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THE GODS MUST BE CRAZY: DOES CONSTITUTION SPEAK ABOUT BIOETHICS?

This paper addresses the issue of the relationship between a constitution and bioethics. I will define bioethics as a discipline that studies ethical issues in medicine, raised in the aftermath of biotechnological and human rights revolution. I will argue that many bioethical dilemmas have been resolved by invoking constitutional rights and freedoms. In the discussion about this tendency, the examples of abortion, euthanasia and human cloning will be used. Arguing that the notion of constitutional rights is a key to address biotical dilemmas, I will not deny that other legal strategies may bring about the same result. The absence of constitutional adjudication does not mean that a bioethical problem is not constitutional. If constitution is silent on certain issue, it might mean that the issue is premature for constitutional adjudication and therefore, should be left for future generations to address. In conclusion: which of the legal strategies is going to be chosen, depends on political, legal, cultural and religious tradition of each particular state as well as time distance in which law should provide an answer to a technological or social innovation.

Keywords: *Constitution. – Bioethics. – Human Rights. – Abortion. – Euthanasia. – Human Cloning .*

At one point, Professor Michael Shapiro had used the theme from a South African's movie – *The Gods Musty be Crazy* – to explain a technological or social innovation's apparent "lack of fit" within standard ways of 'thinking and feeling' in law or elsewhere.² In his opinion, as the Coke bottle questioned the Kalahari Bushmen's system of thought and beha-

¹ I would like to thank the Center for Ethics and Law in Biomedicine of the Central European University Budapest, for providing me space and atmosphere for the research. The usual caveats apply.

² *Michael H. Shapiro, Lawyers, Judges and Bioethics, (1997) 5 S. Cal. Interdisc. L. J. 113*

rior, similarly a technological or social innovation put on test traditional knowledge and experience of the members of modern societies.³

The reactions of a considerable number of Serbian citizens to the ban of human cloning in the new Constitution of the Republic of Serbia affirm Shapiro's comparison. In the absence of public deliberation on a draft Constitution, constitutional ban on human cloning for many in Serbia, appeared as if “coming from the sky”, similar to the Coke bottle in the above mentioned movie. To clarify from the beginning: this is not an article about democratic legitimization of the new Serbian Constitution. The constitutional ban on human cloning has inspired me to discuss in a comparative way the relationship between a constitution and bioethics. The main issue I want to discuss is whether a constitution speaks about bioethics. I will argue that the “bridge” between the two are human rights and to illustrate the point, the examples of the constitutional adjudication of abortion and euthanasia and the constitutional regulation of human cloning will be used.

1. THE PURPOSES OF THE CONSTITUTION AND REASONS FOR CONSTITUTIONALIZING RIGHTS

At the first sight, the purpose of a democratic constitution is to limit power. Thus, constitutions speak about power or more precisely about limited power. At the second sight, the purpose of the constitution is not only reduced to limiting power but also to constitute power, guide it towards socially desirable ends, and prevent social chaos and private oppression.⁴ The constitution, as Stephen Holmes noted, is multifunctional – it prevents tyranny, corruption, anarchy, immobilism, unaccountability, instability as well as the ignorance and stupidity of politicians.⁵ Finally, a democratic constitution seeks to entrench long-standing practices that seem to deserve special status, while at the same time, (a) leaves enough room for their critics and elimination and (b) points the way toward changes, both small and large.⁶

Apart from the fact that it determines state structure and enables the exercise of governmental power, a democratic constitution secures freedom.⁷ Freedom (from autocratic or despotic rule) is guaranteed by a

3 Ibid., at 115.

4 Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy*, (Chicago, London: The University of Chicago Press, 1995) at p. 6.

5 Ibid.

6 Cass Sunstein, *Designing Democracy: What Constitutions Do*, (Oxford, New York: Oxford University Press, 2001) at p. 240.

7 See András Sajó, *Limiting Government*, (Budapest: CEU Press, 1999) at p. 245.

system of checks and balances, rule of law as well as by obliging the state to respect and protect human and minority rights. Having in mind that human rights are particularly instrumental to explain the central issue in this paper, I will now dwell a bit more on the reasons which motivate citizens to constitutionalize certain rights and freedoms and thus exclude them from ordinary politics .

In the first place, one may find that different reasons and ideas underlie the fact that certain rights are envisaged in a constitution. For instance, to justify self-appointed representatives, the American and French revolutionaries turned to the natural law and thus laid the foundations of their state constitutions.⁸ In order to protect humanity and preclude social and political prejudices, some constitutions, including the German one, treat human dignity as a fundamental value and a source of all other rights.⁹ While some rights are guaranteed independently from the principle of democracy, other actually derive from democracy. Thus, for example, the rights to private property, bodily integrity, the ban on torture or freedom from self-incrimination belong to the rights and freedoms that are constitutionally entrenched for reasons entirely independent of democracy – they are guaranteed regardless of what majority might think about them.¹⁰ On the other hand, the right to freedom of speech or voting rights derives from democracy itself. Certain rights play the role of correctives of social inequality and as such enter into constitutional arrangement: The Constitution of South Africa, for example, creates minimum economic guarantees, including the right to housing, following the premise that ordinary politics cannot be trusted to protect the interests of those on the margins of society.¹¹ The socio-economic rights originated from the duties of the government towards the needy. The Mexican Constitution of 1917 and the Constitution of the Weimar Republic (1919) were among the first constitutions which envi-

8 Ibid. at p. 248. The introductory sentence of the American Declaration of Independence of 1776 emphasizes: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted...” The French Declaration of the Rights of Men and of the Citizen of 1789 declares that the rights to liberty, property, security and resistance to oppression are imprescriptible natural rights. In addition, the Declaration also proclaims the rights of political participation, procedural guarantees in criminal proceedings, as well as freedom of religion and expression.

9 Human dignity has been explicitly protected in the most of the post-communist countries as well as, for instance, in the South African, Finish and Portuguese constitutions.

10 *Sunstein, supra* note 6, at p. 97.

11 Ibid., at p. 98.

saged such social interventionism. After the Second World War, Germany committed itself to conduct reliable social policy via constitutional text. Yet, such rights came into blossom in emerging democracies, first in Spain and Portugal and then in the post-communist countries of the Central and Eastern Europe.¹² Some rights become constitutional despite the fact that they may endanger ordinary democratic processes – this is the case with the right to secede which has been used by some societies as a justification of political morality.¹³ Finally, some constitutional rights follow as consequence of industrial and technological development, including, for instance, freedom of speech, the right to privacy, the right to healthy environment as well as the right to forgo pro-life treatment.

