCarthy, prefix *un-* can have two meanings: (i) remove (undress, undo); (ii) reverse, not (unhappy, unlucky).[[7]](#footnote-7) Put another way, prefiх *un-* signifies reversal of some action, deprivation of something, or negation. In some rare occasions placing of prefix *un-* in front of an adjective has a reinforcing meaning (*unravel*, *unloosen*). This happens when an adjective that itself connotes undoing, and this is not the point with the adjective *born*.

Meaning of the prefix *un-* is different with verbs and adjectives. As Ingo Plag explains, ‘un- attaches to verbs only if the action or process denoted by the verb can be reversed’,[[8]](#footnote-8) in other words, put backward, whereas with adjectives it is used mostly for negation. According to Ingo Plag, ‘[t]he prefix [un-] is also used to negate simple and derived adjectives: *uncomplicated*, *unhappy*, *unsuccessful*, *unreadable*. Adjectival un- derivatives usually express contraries, especially with simplex bases’.[[9]](#footnote-9)

Thus etymologically the word *unborn* means *not born*, the opposite of *born*. However, it’s common meaning is different, which is reflected in dictionaries. Longman Dictionary of Contemporary English defines *unborn* as ‘not yet born’.[[10]](#footnote-10) Similarly this term is defined by other dictionaries: as ‘not yet born or brought to birth, still to come in the future’,[[11]](#footnote-11) ‘not yet delivered, still existing in the mother’s womb’.[[12]](#footnote-12) There is much of a difference between *not born* and *not yet born*, because the former connotes a finished action of not being born, whereas the latter signifies that the action is not finished but will be finished in the future.

Ukrainian analogue of the adjective *unborn* is *ненароджений,* which has the similar formation and meaning as in the English language. Whereas in English prefix *un-* could possibly be used not only for negation, but also for reversing actions with verbs, in Ukrainian language prefix *не-* is used only for negation. However, the adjective *ненароджений* in the Ukrainian language is also defined as ‘who was not yet born’.[[13]](#footnote-13) The same question could be posed – where the particle *yet* was taken from?

On the contrary, in the French language the phrase *unborn child* could be translated only as *l’enfant à naître*, which means literally *the child who has to be born*. There is a world of difference between somebody who has to be born, as it is in French, and somebody who is not born, as it is in English or Ukrainian, as well as Russian, German and many other languages. The latter is literally understood as *somebody who is already not born and never will be born*. Put another way, it is somebody who is dead already or will die inevitably in the future never being born.

Although it became common to use terms *the unborn child* or *the unborn baby* in the English language or *ненароджена дитина* in the Ukrainian language in the meaning of the child who was not *yet* born, etymologically this is incorrect. If it was supposed to connote the child who is going to be born in the future, it would sound as *the child who is going to be born* or *not yet born child*, but not *the unborn child*. In Ukrainian the positive meaning of *ненароджена дитина* would be *дитина, що має народитися* or *дитина що ще не народилася.* However, this is not the case.

From this we can conclude, that using the term *unborn child* or *ненароджена дитина* to connote children who will hopefully be born is etymologically incorrect. The French term *l'enfant à naître*, on the contrary, has positive meaning and could be used to denote the child in the period prior to birth who has to be born. However, it can hardly be translated in other languages without distortion.

### 1.1.2. Pre-born (preborn) child

In contrast to the *unborn*, the concept *pre-born*, or *preborn*, literally means “the child prior to birth” or “not yet born” without any negative connotation. This term is often employed in anti-abortion discourse, and bear somewhat positive meaning: the child prior to birth eventually has to be born. Similarly to the French *l'enfant à naître,* this term is not translatable into other widespread languages.

### 1.1.3. Embryo

One of the terms used to refer to the child prior to birth is *embryo*. This term refers to the weeks 3-8 of gestation, following the pre-implantation/pre-embryonic period, which encompasses the first 2 weeks of gestation.[[14]](#footnote-14) Thus a child in prenatal stage could be called an *embryo* only during a short period of gestation.

Mostly often the term *embryo* is employed in legislation, jurisprudence and literature dealing with reproductive technologies, in order to address the child in prenatal stage in its early period of development. For example, Порядок застосування допоміжних репродуктивних технологій в Україні (The procedure for the use of reproductive technologies in Ukraine), approved by the Order of Ministry of Health of Ukraine No. 787 in 2013, along with the donation of gametes regulates donation of embryos, not mentioning the issue of donation of zygotes. Similarly Article L2141-1 of the French Public Health Code mentions gametes and embryos, also germinal tissue, but not zygotes. This means that the term *embryo* in common use is extended to the pre-embryonic stage of prenatal development, which is incorrect.

Furthermore, sometimes *embryo* is used to refer to the whole period between fertilisation and birth. Nadezhda Belobragina, having specified three stages of prenatal development, which are distinguished in biology and embryology, claimed that ‘В праве под эмбрионом человека принято считать организм с момента оплодотворения до рождения (In law, human embryo is considered to be an organism from the moment of fertilisation till birth)’.[[15]](#footnote-15) This opinion cannot be supported, as it is contrary to knowledge obtained in other branches of science, namely medicine, biology, and embryology. An explanation of such an opinion could be found in the fact that sometimes embryology is understood as a science which studies all gestation from the moment of fertilisation till birth. However, according to The Cambridge Dictionary of Human Biology and Evolution, this understanding also is not absolutely accurate:

**[E]mbryology**: study of prenatal development from conception through the eighth week in utero. Sometimes used loosely to describe the entire period of gestation including the fetal period. A discipline more often referred to as ‘developmental biology’ in contemporary biology.[[16]](#footnote-16)

Respectively, the term *embryo* is a misnomer when being used to refer to the child in prenatal stage except when the embryonic stage is addressed strictly between 3-8 weeks of gestation.

### 1.1.4. Foetus

Another term which is used to denote the child in the period starting with fertilisation and ending with birth, is *foetus*, or in American English, *fetus*)*.*[[17]](#footnote-17)

This term derived from the Latin language, where it originally was applied to plants, and afterwards was extended to animals and humans. This is how it is described in the Oxford Latin Dictionary:

[F]etus2 ~ us m. [as prec = tvs^3]

**1** The Bringing forth of young, parturition; (of birds) laying; an instance of this, a birth. **b** the bearing of young, breeding. **c** conception, begetting.  
**2** The bearing of fruit by plants; (also, by the earth).

**3** That which is born, an offspring (usu. of beasts, occ. of human beings, etc.). **b** (sg. collect.) the young (of an animal), the children (of a parent). **c** the young born at one time, brood, litter. **d** the young while still in the womb.

**4** A Fruit of a plant, produce, crop. **b** And offshoot, branch, sucker, sapling, etc., produced by a plant. **c** (transf.) a product of the mind or imagination.[[18]](#footnote-18)

*Foetus* is a medical term denoting a child in later part of gestation following embryonic period. Although foetal period is much longer than embryonic period, still it constitutes only a part of the whole period of gestation. In view of this, applying this term to the whole period of gestation is inaccurate.

Another problematic issue regarding the term *foetus* is that line, drawn by biology and medicine between embryonic and foetal stages, is fuzzy. Most of scholars agree that foetal period starts with the beginning of the ninth week of gestation.[[19]](#footnote-19) However, there are some discrepancies in official sources regarding determination of the beginning point of foetal period. This is how the term *foetus* is defined by The Cambridge Dictionary of Human Biology and Evolution:

**[F]etus:** term used to describe the prenatal young of **viviparous** mammals in the latter stages of development, when organs form and body structures become recognizable as characteristic of a species; in humans, the fetus exists from the 8th developmental week until birth Adjective: fetal. In humans, the fetus exists during the **fetal stage**. Cf. **zygote** and **embryo**.[[20]](#footnote-20)

In given definition the starting point of foetus’s existence is indicated as 8th developmental week, unlike it is in majority of sources. Moreover, the *fetal stage* in the same dictionary is described differently in relation to timeframes:

**[F]etal stage** (or **period):** interval of prenatal growth following the **embryonic stage**, lasting in humans from approximately ten weeks postconception until birth, and characterized by further development and the onset of rapid growth of a **fetus**.[[21]](#footnote-21)

In this definition the starting point of foetal period is shifted two weeks later, with the use of word *approximately*. In practical obstetrics this line becomes even more blurred, as for the sake of simplification the first trimester of pregnancy (till the 13th week) is attributed to the embryonic period of prenatal development, whereas the second and third trimesters correspond to the foetal period[[22]](#footnote-22). This means that employment of the notion *foetus* is conjugated with uncertainty of the moment when an embryo becomes a foetus, which makes the term *foetus* too ambiguous for legal use.

In legal literature devoted to the issue of the status of the child in prenatal stage or its separate aspects the term *foetus* in the UK English or *fetus* in its US version are used mostly often. However, some of authors prefer to give a clarification of the meaning they put in this term. For example, Suliman M. K. Ibrahim denotes:

In this thesis, for the sake of simplicity, the term foetus will be used to denote the unborn human entity regardless of the phase of development it occupies since, in this thesis, the scientific distinction between the embryo and foetus has no effect on the moral and legal status.[[23]](#footnote-23)

Similarly, Francis J. Beckwith and Steven D. Thomas at the very beginning of their publication footnoted:

We use the term “fetus” in the popular sense as synonymous with “unborn”. We are not using it in the technical sense of referring to the last stage in prenatal development after zygote and embryo. Thus, we are using the word fetus to refer to the unborn entity at all stages of its development prior to birth.[[24]](#footnote-24)

This confirms that use of the term *foetus* in legal literature commonly does not imply addressing only the foetal stage of prenatal development. Contrariwise, by the term *foetus* authors usually mean the whole period of prenatal development, making no difference for its separate stages. The exception to this is when the author or the court in a particular case addresses a child, which is at that moment obviously and undoubtedly in the foetal stage of prenatal development.

Another problem with the word *foetus* is that its archetypal meaning is associated with plants, which is reflected in its common use. Ukrainian analogue of the word *foetus* is *плід*, which is most commonly used to denominate a plant, namely its juicy edible part (e.g. an apricot, an apple, berries etc.). This is depicted by the Big Explanatory Dictionary of the Modern Ukrainian Language, where the first meaning of the word *плід* is ‘1. Частина рослини, яка розвивається після запліднення із зав’язі квітки і містить насіння. // Соковита їстівна частина деяких рослин (фрукти, ягоди).’[[25]](#footnote-25) (1. A part of a plant that develops after fertilisation with a flower ovary and contains seeds. // Juicy edible part of some plants (fruits, berries). Only the second meaning of the word *плід* refers to the uterine period of development of mammals and humans: ‘2. Організм ссавців і людини в утробний період розвитку.’[[26]](#footnote-26) (2. The organism of mammals and humans in the uterine period of development). It is not accidental, that mammals are mentioned first, as historically the term *fetus* was firstly extended from plants to mammals, and only thereafter to humans.

In common usage apart from professional medical context the term *плід* in the Ukrainian language is firstly understood as a juicy part of the plant and is not associated with the child *in utero* in his latest stage of prenatal development. Application of this term in Ukrainian language dehumanizes the child in prenatal stage associating it with a plant.

In medicine, however, the term *плід* is used exactly in the meaning equivalent to the English term *foetus*. This is a legislative definition of the medical term *плід*, provided by the Instruction on determination of perinatal period, live birth and stillbirth criteria, approved by the Order of Ministry of Health of Ukraine No. 179 in 2006:

[П]лід – внутрішньоутробний продукт зачаття, починаючи з повного 12-го тижня вагітності (з 84 доби від першого дня останнього нормального менструального циклу) до вигнання/вилучення з організму матері (foetus is an in-utero product of conception, starting with the full 12th week of pregnancy (from the 84th day after the 1st day of the last normal menstrual cycle) till the expel/withdrawal of the mother’s organism).

From this legislative definition of the purely medical understanding of the term *foetus*, or *плід*; as a *product of conception* follows the assertion that even in professional medical context employment of the term *foetus* emphasizes dehumanization of the child in prenatal stage, possibly aimed at justification of treating it without any respect to human dignity, which in fact offences feelings of prospective parents, let alone those of the child. As John Finnis pointed out, ‘[a]s used in the conference program and website, which are not medical contexts, it [the phrase *the foetus*] is offensive, dehumanizing, prejudicial, manipulative’.[[27]](#footnote-27) However, it remains dehumanizing even in medical context.

With due regard to the inaccuracies scrutinized above, the term *foetus* cannot be correctly used in legal context to denominate the child in the period from the moment of fertilisation till birth. This conclusion can be extended to the notion of *foetal rights* for the same reasons.

### 1.1.5. Nasciturus

Another term which is used to refer to the child before birth is *nasciturus*, which is also of Latin origin. According to a known principle in Roman law, ‘Nasciturus pro iam nato habetur, quotiens de commodis eius agitur’,[[28]](#footnote-28) which means that a conceived child was considered as already born, because it was for its benefit.

In the English language the term *nasciturus* is not employed, but in Ukrainian it is known particularly in legal context. In 2016 in Ukraine a bill no. 4295 was registered with the name ‘Про внесення змін до Цивільного кодексу України щодо правового статусу насцітуруса’ (On the amendment of the Civil Code of Ukraine regarding the legal status of nasciturus).[[29]](#footnote-29) This bill defined nasciturus as ‘дитина, яка на момент смерті свого батька (спадкодавця) вже була зачата, але ще не народилася.’[[30]](#footnote-30) (The child, who at the moment of death of his father (testator) was already conceived, but not yet born). Although the bill was withdrawn over time, currently the child, who was conceived during life, but born after death of testator, is a heir under the Civil Code of Ukraine.

This meaning of the term *nasciturus* is very narrow and could be applied only to hereditary relations, in the sense of Roman law.

### 1.1.6. Child in prenatal stage

*Child in prenatal stage* was firstly aptly used in legal context by Igor Ponkin and others in the report ‘О правовых основаниях правового признания ценности жизни, человеческого достоинства и права на жизнь ребенка, находящегося на пренатальной стадии развития (On the legal grounds for the legal recognition of the value of life, human dignity and the right to life of a child who is in prenatal stage of development)’,[[31]](#footnote-31) and from that time on was occasionally used in legal sources.[[32]](#footnote-32) However, the mentioned report did not contain any reasoning for employment of this term.

*Prenatal* consists of two morphemes: prefix *pre-* and adjective *natal*. The former is of Greek origin, and the latter derives from Latin *natus*, participle of *nascor*, which means ‘to be born’.[[33]](#footnote-33) Unlike *foetus*, adjective *prenatal* refers to the whole period of gestation starting with fertilisation and ending with birth. The Big Explanatory Dictionary of the Modern Ukrainian Language defines *prenatal* as ‘[т]ой, що належить до періоду перед народженням’[[34]](#footnote-34) (the one who is appurtenant to the period before birth). The Cambridge Dictionary of Human Biology and Evolution defines *prenatal* as ‘referring to the portion of life from conception until birth in higher animals.’[[35]](#footnote-35)

Prenatal is not synonymous to perinatal. According to the Instruction on determination of perinatal period, live birth and stillbirth criteria, approved by the Ministry of Health of Ukraine perinatal period is defined as follows:

Перинатальний період – період, який починається з 22-го повного тижня вагітності (з 154 доби від першого дня останнього нормального менструального циклу – термін гестації, якому в нормі відповідає маса плода 500 г) і закінчується після 7 повних діб життя новонародженого (168 годин після народження).[[36]](#footnote-36)(Perinatal period starts with the 22nd full week of pregnancy (from the 154th day after the first day of the last normal menstrual cycle – gestation term, which normally corresponds to the foetus’s mass of 500 g) and finishes after the 7 full days of the newborn’s life (168 hours after birth).

A slightly different timeframe is attributed to the perinatal period by the Cambridge Dictionary of Human Biology and Evolution, where perinatal is defined as ‘referring to the period immediately before, during, and after birth; technically, the perinatal period in humans begins at 20 weeks of gestation and terminates 28 days after birth.’[[37]](#footnote-37)

Analysis of the exact meaning of *perinatal* goes beyond the subject of this thesis, as the term *the child in prenatal stage* refers accurately to the whole period of gestation without any discrepancies in meaning in various languages. Literally it means *the child before birth*, which is exactly what is meant in legal context, except the cases where strict stages within the whole prenatal development are addressed.

Along with the adjective *prenatal* the noun *child* is used. This allows avoiding dehumanisation of the living being in concern and corresponds to the actual experiences of parents who are waiting for their child, as well as for medical professionals, for whom this child is well a patient: ‘[l]e foetus est pourtant terriblement présent à l'esprit des parents comme a celui des practiciens qui prennent soin de lui. Pour les uns comme pour les autres, il est déjà “l’enfant”[[38]](#footnote-38) (the fetus is, however, terribly present in the minds of parents and those of the practitioners who take care of him. For both of them, he is already “the child”).

However, some might argue that application of the word *child* to zygote, embryo or foetus does not conform to their nature. As Judith Jarvis Thomson said in a partly different context, although it is also applicable here: ‘Similar things might be said about the development of an acorn into an oak tree, and it does not follow that acorns are oak trees, or that we had better say they are.’[[39]](#footnote-39)

Responding to this suppositious objection, firstly it is necessary to admit, that appearance and the overall level of development of the child in prenatal stage indeed differ a lot from that of the newborn child. However, newborn child also differs a lot from an adult human, and that is a stage of development which was passed by all the adult human beings without any exception.

Biologically, *child* usually refers to the period between birth and adolescence. According to the Cambridge Dictionary of Human Biology and Evolution, child is a ‘young person between the stages of infancy and adolescence’[[40]](#footnote-40); in its turn, infancy is defined as ‘stage in the postnatal period of the human life cycle that ranges from the end of the first four weeks after birth to one year (…) follows the neonatal stage’.[[41]](#footnote-41) Following this logic, under 4 weeks after birth there is no child, which is not acceptable.

Other authoritative dictionaries, however, sometimes include foetus or unborn in the semantic structure of the word *child*. Black’s Law Dictionary, for instance, among other meanings attributed to the word “child”, mentions ‘A baby or fetus’.[[42]](#footnote-42)

The Oxford English Dictionary gives even wider definition, extending it to the whole stage of prenatal development:

**B.** Signification

**I.** With reference to the state or age.

**1.a.** The unborn or newly born human being; foetus, infant. App. originally always used in relation to the mother as the ‘fruit of the womb’.[[43]](#footnote-43)

From the legal point of view, a *child* is any human being below the age defined in law. According to the general rule, established by the Article 1 of the CRC of 1989, a child means every human being below the age of eighteen years. Thus the upper age limit is established, whereas the lower age limit remains unclear under this Article. In conjunction with the Preamble of the CRC the lower age limit could possibly be shifted below the moment of birth, as ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth’. This provision is reiterated from the Preamble of the Declaration of the Rights of the Child of 1959.

This definition of the child stipulated by the Convention on the rights of the child was one of the most difficult to agree upon. Marta Santos Pais, who has served as the Special Representative of the United Nations Secretary-General on Violence against Children and who participated in the drafting process of the CRC, noted:

We couldn’t agree on the beginning, because there were perceptions in some countries that it should be from the moment of conception, others – from the moment of birth, others thought that there should not be any beginning…And we ended up recognising that, - well, states will define the beginning. That is not so fundamental. But from that moment for each nation the rights recognised by the Convention will arise.[[44]](#footnote-44)

Indeed, in the national legal systems the notion of *child* can be used with reference to prenatal period, which, however, does not automatically entail subjective rights. For example, in France the term ‘l’enfant à naître’(child to be born) is used in positive law, e.g. the Social security Code of France in its Article L-531-1 establishes childcare benefits for ‘l'enfant à naître et l'enfant né dont l'âge est inférieur à un âge limite’ (the child to be born and the born child, whose age did not reach an age limit).[[45]](#footnote-45) According to the Article 223 (1) of the Criminal Code of Canada, ‘[a] child becomes a human being within the meaning of this Act when it has completely proceeded, in a living state, from the body of its mother...’,[[46]](#footnote-46) that is, in this purely positivistic and quite arguable meaning of Canadian criminal law a child is not yet a human being, but is already a child.

With regard to the foregoing, there is no difficulty in extending in law the word *child* to the prenatal period, as it does not contradict the biological and legal meaning of *child*. Furthermore, this extension is legally justified, especially for national legal systems as this issue falls within their discretion.

The notion *child in prenatal stage* is in addition preferable for legal purposes due to its neutrality. It does not bear any bias as regards the expected outcome of pregnancy. Instead, it addresses the child in the period between fertilisation and birth without compromising other sciences such as biology and embryology, and, what is of no less importance, does not dehumanize the child in question.

Finally, the notion *child in prenatal stage* can be translated easily into other languages without any distortion. All the components of this notion usually have equivalents in other languages, which facilitates correct translation. For example, in French it will be *l'enfant au stade prenatal*, in Ukrainian – *дитина на пренатальній стадії*, in Russian − *ребенок на пренатальной стадии* and so on. Thus this notion – the child in prenatal stage – will be used throughout this thesis wherever relevant, as well as it can be used in other sources to designate the child from the moment of fertilisation till the moment of birth.

## 1.2. Literature review

To date the idea of the child in prenatal stage as a subject of law and a holder of subjective rights has not been formed in full, to say the least. A huge variety of standpoints and approaches easily leads to confusion. Trends of opinions depend a lot on a legal system, in close correlation with legislation and case law, and even more – with attachment to regional or national human rights system, which gives rise to diverse schools of thought.

Not only with respect to the mere geography of this research, but also paying tribute to the effectiveness of the European regional human rights system, the latter will be the first subject of consideration. What is important, European regional human rights system did not produce a single act or norm establishing recognition of prenatal personhood. This can be attributed to the lack of consensus, to the same extent as to the lack of attention to the issue.

French authors have presented several theses concerning problems of the legal position of the child in prenatal stage. The very close to the topic of this research is the PhD thesis in private law *Embryos and human foetuses: search for normative qualifications* defended by Marianne Mentzel in 1995. In this thesis the author proves that certain rights have been implicitly recognised by the human embryo and foetus throughout human history. The author suggests the embryo and the foetus in utero may be related to the legal category of persons and considered as subjects of law, even if some of the rights specific to the person from whom they benefit, are limited in their effects.

Aude Bertrand-Mirkovic in her thesis ‘La Notion de Personne (Étude visant à clarifier le statut juridique de l’enfant à naître)’ has drawn a clear line between the notions of ‘human being’, ‘human person’ and ‘legal person’, all of them being mixed together in the French positive law and jurisprudence. She finds that a child in prenatal stage is an individual and a human being. Then she explores diverse characteristics of personhood and finally finds:

‘[à] défaut de pouvoir un critère pertinent, ou seulement utilisable pratiquement, pour distinguer l’être humain de la personne humaine, il est logique de considérer tout être humain comme une personne humaine.[[47]](#footnote-47)’

In line with this, Ms Bertrand – Mirkovic makes an important conclusion that the notions ‘human being’ and ‘human person’ are synonymic as they:

[d]ésignent la même réalité, même s’ils évoquent de cette même réalité différents aspects: le terme être humain évoque plutôt l’aspect biologique, le fait d’appartenir à l’espèce humaine, le terme de personne humaine évoquant plus le fait que ces individus humains sont investis de dignité.[[48]](#footnote-48)

Proceeding from the actual state of positive law and jurisprudence in France, Aude Bertrand-Mirkovic tends to the view that legal personhood itself together with subjective rights deriving from it is not necessary for the child in prenatal stage, because it already has rights protected by objective law: ‘Ces droits, qui ne sont pas des droits subjectifs, sont protégés par le droit objectif.”[[49]](#footnote-49) She demonstrates that the notion of ‘personhood’ is wider than that of ‘legal personhood’. Therefore the child in prenatal stage is a person not endowed with legal personhood. Consequently, she stresses that all the legislative provisions concerning persons and human beings are applicable to the child in prenatal stage, unless it is expressly excluded from the scope of provision or whenever it is clear that legislator means only legal persons – that is, persons with legal personhood, and not all the persons[[50]](#footnote-50).

Another research of French origin is more legalistic and was presented by Nathalie Delmas in 2004. The topic of the thesis was *The place of the unborn child and the embryo in vitro in French positive law*, where the author emphasized that traditional views concerning the child in prenatal stage are not sufficient in today conditions, and such fundamental principles, as respect to human life and the right to life also refer to the child in prenatal stage and the embryo in vitro.

Another aspect of the issue was covered by Nathalie Tresch in 1996 in her thesis *The body of the child*, where she noted only partial protection of the embryo and the foetus and difference depending on whether they are *in utero* or *in vitro*. In 2003 Elodie Bayer in the thesis *Human things* uncovered other aspects, namely usage of human elements, such as human body, organs, cells, embryo, foetus, mortal remains, which are associated with problems of qualification due to divided doctrine.

Another monumental research named *Les droits de l'enfant à naître: le statut juridique de l'enfant à naître et l'influence des techniques de procréation médicalement assistée sur le droit de la filiation : étude de droit civil (*Rights of the child to be born : legal status of the child to be born and influence of medically assisted reproductive techniques on the law of filiation : a study of civil law) was published by Belgian lawyer Nathalie Massager in 1997. She analyses first the rule *infans conceptus* from historical perspective as it was conceived in Roman law, and then its application in contemporary Belgian civil law, namely as regards *status familiae* and *status civitatis*. She further finds that the modern version of this rule in Belgian law is not based on usual characteristics of legal fictions, i.e. the criteria of specialisation and usefulness[[51]](#footnote-51), and that Belgian law is one step away from recognition of legal personhood of the child in prenatal stage from the moment of conception[[52]](#footnote-52). She concludes that such step must be taken, and suggests to solve the problem of absence of civil status by the means of imposing on future parents an obligation to declare prenatal existence starting from the twelfth week after conception.[[53]](#footnote-53)

Ukrainian legal science did not go this far – there is no single dissertation fully devoted to the issue connected with the legal status of the child before birth. However, the recently defended doctoral dissertation by Bohdana Ostrovska, written as a monograph, named *Міжнародно-правове регулювання права людини на життя в контексті біоетики* (International legal regulation of the human right to life in the context of bioethics) contains a thorough study of the issues, related to the right to life of a child in prenatal stage.[[54]](#footnote-54) In several theses the issue is mentioned in the context of the right to life or the rights of the child. Olena Rogova came up to a conclusion, that Ukrainian legislation does not consider an unborn creature as actually a human, bearer of the right to life, although it may recognise the interests of a conceived but not yet born child in the cases established by law. The degree of legal protection of an unborn child according to Ukrainian legislation depends on the pregnancy term and develops in proportion with the latter. Rogova claims that intrauterine period of life is a necessary stage of development of a human and should be protected by law, just like human life after birth on every its stage.[[55]](#footnote-55)

Volodymyr Kozhan in his PhD thesis has noted a trend for the research of the status of not yet born child, as well as for the development of legislative regulation of prenatal period of human development. Eventually he came to the conclusion that starting from the 14th day after conception the embryo should be protected by law.[[56]](#footnote-56)

Iryna Voloshyna in her thesis devoted to the constitutional and legal status of a child in Ukraine has supported a view that life is worth of protection from the moment of conception.[[57]](#footnote-57)

Even further went Oleksandr Punda in 2018 in asserting that *de facto* Ukrainian state has already begun to form legal safeguards to secure the rights of an unborn child, although it does not yet directly establish the provision of the beginning of the protection of human life since its conception. Punda refers to Ukrainian legislation concerning legal protection of the child before birth – The Law of Ukraine ‘On Prohibition of Human Reproductive Cloning’ of 2004 and ‘On compulsory state social insurance against accidents at work and occupational diseases that caused disability’ as amended in 1999, where causing harm to a foetus as a result of trauma at work or professional disease of woman during pregnancy, which resulted in the birth of a baby with disabilities equates to an accident which occurred with an insured person.[[58]](#footnote-58)

Some pieces of research were made in Russian Federation, however they are quite fragmentary. A 2014 report of I. Ponkin, V. Yeremyan, M. Kuznetzov, and A. Ponkina named *About legal grounds for the legal recognition of the value of life, human dignity and the right to life of a child in prenatal stage* is one of the most inspiring sources that withal is the first where the term ‘the child in prenatal stage’ is used in legal context.[[59]](#footnote-59)

Inter-American human rights system is of particular interest because the right to life is recognised there from conception as enshrined in the American Convention on Human Rights in 1969 (hereinafter – ACHR).[[60]](#footnote-60) This gave rise to vast and in-depth discussions of the issue.