In the absence of public deliberation, I can only speculate why the ban on human cloning is entrenched in the new Serbian Constitution. First, it is possible that this ban has been motivated by unacceptable medical implications of genetic revolution as well as by the need to secure existing human rights. Second, it may well be that thereby Serbia has responded to the request addressed to states in some international treaties to ban human cloning (the UN Convention on Human Cloning, the Council of Europe Convention on Human Rights and Biomedicine and its Additional Protocol on the Prohibition of Cloning Human Beings). Third, I would not exclude the possibility that the Church influenced constitutionalization of this ban to preclude therapeutic cloning recently announced in Serbia.

2. THE RUDIMENTS OF BIOETHICS

There is no one single approach and one single understanding about bioethics. Some claim that the term was for the first time introduced in 1971 by Van Rensselaer Potter, a biochemist and oncologist, on the occasion of establishing an institute for the research in the field of reproductive medicine.¹⁴ Since then, it has got different meanings, ranging from one that treats bioethics as professional ethics in medicine up to global bioethics and bioethics in terms of respect towards life.¹⁵ To add to the pluralism and diversity of the opinions, I will offer

12 For more see *Wiktor Osiatynski, Introduction*, in *Re-thinking Socio-Economic Rights in an Insecure World*, ed. Nsongurua Udombana and Violeta Beširević, (Budapest: CEU Center for Human Rights, 2006) at pp. 16-17.

13 See *Sunstein*, *supra* note 6, at p. 114.

14 See *Glasilo Hrvatskog društva medicinskih biokemičara*, (2005) Vol. 9, No. 1-2, at pp. 8-9.

15 For more see Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics*, 4th edition (Oxford, New York: Oxford University Press, 1994).

here my understanding: it is an interdisciplinary study of ethical issues in medicine raised as a result of technological and scientific development as well as by recurrent concerns for human rights. In the core of bioethics there are issues which directly and indirectly relate to human life, starting from its very beginning to the very end, including, for example, the issues of artificial insemination, abortion, palliative care, euthanasia and organ transplantation.

Issues and dilemmas that bioethics faces with, do not only question a traditional understanding of human civilization, but also directly affect all members or institutions of one society – individuals, families, governments, health care institutions, physicians etc. This is also valid for law and lawyers who are supposed to provide answers to different sort of new problems including the following: to whom belongs a child carried out to the term by a surrogate mother, whether an embryo enjoys a legal protection or when the life ends. Modern biotechnology generates new interests of individuals, a family or even interest of new organisms. This, in turn, generates new conflicts – for instance, between women who claim to be real mothers, or between those who hold that life ends with a brain death and those who understand death as a permanent cessation of cardiopulmonary function.

At this point one can already get an idea that bioethical dilemmas question or ask for redefinitions of the fundamental values, all more or less subject to constitutional protection, including life, human dignity, personal liberty, bodily integrity, individual autonomy, privacy, equality, health, family life, education as well as scientific research. The responses of constitutional jurisprudence are different and depend on legal, cultural economic and religious tradition of each particular country.

The modern “medicalization” of a constitution started in the US when the Supreme Court proclaimed in *Griswold* a constitutional right to privacy and invalidated the Connecticut’s “uncommonly sully law” which prohibited married couples to use contraceptives.¹⁶ In the legal theory, the decisions of the US Supreme Court and the German Constitutional Court on abortion have been the most thoroughly analyzed and cited. While the American Supreme Court gave an unconditional support to a woman to decide on abortion in the first trimester of her pregnancy¹⁷, the German Constitutional Court was not that decisive in its first decision on abortion. In spite of a strong rhetorical support given to an unborn, the Court acknowledged that the right to free development of one’s personality allowed to a woman to control her life up to certain degree. Therefore, it left the conditions upon which abortion would be

16 *Griswold v. Connecticut*, 381 U.S. 479 (1965).

17 *Roe v. Wade*, 410 U.S. 113 (1973).

available to be determined in the political process.¹⁸ It was only in its second decision from 1993 that the Court expressly concluded that a fetus enjoyed the constitutional protection and that the state was obliged to protect it.¹⁹ The conclusion is also decisive for other bioethical dilemmas that the German legislature can face including, for example, a legal status of therapeutic cloning.

In the meantime, some other bioethical issues had become topics that affected constitutional courts. The Treaty establishing a Constitution for Europe, although not legally binding, can prove to be useful for selecting bioethical issues that could become a part of pre-constitutional arraignment and as such find themselves in constitutions which are drafting in contemporary times. Thus, according to Article II-63 (2), the right to physical and mental integrity requests that in the fields of medicine and biology, the following must be respected: the free and informed consent of the person concerned; the prohibition of eugenic practices, in particular those aiming at the selection of persons; the prohibition on making the human body and its parts as such a source of financial gain; the prohibition of the reproductive cloning of human beings.

Unlike decisions on abortion, which have been exploited in legal theory to a considerable extent, the constitutional jurisprudence on other bioethical topics, including euthanasia and human cloning, has been less often discussed. Therefore, I will concentrate further discussion in this article either on the constitutional jurisprudence or on constitutional texts related to dilemmas raised by the possibility of artificial prolongation of life as well by the possibility to conceive life in a laboratory.

3. EUTHANASIA AS A RIGHT TO DIE

While change in a woman's social position and human rights revolution mostly brought about the legalization of abortion, the technical achievements in modern medicine in 1960s was a main reason to open a new Pandora's Box *i.e.* to start recurrent debate on euthanasia. Before I present a detailed constitutional jurisprudence on euthanasia, I will first say more about its definition.

The term euthanasia derives from the Greek *eu* and *thanatos* and relates with "good" or "easy and good" death. For there is not a generally accepted definition related to this practice, a consensus of those who

18 39 BVerfGE I (1975).

19 88 BVerfGE 203 (1993).

participate in the present debate finishes approximately at this point. Some, including myself, associate euthanasia with an action or omission undertaken with the intent of bringing about death of a terminally or incurably ill patient in order to end their pain and suffering. However, most of the scholars and commentators, make difference between so-called active euthanasia, where a physician, upon request of the patient, directly or indirectly causes their death, and so-called passive euthanasia, which relates to omission of a treatment and "letting a patient die". The contemporary national legislation and judicial practice have also accepted the latter approach – passive euthanasia has mostly been legalized with a help of a legal fiction according to which (a) forgoing pro-life medical treatment is not a suicide and (b) a patient does not die as a result of the physician's action but from a "natural" death caused by a terminal illness or injury. Active euthanasia, *i.e.* mercy killing and physician-assisted, suicide has been forbidden in most jurisdictions, apart from the Netherlands, Belgium, the US state of Oregon, Colombia, Switzerland and Japan.²⁰

When and how euthanasia became a constitutional issue? Soon after the initial fascination with the achievements of the modern medicine had passed, it became clear that the new technology did not only prolong life but the illness as well, and thereby, suffering and pains. The studies from that period had shown that continued survival in a long and irreversible coma required only basic care and tube feeding.²¹ For instance,

20 In those countries, however, the legalization has not been achieved in the same manner. In the Netherlands, all forms of active euthanasia have been legalized via doctrinal principles of criminal law, according to which a physician is not a criminally responsible for active euthanasia if it was preformed following the statutory procedure. Belgium has adopted the law which does not precisely refer to particular forms of active euthanasia, and which empowers the physician to provide for this treatment upon the patient's request. In Belgium, the physician who performs active euthanasia is obliged to follow the statutory procedure, as well. The citizens of Oregon have only approved the legalization of physician-assisted suicide, but not mercy killing, which is still prohibited in this state. The Swiss Criminal Code of 1942 criminalizes only assisted dying committed due to greed, while any other motive, including mercy, does not make such act a criminal one. In Colombia, the High Court legalized active euthanasia but in the same time banned such an act in regard with the patients suffering from Alzheimer's Parkinson's or Lou Gehrig's diseases. Finally, in Japan, the lower courts have reached the consensus about legal permissibility of active euthanasia (see e.g. *Tokunaga* case and the explanation in *Danuta Mendelson and Timothy Stoltzfus Jost, A Comparative Study of the Law of Palliative Care and End-of-Life Treatment*, (2003) 31 *Journal of Law, Medicine and Ethics* 130).

21 Patients in permanent vegetative state are awake at times, although they show no awareness and do not respond to visual, auditory, tactile or noxious stimuli. Because the brain stem continues to function, the patients may retain gag, cough, sucking and swallow reflexes and may make spontaneous movements or noise. For more see *Roger S. Magnusson, The Sanctity Of Life and The Right To Die: Social and Jurisprudential*

several survivals of 18 and 20 years were recorded, one of 37 and one of 40 years.²² Accordingly, it became inevitable to decide whether to initiate pro-life treatment or to discontinue one that had been already initiated. Beside a medical, this decision got a legal aspect as well, because it actually requested a decision to be made with regard to the right to life. The issue – who controlled the machine – a patient or a physician – had become the constitutional issue, first in the US and then in some other countries, as well.

The constitutional aspects of euthanasia have usually been defined with a help of the right to self-determination, which, *inter alia*, embraces the right to die or the right to forgo pro-life medical treatment. Since neither one of the valid constitutions do not explicitly protect these rights, new dilemmas have emerged: which constitutional right serves as *Muttergrundrecht* of the right to die *i.e.* the right to forgo pro-life medical treatment? Whether the right to bodily integrity, privacy, liberty or the right to human dignity could be a source of such rights? Alternatively, it may be that the right to die is an aspect of the right to life. If it is not – whether there is a duty to live? The modern medical technology has influenced also a debate about the constitutional prohibition of torture and degrading treatment. Thus, some hold that the prohibition of degrading treatment has been violated whenever one insists on a treatment that the patient opposes, regardless of the fact whether the treatment in question saves or prolongs the patient's life. Finally, a debate is going on about the constitutional protection of non-terminally ill patients who, on religious grounds, reject even an ordinary treatment like, for instance, a blood transfusion. The problem is reduced to the following: do such patients have a right to refuse life-saving treatment according to their religious convictions? The discussion about passive euthanasia has provoked the reactions of those who are of the opinion that active euthanasia should be legalized, as well. Unlike in the case of passive, the argument on active euthanasia has not been inspired by a technology but rather by a wish to protect human rights.²³

Now, I will look more closely at the answers provided by the courts that faced some of the above-mentioned dilemmas.

Aspects of the Euthanasia Debate in Australia and the United States, (1997) 6 *Pacific Rim Law and Policy Journal* 1.

22 See Bryan Jennet, *Managing Patients in a Persistent Vegetative State since Airedale NHS Trust v. Bland*, in *Death, Dying and the Law*, ed. Sheila A.M. McLean (Hampshire: Dartmouth Publishing Company Limited, 1995), at pp. 19-28.

23 For a more detailed discussion see Violeta Beširević, *Euthanasia: Legal Principles and Policy Choices*, (Florence, Italy: European Press Academic Publishing, 2006).

3.1. The Rise and Fall of the Constitutional Right to Euthanasia

Although the US law had supported the right of a dying patient to forgo pro-life treatment already in 1960s, for a long time the American courts were not able to agree upon a constitutional source of the right to passive euthanasia. The initial approach was based on the common law: the common law rights to self-determination, bodily integrity and the right to consent to treatment served as foundation of the right to reject any recommended medical treatment even that of life saving or life prolonging. In the course of “due process revolution”, the right to passive euthanasia for the first time was constitutionalized as an aspect of the right to privacy.

In *Quinlan*, the Supreme Court of New Jersey set the standards of death and dying law in many aspects, but for the purpose of this paper, the most important is the following conclusion:

The right to privacy articulated in *Griswold* was broad enough to encompass the right to refuse unwanted medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman’s decision to terminate pregnancy under certain conditions...²⁴

The above-cited conclusion had been reaffirmed in a number of cases litigated in 1970s and 1980s, but nonetheless, the Americans became again divided into two groups - those pro-life and those pro-choice oriented. After it left enough time for the case law to develop, the US Supreme Court agreed to consider a case on passive euthanasia. However, its *Cruzan* decision, which is about the right to passive euthanasia, is not a groundbreaking, at least not in a way it is the *Roe* decision on abortion delivered by this court in early 1970s.²⁵ In *Cruzan*, the courts were asked to decide on the parents’ request to remove artificial supports from the body of their twenty-five-year-old daughter, diagnosed with a “persistent vegetative state”, and thus to “allow” her to die. For the purpose of this case, the US Supreme Court has assumed (but not explicitly concluded) that the US Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition, but at the same time, has significantly supported the State’s interest in the preservation and protection of human life.²⁶

24 *In re Quinlan*, 70 N.J. 10, 41, 355 A 2d 647, at p. 651. The right to forgo pro-life treatment is not an absolute – it is limited by the state interests in preserving life, protecting the innocent third parties, preventing suicide and maintaining the ethical integrity of medical profession. *Ibid*, at pp. 663-664.