One of the most cited and the earliest sources is an article written by Judith Jarvis Thompson in 1971, where she compared a foetus to an unconscious famous violinist, who was plugged into a person without consent due to his fatal kidney ailment. Using this analogy Thompson argued, that ‘a woman surely can defend her life against the threat of it posed by the unborn child, even if doing so involves his death’.[[61]](#footnote-61) The other Thompson’s parallel, which was picked up and widely discussed further on, is the Bible story of Good Samaritan. She compared a woman hosting a foetus to the Good Samaritan in a case when this entails substantial inconveniencies to a woman, given that she did not consent to a pregnancy condition, arguing that there should not be any obligation to do so.[[62]](#footnote-62) She distinguished Good Samaritanism from Minimally Decent Samaritanism, which is required when carrying a foetus to term does not imply substantial risk to health or life, as well as in cases when a pregnancy wasn’t a result of a rape, thus, there was a consent to some degree to pregnancy as well. Thompson presented a good for that time attempt to show that due regard should be given to the different circumstances of the case, claiming that ‘[t]here may well be cases in which carrying the child to term requires only Minimally Decent Samaritanism of the mother, and this is a standard we must not fall below’.[[63]](#footnote-63)

Thompson used an expedient, which was also repeated in later literature by other authors – assumption that the foetus *is* a person ‘for the sake of argument’.[[64]](#footnote-64) The main idea, which is particularly relevant for this dissertation, was proving that granting that the foetus is a person from the moment of conception *does not* mean that under any circumstances a woman is obliged to carry it to term.

A prominent US academic, Eileen McDonagh has presented her own theory in 1996, which later on was called as ‘groundbreaking’.[[65]](#footnote-65) Again, she did not admit the human personhood of the foetus explicitly, formally only assuming it: ‘even if the fetus is constructed to be a person, it gains no right to take over a woman’s body against her will’.[[66]](#footnote-66) However, implicitly all her theory is based on this assumption, as she holds the foetus responsible for the pregnant condition of a woman, because it causes pregnancy when it implants in the woman’s uterus.[[67]](#footnote-67)

According to McDonagh, sexual intercourse is not a direct cause of pregnancy. All the responsibility should be imposed on the fertilised ovum: ‘Whereas a man can cause a woman to engage in a sexual relationship with him, a man cannot cause a woman’s body to change from a nonpregnant to a pregnant condition; the only entity that can do that is a fertilised ovum when it implants itself in a woman’s uterus’.[[68]](#footnote-68) Therefore, neither a man nor a woman could be held responsible for pregnant condition of a woman, as consent to a sexual intercourse for McDonagh does not imply consent to pregnancy, but only exposes a woman to a risk of pregnancy, which is not the same: ‘Sexual intercourse merely causes the risk that pregnancy will occur, and consent to engage in sexual intercourse with a man, for any and all fertile women, implies consent to expose oneself to that risk’.[[69]](#footnote-69)

For McDonagh the foetus is a “coercer” and an “intruder” and causes such a grave harm to a woman, which justifies use of “deadly force”:

Even in a medically normal pregnancy, the fetus massively intrudes on a woman’s body and expropriates her liberty. If a woman does not consent to this transformation and use of her body, the fetus’s imposition constitutes injuries sufficient to justify the use of deadly force to stop it.[[70]](#footnote-70)

According to McDonagh, this harm is so serious, that a woman is in power to withdraw her consent, if given, at any stage of pregnancy, even the most later one: ‘even if a woman has consented to be pregnant at one time, this does not bind her to continue to consent in the future, given the changing conditions defining the experience of pregnancy’.[[71]](#footnote-71)

These arguments appeared to be completely new and caused a new prolonged round of discussions, which, as we will see, at some point crossed the borders of Inter-American human rights system and still continues nowadays.

Francis J Beckwith and Steven D. Thomas criticised the McDonagh’s understanding of consent:

A consent that can be withdrawn at any time for any reason or for no reason – even if it results in the death of a mentally immature, rights bearing, human being that one intentionally brought into existence and invited to be placed in vulnerable position – is no “consent” at all. It is a will to power.[[72]](#footnote-72)

This statement might be found unsubstantiated, as it is not yet an established fact that the foetus is a human being and that it is a bearer of rights. However, it seems that Beckwith and Thomas proceeded from the McDonagh’s own assumption, whether it was empty or maybe not.

Criticism became sharper when the discussion crossed the Atlantic Ocean. Mary Ford from the UK wrote a brilliant article *The Consent Model of Pregnancy: Deadlock Undiminished*, where she consistently challenged each and every McDonagh’s argument, revealing all the confusions, holes and logical errors in it. She admits that McDonagh’s approach ‘is more consonant with the actual experiences of real women,’[[73]](#footnote-73) as it avoids dehumanizing the fetus.[[74]](#footnote-74) Ford summarises: ‘as promising as this approach may seem at first, it fails on account of major flaws in the way McDonagh employs such concepts as self-defence, causation, and consent’.[[75]](#footnote-75)

What Ford achieved is not only criticising McDonagh; in her PhD thesis titled *Personhood and property in the jurisprudence of pregnancy*, she collated existing approaches to adjudicating maternal/foetal issues into the “orthodox conflict model” and McDonagh’s “consent model”. The latter, as Ford ultimately concludes, is ‘essentially a variation on the conflict model’.[[76]](#footnote-76) What is even more interesting, she proposed her own “property model”. Whereas frozen embryos are subject to joint control and disposal of both parents, which is closely related to ownership, ‘in pregnancy, only the pregnant woman herself enjoys any of the rights of control and possession normally associated with ownership’.[[77]](#footnote-77) The Ford’s “property model” however, seems inconsistent with the subsequent case-law of the the European Court of Human Rights (the ECtHR), as it will be shown in 1.3.1.

The idea of foetal personhood was also considered in the Ford’s thesis in its 3rd chapter, however, in a quite ambiguous and inextricable way. Ford finally waives the idea of foetal personhood: ‘[p]ersonhood fails because it is too riddled with arbitrariness and contradiction to function as a meaningful account of moral status at all’.[[78]](#footnote-78)

Coming back to the Inter-American regional human rights system, along with feminist stream in determination of the status of the foetus the concept of foetal rights has emerged. Carl Wellman in his article *The Concept of Fetal Rights* suggested that new foetal rights have to be added to the existing legal systems.[[79]](#footnote-79) Among the most recent articles there also are *Constitutionalizing Fetal Rights: A Salutary Tale from Ireland* by Fiona de Londras in 2015,[[80]](#footnote-80) *Sentencing Pregnant Drug Addicts: Why the Child Endangerment Enhancement is not Appropriate* by Monica Carusello in 2016,[[81]](#footnote-81) *Quietly Conscious: a Discussion of Fetal Personhood and Abortion* by Gabriella Graziani in 2017,[[82]](#footnote-82) etc.

Another perspective was taken in PhD thesis of Suliman M. K Ibrahim, whose home country is Libya (African regional human rights system), however, the thesis titled *The Moral and Legal Status of the Human Foetus A Critical Analysis from Islamic Perspective* was defended i 2008 in the UK. In Libya Islam is the source of all laws, therefore the matter of special concern in his thesis was ‘how the adoptability of Western arguments and views in Islamic countries can be assessed’.[[83]](#footnote-83) However, this research was not aimed to produce results for the Islamic countries only:

[T]he thesis should be able to reach conclusions regarding the legal personality of the foetus that are not only valid in Libya and other countries whose legal systems are derived from Islamic tradition, but can also be used in England and other legal systems.[[84]](#footnote-84)

In Ibrahim’s research the issue of legal personality of the foetus was viewed from the Islamic perspective. Unlike McDonagh, Ibrahim focuses on what the foetus is, and not on what it does, and unlike Ford, he clarifies the concept of legal personality clearly and consistently and then applies it to the foetus. Ibrahim’s reasoning due to the Islamic perspective is based on the moment of ensoulment; however, this stand is strongly supported by scientific arguments. He criticises the “born alive rule” and reaches a conclusion that ‘the human foetus should be accorded the moral and legal status of a person from a twentieth gestational week onwards, and an interim status granting it gradual and derivative respect prior to that’.[[85]](#footnote-85)

The legal status of the child in prenatal stage in Australia mostly from the positivistic standpoint was presented by Anna Walsh in her thesis named *The Legal Status of Prenatal Life in Australia*. Walsh analysed all the jurisdictions in Australia with their current regulations as to the legal status of the foetus and concludes, that ‘the search for the truth about what the fetus is, what its value is, and why it is right, wrong or neutral to destroy it, cannot be found in the positive law with its commitment to the born alive rule’.[[86]](#footnote-86)

It appears that these researches of scientists from different parts of the world consistently lead us to the idea of legal personhood and rights of the child in prenatal stage and raise questions what they should be like. Despite the common idea that the issue of the legal status of the child in prenatal stage is too complicated and that the consensus is not likely to be reached, in this thesis it will attempted to prove that existing approaches are compatible in their essence.

## 1.3. Review of international courts’ jurisprudence

The issues of legal personhood and subjective rights of the child in prenatal stage should be approached with due regard to the attitudes and opinions expressed by the international courts.

#### 1.3.1. Case-law of the Institutions of the Convention for the Protection of Human Rights and Fundamental Freedoms

The European Commission of Human rights (the Commission) and subsequently the ECtHR have considered issues contiguous to the status of the child in prenatal stage mostly under Articles 2 and 8 of the ECHR[[87]](#footnote-87).

In 1976 the Commission has considered an application lodged with the ECtHR against Austria, where the applicant X. complained that the new Austrian legislation, which introduced a 3-months period of impunity of abortion if carried out under certain conditions, violates Articles 2 and 8 of the Convention.[[88]](#footnote-88) This application was rejected as incompatible with the Convention *ratione personae*, as the applicant himself was not affected by the new legislation.

In 1975, the four applicants introduced an application against the Federal Republic of Germany, claiming, inter alia, that the judgement of the Constitutional Court of Federal Republic of Germany concerning restrictions of abortion violated their rights under Articles 8, 9, 11 and 12 of the Convention. In its decision on admissibility the Commission found this application admissible solely in respect of two applicants, noting, inter alia, that ‘[t]ermination of pregnancy as such is not an adequate or appropriate method of “family planning” within the meaning that could comply with the claim’.[[89]](#footnote-89)

In its decision of 1977 on the merits of this case, known as *Brüggemann and Scheuten v. Germany*, the Commission noted, that ‘pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant her private life becomes closely connected with the developing foetus’.[[90]](#footnote-90) The Commission unanimously concluded that this case did not disclose a violation of the Article 8 of the Convention, having held, *inter alia*, that:

The Commission does not find it necessary to decide, in this context, whether the unborn child is to be considered as “life” in the sense of Art. 2 of the Convention, or whether it could be regarded as an entity which under Art. 8(2) could justify an interference “for the protection of others”. There can be no doubt that certain interests relating to pregnancy are legally protected, e.g. as shown by a survey of the legal order in 13 High Contracting Parties. This survey reveals that, without exception, certain rights are attributed to the conceived but unborn child, in particular the right to inherit. The Commission also notes that Art. 6(5) of the United Nations Covenant on Civil and Political Rights prohibits the execution of death sentences on pregnant women.[[91]](#footnote-91)

Article 2 of the Convention was invoked in cases where fathers objected to their unborn children being aborted. Generally recognising their standing as victims, the Convention Institutions had still rejected their applications as inadmissible.

Consistent recognition of the father’s victim status in such cases gives reason for claiming that Article 2 of the Convention covers child in prenatal stage. As Aude Bertrand-Mirkovic describes it:

En effet, pour qu’il y ait victime indirecte, il faut nécessairement une victime directe. Le père n’est pas victime directe d’une violation du droit à la vie car sa vie à lui n’est pas en cause. Il ne peut être que victime indirecte en ce qu’il souffre de l’atteinte à la vie d’un autre, la victime directe, qui en l’occurrence ne peut être que le fœtus.[[92]](#footnote-92)

In *H. v. Norway* the father complained that his partner has aborted a 14-week foetus on the grounds that the pregnancy, birth or care for the child might place her in a difficult situation of life. Having noted that terms “everyone” or “life” are not determined by the Convention, the Commission found that:

[Under these certain circumstances of the case] it does not have to decide whether the foetus may enjoy a certain protection under Article 2 ..., but it will not exclude that in certain circumstances this may be the case notwithstanding that there is in the Contracting States a considerable divergence of views on whether and to what extent Article 2 protects the unborn life.[[93]](#footnote-93)

The Commission noted, that ‘there are different opinions as to whether such an authorisation [of abortion of a 14-week foetus] strikes a fair balance between the legitimate need to protect the foetus and the legitimate interests of the woman in question’.[[94]](#footnote-94) It further found ‘that in such a delicate area the Contracting States must have a certain discretion’,[[95]](#footnote-95) and Norway did not go beyond this discretion in this case.

The applicant’s complaint under Article 2 was rejected as manifestly ill-founded, and so were other complaints of this applicant. The applicant alleged, *inter alia*, that his 14-week foetus felt pain during the abortion procedure, which constituted inhuman treatment within the meaning of Article 3 of the Convention. However, these allegations were not supported by any evidence, thus the Commission had to reject them as inadmissible without examination of the merits.

As regards the applicant’s complaint under Article 14, the Commission recalled that Article 14 ‘safeguards individuals against discriminatory differences only if they are placed in analogous situations’ and noted that it ‘does not find that the applicant was placed in an analogous situation with the mother’.[[96]](#footnote-96)

In *X. v. The United Kingdom* the applicant complained under Articles 2 and/or 5, 6, 8 and 9 of the Convention, as his wife intended to abort her 8-week foetus on the ground of a risk of injury to the physical or mental health of the pregnant woman.

In its assessment whether Article 2 of the Convention could be applicable to the unborn child the Commission was not certain, saying that ‘None indicates clearly that it [the term “everyone” (“toute personne”)] has any possible prenatal application, although such application in a rare case, e.g. under Article 6, paragraph 1 – cannot be entirely excluded.’[[97]](#footnote-97) The Commission further assured:

The Commission is aware of the divergences of thinking on the question of where life begins. While some believe that it starts already with conception others tend to focus upon the moment of nidation, upon the point that foetus becomes “viable”, or upon live birth.[[98]](#footnote-98)

In this case the Commission had examined whether Article 2, in the absence of any express limitation concerning the foetus, is to be interpreted as: a) recognising an absolute “right to life” of the foetus; b) as not covering the foetus at all; or c) as recognising a “right to life” of the foetus with certain implied limitations[[99]](#footnote-99). Then the Commission excluded the first option of interpretation as regards an absolute “right to life” of the foetus upon this extensive, but important reasoning:

The “life” of the foetus is intimately connected with, and cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were held to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of a pregnant woman. This would mean that the “unborn life” of the foetus would be regarded as being of a higher value that the life of a pregnant woman. The “right to life” of a person already born would thus be considered as subject not only to the express limitations [of the Article 2] but also to a further, implied limitation.[[100]](#footnote-100)

From this reasoning it appears clear, that whenever continuation of pregnancy endangers the mother’s *life*, termination of pregnancy will be justified *even if* it implies destruction of the child in prenatal stage, depriving him of life. However, this reasoning has nothing to do with endangering mother’s health, which is not so grave as to put her life at risk. It has also nothing to do with those cases when the child in prenatal stage is already viable, that is, capable of survival outside its mother’s womb with appropriate medical assistance, as there is no need to deprive a viable child of her life when continuation of pregnancy puts the mother’s life at risk.

In *X. v. the United Kingdom* the Commission did not complete its analysis of the other two possible interpretations of the Article 2, namely that Article 2 does not cover the foetus at all or covers it with limitations, because considered that to resolve this case it is enough to establish that Article 2 does not recognise an absolute “right to life” of the foetus.

However, nothing in this case disclosed that life of the applicant’s wife was in danger. Two doctors had given her certificates for termination of pregnancy on the grounds that its continuation would involve risk of injury to the woman’s physical or mental health, not life. The Commission, however, developed its further reasoning as follows, accentuating that it’s finding refers only to the initial stage of pregnancy:

... compatible with Article 2(1), first sentence because, if one assumes that this provision applies *at the initial stage* of the pregnancy, the abortion is covered by an implied limitation, protecting the life *and health* of the woman at that stage, of the “right to life” of the foetus.[[101]](#footnote-101)

Three conclusions could be drawn from the foregoing finding of the Commission. The first and immediate is that the Commission did *implicitly* consider the second possible interpretation of Article 2 as recognising the “right to life” of the foetus with certain implied limitations. Which limitations? Those which are set by already recognised rights of its mother. It is interesting, that Aude Bertrand-Mirkovic came to a very similar conclusion that Article 2 of the ECHR covers embryos, although their right to life is relative.[[102]](#footnote-102)

The second conclusion which can be logically drawn from the abovementioned reasoning, is that the balance between the mother’s rights and rights of her child in prenatal stage has to be struck with respect for the stage of prenatal development, as what could possibly be justified at the initial stage of pregnancy will apparently be much more difficult to justify as the child grows and develops, acquiring more and more inner qualities of a conscious and viable human being.

And the third conclusion is that in the Commission’s view as of May 1980, any danger to the woman’s life or health, physical or mental, at the initial stage of pregnancy constitutes justification of lawful pregnancy termination.

In *Boso v. Italy*, another case brought before the ECtHR by a potential father,the ECtHR held that the termination of pregnancy of the applicant’s wife which was performed in conformity with Italian law within the first twelve weeks of pregnancy because of a risk to the woman’s physical or mental health does not violate Article 2 of the Convention.[[103]](#footnote-103) In this case, the ECtHR expressed an opinion that relevant Italian legislation strikes ‘a fair balance between, on the one hand, the need to ensure protection of the foetus and, on the other, the woman’s interests’, and reiterated that ‘it is not required to determine whether the foetus may qualify for protection under the first sentence of Article 2’.[[104]](#footnote-104)

In *Vo v. France* the question reappeared in different context: as a result of tragic mistake and medical negligence a woman was subjected to a therapeutic abortion, resulting in death of her 20-21weeks old foetus, a baby girl, who had not breathed after delivery. The applicant invoked Article 2 of the Convention, as the French authorities refused to classify death of her unborn child as an unintentional homicide. The ECtHR has noted, *inter alia*:

At best, it may be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person – enjoying protection under the civil law, moreover, in many States, such as France, in the context of inheritance and gifts, and also in the United Kingdom ... – require protection in the name of human dignity, without making it a “person” with the “right to life” for the purposes of Article 2.[[105]](#footnote-105)

Due to the lack of the European consensus on the legal status of the unborn child, the ECtHR found that ‘it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention’.[[106]](#footnote-106) Having taken into account this and other circumstances of the case, the ECtHR concluded that ‘even assuming that Article 2 was applicable in the instant case ..., there has been no violation of Article 2 of the Convention’.[[107]](#footnote-107)

It is clearly seen from the Convention institutions’ case-law, that issues concerning the right to life of the child in prenatal stage often invoke Articles 2 and 8 in a somewhat interdependent manner, as the extent of recognition of the right to life of the child in prenatal stage, whether implicit or explicit, subjects its mother’s right to privacy, protected by the Article 8 of the Convention, to limitations to the same extent.

In the case of *A, B and C v. Ireland*, concerning restrictions of abortions in Ireland, the applicants claimed that those restrictions ‘interfered with the most intimate part of their family and private lives including their physical integrity’.[[108]](#footnote-108) Having admitted that these restrictions were “in accordance with the law” and in pursuance of the aim of protecting foetal life, the applicants questioned legitimacy of that aim and proportionality of that interference.[[109]](#footnote-109)

In its assessment the ECtHR maintained its previous findings, namely that:

Article 8 cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman’s private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. The woman’s right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child.[[110]](#footnote-110)

As regards the legitimacy of the aim of such interference with the right, guaranteed by the Article 8, the ECtHR concluded that the impugned restriction ‘pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect’.[[111]](#footnote-111) It is noteworthy, that when choosing the aim out of those listed in the Article 8 (2), the ECtHR again avoided to attribute this restriction explicitly to the protection of the rights and freedoms of others, having concluded that the aim was *protection of morals*, which included, as one *aspect*, protection of the right to life of the unborn.

Having found that this aim was legitimate, the ECtHR had further moved to the question whether the impugned interference was necessary in a democratic society and, in particular, whether the interference was proportionate to the pursued aim. The ECtHR examined whether the wide margin of appreciation of the Irish state as regards abortion laws was narrowed by the existence of consensus among a substantial majority of the Contracting States indeed allowing abortion on broader grounds than accorded under Irish law. The ECtHR found that this consensus *does not* decisively narrow the broad margin of appreciation of the State[[112]](#footnote-112) and concluded:

Accordingly, having regard to the right to travel abroad lawfully for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life ... and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn.[[113]](#footnote-113)

On the other hand, in cases where domestic law allows for termination of pregnancy in certain cases, but authorities fail to implement those provisions effectively in practice, which results in actual harm or risk to the life and/or health of the mother, or in birth of a child with congenital malformations, the ECtHR tends to find a violation of Article 8 of the Convention.

In the aforementioned case, *A, B and C v. Ireland,* the ECtHR has found a violation of Article 8 in respect of the third applicant C, whose situation was different from that of the first two applicants. She suffered from cancer, and feared for her life as she believed that her pregnancy increased the risk of her cancer returning and that she would not obtain treatment for that cancer in Ireland while pregnant.[[114]](#footnote-114) The ECtHR found:

...lack of effective and accessible procedures to establish a right to an abortion … which has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on the ground of a relevant risk to a woman’s life and the reality of its practical implementation.[[115]](#footnote-115)

The case of *Tysiąc v. Poland* concernedthe applicant, a woman 29 years old, suffering from severe myopia which was estimated as a disability of medium severity. The applicant already had 2 children who were born by Caesarean section, and became pregnant for the third time. She was examined by three ophthalmologists, who all concluded that pregnancy and delivery constituted a risk to the applicant’s eyesight, however, refused to issue a certificate for pregnancy to be terminated despite the applicant’s requests. Following the doctors’ advice, the applicant gave birth to the child by Caesarean section. As a result, her eyesight deteriorated badly, she could see objects only from a distance of approximately 1.5 meters, which was estimated as a significant disability. At the time of examination of the case by the ECtHR she was unemployed and was raising her three children alone.

The ECtHR concluded that ‘it has not been demonstrated that Polish law as applied to the applicant’s case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case’[[116]](#footnote-116) and found a violation of Article 8.

In another case, *R.R. v. Poland*, the failure of the State to provide access to abortion of a child with malformation was at issue. In the 18th week of the applicant’s pregnancy as results the ultrasound scan the probability of malformation was established. The applicant expressed her wish to have an abortion if this suspicion proved true.[[117]](#footnote-117)

The applicant had several subsequent ultrasound scans, which gave rise to a suspicion of either Edwards or Turner syndrome, and was given recommendations to undergo a genetic test. However, her numerous requests for a formal referral to undergo a genetic test, as well as demands of pregnancy termination remained unsuccessful. Finally a genetic test was performed in the 23rd week of pregnancy, and the applicant had to wait for two weeks more for the results. The genetic test result indicated the presence of Turner syndrome, however, the applicant was refused to carry out an abortion on the grounds that the child had already achieved viability. As a result, the applicant gave birth to a baby girl affected with Turner syndrome.

In its assessment of the case the ECtHR has maintained its previous findings and those of the former Commission, from which it is clear that ‘the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a mother or a father in relation to one another or *vis-à-vis* the foetus’[[118]](#footnote-118) and reiterated its finding made in the case of Tysiąc v. Poland that:

...once the State, acting within the limits of the margin of appreciation, referred to above, adopts statutory regulations allowing abortion in some situations, it must not structure its legal framework in a way which would limit real possibilities to obtain it. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion ... In other words, if the domestic law allows for abortion in cases of foetal malformation, there must be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus’ health is available to pregnant women.[[119]](#footnote-119)

In this case, the ECtHR found not only a breach of Article 8 of the Convention, but also a breach of Article 3, having noted that ‘[i]t is a matter of great regret that the applicant was so shabbily treated by the doctors dealing with her case’.[[120]](#footnote-120)

The ECtHR has dealt on numerous occasions with cases concerning assisted procreation. In the case of *Evans v. the United Kingdom* the applicant together with her partner was informed of the medical necessity to remove her ovaries. Two weeks before this surgery the couple attended the clinic for *in vitro* fertilisation, as a result of which six embryos were created and frozen. After the operation the applicant did not have another possibility of having biological children, but with the use of those embryos. However, the relationship broke down and subsequently the applicant’s partner withdrew his consent to further use of the embryos. The applicant complained under Articles 2, 8 and 14 of the Convention.

First the applicant invoked Article 2 of the Convention, claiming that withdrawal of consent to the continued storage of the embryos violated their right to life. The ECtHR reiterated:

...in the absence of any European consensus on the scientific and legal definition of the beginning of life, the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere. Under English law, as was made clear by the domestic courts in the present applicant’s case, an embryo does not have independent rights or interests and cannot claim – or have claimed on its behalf – a right to life under Article 2. There had not, accordingly, been a violation of that provision.[[121]](#footnote-121)

Concerning the applicants allegations under Article 8 of the Convention, the ECtHR noted in its assessment, *inter alia*, that:

...the applicant does not complain that she is in any way prevented from becoming a mother in a social, legal, or even physical sense, since there is no rule of domestic law or practice to stop her from adopting a child or even giving birth to a child originally created *in vitro* from donated gametes. The applicant’s complaint is, more precisely, that the consent provisions of the 1990 Act prevent her from using the embryos she and J. created together, and thus, given her particular circumstances, from ever having a child to whom she is genetically related.[[122]](#footnote-122)

The Grand Chamber of the ECtHR found no violation of the Article 8, referring again to the lack of European consensus on the issue, as well as to the clearness of domestic rules, which were brought to the attention of the applicant beforehand. The Grand Chamber consequently did not find a violation of Article 14 of the Convention either.[[123]](#footnote-123)

In another case against the United Kingdom concerning assisted procreation, *Dickson v. the United Kingdom*, the ECtHR, to the contrary, found violation of the Article 8 of the Convention. The case was brought before the ECtHR by the two applicants, who were spouses, the husband serving a prison sentence for murder at the material time. The applicants were refused of access to the artificial insemination facilities, which was found to be in breach of Article 8 of the Convention.

The ECtHR held, in particular, that:

...a person retains his or her Convention rights on imprisonment, so that any restriction on those rights must be justified in each individual case. This justification can flow, inter alia, from the necessary and inevitable consequences of imprisonment…or… from an adequate link between the restriction and the circumstances of the prisoner in question. However, it cannot be based solely on what would offend public opinion.[[124]](#footnote-124)

The ECtHR ruled that the government’s policy lacked individual proportionality assessment, which was of vital importance for the applicants, as artificial insemination was their only realistic hope to beget a child together.

In the case of *Costa and Pavan v. Italy* the applicants, a couple, were healthy carriers of cystic fibrosis. They found out this fact when their first daughter was born with this disease. After that when a woman became pregnant for the second time, with an intention to have a healthy child the couple had a prenatal test carried out, which showed that the foetus was indeed affected by this disease. This pregnancy was terminated on medical grounds.