25 *Cruzan v. Director Missouri Department of Health*, 497 U.S. 261, 110 S.Ct.2841 (1990).

26 *Ibid*, at pp. 277, 279- 280.

Unlike the lower courts, which based the right to forgo pro-life treatment on the right to privacy, the Supreme Court ruled that the liberty interest protected by the Due Process Clause of the Fourteenth Amendment, justifies this presumptive right.²⁷

After some time, the US Supreme Court also accepted to decide on the issue of active euthanasia. A request to uphold the constitutionality of this medical practice was articulated as (a) a liberty interest in committing suicide with assistance; and (b) an equal protection claim based on the fact that the ban on active euthanasia permitted patients to refuse pro-life treatment but did not allow the physicians to assist terminally ill patients to end life by prescribing lethal medication to them. Emphasizing that it assumed a constitutional protection of the right to forgo any kind of unwanted medical treatment on the traditionally protected individual's right to bodily integrity and self-determination, the US Supreme Court ruled against active euthanasia. Its decision revolves around tradition as the only source of the rights deriving from the constitutional concept of liberty.²⁸ The Court also rejected the claim that the Equal Protection Clause was violated by making a distinction between passive and active euthanasia: everyone, regardless of physical condition is entitled, if competent, to refuse unwanted lifesaving medical treatment and no one, the Court emphasized, is permitted to assist in suicide.²⁹

Before I present the constitutional decisions on passive and active euthanasia delivered in some other countries, I will point at the additional American examples that connect bioethics with the constitution. To be exact, in the United States the problem of euthanasia has not only provoked a zealous discussion about the contents and reach of the constitutional rights, but recently has also lead to judicial decisions regarding on of the key constitutional principles – the separation of powers principle, and its effects both on horizontal and vertical level. I will take these examples in chronological order.

American State of Oregon is one of a few jurisdictions in the world that has legalized active euthanasia, although in a limited way. The Oregon's Death with Dignity Act is a product of grass roots law-making - it was adopted through a citizen initiative. However, as soon as it was confirmed at the referenda, a group of plaintiffs lodged a complaint arguing that it violated equal protection clause, since it failed to safeguard against suicide by mentally incompetent patients.³⁰ The appellate court

27 Ibid, at p. 278.

28 *Washington v. Glucksberg*, 117 S.Ct. 2258 (1997).

29 *Vacco v. Quill*, 117 S.Ct. 2293 (1997).

30 *Lee v. Oregon*, 891 F Supp. 1429 (D Or. 1994).

dismissed the constitutional challenge because the plaintiffs lacked standing to challenge the law. The US Supreme Court itself has recently resolved another constitutional dispute concerning this law. Thus, when the Oregon's Act went into effect in 1977, it became clear that the physicians in this state would prescribe federally controlled substances not only to treat patients (as envisaged by the federal law), but for assisted suicide purposes as well. Because the Controlled Substances Act did not mention assisted suicide, different interpretations were immediately offered. The constitutional dispute aroused when the Attorney General warned physicians that they would lose licenses to prescribe federally controlled drugs if they prescribed them for assisted suicide purposes. The competent court immediately said that this case was not about euthanasia but simply about the states' rights to decide on issues referred to them by the Constitution.³¹ The Court ruled that the states have the exclusive right to control the practice of medicine within their borders and that the Oregon's decision to legalize physician-assisted suicide has to prevail over any federal view to the contrary, even with regard to determining the proper medical uses of federally controlled substances. The US Supreme Court affirmed the decision.³²

It is hard that any other recent issue, apart maybe from the issue of fighting terrorism to promote democracy in Iraq, has so much provoked the American public and challenged the fundamental constitutional principles, as the issue of passive euthanasia did in *Schiavo* case. A short reminder follows: a personal tragedy of Tereze Schiavo, for ten years attached to life-sustaining procedures, turned to a family one when her parents stood against her husband's request to discontinue such treatment. Her husband petitioned the trial court to authorize termination of life prolonging treatment. The trial court found by clear and convincing evidence that Tereza would have authorized the termination of life prolonging procedure if she were competent to make a decision herself.³³ A national and constitutional drama started after the Governor of Florida, contrary to the valid and several times confirmed judicial decisions, issued executive order to stay the continued pro-life treatment. First, the Supreme Court of Florida declared the Governor's act unconstitutional because it represented an unlawful delegation of legislative authority and a violation of the right to privacy, and then, the US Supreme Court denied hearing the case. The case culminated when the President Bush, signed into law a bill authorizing the federal courts to review the case. President's signature came after both the Senate and the House of Represent-

31 *Gonzales, Attorney General, et. al., v. Oregon*, (2006) 126 S.Ct. 904.

32 *Ibid.*

33 *Bush v. Schiavo*, 885, So 2d 321 (2004 Fla.).

tatives approved the bill. After the courts reaffirmed all previous decisions, Tereza Schiavo finally was “allowed” to die. If the legislature with the assent of Governor could do what was attempted in the *Schiavo* case, not only the judicial branch would be subordinated to the final directives of the other branches, but also subordinated would be individual rights including the traditionally protected right to self-determination. To those who worry because of Bush administration, including the author of this text, the only comfort is a power of the American courts to reject pressure coming from the other governmental branches.

Although they have not been classified as top constitutional decisions, the decisions on euthanasia of the constitutional courts delivered in some other countries have attracted a public attention and become global references of any judicial dispute about euthanasia. For instance, the decision of the Supreme Court of Canada, handed down in 1993, to reject constitutional challenge of the blanket prohibition on assisted suicide as applied to the practice of active euthanasia, has influenced to a considerable extent the decision of the European Court of Human Rights, delivered almost 10 years later, that the prohibition of active euthanasia was not contrary to the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms.³⁴ In the above-mentioned Canadian decision, the Supreme Court considered the claim that the absolute prohibition on assisted suicide violated the right to liberty and security of the terminally ill patients who were incapable of terminating their own lives without anyone’s assistance. Justice Sopinka, who wrote judgment for the majority, agreed with the appellant’s allegation that the prohibition on assisted suicide deprives a physically incapable individual to commit suicide of autonomy over her person, causes her physical pain and psychological stress in a manner which invades the constitutional right to security of the person. Yet, the majority also stressed that the purpose of the blanket prohibition at stake is to protect the vulnerable, who might be induced in moments of weakness to commit suicide. Thus the terminally and incurable ill patients, physically incapable to commit suicide without assistance, have become scapegoats of the state interest to discourage suicide, which in itself is not a crime in a considerable number of countries. Mostly for the same reason – the need to prevent suicide – the European Court of Human Rights rejected