The applicants therefore wanted to benefit from assisted reproduction technology, however, under the Italian law they were not entitled for any access to it. Therefore the applicants alleged that their right to respect for private and family life under Article 8 was violated, as the only means they had to beget children not affected by cystic fibrosis was to conceive a child by natural means and terminate pregnancy afterwards whenever the prenatal tests show that the child is affected.[[125]](#footnote-125)

The government in its submissions alleged that applicants were relying on a “right to have a healthy child”, which was not protected as such by the Convention.[[126]](#footnote-126) Assessing this argument, the ECtHR has noted that ‘the right relied on by the applicants is confined to the possibility of using ART and subsequently PGD for the purposes of conceiving a child unaffected by cystic fibrosis, a genetic disease of which they are healthy carriers’[[127]](#footnote-127) and further added: ‘[i]n the present case PGD cannot exclude other factors capable of compromising the future child’s health, such as, for example, the existence of other genetic disorders or complications arising during pregnancy or birth’.[[128]](#footnote-128)

Another argument observed by the Italian government was that this interference was in a pursuance of a legitimate aim, namely protection of rights of others and morals. In regulating access to preimplantation genetic diagnosis Italy has taken into account the following issues: a) health of the child; b) health of the woman as regards depression caused by ovarian stimulation and oocyte retrieval; c) protection of the dignity and freedom of conscience of the medical professions; and d) preclusion of the risk of eugenic selection.[[129]](#footnote-129)

The ECtHR agreed with the government as to the legitimacy of this aim, having taken into account that it was not disputed by the parties. However, the ECtHR did not find this measure necessary in a democratic society, as it was not proportional:

While stressing that the concept of “child” cannot be put in the same category as that of “embryo”, it [the ECtHR] fails to see how the protection of the interests referred to by the Government can be reconciled with the possibility available to the applicants of having an abortion on medical grounds if the fœtus turns out to be affected by the disease, having regard in particular to the consequences of this both for the fœtus, which is clearly far further developed than an embryo, and for the parents, in particular the woman.[[130]](#footnote-130)

The case of *S.H. and others v. Austria* concerned two couples, who complained of not being able to benefit from *in vitro* fertilisation under provisions of relevant Austrian legislation. One of the partners from each couple was unable to produce gametes, and it was established that they can beget children exclusively by means of *in vitro* artificial insemination with the use of donor gametes. These procedures, sought for by the applicants, were not allowed under Austrian law. This gave rise to their complaints to the ECtHR under Article 8 of the Convention.

First this case was considered by one of the Sections of the ECtHR, which found a violation of Article 14 in conjunction with Article 8 of the Convention. However, at the request of the Austrian government this case was referred to the Grand Chamber, which overruled previous findings and concluded that ‘neither in respect of the prohibition of ovum donation for the purposes of artificial procreation nor in respect of the prohibition of sperm donation for in vitro fertilisation under section 3 of the Artificial Procreation Act had the Austrian legislature, at the relevant time, exceeded the margin of appreciation afforded to it’.[[131]](#footnote-131)

The Grand Chamber had nevertheless noted emerging European consensus towards allowing gamete donation for the purpose of *in vitro* fertilisation which ‘is not, however, based on settled and long-standing principles established in the law of the member States but rather reflects a stage of development…’.[[132]](#footnote-132) In its conclusion the ECtHR noted, that although it found no breach of Article 8 in this case, the Contracting States need to keep relevant law under review due to ‘a particularly dynamic development in science and law’.[[133]](#footnote-133)

In another important case, *Parrillo v. Italy*, the applicant complained that under Italian law she was not entitled to donate her embryos, created by means of *in vitro* fertilisation, for scientific research. The jurisdiction to consider the application was relinquished to the Grand Chamber under Article 30 of the Convention.

In its assessment of applicability of Article 8 of the convention to the present case the ECtHR concluded that ‘the applicant’s ability to exercise a conscious and considered choice regarding the fate of her embryos concerns an intimate aspect of her personal life and accordingly relates to her right to self-determination. Article 8 of the Convention, from the standpoint of the right to respect for private life, is therefore applicable in the present case’.[[134]](#footnote-134) In its assessment whether the interference with the applicants right to respect for private life was in pursuance of a legitimate aim, the ECtHR acknowledged:

…the “protection of the embryo’s potential for life” may be linked to the aim of protecting morals and the rights and freedoms of others, in the terms in which this concept is meant by the Government … However, this does not involve any assessment by the Court as to whether the word “others” extends to human embryos.[[135]](#footnote-135)

It is noteworthy that, consistently with its approach in previous cases, in this case the ECtHR avoided to explicitly and in its own name asses protection of life, or potential for life, of a child in prenatal stage, in this case at the very early stage prior to nidation, as the aim of “protection of others” in the meaning of Article 8(2). However, the ECtHR again was quite willing to expressly link this aim to the “protection of morals”, - another legitimate aim listed in Article 8(2) of the Convention. Another conclusion, which is affirmed by the ECtHR’s assessment in the present case, is that the ECtHR is willing to assess protection of the rights of the child in prenatal stage as a legitimate aim in the meaning o Article 8(2) of the Convention and link it expressly to the “protection of others” aim whenever the Contracting State itself endows the child in prenatal stage with the corresponding right, so far the right to life. This again is explained by the lack of European consensus on the matter.

The ECtHR found prohibition of donation of embryos to scientific research proportionate and necessary in democratic society within the meaning of Article 8(2) of the Convention, [[136]](#footnote-136) basing this conclusion on a number of reasons, inter alia such as lack of European consensus on the matter, and that the case raises sensitive moral and ethical issues,[[137]](#footnote-137) both of these reasons widening the margin of appreciation to be enjoyed by the State.[[138]](#footnote-138)

The second part of the ECtHR’s assessment in this case is of a particular interest, as it relates to the applicability of Article 1 of Protocol No. 1 of the Convention, invoked by the applicant. The ECtHR therefore was called upon to decide whether embryos conceived by *in vitro* fertilisation are to be considered as covered by the concept of “possession” within the meaning of Article 1 of the Protocol No. 1 of the Convention.

In the parties’ submissions, the Italian government stated that ‘the human embryo could not be regarded as a “thing” and that it was in any event unacceptable to assign an economic value to it’.[[139]](#footnote-139) Moreover, *in the Italian legal system human embryos were considered as subjects of law* ‘entitled to the respect due to human dignity’.[[140]](#footnote-140) Contrariwise, the applicant submitted that ‘embryos conceived by *in vitro* fertilisation could not be regarded as “individuals” because if they were not implanted they were not destined to develop into foetuses and be born.’[[141]](#footnote-141)

In its assessment, the ECtHR rejected this part of application as incompatible *ratione materiae* with the Convention, considering that Article 1 of Protocol No. 1 does not apply in the present case. The ECtHR noted that ‘Having regard to the economic and pecuniary scope of that Article, *human embryos cannot be reduced to “possessions”* within the meaning of that provision.’[[142]](#footnote-142)

#### 1.3.2. Case-law of Inter-American Court of Human Rights and Decisions of the Inter-American Commission on Human Rights

The ACHR is the only one international human rights treaty which provides expressly in its Article 4(1) for the protection of the right to life, in general, from the moment of conception. However, as it will be shown in this paragraph, its interpretation by the competent international bodies departs from this obviousness.

In the Americas, application and interpretation of the ACHR is performed by the I/A Court.[[143]](#footnote-143) However, performance of these functions is closely linked to the activities of the I/A Commission in two ways.

Firstly, in the Inter-American Human Rights System there is no direct access of individuals to the I/A Court, only through the I/A Commission. The I/A Commission has powers to decide on admissibility, request information from the parties, facilitate friendly settlements, draw reports hereof and make pertinent recommendations to the state concerned, and submit the matter to the I/A Court.

Secondly, not all the member states of the Organization of American States are parties to the ACHR thus accepting jurisdiction of the I/A Court. Canada, Unites States of America (hereinafter – USA) and several other countries did not sign/ratify the ACHR, however, they are still within jurisdiction of the I/A Commission.

Due to the foregoing, this paragraph considers legal positions in respect of the child in prenatal stage of both the I/A Court and I/A Commission, as they are interconnected and cannot be properly analysed separately.

In 1977 the I/A Commission was filed with a petition against the USA and the Commonwealth of Massachusetts claiming a violation of the right to life and other rights, e.g. to freedom from discrimination, under the American Declaration of the Rights and Duties of Man. The petition, however, also relied on the Article 4(1) of the ACHR, assuming that this provision was also applicable for proper interpretation of Chapter 1 Article I of the American Declaration of the Rights and Duties of a Man (“right to life”).

The case concerned a male child of above 20 weeks of gestational age, who had from the beginning been identified by courts as “Baby Boy”.[[144]](#footnote-144) This child was deprived of his life by the means of abortion, performed by Dr. Edelin. The abortion was performed on 3 October 1973 on a 17-year old unmarried woman at her own and her mother’s request, both of them consented for the operation. The reasons for pregnancy interruption were not reflected in the file.

For many years in Massachusetts such a deed would constitute a crime under a criminal abortion statute, which allowed only abortions performed in good faith when that was necessary for preservation of a woman’s life or health. However, on 23 January 1973 the Supreme Court of the Unite States decided the cases *Roe v. Wade* and *Doe v. Bolton*, which in fact rendered inoperative the abovementioned Massachusetts abortion statute. At the time of the Baby Boy being aborted new provisions on abortions were not adopted yet in Massachusetts. As a result, Dr. Edelin was convicted for manslaughter by a jury, but following an appeal the Supreme Judicial Court of Massachusetts reversed the conviction for the reasons of lack of evidence.

In this case the I/A Commission did not find a violation of articles I, II, VII and XI of the American Declaration of Rights and Duties of Man. The reasons for that was interpretation of that provisions, and even of Article 4(1) of the ACHR, although the USA were not a party to the latter and could not be rendered responsible for its violation.

The I/A Commission performed analysis of the *travaux préparatoires* of the American Declaration of Rights and Duties of a Man, which revealed that the initial draft of the article 1 – right to life – was formulated as to extend it expressly to the whole prenatal period, from the moment of conception. However, as this definition was incompatible with the laws governing the death penalty and abortion in the majority of American states, the Ninth International Conference of American States *chose not to adopt language which would clearly have stated the principle that the right of life exists from the moment of conception*.[[145]](#footnote-145)

As regards the ACHR, the wording of Article 4(1) was subject to a number of suggestions. Initially the draft reintroduced the concept that right to life ‘shall be protected by law from the moment of conception’.[[146]](#footnote-146) However, as legislation of the American States permitted abortion under certain circumstances, such as danger to mother’s life, rape, protection of an honour of a honest woman etc., it was decided, by a majority vote, to introduce the words “in general”. There were also suggestions to delete the entire final phrase “…in general, from the moment of conception”, which were not supported by the majority for reasons of principle.[[147]](#footnote-147)

This resolution of the I/A Commission on the *Baby Boy* case gives an important understanding of the real meaning of the Article 4(1) of the ACHR, and even of the Article I of the American Declaration of Rights and Duties of Man. They were formulated in the way they are with an intention not to exclude right to life from the moment of conception as such. This right to life during the prenatal stage was subject to limitations, namely in cases of lawful abortion. There were no other reasons to limit this right at the time when the abovementioned treaties were adopted, and this remains relevant in nowadays conditions.

The first decision delivered by the I/A Court where the child in prenatal stage was touched upon, was on the case of *Xákmok Kásek Indigenous Community v. Paraguay* delivered in August 2010. Because of the failure of Paraguay to ensure the right to property of Xákmok Kásek Indigenous Community, the latter could not take possession of its territory and was kept in vulnerable position with regard to food, medicine and sanitation, which resulted in multiple deaths. The representatives of the Xákmok Kásek Indigenous Community provided the I/A Court with a list of deaths for which the Paraguay state was allegedly responsible, which included two stillborn children, that is children who died during their prenatal development.

The I/A Court in its assessment of the latter allegations had noted:

Regarding the specific cases of death, in their list, the representatives indicated the name of (NN) Corrientes Domínguez, stillborn, who died from fetal distress, and (NN) Dermott Ruiz, stillborn, who died in 1998 from unknown causes. In this regard, the Court notes that the representatives and the Commission have not presented arguments regarding the alleged violation of the right to life of the “unborn,” so that, given the absence of grounds, the Court lacks facts on which to form an opinion as to the State's responsibility in these cases.[[148]](#footnote-148)

It is noteworthy, that the I/A Court has distinguished examination of these two deaths from the others of already born people. What is also important, the cause of death of one of these children, Corrientes Domínguez, was indicated by representatives of the Xákmok Kásek Indigenous Community as foetal distress whereas the cause of death of the other child, Dermott Ruiz, was unknown. Representatives of the Xákmok Kásek Indigenous Community did not provide information whether these deceased children in prenatal stage received any medical assistance.

Dealing with deaths of other people the I/A Court had found that whenever the cause of death is unknown or people died from natural causes or accidents, the Paraguay state cannot be considered responsible due to lack of evidence and causal link.[[149]](#footnote-149) The I/A Court also dismissed claims concerning those people who died from known causes, but did receive medical attention:

…the Court finds that responsibility cannot be attributed to the State, because it has not been demonstrated that the medical attention provided was insufficient or deficient, or that there was a causal connection between the death and the situation of vulnerability of the members of the Community.[[150]](#footnote-150)

To the contrary, the I/A Court found violation of Article 4(1) in conjunction with the Article 1(1) and attributed to the Paraguay state deaths of all the other people, where cause of death was known and death was preventable, but medical attention was not given or there was not known whether a person received medical attention. Among these people there was Dermott Martínez, who died from enterocolitis in 2001, at eight months of age, and it was not known whether he received medical care.[[151]](#footnote-151)

The situation of the latter deceased child is comparable with the situation of another child, Corrientes Domínguez, who died from foetal distress. It was not known whether both of them received medical care. Both enterocolitis and foetal distress are diseases which are preventable and require medical attention. The only difference between legal situations of these two children is that one of them was born, and the other died while being in prenatal stage. Despite the express provision of Article 4(1) of the ACHR, the I/A Court dealt with these situations differently without giving reasons that could justify such differential treatment.

Upon assessment of allegations under Article 19 providing for the rights of the child, the I/A Court found violation to the detriment of ‘all the children of the Community’.[[152]](#footnote-152) Does this mean that the I/A Court found violation as regards children in prenatal stage as well?

In its reasoning, the I/A Court reiterated its previous findings concerning access to water, food, medical care and education of the Xákmok Kásek Indigenous Community members, having underscored that this situation affected children in particular and resulted in increased rates in atrophy in their growth and lack of proper vaccinations.[[153]](#footnote-153) The I/A Court further noted that 11 of 13 people whose death was found attributable to the Paraguay state were children.[[154]](#footnote-154) The I/A Court also touched upon issues of children’s cultural identity, right to enjoy their own religion and own language.[[155]](#footnote-155) All in all, the I/A Court did not address specifically any feature of violation to the detriment of children who were in prenatal stage, such as lack of prenatal medical care or of proper nutrition necessary for normal prenatal development. In view of the foregoing, it is unlikely that the I/A Court recognised violation of Article 19 of the ACHR as regards children in prenatal stage.

Decision in the another case, *Murillo et al. (“In vitro fertilization”) v. Costa Rica*, was delivered in 2012 and concerned prohibition of *in vitro* fertilization in Costa Rica, which was introduced in 2000 for the sake of protection of life from the moment of conception, as techniques of *in vitro* fertilisation imply high embryonic loss. The I/A Commission asked the I/A Court to declare the Costa Rican State responsible for violating Articles 11(2), 17(2), and 24 of the ACHR to the detriment of nine couples.

As regards interpretation of Article 4(1) of the ACHR the I/A Сourt found that conception for the purpose of this provision should be understood as implantation in the woman’s uterus, thus embryos fertilised *in vitro* are not persons entitled to the right to life under Article 4(1).[[156]](#footnote-156) The I/A Court proceeded:

Moreover, it can be concluded from the words “in general” that the protection of the right to life under this provision is not absolute, but rather gradual and incremental according to its development, since it is not an absolute and unconditional obligation, but entails understanding that exceptions to the general rule are admissible.[[157]](#footnote-157)

It could be inferred from this finding that, in view of the I\A Court, the scope of the right to life of a child in prenatal stage under Article 4(1) of the ACHR grows as the child advances in its prenatal development. However, taking into account other I/A Court’s conclusions, this is not so:

… it can be concluded with regard to Article 4(1) of the Convention, that the direct subject of protection is fundamentally the pregnant woman, because the protection of the unborn child is implemented essentially through the protection of the woman...[[158]](#footnote-158)

These conclusions’ repercussions go far beyond this particular case. The I/A Court, by virtue of Article 63(2) of the ACHR, has powers of official interpretation of the ACHR. As Judge Eduardo Vio Grossi had noted in his dissenting opinion to the judgment in this case:

…the Court must interpret and apply the Convention, instead of assuming the role of Inter-American Commission of Human Rights or the lawmaking function. The latter belongs to the States, which have the exclusive power to modify the Convention.[[159]](#footnote-159)

As regards the subject of protection under Article 4(1) of the ACHR, Judge Eduardo Vio Grossi had noted:

…this statement cannot be agreed with because, if the intent had been to protect the unborn’s “right to have his life respected” through protection of the pregnant woman, the Convention would have specifically stated so, which was not the case.[[160]](#footnote-160)

In 2018 the I/A Court delivered a judgment in the case of *Cuscul Piraval et al. v. Guatemala* concerning people suffering from HIV, including 5 pregnant women, and their families. The I/A Commission invoked Articles 5, 8, 25, 26 in conjunction with Article 1(1) of the ACHR.

Having recognised increased vulnerability of victims who were pregnant women,[[161]](#footnote-161) the I/A Court found violation of the right to health in respect of two of them. The I/A Court had also acknowledged causal link between the lack of proper medical treatment and vertical transmission of HIV to children of those women[[162]](#footnote-162). However, in line with its previous case-law, the I/A Court did not address children in prenatal stage as victims of violations in this case.

#### 1.3.3. Case-law of the Court of Justice of the European Union

The Court of Justice of the European Union (hereinafter can be referred to as ECJ), as it was aptly generalised by Dobrochna Bach-Golecka, does not impose a uniform scale of values on Member States.[[163]](#footnote-163) Indeed, in the case C-159/90 concerning Ireland the ECJ has ruled that, although medical termination of pregnancy constitutes a service within the meaning of European Economic Community Treaty, a Member State in which medical termination of pregnancy is forbidden can prohibit distribution of information about the clinics in another Member State where voluntary termination of pregnancy is allowed, provided that those clinics are not involved in the distribution of such information.[[164]](#footnote-164)

A number of cases considered by the ECJ were related to the safety and health at work of pregnant workers as provided for by the Council Directive 92/85/EEC of 19 October 1999 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (hereinafter – Directive 92/85/EEC). The Annex I of the Directive 92/85/EEC referred to in Article 4 (1) contains a list of physical agents causing foetal lesions and/or likely to disrupt placental attachments, as well as lists of biological and chemical agents endangering the health of pregnant women and their children in prenatal stage. Consequently, ‘exposure to agents’ which must be assessed by the employer under Article 4 of the Directive 92/85/EEC, refers both to the pregnant worker and to her child in prenatal stage. Jurisprudence of the ECJ on this issue suggests two implications particularly relevant for this research.

The first implication is that the period of coverage of protection provided for by the Directive 92/85/EEC as regards pregnant workers and their children in prenatal stage in case of *in vitro* fertilisation starts with nidation (i.e. implantation of the fertilised ova into the uterus). In the case C-506/06 the ECJ had to give a preliminary ruling concerning interpretation of the ‘pregnant worker’ within the meaning of the Directive 92/85/EEC. In this case, the woman in Austria working as a waitress had recourse to *in vitro* fertilisation treatment. She was informed of her dismissal at the moment when her ova was already fertilised *in vitro*, but not yet implanted in her uterus. The ECJ ruled that Article 10 (1) of the Directive 92/85/EEC, which prohibits dismissal of pregnant workers, ‘must be interpreted as not extending to a female worker who is undergoing in vitro fertilization treatment where…in vitro fertilized ova exist, but they have not yet been transferred into her uterus’.[[165]](#footnote-165)

The second implication is that the Directive 92/85/EEC can be seen as providing two types of protection: economic protection and that of health. The primary beneficiary of the economic protection is a female worker during pregnancy and some period after childbirth, as well as during the period of breastfeeding. Her child in prenatal stage is never mentioned as a beneficiary of such economic protection and at best can be seen as a secondary beneficiary deriving from the fact of being a dependant of a woman. However, when it comes to the protection of health, the primary beneficiary is the child, whereas protection of the mother’s health can be seen as secondary and deriving from her special bounds with the child and/or condition of pregnancy. In the case C-203/03 the ECJ had to decide whether the prohibition of the employment of women in underground work in mining or in a high-pressure atmosphere or in diving work, which existed in Austrian legislation, is contrary to Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. The ECJ decided in the positive, having declared that the Republic of Austria has failed to fulfill its obligations under Articles 2 and 3 of Council Directive 76/207/EEC of 9 February 1976.[[166]](#footnote-166) In this judgment, the ECJ had recourse, *inter alia*, to the Directive 92/85/EEC, which prohibits engaging pregnant women, women who have recently given birth or are breastfeeding in activities which endanger their health and health of their children, including underground work in mining or in a high-pressure atmosphere or in diving work.[[167]](#footnote-167) Thus, in general, engaging into such work is a matter of a woman’s individual choice. However, in cases when she is pregnant, has recently given birth or is breastfeeding, it is an obligation of the employer to preclude exposure to the agents, processes or working conditions which jeopardize the woman’s health and that of her child, not being a matter of individual choice anymore.

In another case the ECJ had to give a preliminary ruling concerning patentability of biotechnological inventions. First of all the ECJ had to give a definition of “human embryo” within the meaning of Article 6(2)(c) of the Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions (hereinafter – Directive 98/44/EC), which prohibits and renders unpatentable the use of human embryos for industrial and commercial purposes. The ECJ ruled that within the meaning and for the purposes of application of Article 6(2)(c) of the Directive 98/44/EC, the concept of “human embryo” must be understood in a wide sense, i.e. including organisms capable of commencing the process of development of a human being, namely: a) a human ovum from the moment of fertilisation, which is ‘such as to commence the process of development of a human being’[[168]](#footnote-168); b) ‘a non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted’[[169]](#footnote-169); and c) ‘a non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis’[[170]](#footnote-170). The ECJ further ruled that “industrial and commercial purposes” within the meaning of Article 6(2)(c) of the Directive 98/44/EC shall be interpreted as including the use of human embryos for purposes of scientific research (not patentable), ‘only use for therapeutic or diagnostic purposes which is applied to the human embryo and is useful to it being patentable’.[[171]](#footnote-171) The last finding of the ECJ in this case is that:

Article 6(2)(c) of the Directive excludes an invention from patentability where the technical teaching which is the subject-matter of the patent application requires the prior destruction of human embryos or their use as base material, whatever the stage at which that takes place and even if the description of the technical teaching claimed does not refer to the use of human embryos.[[172]](#footnote-172)

Thus in this ruling the ECJ has interpreted the Article 6(2)(c) of the Directive 98/44/EC in a way that excludes from patentability all the biotechnological inventions that jeopardise human dignity and integrity of a human embryo in the widest sense possible.

#### 1.3.4. Jurisprudence of the International Court of Justice

The International Court of Justice (hereinafter – ICJ) had to deal with the issue related to the rights in prenatal stage only indirectly. In 1973 Australia and New Zealand filed applications against French Republic regarding the atmospheric tests of nuclear weapons in the South Pacific region. In its request for interim measures of protection, the Government of Australia has argued, *inter alia*, that ‘[i]rradiation of the embryo (and of the foetus) may lead to abnormalities of development or may prove fatal.’[[173]](#footnote-173) In the section “Effects of radiations on man” the Government of Australia continued this line of argumentation stating that ‘[e]mbryonic cells are especially sensitive to radiation and some evidence suggests that exposure of the foetus to small doses of radiation may result in leukemia during childhood’[[174]](#footnote-174) and further distinguished foetuses as a group − ‘particular groups such as children and foetuses may have special sensitivity’[[175]](#footnote-175). In its order of 22 June 1973 ICJ did not express its own considerations due to procedural issues, simply indicating provisional measures, namely that ‘the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on Australian territory’.[[176]](#footnote-176)

## Conclusion of the Section 1

This section deals with such framework issues as terminology, state of literature and jurisprudence of international courts as regards the child in prenatal stage, the legal status and rights of the latter.

It was found, that such commonly employed notions as *unborn child*, *pre-born child*, *embryo*, *foetus* or *nasciturus* each have specific context, which whether distorts the meaning or allows for its understanding in a rather narrow sense. Law treats terminology with caution: it is crucial that notion employed bears the meaning which is exact, easy to understand, neutral (is not biased), and is translatable in other languages for the purposes of further use internationally. The term which meets such requirements is the *child in prenatal stage*. It designates the child in time period starting from conception and ending with birth without any negative or positive connotation: that the child will not be born, as it is in the case with *unborn*, or that it will eventually be born, as it is with French *l'enfant à naître.* Thus, in this thesis the *child in prenatal stage* will be employed further on, except for citations or in the context where a more narrow meaning is necessary. It can also be employed in other studies in the field, especially internationally when it is necessary to overcome language inaccuracies.

The literature review revealed a number of relevant studies, including considerable amount of PhD theses, which have dealt with the issue of legal status of the child in prenatal stage. Some of them advocated for recognition of legal personhood, and some – for mere protection of the rights of child in prenatal stage by objective law. Some authors focus on abortion debate rather than on the issue of legal status of the child in prenatal stage, thereby radicalizing the debate. The stance upheld in this thesis will be elaborated in the Section 2.

As this thesis does not limit itself with any particular legal system, dealing with the issue theoretically with a perspective of possible international application, an analysis of jurisprudence of international courts is of particular importance for further enquiries. Relevant cases were found in jurisprudence of Institutions of the Convention for the Protection of Human Rights and Fundamental Freedoms − European Commission of Human rights and the European Court of Human Rights, in jurisprudence of the Inter-American Court of Human Rights, in the case-law of the Court of Justice of the European Union and in that of the International Court of Justice.

# SECTION 2. PERSONHOOD AND RIGHTS OF THE CHILD IN PRENATAL STAGE (PRENATAL PERSONHOOD AND PRENATAL RIGHTS)

For the time being, worldwide there have been a lot of discussions as regards the legal status of the child in prenatal stage, both in theory and in practice. The key issues of these discussions are all around the questions of when does human life begin and where should legal personhood and subjective rights of the child in prenatal stage start, how the law treats the child in prenatal stage now and how this can be improved.

In light of achievements of previous theoretic research and those of jurisprudence, it is now possible to deal with the issue of personhood and rights of the child in prenatal stage.

## 2.1. When does human life begin in law?

This question became so fundamental due to the fact that beginning of human life should seemingly entail endowing human individual with human rights, whereas subjective rights are built on legal personhood. Following this logic, the moment when human life commences should coincide with the moment when human rights and legal personhood appear. However, in reality beginning of human life does not automatically entail appearance of human rights and legal personhood, because ‘[п]очаток життя людини de jure не збігається з початком її життя de facto’[[177]](#footnote-177) (the beginning of human life *de jure* does not coincide with the beginning of his life *de facto*). Thus the question of when does life of a human individual begin should be answered without prejudice as to the emergence of human rights and legal personhood.

The two major and antithetical standings as regards the beginning of human life suggest the two extreme points of prenatal development − its very end and its very beginning.

### 2.1.1. Live birth v. beginning of prenatal development

The idea that human life begins with live birth comes from stoicism, where a child before birth was considered as a part of his or her mother and only with separation from the mother’s body the child was believed to acquire an individual soul. Stoicism has strongly influenced Roman law[[178]](#footnote-178), which is perhaps the core reason why this idea has become so widely accepted in law together with *infans conceptus* rule. Another tradition which has somewhat contributed to the belief that human life begins with live birth, is Judaism. In its sentient texts there is a passage which instructs what one should do in the case when a woman experiences difficulties during childbirth – one should dismember the child and extract it from the woman in order to save her life. However, once the child’s head or greater part has already emerged from the woman’s body, no harm can be caused, because they ‘do not set aside one life for another’.[[179]](#footnote-179) This verse is often interpreted in a way that in Judaism human life is believed to start with live birth, which is not exactly true. It would be more correct to assert that in Judaism, the moment of ensoulment (and beginning of human life) is considered to be a secret; thereby the child in prenatal stage is to be accorded respect throughout all prenatal period. However, in case of difficulty during childbirth this is the mother’s life that should take prevalence. It is full personhood and not human life which in Jewish tradition is believed to start with the live birth.[[180]](#footnote-180)

The above-referred Jewish insight is very close to the legal dimension of the issue. What starts with the live birth of each human being in most jurisdictions is not human life, but personhood in law.[[181]](#footnote-181) Indeed, during this research there was not found any jurisdiction where legislation would explicitly provide that human life starts at birth.