³⁴ *Rodriguez v. British Columbia (Attorney General)*, (1993) 3 S.C.R. 519. The Charter of Rights and Freedoms is a part of the Canadian Constitutional Act of 1982. According to this act, the Canadian courts, similarly to the American, are empowered to decide on the constitutionality of legal norms. For a detailed discussion on the constitution and rights, see e.g. *Jonathan L. Black-Branch, Entrenching Human Rights Legislation under Constitutional Law: The Canadian Charter of Rights and Freedoms*, E.H.R.L. 1998, 3, at pp. 312-331.

the allegation that the right to physician-assisted suicide is the right protected within the ambit of the privacy rights guaranteed in Article 8 of the European Convention on Human Rights.³⁵

In the United Kingdom, the House of Lords discussed the issue of passive euthanasia with regard to incompetent patients.³⁶ While the Lords have unanimously ruled that the sanctity of life principle is not an absolute, they, however, have split on the issue of the constitutional principles that supposed to justify the right of a terminally ill incompetent patient to passive euthanasia.³⁷ Note that the majority of them were of the opinion that the termination of the patient's life might be in her best interest. The reasoning of Lord Mustill well illustrates this point: doctors have duty to act in the best interests of the patient; while the termination of the patient's life might not be in his best interest, his best interests in being kept alive have also disappeared; thus, the patient had no interest of any kind. Since his personality ceased to exist, the termination of life is ethically and legally permissible.³⁸

The ruling of the Irish Supreme Court is of a particular interest for the purpose of this article.³⁹ The Court vindicated the view that the constitutional right to privacy justified the right of a competent terminally ill patient to refuse pro-life treatment.⁴⁰ On the other hand, it found that the right to self-determination and the right to privacy could not be applied to incompetents and that therefore their constitutional protection rest on different principles. When it comes to the incompetents, the Supreme Court of Ireland ruled that the source of their right to forgo pro-life treatment is the right to die a natural death which is an aspect of the constitutionally protected right to life.

The Constitutional Court of Germany has not yet directly considered a case on euthanasia, but it has expressed its views on this subject indirectly while considering an alleged violation of Jehovah Witnesses' rights.⁴¹ The Court declared *in dictum* that the right to refuse

35 *Pretty v. the United Kingdom*, Judgment of April 29, 2002.

36 Having in mind that an authoritative constitutional text is largely missing in the UK, some may dispute the need to include in this presentation the decision of the British court. There is no doubt that this can be a subject of a separate discussion. In short, this decision has been discussed here because the decisions of the House of Lords are clearly of a constitutional importance.

37 See *Airedale NHS Trust v. Bland* (1993) AC 789, 1 All ER 821.

38 *Ibid.*, at pp. 897-899.

39 The Supreme Court of Ireland is empowered to decide on the constitutional issues (see Article 34 of the Irish constitution).

40 *Ward of Court, Re a*, (1995) IESC, (1996) 2 IR 73, (1995), 2 ILRM 401.

41 32 *BVerfGE* 98(1971).

any kind of hospital treatment, including pro-life-treatment as well, is based on the constitutionally protected right to the free development of one's personality, which also implies freedom of action. However, the Court has not explicitly established that refusal of pro-life treatment claimed on religious convictions is an aspect of the freedom of religion. On this account, by far more explicit were the lower American courts when deliberated cases on religiously motivated refusal of life saving treatments. After initial hesitation, a considerable number of the American courts had supported the right of Jehovah Witnesses' to reject blood transfusions on the religious grounds, even if this represented a serious threat for their own lives.⁴² It is interesting to notice that the courts have mainly grounded this right on the right to self-determination or the right to privacy, while only in a few cases they concluded that it derived from the First Amendment Free Exercise Clause.

Paradoxically, the High Court in Colombia has approved active euthanasia in a case brought by euthanasia opponents who sought to tighten Colombia's euthanasia law of 1980, which envisaged an imprisonment for six months to three years to anyone found guilty of assisting in a suicide. The Court ruled that no person should be held criminally responsible for taking life of a terminally ill patient who requested such an act.⁴³ The decision has been based on an individual's autonomy, which, according to the court, in some circumstances prevailed over the state duty to protect life.⁴⁴ Thus, Colombia became the first country whose court, empowered to decide on the constitutional issues, approved the practice of active euthanasia.

Finally, the last decision to be mentioned here is the decision of the Hungarian Constitutional Court that had been expected by the public for about ten years.⁴⁵ The decision of 2003 reflects the present state of art: passive euthanasia *i.e.* the right to forgo pro-life treatment derives from the right to self-determination, which is by itself an aspect of the constitutionally protected right to dignity. In contrast, active euthanasia cannot be treated to fall within the ambit of the right to self-determination because the cause of a patient's death is not limited only to the action of

42 See e.g. *In re Brooks*, 32Ill. 2d 361, N.E. 2d 345 (1965); *Winters v. Miller*, 446 F. 2d 65 (N.Y. 1971); *Guardianship of Dolores Phelps, County Court for Milwaukee County, Probate Divisions*, No. 459-207, (1972).

43 The decision was delivered in 1997.

44 For more see in Dorsen, N., Rosenfeld M., Sajó A., and Baer S., *Comparative Constitutionalism*, (Minnesota: West Group, 2003) at p. 568.

45 The case before the Court stemmed back to a 1993 manslaughter conviction of Gyorgyi Binder, who intentionally drowned her 11-year-old incurably ill daughter in bathtub. See the Decision no. 22/2003 (IV 28).

the patient but includes a physician's action as well, and therefore it should remain legally prohibited.

To conclude: the ideas of a "natural death" and omission serve to "sell" to the public passive euthanasia as the right to forgo any kind of medical treatment which in some countries acquired a status of the constitutional right. On the contrary, the standard constitutional arguments including human dignity, life (in the sense of non-existent duty to live), privacy, security, personal liberty, prohibition of degrading treatment and equality failed to convince courts to mandate the legalization of active euthanasia. In some countries, like for example in the Netherlands, the issue of active euthanasia has been pacified by the absence of the constitutional debate and resolved in the Parliament by applying the doctrinal principles of criminal law.