If human life does not start at birth, then when does it start? Biologically life of a human individual(s) begin(s) when male and female human gametes fuse, that is, at fertilisation.[[182]](#footnote-182) This moment is often referred to as “conception”, although the meanings of these two terms are not always identical. “Fertilisation” points exactly to the moment when the ovum is fertilised, whereas “conception” can be used loosely. Sometimes it is implied as a synonym to “fertilisation”, and sometimes to designate the moment when the fertilised ovum is implanted into the uterus. In its turn, the moment when the fertilised ovum implants into the uterus has its own names − “implantation” or “nidation”. A comprehensive query into this issue was made by the I/A Court in the Case of *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, where the I/A Court underscored: ‘the scientific evidence agrees in making a difference between two complementary and essential moments of embryonic development: fertilization and implantation’.[[183]](#footnote-183) These moments indeed are essential, as well as complementary − to the extent similar to complementarity of any other two subsequent stages of prenatal development. Implantation can happen only after fertilisation took place, and never vice versa. Even in natural conditions there is a lapse of time between these two moments, which can be equal to several days. There can be a much more substantial lapse of time between fertilisation and implantation in case of *in vitro* fertilisation. Thus life of human individual(s) biologically start(s) at fertilisation, whereas implantation or, synonymously, nidation is another essential and subsequent moment of prenatal development. Implantation (nidation) as a landmark of prenatal development will be considered in more detail in the 2.1.2.1.

Whilst fertilisation is a moment when human life commences its prenatal stage, at this moment there is no pregnancy. The period of time between the moment of fertilisation and that of implantation is nowadays the only one when the fertilised ovum can be regarded in legal sense as a child in prenatal stage free from union with a woman’s body. This fact manifests itself in the event of fertilisation *in vitro*, where embryos are created outside the woman’s body. If such embryo was created under a contract with a reproductive clinic where both parents are signatories to the contract and donors of gametes, contract can stipulate that implantation can take place only upon consent of both parents, allowing for withdrawal of this consent by any of the parents before the implantation took place. In the case of *Evans v. the United Kingdom*, the ECtHR had to consider a situation where implantation was not allowed because the father of the embryo had withdrawn his consent. The ECtHR found that there was no violation of the woman’s right to privacy.[[184]](#footnote-184)

When fertilisation happens *in vivo*, as opposed to fertilisation *in vitro*, current state of medical techniques do not allow for detection of the exact moment when fertilisation takes place. This fact can be established only retrospectively, when completion of implantation of the fertilised ovum triggers production of the hormone “chorionic gonadotropin” in the woman’s body[[185]](#footnote-185). This is the presence of this hormone that can be detected by available medical techniques, signifying that pregnancy has begun, whilst the zygote is small and cannot yet be visualised by the means of ultrasound. However, this does not mean that the period between fertilisation and implantation in case of fertilisation *in vivo* is legally irrelevant. For example, it can be relevant for regulation of the rights of consumers of the abortifacient contraception, which will be considered in more detail in the paragraph 3.2.1.

Prenatal development, *stricto sensu*, can commence not only as a result of fertilisation, but also as a result of other events, such as human parthenogenesis or implantation of a cell nucleus into human ovum. This was admitted by the Court of Justice of the European Union in the case of *Oliver Brüstle v Greenpeace eV.[[186]](#footnote-186)* Beginning of prenatal development by the means of the abovementioned techniques and its particularities will not be considered in this thesis.

Whenever the term ‘conception’ is used to designate beginning of prenatal development, it can lead to a certain degree of ambiguity. Many texts employing this term were drafted before the fertilisation *in vitro* was practiced and thus did not differentiate between fertilisation and implantation. For example, the ACHR was adopted in 1969, the same year when ‘the first convincing evidence of the early stages of fertilization of human eggs *in vitro*’[[187]](#footnote-187) was published. Taking into account that the drafting process of the ACHR took place before its adoption, the fact that prenatal life of human individual commences with fertilisation was not taken into consideration. Thereby the ACHR in the Article 4(1) provides that the right to life ‘shall be protected by law and, in general, from the moment of conception’.[[188]](#footnote-188) When a question whether a fertilised but not yet implanted human ovum is protected by this clause, the I/A Court had to consider this issue in the above-referred Case of *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica*, having decided that “conception” in relation to the ACHR shall be understood as the moment of completion of implantation into the woman’s uterus.[[189]](#footnote-189) Similarly, whenever the term “conception” is used, to understand its meaning correctly one must make a query into the meaning behind it, with due regard to the time when the text was drafted. Therefore in this thesis the beginning of prenatal development of an individual human being will be linked to fertilisation and not to conception, in order to avoid this confusion.

### 2.1.2. Legally relevant landmarks of prenatal development

In 2.1.1., it was already demonstrated that implantation or, synonymously, nidation signifies beginning of pregnancy, but not the beginning of life of a human individual. However, implantation is legally relevant. The same is true for other landmarks of prenatal development, such as completion of pre-embryonic stage, heartbeat, viability, or emergence of consciousness. In this research I argue that certain landmarks of prenatal development can be legally relevant for determination of the legal status of the child in prenatal stage. Whereas attaining certain gestational age or stage of development entails particular consequences in law, this social fact shall not be confused with the biological beginning of human life, which happens at fertilisation.

#### 2.1.2.1. Implantation (nidation)

The fact of implantation of a fertilised human ovum into the woman’s body has considerable effects in law. According to Suliman M. K. Ibrahim, implantation into a womb is one of the key benchmarks which can influence the degree of respect to be accorded to the children in the early prenatal stage, as non-implanted embryos need an additional factor for realisation of their potentialities in comparison to already implanted embryos.[[190]](#footnote-190) Indeed, in the Case of *Artavia Murillo et al. (“in vitro fertilization”) v. Costa Rica* the I/A Courthas ruled that Article 4(1) of the ACHR (right to life) can be applicable only from the moment of implantation.[[191]](#footnote-191)

For a mother, implantation or nidation also has broad legal repercussions, which can indirectly affect the child in prenatal stage. Implantation itself signifies beginning of pregnancy and all the protective measures and incentives entailed by it. Within the EU, pregnant women are protected by the Council Directive 92/85/EEC, which covers, in the event of *in vitro* fertilisation, period of pregnancy starting from the moment of nidation[[192]](#footnote-192). The condition of pregnancy can endow a woman with specific welfare benefits, as it is in France, where presence of the child in prenatal stage entitles woman to a number of allowances, some of them being available from the very beginning of pregnancy.[[193]](#footnote-193) In the event that fertilised ovum implants not in the woman’s womb, but outside of it (ectopic pregnancy), such medical condition is considered dangerous for the woman’s life. In such a case in many legal systems there is a positive obligation on the part of the state to provide the woman with necessary medical help in order to save her life. This medical help implies interruption of pregnancy and that of the child’s life.

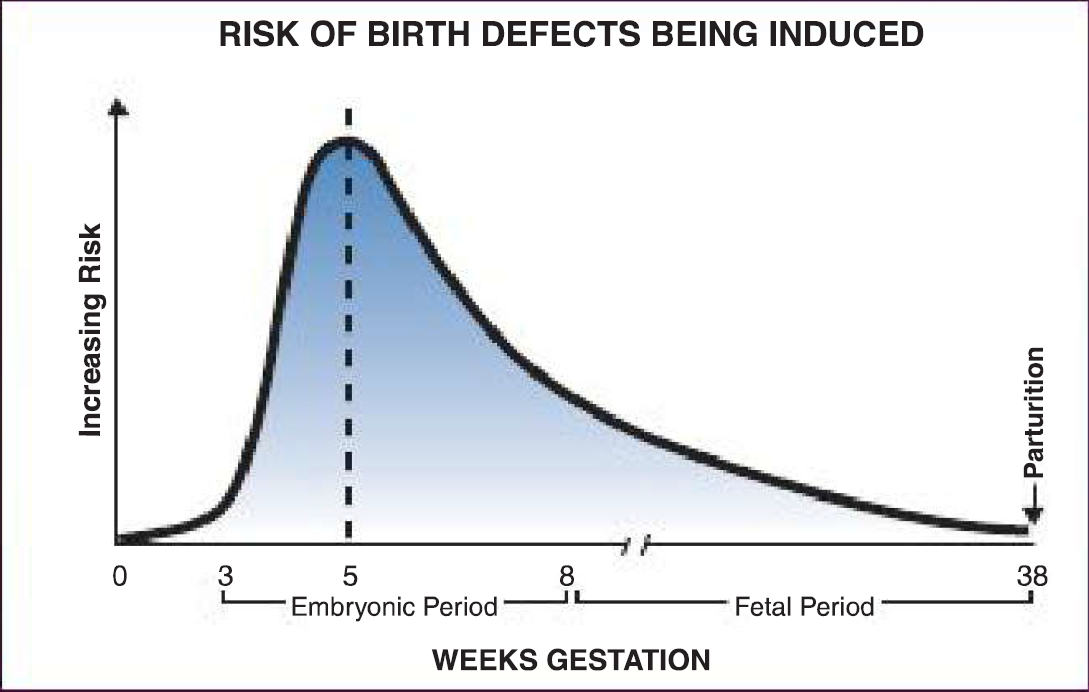
For the father, beginning of pregnancy does not mean beginning of fatherhood in legal sense. However, in the due course of IVF treatment, from the moment of implantation the father of the child in most jurisdictions loses his authority to withdraw consent for this child being carried to term. The father regains his parental authority only at live birth of the child, coupled with official recognition of his paternity.

#### 2.1.2.2. Completion of the pre-embryonic stage

From the point of view of the positive law, during this research there was not found any legal system where certain repercussions in law would be attached to the completion of pre-embryonic stage, that is, the first two weeks of gestational development.[[194]](#footnote-194) However, theoretically this landmark is of particular importance.

Firstly, during this stage the fertilised ova can split into two or more identical twins. This is the reason why sometimes it is asserted that before completion of pre-embryonic stage it is not possible to talk of an individual.[[195]](#footnote-195) This assertion is rebutted by the fact that the phenomenon of division is not an obstacle for qualification of an individual, as there are some living beings which are individuals whilst they reproduce by division.[[196]](#footnote-196) In law, at least in theory, this can be relevant for possible registration of the prenatal existence. In other words, registration of the number of children is not possible until the pre-embryonic stage completes.

The second important reason for the completion of pre-embryonic stage to be an important landmark of prenatal development is that during this stage the ‘great deal of development takes place’.[[197]](#footnote-197) According to Sadler, the period with the highest risks of induced malformations starts approximately at the end of pre-embryonic stage (Picture 2.1.). In the event that a risk of malformation is preventable, the law, at least in theory, can interfere in the best interests of the child.



Picture 2.1. Risks of birth defects being induced[[198]](#footnote-198)

In terms of practice, completion of pre-embryonic stage often remains unnoticed for the pregnant woman herself and her environment. The pre-embryo is not visualised in ultrasound. At best, at the end of pre-embryonic stage pregnancy can be diagnosed by presence of chorionic gonadotropin hormone in the woman’s blood. Thus the third reason why the end of pre-embryonic stage can be legally relevant is that it signifies the point of time where pregnancy can be diagnosed.

#### 2.1.2.3. Heartbeat

Beginning of heartbeat of human embryo takes place in embryonic period. According to Keith L. Moore, ‘[t]he embryonic heartbeat can be detected by Doppler ultrasonography … during the fourth week [after fertilisation], approximately 6 weeks after the last normal menstrual period’.[[199]](#footnote-199)

Following the logic that in medical science clinical death is defined as heart failure, heartbeat can be seen as beginning of life. It is hardly possible to agree with this analogy. The mechanisms of life’s beginning and those of its ending are different. Beginning of heartbeat is not equal to the beginning of life, although it can be legally relevant. In the USA, from 2011 till 2019 a number of states have passed legislation which outlawed abortions once heartbeat of the baby is detectable. The rhetoric of these legislative efforts was not the beginning of life, but ‘political compromise’.[[200]](#footnote-200) All of the so called “heartbeat protection acts” were blocked or struck down by federal court because of the contravention of the landmark decision of the U.S. Supreme Court − Roe v. Wade.[[201]](#footnote-201) However, already in January 2019 the “Heartbeat Protection Act of 2019” bill was introduced in the U.S. Senate,[[202]](#footnote-202) continuing the political struggle.

#### 2.1.2.4. Viability

At some point of prenatal development the child becomes mature enough to be capable of surviving outside the mother’s womb, even if neonatal intensive care is needed for that and even if chances of survival are not high. Much importance has been given to viability in some jurisdictions, although with different context.

Firstly and most importantly, viability can be linked to autonomy. In the abovementioned US Supreme Court decision Roe v. Wade (1973), the Supreme Court of the United States has ruled that public interest in the child in prenatal stage becomes prevalent at the moment when the child attains viability.[[203]](#footnote-203) In the event that the pregnancy has to be terminated for some reason, the child can be saved without regard to the mother’s intent as regards this child. In terms of human rights, the moment of attaining viability can approach some rights of the child in prenatal stage to absoluteness when it comes to weighing the rights of the child against the rights of his or her mother.

Secondly, viability can be seen as the moment when the child’s chances of survival become high enough to make him or her «worthy*»* of recognition in the legal sense. Such recognition is not necessarily equal to full legal personhood, that is, the status of the subject of law. By way of example, in France viability of the child was crucial criterion in adjudication of cases of third party assaults just before the case of Ms. Vo, which became famous in Europe after consideration by the ECtHR in 2004.[[204]](#footnote-204) Before this case, the general approach in French jurisprudence was ‘qu’il suffit, pour caractériser le délit d’homicide involontaire, que l’atteinte à la personne ait porté sur un être humain, même non séparé du corps de sa mère, dès l’instant qu’il était venu à terme viable et que sa mort est seulement imputable à la faute d’un tiers’[[205]](#footnote-205) (that it suffices for qualification of the offense of manslaughter, that the attack on the person concerned a human being, even not separated from his mother's body, as soon as he attains viability and that his death is only attributable to the fault of a third party). After consideration of the case of Ms. Vo by the Court of Cassation in 1999, the French courts started to interpret penal law provisions in a stricter way, requiring for qualification of involuntary manslaughter that a child is born alive and viable.[[206]](#footnote-206)

Being an important landmark, viability is, however, a ‘highly evaluative term in itself’,[[207]](#footnote-207) as ‘[t]here is no sharp limit of development, age or weight at which a fetus automatically becomes viable’.[[208]](#footnote-208) Appointing a certain moment of gestational development as a moment when child becomes viable is always subject to some degree of conditionality. For medical practitioner, a viable foetus is simply the one who has chances of survival,[[209]](#footnote-209) which is probably too uncertain for legal purposes. According to the World Health Organization (hereinafter – WHO) report of 2012, in high-income countries foetuses born at 24 weeks of gestation have 50% chances of survival, whereas those born in low and middle income countries have same chances of survival only when born at 34 weeks.[[210]](#footnote-210) Keith L. Moore, T.V.N. Persaud and Mark G. Torchia observe that children in prenatal stage can be considered viable starting from 22 weeks of gestation, or attaining the weight of 500g, as below these limits there are no chances of survival.[[211]](#footnote-211)

The legal purposes, contrarily, require rigour, that is, there should be clear criteria of viability if they are to be applied in law. The Roe v. Wade, for example, stipulates that ‘[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks’.[[212]](#footnote-212) Taking into account advances in medicine which took place since 1973, the threshold of viability for legal purposes can be placed at 24 weeks or earlier. The WHO’s recommendations of 1977 suggest to establish the lower limit of viability at 22 weeks of gestation or weight of 500 g.[[213]](#footnote-213)

In practice, establishment of normative lower limit of viability for purposes other than statistics entails wide repercussions, ‘because mortality, morbidity, and human and economic costs are high, and the likelihood of long-term survival without disabilities is low’.[[214]](#footnote-214) In the event that the rights of children in prenatal stage are promoted to the extent that the state undertakes the obligation to ensure right to healthcare starting at least from the moment of viability, the society will bear these costs. From the perspective of human rights, however, the costs are incurred anyway. Sandra Fredman observed that one of the aims pursued by equality is ‘accommodating difference for structural change’[[215]](#footnote-215), which is costy:

From the perspective of substantive equality, the starting point must lie in the recognition that the question is not about how much to spend, but who should bear the cost. It is misleading to argue that it is too costy to accommodate difference or to bring about structural change, since the cost is incurred in any event. The status quo, without legal intervention, requires the out-group to bear the full cost: women bear the cost of child-bearing and childcare; disabled people bear the cost of disability; and ethnic minorities bear the cost of their own cultural or religious commitments.[[216]](#footnote-216)

From this perspective, establishment of normative lower limit of viability for purposes other than statistics does not entail new costs. Without intervention of the law all the costs are left on the shoulders of children in prenatal stage who are the least capable of bearing them. Whenever parents have intent and means to fund medical treatment to take chances of survival of their pre-term but viable child, they can do so and thus take over this cost. In other cases children who are viable but yet unable to afford costy medical treatment, deprived of parental support and that of the state, cease to exist.

#### 2.1.2.5. Consciousness

Whilst viability can be most pertinently linked to autonomy, consciousness is often associated with personhood:

A theory present from at least the time of John Locke can be expressed roughly as: *persons are beings with personalities*: persons are conscious beings with thoughts, feelings, memories, anticipations and other psychological states.[[217]](#footnote-217)

Definition of personhood through consciousness in the manner when personhood equals consciousness is not tenable for legal purposes. There exist persons in law who are not conscious. Moreover, consciousness is a term even more evaluative than viability: a meaning attached to consciousness sufficient to count as person can be varied, thus arbitrarily narrowing or widening the circle of those who possess such qualities and can therefore be deemed persons. Children who are just born lack self-consciousness[[218]](#footnote-218), but in law they are endowed with personhood. This is why Aude Bertrand-Mirkovic observed:

Que l'être humain soit investi de la dignité dès sa conception, à partir de sa viabilité ou même à sa naissance, dans tous les cas il n’a pas de capacité de discernement, il n’est pas capable d'effectuer de choix moraux, il ne peut se donner à lui-même la moindre loi et il faudra attendre un certain nombre de mois voire d'années avant qu’il acquière effectivement ce sens moral.[[219]](#footnote-219) (Whether the human being is invested with dignity from his conception, from his viability or even from his birth, in all cases he has no capacity for discernment, he is not capable of making a moral choice, he cannot give himself the slightest law and it will take a certain number of months or even years before he actually acquires this moral sense.)

More specifically, Aude Bertrand-Mirkovic has shown that self-consciousness is a manifestation of personal existence, whereas existence as a person precedes such manifestation: ‘Pour agir comme personne, il faut déjà exister comme telle. L’agir révèle l’existence, mais l’existence précède l’agir[[220]](#footnote-220) (In order to act as a person, it is first necessary to be a person. Action reveals existence, but existence precedes action). This inference evokes the idea that in law consciousness should be linked not to personhood but to capacity to act (*дієздатність* in the Ukrainian language). Capacity to act in law arises gradually in proportion to mental maturity or state of consciousness, whilst personhood always precedes this capacity.

Having linked consciousness to capacity to act it is necessary to acknowledge that prenatal development does not allow for such capacity to arise. The nervous system of a child during prenatal period does develop but not to the state sufficient for recognition of capacity to act. What is claimed in law for children in prenatal stage is not capacity to act, but the ability to have rights (*правоздатність* in the Ukrainian language). This issue will be considered in more detail in subsequent paragraphs of this Section.

What state of consciousness is attained during prenatal period, when, and can it be legally relevant? Suliman M.K. Ibrahim in his thesis has scrutinised the issue of timing of consciousness. Having analysed the scientific evidence he came to a conclusion that bodily readiness and first electrical activity in the brain (although rudimentary) which are indicators of consciousness happen at the twentieth week of gestation.[[221]](#footnote-221) In the USA, there are repetitive attempts to give due regard in law to the fact that the child in prenatal stage at 20 weeks of gestation is pain-capable.[[222]](#footnote-222)

Another dimension of prenatal consciousness which is legally relevant is the child’s ability to be educated. CRC stipulates, that the member states undertake to direct the education of the child to ‘[t]he development of the child’s personality, talents and mental and physical abilities to their fullest potential’,[[223]](#footnote-223) which in conjunction with the paragraph 9 of the Preamble can be applicable not only after, but also before birth.

### 2.1.3. Continuity of human life

Many authors reasonably suggest that human life should be considered continuous from the moment of its biological beginning, i.e. fertilisation, with appropriate response in law. For Claude Sureau, who is the inventor of electronic foetal heart monitoring, accoucher, gynaecologist, former president of the National Academy of Medicine of France (2000) and former member of the National Consultative Ethics Committee(2005) of France, ontological continuity here is evident[[224]](#footnote-224). Bohdana Ostrovska has also noted in this regard, that ‘процес життя людини є динамічним переходом від простого до складного, від меншого до більшого…життя людини є безперервним процесом від зачаття’[[225]](#footnote-225) (the process of human life is a dynamic transition from simple to complex, from smaller to larger … human life is a continuous process from conception). Natalia Besedkina (Russian Federation), the author of a PhD dissertation named “Конституционно-правовая защита прав неродившегося ребенка в Российской Федерации” (Constitutional and legal protection of the rights of unborn child in Russian Federation), wrote: ‘представляется, что ребенок до рождения и ребенок, который уж родился – это только стадии развития одного и того же человека. Соответственно, приемлемо относится к нерожденному ребенку как к естественной фазе человеческого развития’[[226]](#footnote-226) (it seems that the child who is unborn and the one who is already born are only stages of development of the same person. Respectively, it is acceptable to treat unborn child like a natural phase of human development).

Gerard Casey in his book *Born Alive: The Legal Status of the Unborn Child* observed: ‘[w]hat substantive difference is there between a child who is injured just after birth and one who is similarly injured just before? The answer is ... none at all’.[[227]](#footnote-227) The author further continued: ‘There would be no problem if the child *in utero* were considered to be not just biologically continuous with the child that is subsequently born but continuous in the matter of legal subjectivity as well.’[[228]](#footnote-228)

Laura Westra (Canada), being concerned with the long-term health consequences of prenatal exposures, articulated:

[w]hat I have termed the ‘continuity thesis’, that is, the fact that (a) the child in utero is a separate human being from conception; (b) that the developing embryo/foetus is continuous with the born child; (c) the child is not actually a ‘new’ life at birth, but that she’s been a new life from conception.[[229]](#footnote-229)

Similarly, Aude Bertrand-Mirkovic observed:

Les scientifiques sont unanimes pour constater qu’à partir de la fécondation, le développement de l’individu jusqu’à sa mort est un processus continu. Il y a bien sûr des stades dans le développement et, pendant la vie intra-utérine, les étapes franchies sont particulièrement significatives puisque tous les éléments essentiels de la morphologie sont à développer.[[230]](#footnote-230) (Scientists are unanimous in observing that from fertilisation, the development of an individual until his death is a continuous process. There are of course stages in the development and, during intrauterine life, the stages reached are particularly significant since all the essential elements of the morphology are to be developed.)

Theoretical dimension aside, the approach of continuity can be said prevailing for the international law as well; at least this is true within the European human rights system. In its recommendation 1100 of 2 February 1989, the Parliamentary Assembly of the Council of Europe, which takes decisions by consensus, considered ‘that the human embryo, though displaying successive phases in its development … displays also a progressive differentiation as an organism and none the less maintains a continuous biological and genetic identity’.[[231]](#footnote-231)

In light of the above, the entrenched standing that human life begins to be legally relevant only with the live birth is oversimplified and categorical. It segregates human life before and after birth in the way which is not always justifiable, as live birth in itself does not create a new human being. In his introductory lecture to Human Behavioral Biology, Robert Sapolsky stressed, that taking continua and breaking it into categories makes it easier to deal with the difficult issues and evaluate them. However, when too much attention is paid to categories, it becomes difficult to differentiate between two things that fall within one category. In addition, whenever the boundary is drawn somewhere on that continua, there is a ‘trouble seeing how similar things are on either side of it’.[[232]](#footnote-232) Applying this inference to the continuum of human life, it is apparently misleading to categorically split it up in law into such categories as before and after birth. Firstly, when the legislators and judges are focused on the moment of live birth, they often do not differentiate between, e.g., the child in prenatal stage who is viable and the one who is not, or the child who is conscious and the one who is not. Secondly, they may not see or do not give regard to the fact how similar are the children just before birth and shortly thereafter.

## 2.2. Protection by objective law or recognition of legal personhood and subjective rights?

Once it is established that the child in prenatal stage needs to be treated in law appropriately, an important question arises: shall that be done by the means of recognition of personhood and subjective rights, or by other means? Borys Malyshev observed, that ‘з точки зору змісту права суб’єктивні права є метою, а з точки зору суб’єкта ... належні йому права є засобом для досягнення ним певних матеріальних та духовних благ (цінностей)’[[233]](#footnote-233) (in terms of the content of law subjective rights are the aim, whereas in terms of a subject … the rights belonging to him are the means to achieve certain material or spiritual benefits).

In their fundamental theses Nathalie Massager (Belgium) and Aude Bertrand-Mirkovic (France) suggested different approaches in this regard. Nathalie Massager came to a conclusion that the legal personhood of the child shall be recognised in civil law from the moment of conception without any conditionality.[[234]](#footnote-234) Aude Bertrand-Mirkovic differentiated between human personhood and legal personhood, the former being inherent to all human beings, and the latter being attributed by law. She observed that legal personhood should not be attributed to children in prenatal stage due to the practical considerations,[[235]](#footnote-235) which can be summarised as follows:

* the starting point of pregnancy cannot be determined with accuracy, because always ‘il resterait des individus don’t l’existence ne serait pas connue’[[236]](#footnote-236) (there will rest individuals, whose existence is unknown);
* the life in its beginning is rather fragile due to the high risks of miscarriage;[[237]](#footnote-237)
* attributing legal personhood at a certain stage of gestational development also leads to uncertainty and thus to the possibility of mistake or fraud;[[238]](#footnote-238)
* the intimate private life, as well as “pudeur publique” (public decency) are inevitably questioned because of necessity to declare interruptions of pregnancy, voluntary or not;[[239]](#footnote-239)
* legal personhood gives little advantage to children in prenatal stage because it will not hamper interruption of pregnancy and research on embryos.[[240]](#footnote-240)

Instead, Aude Bertrand-Mirkovic observes that objective law can well protect the rights of those who are not endowed with legal personhood, taking into consideration their specific situation for proper organisation of this protection.[[241]](#footnote-241) In the Ukrainian legal system there is a similar construction which is called *legally protected interest[[242]](#footnote-242)* (*охоронюваний законом інтерес* in the Ukrainian language).

### 2.2.1. Scope of protection of the child in prenatal stage by objective law

Objective law allows establishing a considerable degree of legal protection. What is appealing, there is no risk that all the subjective rights which are already established for human subjects of law would automatically apply to a new subject included into this category.

A number of states enshrine in law a general principle of respect to (protection of) human life, which extends to prenatal life as well. In Germany, the constitutional norms regarding inviolability of human dignity and life were interpreted by the Federal Constitutional Court as extending to prenatal period starting from the moment of nidation.[[243]](#footnote-243) Similarly, in the Article 24 (1) of the Portuguese Constitution it has been simply established that ‘human life is inviolable’[[244]](#footnote-244), whereas the Constitutional Court provided an explanation that this provision, although not intended to endow the unborn with the subjective right to life, ‘provides objective protection to human life … to the born and to the unborn’.[[245]](#footnote-245) Some constitutions outright proclaim a promise to protect prenatal life, e.g. the Constitution of Slovakia,[[246]](#footnote-246) the Constitution of Hungary,[[247]](#footnote-247) those of Guatemala[[248]](#footnote-248), Chile[[249]](#footnote-249) and others.