4. HUMAN CLONING: CONSTITUTION V. LABORATORY

Article 24 of the Serbian Constitution reads: cloning of human beings shall be prohibited. This formulation obviously derives from the previously short-valid constitutional text *i.e.* Article 11 of the Charter on Human and Minority Rights and Civil Liberties of Serbia and Montenegro.⁴⁶ Apart from the Serbian Constitution, the EU Constitution also speaks about cloning while the reaction to this topic has come from the Supreme Court of Costa Rica, as well. The EU Constitution is a more precise than the Constitution of Serbia – it prohibits human cloning for reproductive purposes, while the Supreme Court of Costa Rica has invalidated the governmental decree on the techniques of artificial inseminations and thereby implicitly prohibited human cloning in therapeutic purposes.⁴⁷

Now, it is not difficult to determine the mutual relation between a constitution and human cloning. Human cloning, as well as euthanasia and abortion, triggers the issues of constitutional rights and freedoms. Before I present in more details reasons that motivated the constitutional prohibition of human cloning, I will explain the rudiments of this process, necessary for its regulatory legitimacy.

46 Official Gazette of Serbia and Montenegro, 1/2003.

47 See Rosario M. Isasi, Bartha M. Knoppers, Peter A. Singer, Abdallah S. Daar, *Legal and Ethical Approaches to Stem Cell and Cloning Research: A Comparative Analysis of Policies in Latin America, Asia, and Africa*, (2004) 32 *Journal of Law, Medicine and Ethics* 626, at. p. 630.

4.1. Risks of Definitions

In the scientific area, the term cloning is often used as shortcut for producing a copy of a biological entity – a gene, a cell, an organism. In molecular biology, so-called molecular cloning relates to cloning of DNA and it is used, for example, for the production of insulin or growth hormones.⁴⁸ Cloning of cells can happen naturally – monozygotic twins are clones that simultaneously sprang up from the same egg cell. Yet, in the most cases this term relates to a cell cloning in laboratory – first the embryo is artificially divided and then from thus divided parts two or more genetically identical organisms are developed.⁴⁹ The term cloning in the above-mentioned senses is not disputable.

As a rule, the problems occur when one endeavors to define human cloning *i.e.* cloning of human beings, which is the wording used in the Serbian Constitution. First there is reproductive and therapeutic cloning. Second, both relate to human cloning. Third, reproductive and therapeutic cloning has been treated differently in the scientific and legal discourse. On the one hand, the consensus has been made that reproductive cloning is legally and ethically unacceptable. On the other hand, there is neither one voice about ethical permissibility of therapeutic cloning nor harmony among the countries about its legal permissibility. In the absence of a consistent scientific terminology, it is hard, however, to determine precisely the meanings of these terms as well as a line of their division. The current definitions can be reduced to the following:

Reproductive cloning relates to artificial production of embryos – a genetic copy of an existing individual, in order to accomplish an ultimate aim – to clone a human being. This implies: (a) nucleus substitution – an enucleated egg cell of an adult is fused with the nucleus from an adult somatic cell and then the egg is stimulated to divide and to form an embryo until it reaches the blastocyst stage; (b) once this stage has been reached, the embryo is transferred into the uterus of a female in order to be gestated to term.⁵⁰

Therapeutic cloning implies the same process of nucleus substitution but not implantation of the created embryos into the uterus of a female. Instead, the process is limited to the development of the embryo

48 See Bart Hansen, *Embryonic Stem Cell Research: Terminological Ambiguity May Lead to Legal Obscurity*, (2004) 23 MEDLAW 19, at pp. 20-21.

49 See Dubravka Šimonović i Ksenija Turković, *Pravna regulacija kloniranja u nas i u svijetu*, (2005) Zbornik PFZ, 55 (6) 1543-1574, at p. 1544.

50 For a definition of reproductive cloning see e.g. Marc Stauch and Kay Wheat with John Tingle, *Text, Cases & Materials on Medical Law*, (New York: Routledge-Cavendish, 2006) at p. 368; see also the World Health Organization home page: <http://www.who.int/ethics/topics/cloning/en/index.html>

to the blastocyst stage in order to create embryonic cells that can be used to clone replacement organs and tissue or to treat causes of different diseases.⁵¹

Accordingly, the similarities between reproductive and therapeutic cloning are reduced to the procedure of somatic cell nuclear transfer (SCNT) while differences to – a final product, time frame to accomplish the final product, the purpose of cloning and its medical implications.

Some, however, argue that differences are insignificant, that what matters is the technique which is identical, and that the only difference is the fact that reproductive cloning is aimed at creating human beings, while therapeutic – at creating embryonic cells.⁵² Slippery-slopes arguments are also offered: if SCNT is allowed, human coming for reproductive purposes cannot be avoided.⁵³ Further, it is claimed that by introducing a partial ban *i.e.* by allowing therapeutic cloning, a creation of human embryos aimed at their distortion would also be allowed, which in turn would imply the “instrumentalization” of human life.⁵⁴ Additionally, the distinction between these two types of cloning has been compounded by the interchangeable use of reproductive cloning with therapeutic cloning by those who hold that the therapeutic cloning embraces also a “therapeutic” treatment for infertility, which in medicine has been known as preimplantation genetic diagnosis (PGD).⁵⁵ Namely, a type of cell nuclear replacement could be used to treat infertility or avoid birth of a child with inherited genetic anomalies.⁵⁶ This procedure has been available in many countries including the United States, United Kingdom, Belgium, Israel but not Germany, because of the earlier mentioned approach of the German constitutional jurisprudence that the fetus enjoys constitutional protection, which in turn implies the prohibition of destroying or discarding embryos. Worth to be mentioned here is that the

51 See Stauch *et. al*, *supra* note 50, at p. 365. Human embryonic stem cells for the first time were separated in 1998. Today they can be obtained either from spare embryos from IVF treatment or from embryos created for the research purposes.

52 See <http://www.who.int/ethics/topics/cloning/en/index.html>

53 See A.M. Capron, *Placing a Moratorium on Research Cloning to Ensure Effective Control over Reproductive Cloning*, (2000) *Hastings Law Journal* 53, at p. 1057; S. Holm, *The Ethical Case Against Stem Cell Research*, (2003) *Cambridge Quarterly of Health Care Ethics* 12, at pp. 372-383.

54 See Šimonović and Turković, *supra* note 49, at p. 1553.

55 See Hansen, *supra* note 48, at pp. 23-24. See also John A. Robertson, *Reproductive Technology in Germany and the United States: An Essay in Comparative Law and Bioethics*, (2004) 43 *Columbia Journal of Transnational Law* 189, at pp.221-225.

56 *Ibid.*

world-known philosopher Jürgen Habermas had harshly criticized the practice of PGD as the harbinger of a renewed eugenics regime.⁵⁷

The approach of the German law towards the constitutional protection of fetus turns me back to the questions of the legal protection of human life and its constitutional limits, which are important for a legal standpoint towards therapeutic cloning. Note that there is a dichotomy on both the state and international level when it comes to the legal definition of a human being. Moreover, international law is usually silent on this point. For example, the Additional Protocol to the European Convention on Human Rights and Biomedicine on the Prohibition of Cloning Human Beings leaves to the Member States to define the term “human being”.