Сonstitutional protection of prenatal life is usually implemented through the norms of other legislative acts, protecting the right to life and possibly extending to some other rights. For example, in Germany the prenatal life is protected by the § 218 of the Criminal code,[[250]](#footnote-250) which prohibits interruption of pregnancy. This prohibition, however, is subject to a number of exceptions when interruption of pregnancy can be lawfully conducted. One of the conditions to be fulfilled in order for a case to be treated as a lawful exception is that a woman must take a pre-abortion counselling at least three days prior to the day of abortion.

Pre-abortion counselling itself is a protecting measure aimed, at least partially, at protection of the right to life of the child in prenatal stage by the means of objective law. In the Council of Europe 32 out of 47 member states stipulate for mandatory pre-abortion counselling, and 17 member states require a waiting period between the counselling and the abortion.[[251]](#footnote-251) It must be said that all regulations established for the procedure of interruption of pregnancy are aimed jointly at protection of a child in prenatal stage and a woman.

In Germany, constitutional protection of human dignity and life as extended to prenatal period has resulted in the number of regulations aimed at protecting the embryo, which are collated in the Embryo Protection Act.[[252]](#footnote-252) These can be seen as mainly ensuring the right of the child to know and to be cared for by his or her parents, as they hold criminally punishable, *inter alia*, such activities as surrogacy or *post-mortem* insemination. Indeed, on the example of Ukraine and Russian Federation it was found that in practice surrogacy does expose children to abuses of their rights, including their right to know parents.[[253]](#footnote-253)

Some countries, such as Albania,[[254]](#footnote-254) Luxemburg,[[255]](#footnote-255) Poland[[256]](#footnote-256) and Ireland,[[257]](#footnote-257) do not include the prenatal right to life into their constitutions, but enshrine it in their other laws. Usually these are laws regulating issues of pregnancy termination. While establishing the general principle of respect to human life, they allow for exceptions, such as termination of pregnancy in certain circumstances. Under such regulations, every assault which does not fall under the one of exceptions allowed by law will be regarded as a violation. Similarly to the approach of enshrining this principle in a constitution, this one results in a more sophisticated protection of various rights of the child in prenatal stage, simply because children in prenatal stage are taken into account.

Protection by criminal and administrative law does not require legal personhood. This is why objective criminal law can establish charges for harm caused to a child prenatally without necessarily recognising legal personhood of a child in prenatal stage. For example, Polish Criminal Code traditionally prohibits unlawful termination of pregnancy,[[258]](#footnote-258) but besides that, deeds against the conceived child − causing death or bodily injury, − are also criminally punishable.[[259]](#footnote-259) Chapter 22 of the Criminal Code of Finland establishes criminal responsibility for various infringements upon the foetus, embryo, and genetic inheritance.[[260]](#footnote-260) Criminal codes of Romania[[261]](#footnote-261) and of Greece[[262]](#footnote-262) also provide for criminal law protection of the foetus. French administrative law allows for reparation for harm caused to a child in prenatal stage by improper medical treatment.[[263]](#footnote-263)

In the domain of civil law, legislations can protect the right of the child to be an heir,[[264]](#footnote-264) to receive gifts,[[265]](#footnote-265) provide for the right to receive compensation for killing a person liable of maintenance,[[266]](#footnote-266) to be beneficiary of a contract[[267]](#footnote-267) or to receive compensation for an injury to health received prenatally.[[268]](#footnote-268) However, enforcement of these rights is not possible without legal personhood. As long as the legislator is not willing to recognise legal personhood of the child in prenatal stage, he resorts to a widely employed legal fiction called *infans conceptus*.

#### 2.2.1.2. “Infans conceptus” rule (conditional personhood in civil law)

As it was mentioned above in 2.1.1., amongst what we have inherited from Roman law is *infans conceptus* rule, which reads as follows: *infans conceptus pro nato habetur, quoties de commodis ejus agitur* (the conceived child shall be considered as born whenever this is in his interest). In many legal systems this rule governs the status of the child in prenatal stage in civil law.[[269]](#footnote-269)

Within the framework of the *infans conceptus* rule, in legal doctrine the child’s personhood is usually described as conditional,[[270]](#footnote-270) for the *infans conceptus* rule to be put into effect there is a condition that the child is born, meaning live birth. For example, the Article 1 of the Civil Code of Italy provides that legal capacity is acquired at the moment of birth, whereas the rights recognised by the law in favour of the conceived child are subordinated to the event of birth.[[271]](#footnote-271) The Civil Code of Ukraine in its Article 25 similarly stipulates that civil personhood of a natural person appears at the moment of birth; whilst in cases established by law the interests of the conceived but not yet born child are protected.[[272]](#footnote-272)

Some other countries which have implemented the *infans conceptus* rule into their legal systems require, besides live birth, that that the child is born viable. For instance, the Civil Code of Philippines in its Article 40 similarly to previous examples provides that personhood stems from birth with the conceived child being considered as already born for all purposes where this is favourable for the child. However, the subsequent Article 41 provides for two conditions to be met: 1) that the foetus is born alive, and 2) in cases when its gestational age is less than 7 months, that the child lives 24 hours after birth, otherwise he is not deemed born.[[273]](#footnote-273) The latter condition is requirement of viability, although it is not expressly named so. Viability is a necessary condition for the *infans conceptus* rule to be applied also in other countries, e.g. Belgium[[274]](#footnote-274) and France.[[275]](#footnote-275)

Another variable dimension of the *infans conceptus* rule is the scope of its application − wide or narrow. In some countries conditional legal personhood is adopted ‘without any reservation as to its content, or with generally determined limits’.[[276]](#footnote-276) Although in French legislation *infans conceptus* was designated only for inheritance and gifts, the jurisprudence elevated it to the rank of general principle of law[[277]](#footnote-277), having extended it, *inter alia*, to the cases of work accidents[[278]](#footnote-278) and parent-child relationship[[279]](#footnote-279), as well as to cases when an unsuccessful abortion has led to the birth of a child with a trauma[[280]](#footnote-280) or when the child was conceived as a result of incest, which entailed problems in establishing proper parent-child relationship[[281]](#footnote-281). In a similar way, in Belgium the *infans conceptus* ruleis attributed with value of a general principle of law,[[282]](#footnote-282) which allows for its wide application, e.g. in the issues of filiation,[[283]](#footnote-283) succession,[[284]](#footnote-284) gifts,[[285]](#footnote-285) compensation of prenatal harm resulting from a fault[[286]](#footnote-286) etc.

In other countries, such as Ukraine and other Post-Soviet states, e.g. the Republic of Uzbekistan[[287]](#footnote-287), Russian Federation[[288]](#footnote-288) etc. application of *infans conceptus* rule is narrow. For example, according to the Artice 25(2) of the Civil Code of Ukraine, interests of conceived but not yet born child are protected in cases established by law. The latter include succession, prenatal recognition of paternity and compensation in case of death of breadwinner. The wording of the Article 25(2) of the Civil Code of Ukraine differs from the classical one; in addition, it does not allow the courts to extend application of *infans conceptus* to all the cases where this can be to the child’s benefit.

After enquiry into the origins of this rule, Nathalie Massager concluded that it was invented by Roman lawyers at the time when philosophers doubted human nature of the child *in utero*; consequently, ‘il ne s’agirait plus de réputer fictivement né un enfant qui n’est que conçu’.[[289]](#footnote-289) Indeed, the child in prenatal stage is in different situation in comparison to the child who is already born. However, the *infans conceptus* fiction is an instrument which is successfully applied in objective law in order to protect the civil rights of the child in prenatal stage.

#### 2.2.1.2. “Born alive” rule in common law (conditional personhood in criminal matters)

Although criminal law protection does not necessarily require legal fictions or legal personhood, in common law there exists “born alive” rule, − the principle applied in criminal matters which says that ‘a person cannot be held responsible for injuries inflicted on a foetus *in utero* unless and until it is born alive’.[[290]](#footnote-290) The ‘born alive’ rule was shaped in English law as early as in the 17th century CE,[[291]](#footnote-291) and became deeply entrenched in common law.

Authors are unanimous that the purpose of the “born alive” rule was mostly evidentiary.[[292]](#footnote-292) In the time when this rule emerged, there were no means which would made it possible to ascertain that the child *in utero* was alive at the moment of assault and to prove the causal link between the injuries caused prenatally and the death of the child *en ventre sa mere*. Seriousness of criminal charge does not allow convicting a person of murder or manslaughter whilst there is a doubt that this was his deed which caused the death of the child. Besides this fundamental reason, historically there were other considerations in support of the “born alive” rule. The “Mirror of Justices” says: ‘no one can be adjudged an infant until he has been seen in the world so that it may be known whether he is a monster or no’.[[293]](#footnote-293) Such legal artifacts as requirement for baptismal name of the ‘thing killed’[[294]](#footnote-294) to qualify as murder or differentiating the amount of the fine depending on the sex of the injured foetus[[295]](#footnote-295), although further dismissed, have also contributed to laying the groundwork for further emergence of the “born alive” rule.

The legal fiction underlying the “born alive” rule is needed to circumvent the fact that at the moment of being injured the child is not a legal subject:

As the result of not treating the child in the womb as a legal subject the courts have been forced, in order to see the justice done, to pretend that the child suffers the injury when born, when the plain facts are that the child suffers injury in the womb.[[296]](#footnote-296)

Nowadays the “born alive” rule is widely criticised for being outdated, ill-founded,[[297]](#footnote-297) for having ‘outlived its usefulness’.[[298]](#footnote-298) Finally, it is suggested that ‘it’s time to give its corpse a decent burial’.[[299]](#footnote-299) Discontent stems from the fact that the fiction allows a perpetrator to escape responsibility in cases when the injuries were severe to the extent that the child died prenatally and was stillborn, whereas it is possible to hold an assailant responsible for only slighter offences. This violates the principle of proportionality and creates preconditions for knowingly unfair decisions.

It must be said, however, that “born alive” rule, although incapable − as any fiction − of serving all the variety of relations that arise regarding the child in prenatal stage, still can effectively address the situation when the child was injured prenatally and has managed to be born alive. The legal systems which do not have such rule and do not resort to objective law protection in criminal matters are helpless in such situation. By way of example, in Ukrainian criminal law beginning of human life is associated with commencement of delivery process. The courts do not have the “born alive” rule in their disposal. Consequently, a viable child who was injured prenatally, then born alive and died in 35 hours because of the injuries, is not considered as a victim of a manslaughter.[[300]](#footnote-300) In a similar vein, in France a viable child who was killed resulting from a negligent driving of a third party under alcohol intoxication, could not be recognised a victim of an involuntary homicide.[[301]](#footnote-301)

### 2.2.2. Deficiencies of protection by objective law

Protection by objective law сan be rather sophisticated. So is there any need of legal personhood when it comes to children in prenatal stage? Aude Bertrand-Mirkovic was of the opinion that there is no such need. She observed that the fundamental difference which is brought about by legal personhood is capacity to act in order to make others respect the subjective rights,[[302]](#footnote-302) whereas ‘à défaut de personnalité juridique c’est le système répressif qui assure cette protection’.[[303]](#footnote-303) This observation is particularly real for the criminal and administrative law. However, putting the issue this way, − the legal personhood gives only capacity to act and the child in prenatal stage does not have and does not need this capacity − misses the point.

#### 2.2.2.1. The absolute right to be recognised as person before the law

The very right to be recognised as person before the law is one of the few human rights which are absolute. It is enshrined in the Article 6 of the Universal Declaration of Human Rights and aims at protection from discrimination of all the members of human family. It is not disputed in this thesis that at the moment when the Universal Declaration of Human Rights was drafted it was not intended that Article 6 will cover children in prenatal stage. However, the overall spirit of human rights and the principle of non-discrimination prompt to the idea that all the members of human family, however small, must be entitled to human rights including the right to be recognised as a person before the law.

Protection by objective law inevitably resorts to *infans conceptus* in civil law with its conditional personhood − the child in prenatal stage is deemed person subject to a condition that she is subsequently born alive (and viable). The civil rights are not enforceable until the fact of live (and viable) birth takes place. Therefore, prenatally the child at best is treated and is often named as potential person. However, in law ‘there is a world of difference between potential and actual’.[[304]](#footnote-304) The central point here is that an ‘embryo is not only a potential human adult but is an actual human creature’.[[305]](#footnote-305) As Bohdana Osrovska has aptly pointed out, ‘[ц]е не потенційна людина, а людина з великим потенціалом’ (This is not a potential human, but a human with great potential).[[306]](#footnote-306) Treating children in prenatal stage as only potential persons conceptually compromises their value as actual human beings.

This fundamental drawback of the objective law approach is not only theoretical. In practice it imperils correct implementation of objective law aimed at protection of children in prenatal stage, as their legal status remains uncertain, the logic behind objective norms is unclear, and the threshold between protection and ignorance is too vague. A good example of this ambiguity is the Inter-American Human Rights System: although the Article 4(1) of the ACHR does provide outrightly for the protection of the right to life from the moment of conception, the I/A Court does not implement this provision in line with its initial purpose, which was to protect the right to life in all cases except lawful abortions and death penalty.[[307]](#footnote-307) In the I/A Court’s practice the right to life of children in prenatal stage is always disregarded even though the cases do not concern lawful abortions. This self-evident inconsistency constitutes unequal treatment without reasonable justification, which can be seen as prenatal discrimination.[[308]](#footnote-308) Those who are only objects of protection are more likely to be exposed to abuses than those who have the status of a subject.

#### 2.2.2.2. Cases where objective law is helpless

According to Petro Rabinovytch, ‘[у] державно-організованому суспільстві переважну частину своїх основних прав людина не зможе здійснювати, якщо вона не стане носієм суб’єктивного юридичного права’[[309]](#footnote-309) (in a state-organised society, a human will not be capable of realising the prevailing part of her fundamental rights if she does not become a bearer of a subjective legal right). Legal personhood does not equal protection by objective law plus capacity to act; it does equal ability to have rights plus capacity to act, as well as other elements in some legal systems. This is why newborn children who also lack capacity to act can be effectively represented by their legal representatives and/or competent authorities. Contrariwise, children while being in prenatal stage in most cases cannot be represented in civil legal relations because of lack of legal personhood. Sometimes such representation is not necessary because enforcement of a right can wait. For example, usually there is no urgency in acceptance of a gift. However, there are cases when the child in prenatal stage needs subjective civil rights which are enforceable *during* prenatal period.

Such need can arise as regards the paternal rights or responsibilities. It is not always true that ‘puissance paternelle suppose pour s’exercer que l’enfant soit né’[[310]](#footnote-310) (paternal powers presupposes in order to be exercised that the child is born), as the child requires parental care not only after birth, but during prenatal development as well. In particular, prenatally the child might require medical treatment, such as screening, medications or surgery. In the absence of legal personhood of her child, the pregnant woman cannot recover the one-half of foetal treatment costs from the child’s father because his paternal responsibilities have not yet arisen. In the countries where children in prenatal stage are protected by objective law in a relatively sophisticated way the mother can probably recover such costs from the child’s father already after the child is born alive (and viable). However, the financial burden on mother is not only disproportionate, but also might turn out to be exorbitant. If the child’s mother is incapable of paying for timely medical treatment, the child will suffer from consequences or even die. Furthermore, in the event that the child is not born alive (and viable), the mother will not be entitled to reimbursement of the expenditures for the medical treatment of her child in prenatal stage, as if such child never existed. In the USA, however, fathers are obliged to pay prenatal support even in those states where children in prenatal stage are not recognised as persons before the law.[[311]](#footnote-311)

Whenever the child in prenatal stage becomes a patient he needs subjective patient rights in order to be protected from non-professional medical treatment. Even where the objective criminal and civil laws allow for holding the medical practitioners responsible for their possible wrongdoings, civil liability as regards the harm caused to a child is always retrospective and hinges upon (viable) live birth. It must be said, however, that in France this problem is solved by the means of administrative law: the medical practitioners can be ordered to pay compensation, including the cases where the victim is a child in prenatal stage, regardless of the live birth.

Finally, as long as children in prenatal stage are only objects of protection and not subjects, they have no standing before the human rights courts. In order for an application to the ECtHR to be considered admissible, legal capacity of an applicant is not important; however, it must be filed by a physical person,[[312]](#footnote-312) and not just a human being. There were a number of cases considered by the Commission or the ECtHR where a father or a mother of a child in prenatal stage had been recognised as indirect victims,[[313]](#footnote-313) but it was never explicitly acknowledged that a child in prenatal stage, who actually had suffered from a violation, is a direct victim. The ECtHR takes into account the objective law when deciding on whether there was a violation or not. However, it is consistently cautious of its own qualification of a child in prenatal stage as a person within the meaning of ECtHR, leaving the issue to the discretion of the member states. Apparently this approach will remain unchanged unless and until there will be an emerging consensus between the Council of Europe (hereinafter – CoE) member states as regards the personhood of children in prenatal stage. In the Inter-American Human Rights system, despite the fact that ACHR expressly provides for protection of the right to life from the moment of conception, in practice this right cannot be defended before the I/A Court if a violation took place in prenatal period.[[314]](#footnote-314) It is evident that human rights arrived to be enjoyed by persons − human and legal, but not by all human beings.

## 2.3. Prenatal personhood

The subjective rights are always preceded by legal personhood.[[315]](#footnote-315) Although Aude Bertrand-Mirkovic herself suggested the notion of ‘future legal personhood’[[316]](#footnote-316) of the child in prenatal stage, she admitted that ‘mises à part les difficultés pratiques, on peut très bien imaginer un système juridique qui reconnaîtrait la personnalité juridique à l’enfant non né’[[317]](#footnote-317). As objective law can only partially meet the needs which arise when the rights of the child in prenatal stage are jeopardised, we should consider whether there can be any personhood in prenatal period and if yes, what it should be like.

### 2.3.1. The concept of personhood

It was already extensively explored in legal literature that human personhood and legal personhood is not the same. Legal personhood implies that a person is recognised as such by law, and it is not necessary that such person is human. Furthermore, being human does not automatically mean recognition as a person before the law.

#### 2.3.1.1. Legal personhood

Obtaining a certain range of qualities is not sufficient to count as a person before the law, because ‘[l]’individu n’est sujet de droit que si le droit le dit’[[318]](#footnote-318) (individual is not a subject of law only the law says otherwise). Conventionality of legal personhood thus stems from the will of majority. The latter, personified in legislative authorities, decides who shall be recognised as a person before the law. At the heart of the concept of legal personhood in any legal system is the fact that it is synthetic, as it is a purely intellectual construction. Nathalie Massager observed:

C’est au législateur qu’incombe la délicate mission de déterminer souverainement à quels êtres il octroie l’aptitude à acquérir des droits et des obligations, et à quels êtres il la refuse. La personnalité juridique est donc un « don de la loi ».[[319]](#footnote-319)

Legal personhood usually even does not have a definition in legislative acts. Aude Bertrand-Mirkovic assumed that this is because legal personhood is an evolutive concept: ‘[i]l n’y a pas de définition légale de la personnalité juridique, ce qui se comprend puisque l’ émergence de cette notion comme concept juridique a été, ... le fruit d’une evolution progressive’[[320]](#footnote-320). Indeed, the range of beings and entities which are recognised as persons before the law is gradually increasing. Dmytro Gudyma noticed trends towards expansion of a concept “subject of law” by the means of inclusion of animals, robots and assignment of some rights to deceased people.[[321]](#footnote-321) A recent development, by way of example, is recognition of dolphins as non-human persons in India.[[322]](#footnote-322)

Another important dimension of legal personhood is that it is divisible. Aude Bertrand Mirkovic assumed that although legal personhood can theoretically vary worldwide, in general it has two elements: ‘la capacité de jouissance et la capacité d’agir en justice’[[323]](#footnote-323). In a similar vein, Nathalie Massager observed:

On distinge traditionnellement la *capacité de droit*, ou capacité de joissance, qui est l’aptitude a devenir titulaire de droits subjectifs, et la *capacité de fait*, ou capacité d’exercice, qui est l’aptitude a pouvoir exercer personallement et valablement les droits dont il est titulaire.[[324]](#footnote-324)

In some legal systems, such as Ukrainian, Russian, German etc., legal personhood is traditionally considered to have three components: ability to have rights and responsibilities, capacity to act and ability to bear responsibility for wrongdoings. In most cases ability to be responsible for wrongs keeps up with capacity to act, that is, a person with capacity to act will be responsible for wrongs. In any event, similarly to other legal systems where legal personhood has two components, only ability to have or to enjoy rights is a necessary prerequisite to count as a subject endowed with subjective rights:

Правоздатність лише підтверджує, що дана особа дійсно є суб’єктом права, що вона може мати певні права, гарантовані державним захистом. … Що ж до суб’єктивних прав правоздатність виступає як їх передумова, як абстрактна … можливість бути суб'єктом цих прав, що визнані і допущені об'єктивним правом для даного виду суб'єктів.[[325]](#footnote-325)

All subjects of law have ability to enjoy rights, but not all of them have capacity to act and ability to bear responsibility for wrongs. If someone or something falling into category of legal subjects lacks legal capacity and/or ability to be responsible for wrongs, s/he still will be recognised as a person before the law.

Finally, legal personhood is variable. Abstract ability to have rights does not automatically entail ability to have all rights and the equal scope thereof. Children do not have same rights as adults, legal entities do not have same rights as human persons, and dolphins in India do not have same rights as physical human persons and legal entities. Regulations of the range of subjects endowed with this or that right and variation of its scope depending on the subject’s special situation are far from exceptional. Legislator decides which categories of subjects can be endowed with which rights, and can limit exercise of some subjective rights where it is justified.

#### 2.3.1.2. Human personhood, human beinghood, human rights

Whereas legal personhood means being a person in the eyes of law, human personhood is autonomous and does not require legal appraisal. We can well imagine a human person not being recognised as a person before the law, especially when referring to historical examples, such as slavery. Nowadays all born human beings must be recognised as persons before the law regardless of other criteria. However, does being human automatically entail human personhood? Is it conditional or absolute?

Aude Bertrand-Mirkovic compartmentalised notions ‘legal person’ (in the sense of a person-in-law, *personne juridique*), ‘human person’ and ‘human being’. She found that ‘la personnalité ne se limite pas a la personnalité juridique’.[[326]](#footnote-326) Her other important finding was that all human beings are human persons, that is, that human personhood is absolute. She distinguished 4 aspects of personhood: physical, psychical, moral and ontological[[327]](#footnote-327) and came to a conclusion that only dignity is the quality that makes human being a human person[[328]](#footnote-328).

The intent behind her fundamental research could be that human rights must be extended to all humans without requirement of them being recognised as subjects of law.[[329]](#footnote-329) However, the reality is that these are subjects of law who are entitled with human rights, even if such subjects of law are not human persons but are legal entities or other non-human persons.[[330]](#footnote-330) Not being human, but being a subject is law is what required for a being to be endowed with human rights.

Admittedly, inference made by Aude Bertrand-Mirkovic that from the moment of fertilisation all human beings are human persons is not indisputable. A person with other mindset would quite possibly come to other conclusion. For example, Suliman M.K. Ibrahim studied this issue from the Islamic perspective and concluded, that in Islam the nature of human being is dualistic, comprising of two elements − body and soul.[[331]](#footnote-331) As the prevailing view in Islam is that ensoulment is delayed, that is, it happens not at conception but later, approximately in the middle of prenatal development, before that moment, from the Islamic perspective, the child in prenatal stage is not a human being and has an interim status.[[332]](#footnote-332) However, starting from the moment of ensoulment, which in Islamic belief system happens around the 20th week of gestational development, the child in prenatal stage becomes a human being and a full-fledged human person.[[333]](#footnote-333) Thus from the Islamic perspective human personhood is also absolute, meaning that it does not hinge on any condition and is inherent in all human beings. However, the starting point where being is started to be considered human is ensoulment and not fertilisation.

As it was considered in 2.1.1., biologically human life starts from fertilisation. Consequently, from this moment we are definitely dealing with a human being in biological sense. In general and apart from Islamic perspective, this fact is not being contested. What can indeed be and is contested is whether being human is sufficient to count as a human person. Personhood, separated from its legal meaning, can be attached to some developmental landmark, most commonly consciousness. It was, however, already revealed in 2.1.2.5. that consciousness is a quality that must be more pertinently linked to capacity rather than to personhood.

In any event, choosing any quality as decisive in the matter of attribution of personhood to a human being is always subject to a certain degree of arbitrariness. It is sufficient to admit that human being *can* be seen as human person from the moment of fertilisation for the sake of proper protection.

### 2.3.2. Extension of legal personhood to prenatal stage

We have already found that human being is most generally considered as such from the moment of fertilisation and can be seen as human person. We have also found in 2.2.2. that protection by objective law has deficiencies, which are few but fundamental, and that recognition as a person before the law would be substantial for proper legal protection of the child in prenatal stage. In 2.3.1. it was recalled that legal personhood is conferred by positive law based on the political will to do so, and that legal personhood is divisible: to count as person before the law it is sufficient to be recognised able to enjoy rights; legal capacity or ability to be held responsible for wrongs are only auxiliary. Finally, the number of rights and their scope can vary depending on a particular situation of the subject of law. In light of these findings, it is not surprising that some states have already pioneered recognition of legal personhood in prenatal period.

#### 2.3.2.1. States which have pioneered personhood prenatally (selected examples)

There are a number of states which officially declare that they recognise legal personhood of children in prenatal stage. However, this does not mean automatically that children in prenatal stage in these states are given a status of a full-fledged natural person in civil law, nor does it always mean a total ban of abortions.

Article 1 of the Constitution of El Salvador provides that the state recognises as a human person every human being from the moment of conception.[[334]](#footnote-334) The Articles 3 and 5 of the Law on Integral Protection of Children and Adolescents define conception as a starting moment for children’s personhood and establish unequivocally that all children, including those in prenatal stage, are full subjects of rights.[[335]](#footnote-335) In line with these provisions, the Article 52 of the Civil Code of the Republic of El Salvador establishes that all the individuals of human species fall into the category of natural persons.[[336]](#footnote-336) There is no requirement of being born to qualify as a natural person; however, it is not specified expressly that children in prenatal stage are also included into this category. Further Civil Code provisions indicate that civil law status of children in prenatal stage in El Salvador is still not identical to that of already born persons: legal existence is said to begin at birth with separation from the mother’s body and in case of the child’s death before that moment it shall be deemed that such child has never existed (Article 72). The law, however, provides for a number of protective measures aimed at guaranteeing rights of the child in prenatal stage, with a particular emphasis on the right to life and the right to health. By way of example, Article 73 of the Civil Code of the Republic of El Salvador empowers a judge to take measures which s/he deems appropriate for protection of the existence of a child in prenatal stage whenever s/he believes it is put in danger. Another example of provision which benefit child during prenatal stage and not only after birth is the positive obligation of the state, enshrined in the Article 17 of the Law on Integral Protection of Children and Adolescents, to provide free health and psychological care to pregnant women and their children who are in special health or poverty conditions.[[337]](#footnote-337) All types of abortions, incitement to abortion and causing injuries to a child in prenatal stage in El Salvador are prohibited and criminalised. However, a woman is not criminally responsible for causing miscarriage to herself, nor is she responsible for negligently causing injuries to her child in prenatal stage.[[338]](#footnote-338)

In Peru children in prenatal stage are also recognised as persons before the law. The Article 2(1) of the Political Constitution of Peru proclaims outright that ‘[t]he unborn child is a rights-bearing subject in all cases that benefit him’.[[339]](#footnote-339) However, in civil matters Peruvian legislator also resorts to the *infans conceptus* fiction: the Article 1 of the Peruvian Civil Code establishes that personality is determined by birth, whereas the unborn is said to be born always when this is favourable to him, provided that he is born alive.[[340]](#footnote-340) The Penal Code of Peru contains a list of crimes related to different types of abortions, a woman herself also can be held criminally culpable for self-induced abortion or consenting to abortion performed on her by someone else. However, there is an exception for therapeutic abortion which is not punishable when it is the only means to save the pregnant woman’s life or to avoid serious harm to her health.[[341]](#footnote-341) In case of rape or non-consensual artificial insemination out of wedlock, as well as in case of the child’s malformation abortion is considered a less serious crime punished by custodial sentence of no more than three months.[[342]](#footnote-342)

In the case of *Parrillo v. Italy*, considered by the ECtHR in 2011, Italian government observed ‘that in Italian legal system the human embryo was considered as a subject of law entitled to the respect due to human dignity’.[[343]](#footnote-343) The Constitution of the Italian Republic,[[344]](#footnote-344) however, does not contain any special provisions regarding children in prenatal stage. The Article 1 of the Italian Civil Code provides that legal personhood is acquired from the moment of birth, whereas rights recognised in favour of the conceived children are subordinated to the event of birth.[[345]](#footnote-345) Termination of pregnancy in Italy is legal since 1978. Although the Article 1 of the Law No. 194 of 1978 “Rules for the social protection of maternity and on voluntary termination of pregnancy” establishes, *inter alia*, that state protects human life from its beginning,[[346]](#footnote-346) this was nothing more than objective law protection. Italian legal system began to tend to recognition of a child in prenatal stage as a rights-bearing subject with adoption of the law “Rules on medically assisted procreation” in 2004, as its Article 1 names the conceived child among those rights-bearing subjects who are involved in medically assisted procreation.[[347]](#footnote-347) Several years thereafter the Italian Supreme Court of Cassation delivered a judgment with the following clarification:

Il concepito, pur non avendo una piena capacità giuridica, è comunque un soggetto di diritto, perché titolare di molteplici interessi personali riconosciuti dall'ordinamento sia nazionale che sopranazionale, quali il diritto alla vita, alla salute, all'onore, all'identità personale, a nascere sano; diritti questi rispetto ai quali l'avverarsi della condicio iuris della nascita è condizione imprescindibile per la loro azionabilità in giudizio ai fini risarcitori. (The conceived child, although does not have full legal capacity, is in any case a subject of law, because he is the holder of multiple personal interests recognised by both national and supranational law, such as the right to life, health, honor, personal identity, to be born healthy; these rights with respect to which the fulfillment of the *condicio iuris* of the birth is an essential condition for their enforceability in court for compensation purposes.)[[348]](#footnote-348)

The first inference which can be drawn from this explanation of the Italian Supreme Court of Cassation is that the child in prenatal stage in Italian legal system is indeed a subject of law, meaning subject of rights or possessor of subjective rights. The other inference is that the child in prenatal stage in the said legal system does not possess full legal personhood (term “legal capacity” was used in this sense), but this does not prevent him from qualifying as a subject of law. The Italian Supreme Court of Cassation has thus articulated a refined observation that not possessing full personhood is not an impediment to possessing subjective rights, particularly when it comes to a child in prenatal stage.

In Poland, with adoption of the Family Planning, Human Embryo Protection and Conditions of Permissibility of Abortion Act in 1993,[[349]](#footnote-349) the Article 8 of the Civil Code was supplemented with § 2, providing that ‘conceived child shall also have legal capacity; however, it shall enjoy its property rights and obligations provided it is born alive’.[[350]](#footnote-350) It can be said that in this provision what was meant is not exactly legal capacity (*дієздатність* in the Ukrainian language), but legal personhood, as it deals with ability to enjoy non-property rights starting from the moment of conception. The ability to enjoy property rights was left conditional in terms of *infans conceptus* rule. However, this provision was repealed several years later[[351]](#footnote-351) probably due to political reasons rather than theoretical or practical considerations.[[352]](#footnote-352)

#### 2.3.2.2. Prejudices related to recognition of personhood prenatally

However promising the examples of states which expressly recognise a child in prenatal stage as a subject of law and not merely an object of protection, admittedly they are few. There can be distinguished two major reasons that discourage such recognition and seriously impede further elaboration of legal personhood of the child in prenatal stage both in theory and in practice.

The first and the most substantial reason is that the issue of the legal status of the child in prenatal stage is strongly associated with abortion and is still often regarded through it. Given the sensitivity of the latter, the legal status of the child in prenatal stage is not being elaborated in order not to impede exercise of lawful abortions.[[353]](#footnote-353) However, as we have seen in 2.3.2.1., legal personhood of the child in prenatal stage does not impede lawful abortions if majority is of the opinion that abortions should be legal. Aude Bertrand-Mirkovic rightly observed in this regard that this approach is very reductionist,[[354]](#footnote-354) whereas avoidance to qualify the child in prenatal stage in law places him in a situation of non-law.[[355]](#footnote-355) The variety of relationships arising as regards the child in prenatal stage and that of possible violations of his rights goes far beyond the question of abortion and can include issues of health care, maintenance, filiation, inheritance, gifts, protection at workplace, traffic accidents, third party assaults, protection of abuses in reproductive technologies etc. Sometimes ensuring a right of a child in prenatal stage indeed requires that another right of his mother must be limited; in other words, there is a conflict of rights. At the same time, there is a huge variety of cases where mother’s rights are not compromised but to the contrary, are often insured through protection of the rights of her child in prenatal stage. The fear to impede abortions by the means of establishing adequate legal framework for the child in prenatal stage is thus nothing but a prejudice which does not have any rational grounds behind it.

Another considerable disincentive from proper legal qualification of the child in prenatal stage is convenience and economy; in other words, utilitarian or practical considerations. Recognition of an additional subject of rights who does need to be cared for imposes obligations on those who recognise. When society is ignoring this category of children, the only ones who can provide necessary protection and care are the parents, who are free to decide, to execute their absolute power, and to bear all the costs. If the parents are not willing to bear the costs, the latter are put on the shoulders of the child, who is of course the least capable of bearing them. The costs incurred in prenatal period in any event belong to humanity. These children are not aliens who came from another planet and require mercy of our civilisation, *they are we*. Whilst legal science is concerned with status of dolphins and artificial intelligence, it seems pertinent to firstly qualify in law and protect the rights of our own children.

### 2.3.3. Prenatal personhood is personhood of a particular type

We have observed that there exist various objective law regulations and even explicit recognition of personhood of the child in prenatal stage, which still lack theoretical conceptualisation. In practice, in some legal systems there exists legal personhood of a particular type, and in other legal systems this personhood is not yet legally recognised but still it is human beinghood which can be seen as human personhood. The objective law protects such human personhood without granting it status of legal personhood due to prejudices described in 2.3.2.2.

It can be said that legal personhood is a destination point, which can be achieved through objective law protection. It seems unrealistic that a state which does not have any protective norms in its legal system as regards some being suddenly decides to confer legal personhood on him granting him a quality of a subject of law. It is much more probable and reflecting the current state of affairs that society, by means of development and sophistication of its legal system, gradually elaborates and expands protective norms and arrives at a decision that this came to be legal personhood.

Such personhood cannot be named “foetal personhood” due to the reasons similar to those described in 1.1.4. More appropriately it must be called “prenatal personhood”, as it covers all the prenatal period starting from fertilisation and ending with birth. At the heart of the idea of prenatal personhood and prenatal rights based on it[[356]](#footnote-356) is the key feature of prenatal period, − possible conflict of rights of a pregnant woman with those of her child in prenatal stage. It is thus suggested to weigh each right of the child in prenatal stage against the possibly conflicting rights of her mother in order to avoid unjustified interference with maternal rights.[[357]](#footnote-357) It was also observed that viability is a key landmark in respect of degree of absoluteness of some rights with which the child in prenatal stage can be endowed.[[358]](#footnote-358)

Currently there can be articulated additional peculiarities of prenatal personhood.

#### 2.3.3.1. Prenatal personhood does not equal full legal personhood

Prenatal personhood will always lack legal capacity to act, as well as capacity to bear responsibility for wrongs. Furthermore, the range and scope of rights that can be enjoyed by the child in prenatal stage is different from that of an already born human child, all the more from human adult.

In regard to the CRC, a number of rights enshrined therein are not relevant in prenatal stage, e.g.: the right to seek and impart information (Article 13), the freedom to manifest one’s religion or beliefs (Article 14), freedoms of association and that of peaceful assembly (Article 15), the freedom of arbitrary or unlawful interference with the child’s correspondence (Article 16), the right to be protected from work of deleterious nature (Article 32) or the right to protection from sexual exploitation (Article 34).

However, there is a considerable range of rights enshrined in the CRC, which can be extended very appropriately to prenatal stage. These include not only the right to life (Article 6), but also the right to preserve identity (Article 7), to certain extent the right to be not separated from parents against their will (Article 9), the right to be protected from illicit transfer and non-return abroad (Article 11), the right to receive information (Article 13), the right to be cared by own and both parents (Articles 7 and 18), the right to protection from violence, injury, abuse, neglect, negligent treatment, maltreatment or exploitation (Article 19), the right of a disabled child to special care (Article 23), the right to health care (Article 24) etc.

One of the key challenges which arise when it comes to articulating legal personhood of children in prenatal stage and seriously contribute to the fact that prenatal personhood is not full, is the issue of civil registration.

#### 2.3.3.2. Civil registration

In order to effectuate civil rights, even through legal representative, one needs civil registration. How can it be ensured in practice, when the child is not born yet? We have seen in 2.3.2.1. that even those states which officially recognise children in prenatal stage as persons before the law do not provide for their civil registration and thus have to resort to *infans conceptus* rule when it comes to property rights, including compensation purposes.

In theory, however, civil registration is possible. If birth is followed by civil registration of birth, why fertilisation or implantation cannot be followed by registration of a special civil status act? It was earlier proposed to introduce civil registration of pregnancy in Ukraine for the sake of solving a number of problems related to inheritance in notarial practice, which can be made as soon as the fact of pregnancy is first established by a medical institution.[[359]](#footnote-359) The French author Xavier Labbée suggested creating a special registry of prenatal existence to be maintained by local self-government, which shall be filled by data declared voluntarily by the parents starting from the 10th week of gestation.[[360]](#footnote-360) This idea was upheld by Belgian author Nathalie Massager, who only suggested making such declaration obligatory and shifting the timing to the end of 12th week of gestation for Belgium, because abortion on demand in Belgium is allowed up to that moment.[[361]](#footnote-361)

Civil registration would definitely make legal status of children in prenatal stage more certain and would enable them to be full-fledged bearers of property rights before the moment of birth. However, currently there is no right to have one’s existence registered. The Convention on the Rights of the Child in its Article 7 only enshrines the right to be registered immediately after birth. Registration of prenatal existence thus goes beyond the now-existing children’s rights framework. Other constraints include costs of civil registration to be borne by society, and interference with the parental right to privacy, especially that of a mother.

Although right to privacy is not absolute and can be limited, such limitation must be properly justified. In the ECtHR’s practice there exist the three tests which are used once it is established that there was an interference with a relative right, e.g. the right to privacy, enshrined in the Article 8 of the European Convention on Human Rights. Firstly the ECtHR analyses whether the interference was in accordance with the law; in case of positive answer the ECtHR proceeds to analyse whether the interference was in pursuance of a legitimate aim; and finally − whether it was necessary in a democratic society, that is, whether interference was proportionate to the declared aim.[[362]](#footnote-362) Supposedly, civil registration of prenatal existence can be recognised as established for the protection of rights and freedoms of others within the meaning of Article 8(2). This aim can be considered to be legitimate, provided that children in prenatal stage are outrightly recognised as subject of rights within the national legal system, if they are supposed to count as “others” within the meaning of Article 8(2). However, the most challenging here is the third test as regards proportionality of interference: there should be a pressing need to interfere with the mother’s privacy for the sake of protection of rights of her child in prenatal stage.

Admittedly, under the current circumstances in majority of legal systems legal protection of children in prenatal stage can be improved in a variety of alternative ways that do not require civil registration. What is more important, contrary to popular belief,[[363]](#footnote-363) civil registration is suppletive (non-mandatory) for legal personhood. This is well demonstrated by the states who have already pioneered recognition of legal personhood in prenatal stage, none of which having provided civil registration of prenatal existence. Even if the theoretical framework of legal personhood within a legal system still does not envisage possibility of personhood without civil registration, there can be developed new theoretical constructs for prenatal personhood as a concept of non-full personhood of a particular type.

Although civil registration is suppletive for prenatal personhood, there rests a question of how one shall define the beginning of prenatal existence for legal purposes.

#### 2.3.3.3. Defining the beginning

When fertilisation happens in natural conditions and not *in vitro*, the exact moment of the beginning of prenatal existence cannot be defined with certainty. The very fact that fertilisation took place can be established only retrospectively, the earliest with completion of the pre-embryonic stage.[[364]](#footnote-364)

The moment when prenatal existence starts *in utero* is uncertain − this is the reality of the day. If it cannot be known whether there exists a child in pre-embryonic stage, the degree of risks of malformations induced in this stage cannot justify any interference with the woman’s privacy. In the event of an early-term miscarriage caused by a car accident, when both the fact of fertilisation and that of miscarriage remain unnoticed for a woman, definitely the negligent driver cannot be held responsible for this wrong. In such cases prenatal existence remains unnoticed by law, although this does not deny the existence as such and should not render legally irrelevant all the rest period of prenatal life which is well noticeable.

There are, however, rare cases when it may be necessary to determine with a legally valid precision when the moment of fertilisation took place. For instance, Ukrainian civil law provides that only a child conceived before the death of a testator can be an heir, given that this child is born alive afterwards. However, Ukrainian law does not provide any guidance in respect of determination of the moment of conception. In some legal systems this issue is solved by the means of legally established presumption. For example, Article 311 of the French Civil Code establishes a presumption that conception is considered to take place at some moment in-between the 300th and the 180th days, depending on what is in the child’s interests, whilst evidence to the contrary are admissible to overcome this presumption.[[365]](#footnote-365) In a quite similar way, the Article 74 of the Civil code of El Salvador provides that it is presumed by law that the time of conception has preceded the birth not less than 180 days and not more than 300 days, counted backwards from midnight of the day of birth.[[366]](#footnote-366) It appears that in rare cases when the moment of fertilisation is legally relevant and unclear, such presumption can solve the problem.

#### 2.3.3.4. Interrelations with maternal rights

Starting from the moment of fertilisation or, in case of fertilisation *in vitro*, − from the moment of implantation, and up to the moment of birth the child in prenatal stage is located within the mother’s body and is totally dependent on her. Pregnancy itself is often seen as sacrifice made by a woman for the sake of procreation. Thus endowing a child in prenatal stage with any right can potentially limit some right(s) of his mother, who is already a full-fledged subject of law. It is therefore appropriate to make an analysis of an influence on the mother’s rights each time when issues related to rights of the child in prenatal stages are being decided.

In many cases, however, recognition of a right of the child in prenatal stage does not compromise maternal rights but can even ensure them. These include protection from third party assaults or negligent injuries, including those received in car accidents, rights of a patient, protection from incitement and/or coercion to abortion, right to freedom from torture, right to freedom from commercial use of foetal materials, right to protection from detrimental effect of employment conditions during pregnancy, environmental rights, rights to be an heir, to receive gifts, alimony, compensation and maintenance.

When it comes to possible limitation of maternal rights, articulation of prenatal right becomes more complicated. Such difficulty is typical for any conflict of rights, when it is necessary to find a fair balance between them. First and foremost, in most jurisdictions, including the European Human Rights System, right to life of the pregnant woman always takes prevalence in this maternal-prenatal relationship. Institutions of the ECtHR put it clear that the right to life of an already born person cannot be subjected to an implied limitation, namely protection of the right to life of a child in prenatal stage.[[367]](#footnote-367) Interestingly, the religious dimension of the issue is very close to this approach: the world’s major religions unanimously uphold the view that this is the mother’s life which must be saved should a critical situation arise.[[368]](#footnote-368)

Apart from the “right to life” issue, there are no other generally agreed-upon guidelines specific to maternal-prenatal relationship. However, any interference with the mother’s rights must be properly justified; within the European Human Rights System pertinence of interference can be evaluated by the means of three tests employed by the ECtHR.[[369]](#footnote-369)

#### 2.3.3.5. Interrelations with paternal rights

Paternal-prenatal relationship is not a common discourse, as up to the moment of birth all the pregnancy-related issues are considered to fall solely within the woman’s authority. The only exception is the pre-implantation period in the event of fertilisation *in vitro*.[[370]](#footnote-370)

However, in human rights law there is a principle that both parents have common responsibilities for the upbringing and development of the child.[[371]](#footnote-371) Furthermore, if there are responsibilities on the part of the child’s father, there can be some rights on his part as well. Most remarkably, when the father is not endowed with any parental rights as regards the child in prenatal stage, he is also unburdened by any responsibilities, such as alimony or compensation of expenses.

From the perspective of child’s best interests, increased legal presence of the father in the child’s prenatal life would serve as a balancing factor. For example, in numerous legal systems a father participates in pre-abortion counseling. Sometimes it is simply suggested to a woman to engage the father into the procedure, whereas in some countries his presence is obligatory. In Turkey artificial termination of pregnancy cannot be performed without a written consent of both spouses, if a woman is in registered wedlock.[[372]](#footnote-372)

The extent to which the father of the child in prenatal stage is legally engaged in childbearing and care can vary from jurisdiction to jurisdiction due to cultural, economical, religious or other reasons. However, assessment of the rights of the child in prenatal stage shall include interrelations with paternal, and not only maternal, rights.

#### 2.3.3.6. Regard to legally relevant landmarks of prenatal development

Human being in prenatal stage develops with a tremendous speed, incomparable to any subsequent life stages. There indeed is difference between the child at the very beginning of this way and the one at the very end, as well as between an embryo which is already implanted into the uterus and the one who is not, between the viable child and the one who did not attain the age of viability etc. The most important and legally relevant landmarks were considered in 2.1.2.

In general, the longer is the prenatal existence, the wider is the range of rights attained by the child and the greater is their scope. Although this principle is usually not expressly articulated, it is implied. In the case of *Costa and Pavan v. Italy*, considered by the ECtHR in 2010, the reason why the interference with the applicants’ right to privacy was considered disproportionate, was the fact that it has not been allowed in Italy make a pre-implantation genetic diagnosis to find out whether an embryo is affected with cystic fibrosis or not, but it was allowed to make a late abortion because of that disease, although the foetus is developed far further at that moment.[[373]](#footnote-373)

## Conclusion of the Section 2

Beginning of human life should not be confused with beginning of legal personhood. Whereas human life biologically begins at fertilisation, in majority of jurisdictions legal personhood starts with live birth. Such landmarks of prenatal development as implantation (nidation), completion of the pre-embryonic stage, beginning of heartbeat, attaining viability or attaining consciousness are not points when life of a human individual starts, but are sub-stages of prenatal stage which are all legally relevant. Human life thus must be considered from the perspective of continuity with appropriate regard to its legally relevant stages and sub-stages.

Child in prenatal stage as a human being can be also seen as a human person; from the moment of fertilisation the child can be protected by objective law without recognition of such child as a person before the law. In criminal and administrative law this protection does not require legal personhood and can be exercised fully in accordance with the legislator’s will. In civil law enforcement of property rights before the moment when legal personhood starts is deemed problematic. Thus legislators in multiple jurisdictions refer to a fiction − *infans conceptus* rule, which subordinates the enforcement of property rights to the event of live (and viable) birth. Combination of these instruments can elevate legal protection of children in prenatal stage to a rather sophisticated level still without recognising a child in prenatal stage as a person before the law, subject of law and bearer of subjective rights.

Protection of objective law, however, has its limits, or deficiencies. First and foremost, it leaves the child in prenatal stage vulnerable in front of possible violations and disregard. The right to be recognised as a person before the law is itself an absolute human right aimed at protection from discrimination. When the law does not recognise the quality of a person, the value of a human being is seriously compromised and often ignored.

Another reason for recognition of personhood prenatally is that there arise situations where civil property rights need to be enforceable during prenatal period, and not only upon live birth. Even more importantly, quality of being human is not sufficient to have a standing before human rights courts and/or to be recognised as a victim of a violation. It is not a quality of human being which is needed to enjoy subjective human rights and protection of a human rights system, but a quality of a subject of law.

Legal personhood, in its turn, is a purely intellectual construction, “don de la loi”, which is also evolutive. This is the legislator who decides whom to endow with legal personhood. In addition, legal personhood is divisible: it is considered to comprise of ability to have (enjoy) rights and capacity to act; sometimes there are other capacities distinguished, such as capacity to bear responsibility for wrongs. To count as a person before the law it is sufficient to have an abstract ability to have (enjoy) rights, whereas other components are only auxiliary. The ability to have or enjoy rights is also not universal − the law attaches different rights of varied scope to different groups of subjects depending on their particular situations.

Consequently, legal personhood can be extended to children in prenatal stage. There are examples of states which have already pioneered official recognition of children in prenatal stage as persons before the law. This recognition does not necessarily entail prohibition of all types of abortions. Furthermore, none of the studied states have arrived to rejection of *infans conceptus* rule. The enforcement of civil property rights is still subordinated to the event of live birth. The misgivings that recognition of a child in prenatal stage as a person before the law always implies total ban of abortions and that such recognition is not practical are nothing more than prejudices.

Prenatal personhood is not likely to be recognised by law all of a sudden. It is a destination point, which can be achieved through the sophistication of protection of the rights of children in prenatal stage by objective law. Prenatal personhood is not full personhood because: 1) it lacks capacity to act and to bear responsibility for wrongs; 2) the range and scope of subjective rights of a child in prenatal stage is likely to be smaller comparing to rights of already born children; 3) civil registration of prenatal existence, although theoretically possible, goes beyond the existing children’s rights framework and is likely to be not necessary in democratic society in the current circumstances, whereas issues of the beginning of prenatal existence can be solved by the means of rebuttable presumptions. Prenatal personhood has other particularities, such as: a) the fact that it prenatal rights must be articulated through interrelations with the rights of a pregnant woman; b) concern must be given to the interrelations of prenatal rights with those of a father; c) a due regard must be given to legally relevant landmarks of prenatal development.

# SECTION 3. SUGGESTED BASELINE PROTECTION OF THE RIGHTS OF THE CHILD IN PRENATAL STAGE (PRENATAL RIGHTS)

As it was found in the Section 2, numerous rights can be protected by the objective law. In the event that the density of objective law norms aiming at protection of children in prenatal stage persistently increases within a legal system, it may be eventually regarded that children in prenatal stage have arrived to be subjects of law within such a legal system. It is thus appropriate to establish objective law provisions in favour of children in prenatal stage even before and long before they are granted a status of a subject of law.

The scope of prenatal rights can well differ from jurisdiction to jurisdiction. However, certain scope of legal prenatal protection can be suggested as a baseline. The idea behind it is that some of the prenatal rights can potentially conflict with the rights of a pregnant woman, whereas the others cannot or even can reinforce the rights of a woman. The latter can be suggested as a baseline protection.

This, however, does not mean that those prenatal rights which can conflict with the rights of a pregnant mother do not deserve consideration and protection. The mere existence of a conflict or its potentiality should not deny the rights of a weaker party. However, one should not start from conflicting rights.

Firstly, there is no single state which has already established all the protective measures suggested here as the baseline protection. Why should protection of children in prenatal stage start with compromising women’s rights, while there are a lot of opportunities to support women and their children altogether? When the rights of women are protected better they may feel less vulnerable and more open to better protection of the rights of their children, maybe even at the cost of their own interests.

Secondly, the conflict of rights is used to be solved by the means of balancing. Sara Fredman has aptly noted, although in a somewhat different context, that ‘the right itself should be clearly established before it is balanced against other rights and interests’.[[374]](#footnote-374) Following this logic, balancing is more appropriate when the prenatal rights are clearly established, that is, when legal personhood and subjective rights of children in prenatal stage are recognised. For the time being, only a few states have already done this.

The baseline protection suggested in this Section is not aimed to fit a particular country. Instead, it can be used in any legal system in order to identify the possible ways of smooth improvement of the legal situation of children in prenatal stage. It can also be used at international level in the event that there will be a political will to reach agreement on protection of prenatal rights.

## 3.1. Prenatal right to human dignity

Human dignity is a multi-dimensional concept. Its magnitude, accrued by historical background and current plurality of theoretical views and practical applications, allows for diverse interpretations. The very special place of human dignity in the human rights constellation results from the fact that human dignity is seen not only as a right, but also as a value[[375]](#footnote-375) and, perhaps even more importantly, as a source and foundation of all human rights, whereas respect to human dignity is a ‘baseline universal standard’.[[376]](#footnote-376) Because of this other human rights are used to be interpreted in light of the dignity concept and are linked to it.

According to Sandra Fredman, dignity understood as recognition of all individuals due to their basic humanity constitutes one of the facets of equality.[[377]](#footnote-377) Equality is thus linked directly to humanity, without a reference to legal personhood. Aude Betrand-Mirkovic made a thorough research of the concept of human dignity and different approaches to its understanding; she finally came to a conclusion that it is inherent to all human beings from the moment of fertilisation.[[378]](#footnote-378) The constitutional courts of Germany and Poland have interpreted constitutional provisions as regards human dignity as extending to prenatal period.[[379]](#footnote-379) Notwithstanding the fact that the notion of human dignity can be understood and applied rather loosely, it can be well interpreted as inherent to all human beings from the very biological beginning of their life, regardless of legal personhood.

### 3.1.1. Freedom from torture, inhuman and degrading treatment during abortion

The right to freedom from torture and inhuman treatment is absolute.[[380]](#footnote-380) Torture is prohibited by numerous international treaties such as ECHR, UN International Covenant on Civil and Political Rights (hereinafter – ICCPR), UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, and the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment. Prohibition of inhuman treatment is a universal standard.[[381]](#footnote-381)

In practice, the right to freedom from torture is not used to be extended to prenatal period. In *H. v. Norway* the applicant invoked Article 3 of the ECHR claiming that his 14-week foetus could have experienced pain during the abortion procedure, which constitutes inhuman treatment or torture. These claims were rejected as manifestly ill-founded: the applicant did not present any material that would prove that the foetus experienced pain.[[382]](#footnote-382) There were no further attempts to prove to the ECtHR torture or inhuman treatment of a foetus during abortion.

There is no uniform definition of torture or that of inhuman treatment. According to the Article 1 of UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, for the purposes of said Convention torture is:

[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[[383]](#footnote-383)

In the above definition, such purpose as “discrimination of any kind” could possibly be applied to children in prenatal stage,[[384]](#footnote-384) at least in theory. Following this logic, in order for suffering during abortion to be recognised as torture it must first be established in international law that children in prenatal stage are discriminated. Admittedly, the margin between recognition of prenatal discrimination and prohibition of abortion is too vague. In view of current political situation it is not likely that international law will go this far.

When it comes to jurisprudence of the ECtHR, the latter does not articulate the definition of torture or that of inhuman treatment. It has been only estimated in literature, that in order for treatment to amount to torture, it must constitute the intentional or deliberate infliction of severe mental or physical pain or suffering in the pursuit of gaining information, punishment or intimidation.[[385]](#footnote-385) Application of this definition to abortion reveals that it is dubious that a medical professional has intent to inflict pain or suffering on a child in prenatal stage. Furthermore, there is no special purpose in such infliction. Consequently, pain and suffering during abortion is not likely to amount to torture within the meaning of ECHR.