A good example about the perplexities even among experts is different reports of influential medical journals on the adoption of the Dutch Embryos Act of 2002: a prestigious British medical journal – the *Lancet* informed that the new legislation approved embryonic stem cell research and that researchers had only to use spare embryos from IVF treatment. By contrast, the *British Medical Journal* stated “the Netherlands voted in favor of therapeutic cloning and... that scientist would be allowed to create embryos either through *in vitro* fertilization techniques or by cell nuclear transfer (cloning)”.⁵⁸ Many asked themselves what exactly the Dutch law allowed and prohibited.

4.2. Reasons for Constitutional Prohibition

Apart from the unwanted medical implications, the main reason to ban human cloning is the human rights protection. The Constitution of Serbia places this ban within the provisions relating to the right to life. The EU Constitution speaks about the prohibition of reproductive cloning within the protection of one’s physical and mental integrity. Yet, the scope of the rights that human cloning may endanger is much broader: in addition to human dignity and personal identity, the most frequent reasons for the ban, the reproductive cloning is contrary to many other rights, as well. If one excludes imaginary ideas from science fiction movies that equal cloning with production of armed slaves specially trained for military and other tasks, it is possible to argue that reproductive cloning is contrary to the following constitutional rights and freedoms:

Human dignity and the right to life – these rights have been treated as the cornerstone of constitutional prohibition of cloning. Although human dignity has not been given one meaning, its concept implies that

57 For more about preimplantation genetic diagnosis see e.g. David DeGrazia, *Human Identity and Bioethics*, (New York: Cambridge University Press, 2005).

58 For more see Hansen, *supra* note 48.

every human being is worthy of honor and respect which in turn requires a prohibition of inhuman treatment and acts. The UNESCO Declaration on the Human Genome and Human Rights states that dignity makes it imperative not to reduce individuals to their genetic characteristics and to respect their uniqueness and diversity.

There are different opinions about implications related to the *right to life*. Some hold that genetic manipulations imply the arbitrary taking of life, which does not occur in the process of human cloning because the former is understood as the process of creating and not depriving of life.⁵⁹ Other, however, believe that all people have the right to be conceived, gestated, and born without genetic manipulation.⁶⁰ Yet, usually one speaks about the need to prohibit human in the contexts of the genomes and embryos protection, which, according to some, enjoy the right to life equally as already born human beings.

It is possible to assume that human cloning is contrary to the prohibition of torture, cruel, inhuman or degrading treatment. On the one hand, one can assert that physical and mental “abnormalities” resulting from human cloning constitute “cruel treatment”, while on the other hand, it is possible to interpret that physical and mental conditions of a cloned individual make their life “cruel”.⁶¹

In addition, there are different theories about human cloning in the context of the right to health. Although a unique understanding of the right to health is missing, the following approaches are currently debated: (a) a state obligation to respect the right to health requires from a state not to finance therapeutic cloning⁶²; (b) if human cloning were to be allowed, instead of a woman’s - the right to decide about reproduction would become physicians’ and bioethicists’ right, while at the same time, requests addressed to women to deliver “perfect babies” would become much stronger.⁶³

Except for the rights that protect physical and mental integrity of an individual, it is alleged that the practice of human cloning, also violates

59 See Stephen P. Marks, *Tying Prometheus Down: The International Law of Human Genetic Manipulation*, (2002) 3 *Chicago Journal of International Law* 115, at p. 126.

60 See the approach of the American NGO – *Council for Responsible Genetics*, defined in the Article 10 of its Model Law on Genetic Rights, (2000) 13 *GeneWatch* 3.

61 Marks, *supra* note 59, at p. 124.

62 Using contrary assumptions about the risks and moral implications, the same obligation could be invoked to engage the national health system and other organs of the state in tolerating, promoting, and practicing genetic manipulations. *Ibid*, at p. 129.

63 Marcy Darnovsky, *Human Germline Engineering and Cloning as Women’s Issues*, (2001) 14 *GeneWatch* 1.

the rights regarding one's identity, autonomy, family relations and equality rights. Thus it is frequently argued that cloning threatens rights to personal identity, individuality, and uniqueness. In addition, it questions family relations – a clone would be both a sibling and a child of its “parent”. Equality concerns are also present: since it would be possible to determine a particular genetic heritage of a clone, persons created in such a way may be discriminated in regard with others in the course of employment or insurance. Similar disputes have been already litigated in the United States because of the proceedings that relates to gene sequencing.⁶⁴

This short presentation does not include the list of all rights involved by regulating reproductive human cloning. The process would radically challenge a traditional understanding about what it means to be a human being, what an individual's nature and a role in the society are, and thereby what rights he or she enjoys. Some hold that a “clone” by itself would not be in a possession of human rights.

4.3. The Reaches of the Constitutional Prohibition

The last issue that I want to discuss in this article relates to the reach of the constitutional prohibition of cloning set for in Article 24 of the Constitution of the Republic of Serbia. Suppose that, because of the unwanted medical implications and human rights protections, the drafters of the Constitutions envisaged this prohibition as an absolute one. No exceptions are permitted, similarly like in the case of torture. This intention I do not dispute. The issue is, whether the drafters stated what they actually wanted. The possible interpretations are the following:

First, having in mind that human cloning refers both to reproductive and therapeutic cloning, the above mentioned constitutional protection is of an absolute nature and stands against both types of cloning.

Second, the opponents of both types of cloning could point at Article 252 (2) of the Serbian Criminal Code which set out punishment for a person who engages in human cloning or in experiments aimed at human cloning, to argue that engaging in experiments aimed at cloning amounts to therapeutic cloning, which in turn helps to interpret the constitutional prohibition in absolute terms.

Third, having in mind that in the Serbian law the term “human being” relates to the born and not to the unborn⁶⁵, those who hold that reproductive cloning cannot in any sense equal with therapeutic cloning,

⁶⁴ Marks, *supra* note 59, at p. 124.

⁶⁵ See Nataša Mrvić-Petrović, *Krivično pravo*, (Beograd: Fakultet za poslovno pravo, 2005), at p. 226.

can assert that the constitutional prohibition relates only to reproductive and not to therapeutic cloning.

Yet, in the absence of public deliberation on a draft Constitution, one cannot firmly assert that the drafters intended to ban only reproductive and not therapeutic cloning, as well. If it is of any comfort, the fact is that regulation on human cloning is itself in embryonic phase both on international and national level.⁶⁶ A lot of information is still missing. Consider some troubles that emerged at international level.