If it is not likely to be qualified as torture, can it be assessed as inhuman treatment? In the *Greek Case* the Commission evaluated that ‘the notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable.’[[386]](#footnote-386) The general principles of application of the Article 3 of the ECHR are that if ill-treatment is to fall within the scope of Article 3, it must attain the minimum level of severity, which is relative and depends on all the circumstances of the case. The ECtHR has previously held the treatment inhuman because it was: a) premeditated; and b) applied for hours in a stretch; and c) causing either actual bodily injury or intense physical or mental suffering. The purpose of ill-treatment, that is, whether it was intended to humiliate or debase the victim, is a factor that is taken into account by the ECtHR. However, the absence of such purpose does not automatically lead to a finding that there has been no ill-treatment under Article 3.[[387]](#footnote-387)

In light of the above, it is not possible to state with certainty whether ECtHR would find a violation of Article 3 in the child’s suffering during abortion. First of all, there is no evidence that a child in prenatal stage is pain-capable during the first trimester, when the bulk of abortions take place. As it was already noted in 2.1.2.5., the first electrical activity in brain happens, according to Suliman K. Ibrahim, at 20th week of gestation. In the latest bill aiming at protection of pain-capable children in prenatal stage, introduced in the US Senate in February 2020, extensive evidence has been given that child in prenatal stage is pain-capable far before birth, namely not later than 20 weeks after fertilisation.[[388]](#footnote-388) In medical literature on foetal surgery it is stated that at the gestational age of 23 weeks foetus is pain-capable, so during surgical interventions anaesthesia is recommended.[[389]](#footnote-389) Later research identifies that a foetus needs to be anesthetised already from the 21st week of gestation.[[390]](#footnote-390) It is thus reasonable to assert that a child of the same gestational age can experience pain during abortion. The level of severity of such pain and its duration well depends on the abortion method. By way of example, the Ukrainian clinical protocol on interruption of pregnancy establishes that interruption of pregnancy in 2-nd trimester can be performed by the means of: a) medical abortion (with the use of mifepristone or misoprostol); b) method of dilatation and evacuation; c) other methods. Although it has provisions as regards the use of anaesthesia for a woman, it does not contain any information of anaesthetic effect on a foetus or desirability of such effect, nor does it contain any estimation of suffering caused to a child by different methods of late interruption of pregnancy.[[391]](#footnote-391) Accordingly, there is neither regard to the suffering of a pain-capable child, nor any attempt to prevent or, if not possible, to reduce unnecessary suffering. In order to meet the obligations under the Article 3 of the ECHR, as well as on compassionate grounds, it is necessary to reconsider the clinical protocols on interruption of pregnancy in the 2nd trimester.

### 3.1.2. Protection from commercial use of foetal tissues

In general, trafficking in human organs is prohibited in international law,[[392]](#footnote-392) as well as in national legislations of individual states. In France, the Penal Code protects human body and specifically prohibits industrial or commercial use of human embryos, as well as selling or buying human embryos.[[393]](#footnote-393) In Ukraine, trafficking in human beings as prohibited by the Article 149 of the Criminal Code also encompasses trafficking in human organs. However, it appears that said provision does not have any prenatal application. The Law of Ukraine “On the application of transplantation of anatomic materials ***to*** a human” does allow use of anatomical materials of dead human embryos and foetuses, which are called *foetal materials*.[[394]](#footnote-394) There is no prohibition of commercial use of foetal materials. However, the Criminal Code in its Article 143 prohibits actions called “Violation of the statutory procedure for transplantation of anatomical materials ***of*** a human”. Remarkably, it does not apply the terms “of a physical person”, nor “of a human person”, nor “of a subject of law”. Instead, it uses the term “human”, which includes, at least in theory, children in prenatal stage. The part 3 of the Article 143, however, already proscribes actions toward a ***person***, who was in a helpless state or was financially or otherwise dependant on the perpetrator. In the spirit of the above, it is clear that the Article 143 of the Criminal Code of Ukraine was not intended and cannot be applied as to prohibit violation of the statutory procedure for transplantation of foetal materials, as if they are not human. This, however, points to the fact that the need to protect children in prenatal stage was not raised in front of drafters of the said article, was not taken into account and was not considered by them.

Bohdana Ostrovska in her thesis tends to necessity of a total prohibition of the use of human foetal materials on international level.[[395]](#footnote-395) This inference tends to suggest that, at minimum, all kinds of possible use of human foetal materials can be unethical, and, at maximum, all of them are in fact commercial. This hypothesis can be a subject of further research. However, it is generally not contested that commercial use of human foetal materials should be prohibited.

### 3.1.3. Protection of the right to decent burial in case of stillbirth, non-viable birth, or abortion

In the event that a child dies prenatally or shortly after birth in most jurisdictions parent(s) who intend(s) to properly bury their child’s body face(s) difficulties with: a) obtaining of the child’s body; b) obtaining necessary permissions for performance of the burial. The relevant regulations are usually designed in such a way that does not consider children deceased prenatally, who did not yet become subjects of law. Notwithstanding the fact that parents are themselves interested in decent burial of their child, due to the lack of regulations realisation of this interest is nearly impossible or impossible.

The situation in France was considered thoroughly by Aude Bertrand-Mirkovic. She found that proper burial is obligatory when a child is born alive and died thereafter, and possible in case of stillbirth if a child’s gestational age is 180 days or more. For younger children in the ordinary course of events burial is not available, as legislation provides that their bodies shall be cremated at the expense of medical institutions. However, particular municipalities provide for possibility to bury children of less than 180 days at the cemeteries, although in practice realisation of burial is problematic for the parents.[[396]](#footnote-396)

In Ukraine issues of burial are regulated by the Law of Ukraine “On burial and funeral business”. The Article 6 of the said law stipulates that all the citizens are entitled to the right to burial. The provision does not correspond to the current state of affairs,[[397]](#footnote-397) because in practice this right pertains not only to citizens of Ukraine, but also to foreign citizens and stateless persons. The law does not contain provisions that would allow burial of a child deceased prenatally: the document which is the ground for organisation of burial is death certificate, which is not issued for stillborn children. In the event of perinatal death (of children of the gestational age starting from 22 full weeks), however, bylaws[[398]](#footnote-398) provide for possibility of burial, although in practice they are not enforced.[[399]](#footnote-399) It appears that procedure of burial of children deceased prenatally in Ukraine is also underregulated to the extent that it poses extensive burden on the parents who endeavor to provide proper burial to their children deceased prenatally.

## 3.2. Prenatal right to life

When it comes to right to life of children in prenatal stage, the discussion is often radicalised by lapsing into a debate on moral permissibility of abortions. While the said debate is important and is likely to be continued, it should not impede development of protective norms related to other dimensions of prenatal right to life, which are not so controversial. The abortion should not be seen as a factor that is tabooing the whole field, but simply as one of the limitations that can be placed on the prenatal right to life in the event, ̶ and to the extent ̶ that a society has decided in a particular historical period.

### 3.2.1. Limitations of the prenatal right to life

The right to life of all human beings, born and not yet born, is not absolute. It is relative, because ‘son respect n’est pas assuré dans tous les cas’[[400]](#footnote-400) (respect to it is not assured in all the cases). Limitations that can be placed on prenatal right to life are different comparing to those that can be placed on postnatal right to life.

As it was already outlined in 2.3.3.4., in general, both from the human rights and from the religious perspectives, the prenatal right to life can be limited when the maternal right to life is at serious risk. This is a distinctive feature of the prenatal right to life. The right to life of children in prenatal stage thus can be subjected to an additional limitation – protection of maternal right to life.

At the same time prenatal right to life is generally exempted from another limitation, inherent to the right to life of already born people in states which did not abolish death penalty. According to the Article 6(5) of the ICCPR, sentence of death shall not be carried out on pregnant women. Although the General Comment No. 36 (2018) on Article 6 of ICCPR does not elaborate the implications of this particular provision,[[401]](#footnote-401) by implication it is aimed exclusively at protection of children in prenatal stage, because the sentence of death *can be imposed* on pregnant women (unlike the young people below the age of 18), but cannot be executed on them. Accordingly, the sentence of death, imposed on pregnant women, can be executed later after delivery. This provision thus protects children in prenatal stage from capital punishment, as there obviously cannot be any guilt on their side.

The voluntary termination of pregnancy is another limitation, which can be placed only on the prenatal right to life. This fact is most apparent in countries, which declare the general principle of respect to (protection of) the right to life from its very beginning (e.g. Albania, Chile, France, Germany, Guatemala, Hungary, Italy, Luxemburg, Portugal, Slovakia, Poland etc.). As legislations of these countries provide for lawful terminations of pregnancy, it can be inferred that the latter is an exception to the general principle of respect to (protection of) the right to life. The legislations of the countries listed above provide for termination of pregnancy for different reasons, which are not limited to cases when the maternal right to life is at risk, which again supports the idea that termination of pregnancy is an autonomous limitation of prenatal right to life. Aude Bertrand-Mirkovic observed that Council of State and the Court of cassation of France have estimated that ‘la possibilité de recourir à l’interruption volontaire de grossesse ouverte par la loi se ne heurte pas le droit à la vie ... car le droit à la vie reconnu à toute personne n’est pas absolu et peut recevoir des limitations dans les conditions fixées par la loi’.[[402]](#footnote-402)

Another example which demonstrates that termination of pregnancy is an exception from the principle and a limitation of the right is the Article 4(1) ACHR, which establishes that the right to life ‘shall be protected by law and, in general, from the moment of conception’.[[403]](#footnote-403) It was already found in 1.3.2., that the purpose of reservation of this provision, namely the words “in general”, was to allow various types of lawful abortions.

It is worth noting that priority of maternal right to life does not only arise in the context of abortion. Indeed, risk to mother’s life usually constitutes a legal ground for abortion regardless of the child’s gestational age. However, it can happen that the danger to mother’s life arises already during delivery, when the pregnancy is already terminated.

### 3.2.2. Protection from third party assaults

In case of third party assaults there definitely is no conflict between the rights of the child in prenatal stage and those of his mother. While legislations protect pregnant women from assaults, they do not always arrange special regulations for protection of children in prenatal stage.

It was found in 2.2.1., that criminal law protection does not require legal personhood of a victim. Aude Bertrand-Mirkovic also rightly observed that definition of the crime should not be confused with a qualification of the victim.[[404]](#footnote-404) Criminal law can protect a wide variety of relations, objects or interests, which are not limited to subjects of law.

Furthermore, when a mother of a child in prenatal stage is excluded from the range of possible subjects of crimes against the life of the child in prenatal stage, the issue is not considered to be sensitive. This does not mean that all types of maternal behaviour towards the child in prenatal stage shall be freed from criminal responsibility. However, criminal law at a minimum should proscribe third party assaults, whereas more sensitive issues can be left to more long-lasting discussions.

The absence of such criminal law regulations lead to situations when harm caused to a child in prenatal stage by a third party is not criminally punishable. The criminal law does not allow for loose application, thus the courts cannot deliver justice in such cases, regardless of their endeavor to do so.

In the event that pregnancy is visible, and/or an assailant otherwise knows that a woman is pregnant, and punches her in the stomach, this deed is not only aimed at interruption of pregnancy, but also can be aimed at deprivation of life of a child in prenatal stage. In terms of common sense, it does not matter whether a child dies prenatally or postnatally, given that a causal link between the punch and death is proven. For example, in the case considered by the Novoodesky district court of Mykolaiv region (Ukraine) in 2008, a woman who has entered the eighth month of pregnancy was all of a sudden twice punched in the stomach by her partner, who was under the influence of alcohol. The pregnancy was interrupted. The woman subsequently died in the hospital. There was a proven causal link between the punches and the interruption of pregnancy and death. The assailant was punished with a prison sentence of 7.5 years, almost a minimum punishment under the Article 121 (2) of the Criminal Code of Ukraine. It was not even mentioned in the court judgment what did happen to a child as a result of this crime, probably because this information is legally irrelevant.[[405]](#footnote-405) In another case that was analysed previously in the article “A case on the beginning of human life”, the viable child was born prematurely resulting from a punch in the stomach of the pregnant woman, and died afterwards from injuries received as a result of this punch. The woman claimed that this was a manslaughter of her child, but the court could not satisfy her claims and found the assailant guilty of causing grievous bodily harm to the woman under Article 121(1) of the Criminal code of Ukraine.[[406]](#footnote-406)

In another case considered by the Kyiv district court of Poltava (Ukraine) in 2018, the assailant, also being under the influence of alcohol, decided to kill his partner, who has entered the eighth month of pregnancy. He doused her with gasoline and set her on fire. However, the woman managed to put the fire out and to survive. Her pregnancy was interrupted, and the child was born alive at the gestational age of 34 weeks with severe injuries estimated as grievous bodily harm. The assailant, however, was convicted only of attempted murder as regards the pregnant woman; his deeds towards the child and their consequences for the child did not receive any qualification in law.[[407]](#footnote-407) Apparently setting on fire the pregnant mother was aimed also at the murder of her child in prenatal stage.

In another Ukrainian case the woman was 14-15 weeks pregnant, and this fact was known to her husband. Under the influence of alcohol he has beaten his wife and punched her in the stomach. Her pregnancy was interrupted, but the forensic examination could not establish with certainty whether pregnancy was interrupted as a result of the assault. The reasoning for such a conclusion was that the pregnancy was pathological (the woman was hospitalised before because of the risk of miscarriage). The assailant was thus convicted only of intentional moderate bodily injury.[[408]](#footnote-408) However, the assailant, who was the victim’s husband, apparently knew about her risk of miscarriage. The existence of this risk in terms of common sense should not have exempted him from responsibility for intentionally punching his wife in her stomach, as this was even more likely to end with miscarriage and the child’s death. Even if the punch in a stomach of a pregnant woman or any other violence towards her does not result in interruption of pregnancy,[[409]](#footnote-409) the mere risk of such interruption and/or prenatal injuries to a child should be appropriately qualified in criminal law.

### 3.2.3. Protection from coercion to termination of pregnancy

Coercion to abortion violates the rights of both the woman and the child. It may imply use of physical or emotional violence, as well as fraud. It can be said that coerced abortion is the one which is performed without a valid, informed, willful, conscious and voluntary consent of a pregnant woman,[[410]](#footnote-410) although criteria may differ from country to country.

A number of states have already prohibited coercion to abortion by the means of criminal legislation. These include Austria,[[411]](#footnote-411) Belgium,[[412]](#footnote-412) Bulgaria,[[413]](#footnote-413) Croatia,[[414]](#footnote-414) Finland,[[415]](#footnote-415) France,[[416]](#footnote-416) Germany,[[417]](#footnote-417) Greece,[[418]](#footnote-418) Hungary,[[419]](#footnote-419) Republic of Latvia,[[420]](#footnote-420) Republic of Lithuania,[[421]](#footnote-421) Netherlands,[[422]](#footnote-422) Romania,[[423]](#footnote-423) Slovenia[[424]](#footnote-424) and Switzerland.[[425]](#footnote-425) Article 144 of the Criminal Code of Spain stipulates equal punishment for performing abortion without consent of a woman and the one where consent was obtained by the means of violence, threat or deception.[[426]](#footnote-426) In Ukraine, coercion to abortion before 2001 was a criminal offence according to the Article 110 of the Criminal Code of the Ukrainian Soviet Socialist Republic. The new Criminal Code of Ukraine, adopted in 2001, did not prohibit coercion to abortion, until 2017 when this provision was reintroduced.[[427]](#footnote-427)

### 3.2.4. Protection from incitement to illegal termination of pregnancy

The mere incitement to abortion can influence a woman’s will, particularly when it comes from entrusted persons, such as the members of her family or the doctor. Similarly to coercion, incitement jeopardises not only the right of the woman to her privacy, but first of all the right to life of her child in prenatal stage.

Several states have prohibited only incitement to *illegal* termination of pregnancy, whereas incitement to legal termination of pregnancy is not criminalised. For example, the Article 188(1) of the Criminal Code of Switzerland equates instigation to illegal abortion and execution of illegal abortion.[[428]](#footnote-428) Similarly, in Poland incitement to illegal pregnancy termination is criminalised, with a distinction between viable and non-viable child. Polish legislator equates commitment of illegal termination of pregnancy, assistance in it and incitement to it, simply listing them before stipulating a criminal penalty for commitment of one of these deeds.[[429]](#footnote-429) In Croatia encouragement of illegal pregnancy termination is also equated with its execution.[[430]](#footnote-430)

In Germany, however, it is prohibited to advertise abortion services, even if they are legal,[[431]](#footnote-431) and to promote means for termination of pregnancy.[[432]](#footnote-432)

### 3.2.5. Protection from the illegal termination of pregnancy

In most jurisdictions abortions are considered criminally punishable unless they are performed strictly in accordance with the law. However, the criminal law provisions can be articulated in such a way that considerable amount of grave violations is left beyond regulations and thus are not regarded as prohibited.

The Criminal Code of Ukraine proscribes unlawful performance of *abortion* and not of pregnancy termination. This is a feature inherited from Soviet Union legislation. As compared to termination of pregnancy, in doctrine abortion is considered to be a narrower concept: abortion is a termination of pregnancy only before full 22 weeks, whereas between 22 and 37 weeks artificial termination of pregnancy is performed by the means of induction of premature labour.[[433]](#footnote-433) Following this logic, prohibition of illegal abortion by the means of criminal law does not cover illegal termination of pregnancy after 22 weeks.

This theoretical way of thinking is not, however, clearly reflected in Ukrainian jurisprudence. There is no settled practice as regards this issue. In a case considered by the Trostyanetsky district court of Vinnytsya region (Ukraine) in 2012, the gestational age of the child was not specified clearly; however, it was stated in the court decision that the baby was full-term. The pregnant woman was unwilling to give birth to her child and asked another woman to interrupt her pregnancy for remuneration and to deprive her child of life. The woman has agreed and performed termination of pregnancy at home by the means of induction of labour. The baby girl was born full-term, alive and viable. After that the woman who was performing interruption of pregnancy, has put the child into a basket with water, where the baby girl died. Firstly both women (the mother and the one performing pregnancy termination) were convicted of murder and were charged with 12 and 13 years of imprisonment; the woman who performed the abortion was additionally convicted of illegal abortion.[[434]](#footnote-434) However, the appellate court has changed the verdict having repealed it in the part of conviction of illegal abortion. The reasoning of the appellate court was that the *actus reus* of illegal abortion implies that abortion must be performed before the beginning of physiological delivery.[[435]](#footnote-435) It rests therefore unclear whether a deed to be qualified as illegal abortion must imply deprivation of life of a child before the beginning of physiological delivery regardless of gestational age, or gestational age does matter for criminal law qualification. In addition, the maximum criminal penalty that could have been applied in this case if the child was put to death *in utero*, is imprisonment for 2 years, but only for a performer, and not the mother. The criminal sanction for illegal abortion of a full-term and viable child is thus not proportional to the gravity of offence, as for murder of the same child in several minutes after birth Ukrainian criminal law provides 6 times heavier sanctions.

The most questionable, however, is another aspect of criminal law regulation of illegal abortion in Ukraine: the deed is punishable only if it is performed by a person without special medical education. When it is performed by a person with a special medical education but outside of a hospital and/or otherwise in breach of regulations on termination of pregnancy, the deed is not criminally punishable. This approach results in extremely rare application of the said provision in practice, as there is no need to refer to persons without special medical education. When late-term abortions are made by people with a special medical education there are no grounds of their criminal prosecution, unless they are made for remuneration received illegally.

On the 05 of June 2013 an obstetrician-gynecologist in Kharkiv, Ukraine, received a call from his colleague, who offered him to induce a premature delivery at the 28-30 week of pregnancy for a financial reward. The obstetrician-gynecologist asked for 12000 hryvnias (equivalent of 1147 Euro to that date). The very next day the pregnant woman came to the hospital to perform the premature delivery. She already had two children and was unmarried, thus she wanted to get rid of her pre-born child. According to the forensic report, the foetus was viable, achieved maturity corresponding to the gestational age of 28-30 weeks, and died from intravital damage to the head that occurred during the operation of destroying the foetus. The Krasnokutsky district court found the obstetrician-gynecologist guilty of bribery (Art. 354(3) of the Criminal Code of Ukraine) and sentenced him to a fine of 8500 hryvnias (equivalent of 612.62 Euro to that date).[[436]](#footnote-436) In analogical cases Ukrainian courts follow similar approach.[[437]](#footnote-437)

Articulation of provisions prohibiting illegal termination of pregnancy in a such a narrow way apparently facilitates violations of prenatal right to life.

### 3.2.5. Caution for abortifacient and anti-implantation contraception

While the contraception methods can be chosen freely as long as they do not violate the existent regulations, numerous sources point to the fact that some contraception methods can imply abortifacient and/or anti-implantation effects, or certain degree of possibility thereof.[[438]](#footnote-438) Given the fact that biologically human life begins at fertilisation, which happens prior to implantation, it is important that a woman makes her reproductive choice with all the relevant information in hand.

Who is responsible for delivery of such information to women? In view of free sale of a variety of contraceptives which can possibly cause abortifacient and/or anti-implantation effect, most properly the producers and distributors can be made responsible for provision of relevant information. By way of analogy, the Article 11 of the World Health Organization Framework Convention on Tobacco Control provides that parties shall adopt effective measures to ensure that, in particular, ‘product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions’ and that ‘each unit packet and package of tobacco products and any outside packaging and labelling of such products also carry health warnings describing the harmful effects’.[[439]](#footnote-439) Admittedly, contraceptives are not similar to tobacco. They do not always have abortive and/or anti-implantation effect. However, in the event that they do or can possibly do, including contraceptives which mechanism of action is not known in full, the manufacturers and distributors could be obliged to ensure that outside packaging and labelling of such products carry warnings as regards their possible abortifacient and/or anti-implantation effects.

### 3.2.6. Pre-abortion counselling

As it was noted in 2.2.1., regulations established for the procedure of artificial termination of pregnancy are always aimed at protecting jointly a pregnant woman and her child in prenatal stage. Pre-abortion counselling is an element of said procedure. If stipulated by respective regulations, pre-abortion counselling takes place between the moment when a pregnant woman first refers to a doctor with a request for artificial termination of her pregnancy and the moment when termination of pregnancy is performed.

In prevailing majority of CoE states pre-abortion counselling is obligatory.[[440]](#footnote-440) Sophisticated regulations on pre-abortion counselling include:

a) the amount and type of information to be delivered to a pregnant woman, which can include health implications, available alternatives to abortion, rights and allowances provided for pregnant women and families with children, organisations which provide support to pregnant women, medical institutions which perform artificial termination of pregnancy, stage of gestational development of a child etc.;

b) the form of information (written, oral or both);

c) the subject(s) authorised to provide pre-abortion counselling. In some countries these are only doctors who themselves perform termination of pregnancy (e.g. in Albania, Armenia, Belgium, Greece etc.). In France, medical part is delivered by a doctor, and the social part of counselling is delivered by an approved body. In some states bodies authorised for provision of pre-abortion counselling are fully separated from those who perform abortions (e.g. in Germany, Hungary and Italy);[[441]](#footnote-441)

d) the form of consent that should be given by a woman for termination of her pregnancy, provisions in case of minors or persons who otherwise lack legal capacity;

e) engagement of the child’s father in the pre-abortion counseling, necessity of his consent to termination of pregnancy;

f) a waiting period between the first reference to a doctor or the provision of counseling and termination of pregnancy. Some countries establish additional guarantees ensuring that waiting period will not be a reason for missing the deadline stipulated for abortion on demand (e.g. Albania, Armenia, and Russian Federation).

## 3.3. Prenatal right to health

Prenatal right to health is multi-dimensional. It can possibly conflict with maternal right to privacy, such as in the event of maternal substance abuse[[442]](#footnote-442) or when a pregnant woman refuses medical procedures or therapy aimed at well-being of her child.[[443]](#footnote-443) However, some its elements do not conflict with maternal rights or even can support them.

### 3.3.1. Protection of prenatal patient rights

Historically the child in prenatal stage was regarded in medicine as a product of conception until 26 December 1821, date when Jacques Alexandre Le Jumeau de Kergaradec presented his memoir on auscultation of foetal heart sounds.[[444]](#footnote-444) This was a turning point towards a new and increasing quality of a patient. For medical community this quality is not questioned: ‘[n]otre reponse fut sans équivoque: oui, le foetus est pour nous un patient’.[[445]](#footnote-445)

Being a patient is neither potential, nor future, nor conditional – it is well real for a child in prenatal stage. Claude Sureau, inventor of electronic foetal heart monitoring, birth attendant, gynecologist and former president of the National Academy of Medicine of France described several cases when non-recognition of personhood of the child in prenatal stage leads to practical difficulties, if not deadlocks in medical practice:

1. In the event of death of a pregnant woman given that a child inside is considered to be viable, there is around 17-18 minutes to extract the child. Do medical professionals have a right to violate physical integrity of a dead woman to save the child? According to the Article 16-3 of the Civil Code of France in case of exceptional therapeutic interest of *autrui*, however, the child in prenatal stage n French jurisprudence is not that *autrui*.[[446]](#footnote-446)
2. When a woman being in the beginning of pregnancy due to a pathological or traumatic event falls into an irreversible coma, is that justifiable to keep her alive until the child attains viability, so that it can be extracted from the body of its mother? What if family disagrees?[[447]](#footnote-447)
3. What if a pregnant woman refuses surgery, including Caesarian section, or other intervention necessary to save her child in prenatal stage? According to Claude Sureau, this happens when a woman does not understand the language, or due to social devaluation, cultural reasons etc.[[448]](#footnote-448)

The latter example points to a situation when the right to health of a child in prenatal stage is in conflict with maternal right to privacy. In some jurisdictions, e.g. in the USA,[[449]](#footnote-449) United Kingdom,[[450]](#footnote-450) Caesarian section can be ordered by a court. However, this clearly is an interference with maternal rights. Whereas such interference can be found reasonable in some jurisdictions, in others it will be rejected as not acceptable. The first to examples given above, however, do not imply a conflict between the rights of a pregnant woman and those of her child.

In normal course of events women are interested more than anybody else in the good health of their children. Apart from the listed deadlocks, there are medical interventions or just health care regarding the child in prenatal stage, which are performed with the consent of a mother. There is no practical difficulty for a doctor in such a case, as well as there is no conflict with the rights of a mother. However, in the event of unlawful activity or inactivity of medical practitioners the child is seriously disadvantaged, as it does not have a legal status of a patient. Parents of a disadvantaged child as a consequence are usually disadvantaged as well.

Is that possible to give to a child the status of a patient in some cases and to refuse him this status in the event of conflict with the rights of a mother? Right to health is far from absolute and can be limited provided that such limitations are properly justified. It thus can be stipulated in law that a child in prenatal stage is a patient but in case of conflict with maternal interests or rights, the latter take prevalence unless a pregnant woman decides otherwise.

### 3.3.2. Prenatal right to health at work

It was already reviewed in 1.3.3. that the Council Directive 92/85/EEC has two beneficiaries – a woman and her child. The economic protection, provided by the said Directive, id aimed to benefit first of all a woman, whereas her child can be seen as a secondary beneficiary. The primary beneficiary of health protection, however, is the child in prenatal stage, whereas his pregnant mother here is only a secondary beneficiary.[[451]](#footnote-451)

The national legislation of the EU Member States implements and sometimes even further elaborates provisions of the said Directive by explicitly naming the child in prenatal stage as a beneficiary of protection at work. The Paragraph 3 of the Chapter 2 of the Law on employment contracts (työsopimuslaki (55/2001) of Finland provides for measures to be taken by an employer in the event that the pregnant worker's duties or working conditions endanger her *or the fetus' health.[[452]](#footnote-452)* In a similar way, the Article 26 of the Spanish Law on the Prevention of Occupational Risks, named “Protection of Maternity”, stipulates employer’s obligation in case of exposure of a pregnant worker *or the foetus* to working conditions, procedures or agents which can negatively influence their health.[[453]](#footnote-453)

The ILO Maternity Protection Convention of 2000 in its Article 3 openly names the child of a pregnant woman (apparently meaning the child in prenatal stage) among the beneficiaries of health protection at work:

Each Member shall, after consulting the representative organizations of employers and workers, adopt appropriate measures to ensure that pregnant or breastfeeding women are not obliged to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or the child, or where an assessment has established a significant risk to the mother's health or that of her child.[[454]](#footnote-454)

This Convention is to date ratified by 39 states,[[455]](#footnote-455) which do not include neither Ukraine, nor France. French Labour Code does provide for protection of health of pregnant workers in the Section 1 of the Chapter V.[[456]](#footnote-456) However, it does not proclaim openly that the child in prenatal stage is also a beneficiary of those provisions. Ukrainian labour legislation includes several provisions aimed at protection of health of pregnant women at work, however, they also do not expressly name the child in prenatal stage as a beneficiary of such protection.

## 3.4. Prenatal right to family life

According to the Preamble of the CRC, ‘the child, for the full and harmonious development of his or her personality, should grow up in a family environment’.[[457]](#footnote-457) When extended to prenatal period, the right to family life is generally also in the interest of a mother. Furthermore, family life and filiation is interconnected with the prenatal property rights, namely the right to inherit and the right to prenatal support, as it will be further scrutinised in 3.5.

### 3.4.1. Prenatal acknowledgement of paternity

When the parents of a child are not married, the filiation link between the father and the child is not established automatically. In considerable amount of jurisdictions, e.g. in Belgium,[[458]](#footnote-458) Ukraine,[[459]](#footnote-459) Netherlands,[[460]](#footnote-460) Switzerland,[[461]](#footnote-461) France,[[462]](#footnote-462) Russian Federation[[463]](#footnote-463) etc., it is possible to acknowledge paternity in advance, not waiting until the child is born. Usually it is done by the means of filing a statement to a civil registration authority.

Acknowledgement of paternity before the child is born can solve a number of practical difficulties, if not deadlocks, related to filiation and parental authority. For example, if the woman dies in childbirth or is unconscious, the child’s father will have parental authority as regards his child from the very moment of birth. In the event that a child is born while his father is away, there will be no difficulties with correct birth registration. And finally, in the case of untimely death of the father a child will legally descent from his real father and will inherit after him.

Acknowledgement of paternity before the child is born does not mean that filiation link is established in real time, nor does it mean that paternity commences from the date of such acknowledgement. Legal relationship of paternity still commences with the child’s birth. In the event that the child’s father did not acknowledge paternity prenatally, there still should be mechanisms in a legal system to establish filiation.

### 3.4.2. Filiation in prenatal period

In the absence of legal personhood and, in particular, in the absence of civil registration of prenatal existence, there can be difficulties with filiation. In a case of *Znamenskaya v. Russia*, considered by the ECtHR in 2001, the applicant gave birth prematurely to a stillborn boy. As she had a divorce 6 months ago, according to the legal presumption applied in Russian Family law, her former spouse was identified as a father of the stillborn child. The applicant, however, insisted that she had not been living with her former husband already for 3 years. Instead she lived with another man who was the father of the stillborn. As he had been placed in detention two months prior to the child’s birth, they could not file a joint declaration establishing the child’s paternity. In two months the child’s actual father died in custody. The applicant refused to put the surname of her former husband on the tombstone of her late child. Having left it empty, she applied to a court with a request to establish paternity and to amend the child’s surname and patronymic. The first instance court and subsequently the appellate court refused her claim as ‘the case could not been examined as a civil action because the child has not acquired civil rights’.[[464]](#footnote-464) The ECtHR found Article 8 applicable because:

[T]he applicant must have developed a strong bond with the embryo whom she had almost brought to full term and that she expressed the desire to give him a name and bury him, the establishment of his descent undoubtedly affected her “private life”, the respect for which is also guaranteed by Article 8.[[465]](#footnote-465)

The ECtHR found that there has been a violation of Article 8 in the said case. In deciding so, the ECtHR reiterated that according to its case-law:

[t]he situation where a legal presumption is allowed to prevail over biological and social reality, without regard to both established facts and the wishes of those concerned and without actually benefiting anyone, is not compatible, even having regard to the margin of appreciation left to the State, with the obligation to secure effective “respect” for private and family life.[[466]](#footnote-466)

Sergiy Rabinovytch observed in this regard, that the right, protected by the Article 8 of the Convention, was in this case interpreted as including the right to request the state to recognise paternity of a stillborn child, whereas the death of the child’s father cannot be seen as an excuse for interference with this right.[[467]](#footnote-467)

Apart from the presumption of paternity of a husband, there is a presumption of maternity of a woman who carries a pregnancy.[[468]](#footnote-468) This presumption also raises filiation issues, because in surrogacy the legal and genetic motherhood do not pertain to a woman who carries pregnancy. In the spirit of the above, the state should allow that biological and social reality prevails over presumptions, given that the interested parties prove the facts they are interested in. There should be mechanisms available to those parents who wish to establish filiation with a child in prenatal stage, alive or deceased.

### 3.4.3. Protection from parents’ divorce during pregnancy

The right to family life of a child can be protected by the means of prohibition of divorce during pregnancy, in the event that the pregnant woman is in a registered wedlock. By way of example, such prohibition is enshrined in the Article 110(2) of the Family Code of Ukraine. It prohibits divorces during pregnancy, as well as during the first year after delivery of a child, unless:

1. one of the spouses has committed unlawful conduct, which contains signs of a criminal offense, against the other spouse or the child;
2. the paternity of the child is recognised by another person, or the data on a father was excluded from a birth record following a decision of a court.[[469]](#footnote-469)

According to the p. 9 of the Resolution No. 11 dated 21 December 2007 of the Plenum of the Supreme Court of Ukraine “About practice of application by courts of the legislation in the adjudication of cases on the right to marriage, the dissolution of marriage, its annulment and division of marital property”, the limitation, enshrined in the Article 110(2) of the Family Code of Ukraine, refers both to the husband and to the wife, including cases where the child was stillborn or has died before attaining the age of 1.[[470]](#footnote-470)

The dissolution of marriage can be performed: a) by a state registration authority in the event that the spouses do not have already born children and both endeavor to dissolve their marriage; or b) by a court in the event that they have already born children and/or one of the spouses does not consent to submit an application on dissolution of marriage. Consequently, the case of dissolution of marriage where the wife is pregnant can be performed, depending on the circumstances of the spouses, by whether a state registration authority or the court. How should either of them understand that the woman is pregnant? If there was a state registration of prenatal existence there would be more certainty in this regard. However, as Ukraine is not yet there, the state registration authorities and the courts do not have such an instrument in their disposal. From the relevant court rulings it can be concluded that the courts learn about the woman’s pregnancy whether in the courtroom (visually and/or by the means of posing questions to the parties or receiving their explanations),[[471]](#footnote-471) or directly from the text of a lawsuit,[[472]](#footnote-472) or from the case file (e.g. medical documentation).[[473]](#footnote-473) This suggests that the circumstances of pregnancy of a woman could be possibly concealed from authorities if both of the spouses endeavor to dissolve their marriage despite the pregnancy. If, however, at least one of the spouses objects, s/he can provide relevant materials to the court and the proceedings will be closed.

The comparable regulations exist in some other jurisdictions, such as Wisconsin (USA)[[474]](#footnote-474) or Russian Federation. In Russian Federation, however, the Article 17 of the Family Code stipulates that only the husband has no right, without the consent of his wife, to initiate a divorce case during the wife's pregnancy and within a year after the birth of the child.[[475]](#footnote-475) The wife can initiate divorce without the consent of her husband even if she is pregnant or the spouses have a child born less than 1 year ago.

### 3.4.4. Protection from filiation with a rapist

In the majority of legal systems cases when a child is conceived resulting from a rape is a lawful ground for abortion. What does happen, however, in the event that a woman who had been raped decides to keep the child?

Most probably a woman who had courage to give birth to a child conceived from rape will not want to maintain relations with a child’s genetic father. However, in majority of jurisdictions there are no mechanisms to protect the child and his mother from a filiation link with the rapist. If a rapist who is the child’s father decides to establish filiation, there will be no legal impediments to that. Alternatively, in the event that such a filiation link is not established, a woman together with her child has to resign her to the absence of alimony that could have been requested from a child’s father if he wasn’t a rapist. It turns out that a woman who has conceived from a rape is not encouraged or supported to take up this challenge, to give birth to and to raise the child. Instead, she is discouraged and further pushed to abort her child or to put it up for adoption.

Indeed, if we look into the grounds for deprivation of parental rights specified in the Ukrainian Family law,[[476]](#footnote-476) we will not find any ground which actually is or can possibly be extended to cases where a child was conceived from a rape. In France, however, the Article 378 of the Civil Code provides that parental authority can be withdrawn by a decision of a penal court in case of conviction, *inter alia*, of an offence against the other parent.[[477]](#footnote-477)

Deprivation of parental rights is an instrument that generally can be applicable in situations where a child was conceived from rape. A parent who is deprived of parental rights cannot exercise parental authority as regards the child, but can however be ordered to pay child support. It does not, however, entail automatically the exclusion of data on a parent, who is deprived of parental rights, from the birth record of the child. For this option do be available the state has to provide for special procedures.

By way of example, in the USA, the issue of deprivation of parental rights regarding a child conceived from a rape is being solved at the state level. For the time being, all the states except Minnesota already do allow for termination of parental rights of a rapist over a child born from that rape.[[478]](#footnote-478) Some of them require criminal conviction, whereas others are satisfied with clear and convincing evidence demonstrating that the rape led to the conception of a child in question.

### 3.4.5. Protection from abandonment

In France, a child in prenatal stage is protected from abandonment by the means of criminal law. The Article 227-12 of the Criminal code of France prohibits provoking the parents or one of them to abandon an already born child or a child in prenatal stage for financial gain or by gift, promise, threat or abuse of authority.[[479]](#footnote-479) According to Aude Bertrand-Mirkovic, for the *actus reus* of this offence the subsequent live and viable birth is of no relevance.[[480]](#footnote-480)

Such a provision is rare, if not unique. The very fact of provoking the parents or one of them, most likely the mother, jeopardises the prenatal right to family life.

## 3.5. Prenatal property rights

Prenatal property rights, on the one hand, lay outside the sensitive area of potential conflict with maternal rights. On the other hand, their realisation is subjected to commencement of legal personhood. Furthermore, as it was found 2.3.2.1., even those states which have recognised legal personhood prenatally do postpone commencement of property rights and subject it to the event of live birth. This, as it was highlighted in 2.3.3.2., allows avoiding civil registration of prenatal existence.

It should be mentioned, however, that within the legal system of Canadian province Québec, which was not considered in 2.3.2.1., a conceived but not yet born child is deemed to be a natural person whose status in the civil law is approximated with the status of an already born person. Firstly, the Article 1 of the Civil Code of Québec provides that ‘[e]very human being possesses juridical personality and has the full enjoyment of civil rights’.[[481]](#footnote-481) Furthermore, in the Article 617 of the Civil Code of Québec the ‘children conceived but yet unborn’ are outrightly listed among the natural persons who may inherit.[[482]](#footnote-482) And finally, according to the Article 192 of the Civil Code of Québec, ‘the father and mother are also tutors to their child conceived but yet unborn and are responsible for acting on his behalf in all cases where his patrimonial interests require it.’[[483]](#footnote-483) It therefore follows that the civil law of Québec deserves more thorough study in respect of the legal status of the child in prenatal stage and prenatal rights.

Nevertheless, even in the countries which refer to *infans conceptus*, such prenatal property rights as the right to inherit, the right to receive gifts and, less commonly but most interestingly ̶ the right to prenatal support can be considered as baseline prenatal rights which do not conflict with maternal rights but, to the contrary, often reinforces them.

### 3.5.1. Prenatal right to inherit and the right to receive gifts

The prenatal right to inherit is apparently the most commonly protected worldwide. Effectuation of this right is usually subjected to the event of live (and sometimes viable) birth. Only those children who are already conceived at the moment of death of a testator can inherit after him; thus, those who can be possibly conceived *in vitro* already after the death of testator will not have the right to inherit after him, if at all posthumous reproduction is allowed within a legal system.

The prenatal right to receive gifts is less widespread. It is enshrined in the civil law of France, Italy, Canada’s province of Québec etc. It must be noted, however, that even when this right is not enshrined in legislation, it can and is likely to be exercised in practice. It is not possible, in the absence of relevant provisions, to donate real estate or other property, which transfer is subjected to written contracts. However, donation of small gifts, such as baby carriage, clothes or toys is commonly practiced regardless of a legal system and written law.

### 3.5.2. Right to prenatal support

It is usually presumed that a child needs prenatal support or alimony only upon live birth. In legal terms it is whether not possible to demand alimony in prenatal period, or, less frequently, it can be demanded, but effectuation of such decision will be subjected to the event of live (and viable) birth. By way of example, although in France payment of alimony can be established during prenatal period within *infans conceptus*, the decision takes effect only upon viable birth of the child. Aude Bertrand-Mirkovic observed in this regard:

[s]i un homme est débiteur d’une pension alimentaire, c’est en tant que père ; avant de le condamner à la verser, le juge doit d’abord établir la filiation entre lui et l’enfant ; à défaut, il ne doit aucune contribution à son entretien, fût-il physiquement son père.[[484]](#footnote-484)

It is, however, contestable that ‘pendant la grossesse les mesures [relatives à l’autorité parentale] seraient dépourvues d’utilité’[[485]](#footnote-485), as well as that ‘parce que pendant cette période elles se heurteraient à la liberté de la femme’[[486]](#footnote-486). In case of alimony measures of establishing filiation link between a father and a child would be neither useless nor would it jeopardise freedoms of the mother. This issue was already touched upon in 2.2.2.2. Even when pregnancy is free from complications, it entails additional expenses for a woman, such as medical examinations, clothes, birth preparation courses, special nutrition, vitamins and medications. In the event of complications there will be additional expenses on medical treatment of a pregnant mother or directly her child. Sometimes the state of pregnancy, despite all the protective legislative measures, influences the amount of woman’s earnings because she is not capable of performing the same work as before. Aude Betrand-Mirkovic herself admitted that theoretically financial support of a child during pregnancy could be ordered by judges, as it does not infringe freedom of a woman.[[487]](#footnote-487)

Is obligation to alimony a child is possible in the absence of legal personhood of a child? In theory, yes, provided that: 1) this is enshrined in law; and 2) the filiation link is established between the father and the child in question.[[488]](#footnote-488) Despite the fact that alimony is paid to a child, and not to the other parent, the one who actually receives it and disposes of it until the child acquires legal capacity to do so is the other parent. The child under the age of capacity is only a beneficiary in alimony relations.

These assumptions are confirmed by the example of the USA, which is a pioneer also in the issue of prenatal child support. The issue is regulated on a state level by all the states.[[489]](#footnote-489) For instance, the Nebraska Revised Statutes stipulate:

The father of a child shall also be liable for the reasonable expenses of (a) the child that are associated with the birth of the child and (b) the mother of such child during the period of her pregnancy, confinement, and recovery. Such liability shall be determined and enforced in the same manner as the liability of the father for the support of the child.[[490]](#footnote-490)

In the provision cited above the obligations associated with the birth of the child are highlighted separately from those associated with the mother during pregnancy. However, this provision equated said liability with child support but did not identify it as child support. In other states it can be identified outrightly as child support, e.g.:

(1) As used in this chapter, the term "child" means child or children, including any unborn child with a detectable human heartbeat as such terms are defined in Code Section 1-2-1.

(2) Notwithstanding any provision of this Code section to the contrary, the maximum amount of support which the court may impose on the father of an unborn child under this Code section shall be the amount of direct medical and pregnancy related expenses of the mother of the unborn child. After birth, the provisions of this Code section shall apply in full.[[491]](#footnote-491)

What is interesting, in the USA the correlation between the filiation link and the prenatal child support works also the other way around. When considering the filiation issues, the courts do pay attention to payment or non-payment of prenatal child support. This gave grounds to development of a *child abandonment theory*, according to which ‘a biological father forfeits his parental rights to a newborn by neglecting his parental responsibilities during the mother’s pregnancy’.[[492]](#footnote-492)

## Conclusion of the Section 3

The rights of children in prenatal stage (prenatal rights) can be divided into those which: 1) conflict or potentially can conflict with the rights of a mother and 2) those, which do not conflict with the rights of a pregnant mother and even can reinforce them. The second group is suggested as a baseline protection of the rights of children in prenatal stage. It includes: a) prenatal right to human dignity; b) prenatal right to life; c) prenatal right to health; d) prenatal right to family life; and e) prenatal property rights.

Within the prenatal right to human dignity the baseline protection can include: 1) freedom from torture, inhuman and degrading treatment during abortion; 2) protection from commercial use of foetal tissues; and 3) protection of the right to decent burial. Starting approximately from the 20th week of gestational development the child in prenatal stage is pain-capable. In order to avoid ill-treatment and for compassionate reasons it is pertinent to reconsider the clinical protocols on interruption of pregnancy in the 2nd trimester in order to avoid unnecessary suffering. It is further necessary to protect children in prenatal stage from commercial use of foetal materials and to ensure that their right to decent burial is enforceable.

The prenatal right to life is subject to limitations which differ from the limitations of the postnatal right to life. Firstly, it can be limited when the maternal right to life is at serious risk. Secondly, prenatal right to life can be limited by lawful abortion. However, in the countries which did not abolish death penalty, this limitation does not apply to prenatal right to life.

Baseline protection of prenatal right to life can include prohibition by the means of criminal law of third party assaults, of coercion and incitement to termination of pregnancy, and of illegal termination of pregnancy. An additional protective measures that can contribute to protection of prenatal right to life are: a) an obligation of manufacturers and distributors of contraceptives to ensure that outside packaging and labelling of such products carry warnings as regards their possible abortifacient and/or anti-implantation effects; and b) establishing thorough regulations of pre-abortion counselling, such as to specify amount, type, and form of information, form of consent and reservations regarding persons who lack legal capacity, engagement of a father and establishment of a waiting period.

Prenatal right to family life can be ensured through establishing legal mechanisms for prenatal acknowledgement of paternity and establishment of a filiation link in prenatal period. In the event that a child was conceived resulting from a rape there should be legal means for protection of the child and the other parent from relations of filiation with the rapist, namely the option of deprivation of parental rights, as it is implemented in the USA. Additional elements of protection of prenatal right to family life are prohibition of from parents’ divorce during pregnancy, as it is implemented in Ukraine, and protection from abandonment by the means of criminal law, as it is implemented in France.

Prenatal property rights are the most commonly protected prenatal rights. In general, they include the right to inherit and the right to receive gifts; they can be effectuated from the moment of birth. The right to prenatal support (alimony), which is far more frequently needed, is generally not known. However, in the USA it is already operating for a long time in all the states. It is enforceable straightly in prenatal period and has two beneficiaries: the mother and the child in prenatal stage.

# CONCLUSION

Rights of children in prenatal stage, as well as of any other beings, are contingent upon legal personhood. In general, children in prenatal stage are not recognised as persons before the law. Thus the aim of this study was to identify the approach which allows ensuring at least baseline protection of the rights of children in prenatal stage in view of said complications. Such approach was aimed to be applicable not only within a particular legal system, such as of Ukraine or France, but potentially capable of being applied in any legal system, as well as internationally. In order to identify such approach it was necessary to analyse and generalise the already existing theoretical and jurisprudential stances, international law regulations and national legislations of individual states. The findings of this study are as follows.

1. The terms which are applied in legal context to designate the child between the moment of fertilisation and that of birth include *unborn child*, *pre-born (preborn) child*, *embryo*, *foetus*, *nasciturus* and *child in prenatal stage*. It was found that application of the terms *embryo* and *foetus* is limited to particular stages of prenatal development and cannot be extended to the whole prenatal stage without compromising accuracy. The term *unborn child* bears negative connotation and lacks neutrality. The American term *pre-born* (or *preborn*) *child* is accurate and neutral, but it is not always translatable in other languages. In contrast, the notion *child in prenatal stage* is accurate and neutral, as well as translatable in other languages without distortion. Consequently, the notion *child in prenatal stage* is most suitable for universal application in legal context.

2. The biological beginning of human life is an autonomous concept as regards beginning of legal personhood, which in majority of jurisdictions starts at birth. Biologically human life begins at fertilisation and should be regarded from a perspective of continuity, whereas certain landmarks of prenatal development, such as implantation (nidation), completion of pre-embryonic stage, beginning of heartbeat and that of consciousness should be regarded as legally relevant landmarks of prenatal development. Categorical legal segregation of human life into prenatal and postnatal stages can be misleading and is not always justifiable.

3. In legal literature, there are two major stances regarding the way children in prenatal stage should be treated by law. According to the first one, rights of the children in prenatal stage can be effectively protected by the means of objective law without conferring legal personhood on them, and consequently without endowing them with subjective rights. This stance is similar to the legal construct of *legally protected interest*, which exists in the Ukrainian legal system. The alternative major stance is that children in prenatal stage should be recognised as persons before the law and should be endowed with subjective rights.

4. The analysis of the scope of legal protection that can be implemented by the means of objective law approach has revealed that it can be extensive and rather sophisticated. In criminal and administrative law, it is not required that the object of protection has a status of a subject of law. Thus in those legal systems where children in prenatal stage are not recognised as subjects of law, they can be protected by the means of criminal and administrative law. In civil law, however, effectuation of civil property rights is subordinated to the status of a subject. Accordingly, states which do not endow children in prenatal stage with legal personhood, in civil law inevitably resort to *infans conceptus* fiction. Thus under objective law approach civil rights can be put in effect only upon live (and in some jurisdictions viable) birth. The objective law approach has two major and evidently insurmountable deficiencies: 1) it was proved that the very absence of recognition as a person before the law increases vulnerability to abuses and ignorance of rights protected by the means of objective law; 2) those who are not recognised as persons before the law do not have a standing before the human rights courts and are not regarded there as direct victims, even when the action is brought by an indirect victim.

5. Legal personhood should be seen independently from human personhood. The former is a purely intellectual construction; it is conferred on objects by legislator’s will which turns them into subjects. Thus it is synthetic. It also undergoes changes with time, as the range of beings and entities that are deemed to be persons in law expands, and the legal construct of personhood is gradually being elaborated and sophisticated. Thus it is evolutive. Legal personhood generally comprises of elements. The two basic elements which are generally distinguished in all legal systems are ability to have rights and capacity to act (in the Ukrainian legal system – 1) the ability to have rights and responsibilities, 2) the ability to acquire and to realise them by own actions, and 3) the ability to bear legal responsibility for wrongs). To count as a subject of law, it is enough to be endowed with legally recognised ability to have rights; capacity to act is only auxiliary. Thus legal personhood is divisible. Subjective rights which are accrued to different groups of legal subjects differ by range and scope. Thus legal personhood is variable.

6. It is proved that, both in theory and in practice, human beings can be endowed with legal personhood prenatally. There are examples of states which do recognise children in prenatal stage as persons before the law. Despite the widespread prejudices, recognition of children in prenatal stage as persons before the law does not automatically lead to total prohibition of abortion.

7. It was found that recognition of children in prenatal stage as persons before the law within a legal system is not likely to happen all of a sudden. To the contrary, when the protection by the means of objective law gradually increases, it may be eventually regarded that children in prenatal stage arrived to be subjects of law, with the gradual introduction of appropriate legislative changes. Such a development of the legal status of the child in prenatal stage can be observed in the legal systems of the Italian Republic and, with some reservations, the Republic of Poland.

8. Prenatal personhood thus is a legal personhood of a particular type. It does not equal full legal personhood. It always lacks capacity to act. Furthermore, the range and scope of subjective rights accrued to children in prenatal stage differ from those accrued to other groups of legal subjects. It was revealed that civil registration of prenatal existence is possible, but not indispensable for recognition of children in prenatal stage as persons before the law. The beginning of prenatal existence, when necessary for legal purposes, can be defined by the means of legally established presumption. The inherent particularity of prenatal personhood is that the rights of the child in prenatal stage (prenatal rights) are closely interrelated with those of his mother and sometimes father. Some prenatal rights may conflict or potentially conflict with the rights of a pregnant mother. However, the other prenatal rights do not conflict with maternal rights and even reinforce them, i.e. have two beneficiaries. Finally, prenatal rights should be articulated with due regard to legally relevant landmarks of prenatal development.

9. Prenatal rights that do not conflict and/or potentially conflict with maternal rights but even reinforce them can be suggested as a baseline protection. Such baseline protection can be implemented both in legal systems where children in prenatal stage are recognised as persons before the law and in those legal systems where they are only protected by the means of objective law. Baseline protection can encompass prenatal right to human dignity, prenatal right to life, prenatal right to health, prenatal right to family life and prenatal property rights in the scope defined accordingly.

10. Prenatal right to human dignity can be envisaged through freedom from ill-treatment during abortion, protection from commercial use of foetal tissues and protection of the right to decent burial.

11. Prenatal right to life is subjected to limitations which are different comparing to limitations of postnatal right to life: a) it can be limited when it is necessary to save the life of a pregnant mother; b) it can be limited by lawful abortion; c) it cannot be limited by death penalty imposed on a pregnant mother. Prenatal right to life can be protected by the means of criminal law, namely: a) by prohibiting third party assaults of children in prenatal stage; b) by prohibiting coercion to termination of pregnancy; c) by prohibiting incitement to illegal termination of pregnancy and the illegal termination of pregnancy itself. The other means to protect the right to life of children in prenatal stage and rights of their pregnant mothers is to oblige manufacturers and distributors of contraceptives to ensure that outside packaging and labelling of such products carry warnings as regards their possible abortifacient and/or anti-implantation effects. Finally, prenatal right to life, as well as maternal rights to privacy and health can be supported by the means of establishing of proper pre-abortion counselling. The latter should specify amount, type, and form of information to be delivered to a mother and possibly father, form of consent and reservations regarding persons who lack legal capacity, engagement of a father and establishment of a waiting period.

12. Prenatal right to health in the part which does not conflict with maternal rights includes patient rights and prenatal right to health at work. Prenatal patient rights are also limited by rights or interests of a pregnant mother: in the event of their conflict with prenatal patient rights the former take prevalence unless the woman decides otherwise. Prenatal right to health at work is already protected in the EU member states and also by the states which have ratified Maternity Protection Convention of 2000.

13. Prenatal right to family life can be supported by the means of: a) establishing of mechanisms for prenatal acknowledgement of paternity; b) provision of mechanisms for establishing of a filiation link in prenatal period regardless of subsequent live (and viable) birth; c) prohibition of parents’ divorce during pregnancy; d) protection from filiation with a rapist in the event that a child was conceived from a rape, and establishing of a mechanism for deprivation of parental rights on this ground; e) protection from abandonment by the means of criminal law prohibition of provoking abandonment of a child in prenatal stage.

14. Prenatal property rights include prenatal right to inherit and the right to receive gifts, the former being the most widely protected prenatal right in the world. Usually both of them can be effectuated after the child is born alive (and viable). The property right which can be effectuated before the moment of birth is prenatal right to support (alimony) which has two beneficiaries – a pregnant mother and her child in prenatal stage. The example of a state where a child in prenatal stage has a right to prenatal support is the USA.

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462. Code Civil (n 362) Article 316. [↑](#footnote-ref-462)
463. Федеральный закон от 15.11.1997 г. №143-ФЗ «Об актах гражданского состояния», ст. 50 (3) <http://www.consultant.ru/document/cons\_doc\_LAW\_16758/df10df60ecb1886535ac05306781850584009d44/ accessed 20 April 2021. [↑](#footnote-ref-463)
464. *Znamenskaya v Russia* App no 77785/01 (ECtHR, 2 June 2005) para 17. [↑](#footnote-ref-464)
465. ibid., para 27. [↑](#footnote-ref-465)
466. ibid., para 31. [↑](#footnote-ref-466)
467. Сергій Рабінович, ‘Право на повагу до приватного життя у практиці Страсбурзького суду: інтерпретації з позицій герменевтики буття’ (2009) 206, 211. [↑](#footnote-ref-467)
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469. Сімейний кодекс України: Закон України від 10.01.2002 року № 2947-III. *Офіційний вісник України* 2002. № 7. С. 1. [↑](#footnote-ref-469)
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475. Семейный кодекс Российской Федерации [текст]: федеральный закон от 29.12.1995 г. №223-ФЗ (в ред. от 04.02.2021, с изм. от 02.03.2021)// Собрание законодательства РФ – 1996 – № 1. – Ст. 16. [↑](#footnote-ref-475)
476. Сімейний кодекс України (n 466) ст. 164(1). [↑](#footnote-ref-476)
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479. Code pénal (n 390) Article 227-12. [↑](#footnote-ref-479)
480. Aude Bertrand-Mirkovic (n 2) para 692. [↑](#footnote-ref-480)
481. Civil Code of Québec, Article 1 <http://www.legisquebec.gouv.qc.ca/en/showdoc/cs/CCQ-1991> accessed 20 April 2021. [↑](#footnote-ref-481)
482. ibid., Article 617. [↑](#footnote-ref-482)
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485. ibid., para 626. [↑](#footnote-ref-485)
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