The UNESCO Declaration on the Human Genome and Human Rights of 1997, explicitly prohibits reproductive cloning as a practice that stands contrary to human dignity. However, the opponents of any types of human cloning are inclined frequently to invoke a controversial Article 18 of the European Convention on Human Rights and Biomedicine which speaks about research on embryos *in vitro* in the following terms: (1) where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo; (2) the creation of human embryos for research purposes is prohibited. The Additional Protocol on the Prohibition of Cloning Human Beings, adopted in 2001, was aimed to clarify what left unspecified and regulate this area in more details. Thus, Article 1 of this Protocol establishes an absolute prohibition of any intervention seeking to create a human being genetically identical to another human being, whether living or dead. The same Article explains that the term human being “genetically identical” to another human being means a human being sharing with another the same nuclear gene set. This prohibition, according to the Explanatory Report, relates to cloning of human beings, either by utilising the techniques of embryo splitting or nuclear transfer. However, as remarked earlier, since the Protocol leaves to the Member States to define the term “human being”, the reach of this prohibition is limited. In the jurisdictions where it is established that life begins at fertilization, like in Germany, it is prohibited to destroy or discard embryos and thereby to engage in cloning for therapeutic purposes, while in the Netherlands, for example, therapeutic cloning is permitted but only by using spare embryos from IVF treatment.

Neither EU regulations can treat the above-mentioned troubles. In its Resolution of 1997, the EU Parliament reached the conclusion that human cloning had to be banned⁶⁷. The EC Directive on the Legal Protection of Biotechnological Inventions also speaks about human cloning and excludes unequivocally from patentability processes for modifying the germ line genetic identity of human beings, processes for cloning human beings and uses of human embryos for industrial or com-

⁶⁶ For reports on different state regulations see <http://www.glyphr.org/>

⁶⁷ See EU Resolution on Cloning EP OJ C 115 of March 3, 1997.

mercial purposes.⁶⁸ In addition, the Directive specifies that the term “human being” relates to a human being for the embryonic stage.⁶⁹ Yet, the story of therapeutic cloning does not end-up here as far as the EU level is concerned. Although two years ago the EU Council of Ministers failed to decide whether or not to fund embryonic stem cell research⁷⁰, recently reported American research enabling the manipulation but non-destruction of embryos as well as the research in South Korea, has refreshed a debate on therapeutic cloning at the Union level.⁷¹

Finally, although legally non-binding, the UN Declaration on Human Cloning, adopted without a consensus in 2005, is the best example of a deep present divisions among scientists and countries in regard with the therapeutic cloning.⁷² The Declaration invites countries to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life. There is no doubt that the prohibition includes reproductive cloning while as far as the therapeutic cloning is concerned, it is left for the countries to decide, in accordance with their national legislation, whether it stands contrary to human dignity and the right to life.

Coming back to the prohibition of human cloning in the Serbian Constitution, I hold that in the absence of a universal approach, laws that would regulate reproductive cloning, artificial insemination, protection of embryos and the uses of spare embryos, the constitutional prohibition should be interpreted in absolute terms for there is a great danger of misconduct.⁷³ On the other hand, rather careful and unbalanced approach of the international community, may testify that we have closed a debate on the therapeutic treatment too early, since the experts assert that it can be of enormous help in the treatment of serious illnesses as well as for the

68 See EU Directive 98/44/EC of July 6, 1998. para. 41.

69 See the Council of Ministers explanatory memorandum to the common position on the EU Directive on the legal protection of biotechnological inventions OJ C 110, 8.4.1998, p.30, point 35.

70 See *Noëlle Lenoir, Biotechnology, Bioethics and Law: Europe's 21st Century Challenge*, (2006) 69 (1) *The Modern Law Review* 1, at p. 5. A potential compromise on stem cell research was blocked by Germany, Italy, Austria, Spain and Portugal. See *Robertson, supra* note 55, at p. 212-213.

71 See points 5.2.2. -5.2.3. of the Report of EU Commission on Development and Implications of Patent Law in the Field of Biotechnology and Genetic Engineering of October 7, 2002. See also *Lenoir, supra* note 70, at p. 5.

72 The UN Declaration no. A/59/516/Add.1 was adopted by a recorded vote of 84 in favor to 34 against, with 37 abstentions. Serbia and Montenegro was among the countries that abstained.

73 The existing administrative decree, which partially regulates this issue, cannot be treated as effective or sufficient protection against possible misconducts.

purposes of regenerative medicine. Yet, the issue of whether one generation has the right to decide about issues of the next generations, is a subject of some other discussions.

5. CONCLUSIONS

When some 40 years ago the first bioethical dilemmas appeared, many doubted that a key to address them might be the constitutional principles and standards. However, it turned out that the constitutional rights were a key to abridge the problems attached to the technological and social fascinations. The constitutional adjudication of abortion, euthanasia or the constitutional regulation of human cloning illustrates well the point.

Yet, I do not claim that the bioethical dilemmas can be resolved only by a constitutional adjudication. Which strategy is going to be chosen, depends on political, legal, cultural, economic and religious tradition of each particular state. It might appear that countries where the rights talk prevails in the legal discourse and countries that tend to remedy recent undemocratic past by creating new rights would opt for the solution deriving from the constitutional jurisprudence. Other countries, where religion does not play a significant role and whose citizens are traditionally tolerant and prone to achieve political compromise relatively easily, like for example the Netherlands, would choose a regular parliamentary procedure for resolving bioethical issues.

Time distance may also be significant in opting for a particular legal strategy or deciding whether any legal regulation is needed in the first place. For instance, the US Supreme Court granted certiorari to hear the case on passive euthanasia only after twenty years passed since the first cases had been litigated. The Americans, anyway prone to conduct constitutional disputes, have not initiated a significant constitutional debate on permissibility of human cloning or stem cell research. Instead, the president Bush established the President's Council on Bioethics with a task to develop a deep and comprehensive understanding of the issues that it considers. So far, the Council has issued four reports which are now subjects of a zealous public discussion.

Neither the citizens of Serbia can feel indifferent to bioethical dilemmas. Yet, there is no continued public debate due to general occupation with pre-political issues. Therefore, there is no wonder why many were surprised with the constitutional prohibition of human cloning. The purpose of this article is to indicate that we are not the only society that has chosen to solve bioethics controversy via constitutional text. If we, however, have achieved what we wanted by this constitutional prohibition and if we have partially closed the doors to the idea of progress, still remains to be discussed.