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BUT IN THIS TWILIGHT OUR CHOICES SEAL OUR FATE: THE INTERPLAY OF AUTONOMY AND DIGNITY IN DEFINING INTERNATIONAL LEGAL RESPONSE TO THE BEGINNING OF HUMAN LIFE

Contents

But in this Twilight our Choices Seal our Fate: The Interplay of Autonomy and Dignity in Defining International Legal Response to the Beginning of Human Life

1 INTRODUCTION

1.1 Deny thyself

> "No!" I said instantly and at once, without hesitating and, virtually, instinctively since it has become quite natural by now that our instincts should act contrary to our instincts, that our counterinstincts, so to say, should act instead of, indeed as, our instincts.[1]

It was as if Imre Kertész had described my reaction and instincts, when I first was informed that there was an increased risk for chromosomal trisomy for the unborn child of mine, residing in the womb of my spouse. It is not going to happen to me, a life with a disabled child, I thought. And then, as if the counterinsticts of mine had gone dormant, I realised that what I just had uttered was the very antinomy of how I had taught myself to think that everyone should be entitled to equal respect – a life of dignity and worth. There I was, perplexed. After a moment of introspection I was able to discern a conflict of my own life plan and my perception of what a life with a disabled child would be. My dignity, my autonomy, they were the ones shouting "No!", whereas the human rights narrative I had grown so fond of remained silent. Together with my spouse we had decided to have an amniocentesis that came with a risk of more than one per cent of miscarriage; the risk for trisomy was only slightly higher, expressed in the common parlance of risk factors reaching the daunting figure of 1:80. In retrospect, when looking at my now almost three-year-old boy, I fail to find any justification for my actions. I showed utter contempt to his prospects of life not because he would face a life of misery, but because I was not willing to accept an additional hindrance to life plans I had set to myself. I am sorry.

[1] *Kertész* 2010, p. 1.

But to my solace I was not alone, for the life and its margins had become concerns of not only parents-to-be, but for entire fields of scholarly inquiry.[2] Danes were traveling to Sweden for an abortion simply to have a child of wanted sex;[3] the skin colour of a gamete donor was deemed non-discriminatory information for assisted reproduction in Finland[4] and denying access to pre-implementation embryo diagnosis was a violation of human rights[5]. Rather than being a unique snowflake, my perplexity was an epitome of global mania. Control of our own heredity had grown into a phenomenon, where ordinary people were willing to take extraordinary measures simply to have a life they had imagined worthy. Midst all of these seemingly innocuous news of individuals and their choice, a more traditional international legal narrative was evolving: Third optional protocol[6] for the Convention on the Rights of the Child (CRC)[7] was opened for signatories on 28 February 2012. It allows – now that it has reached the needed ten ratifications[8] – children and those advocating their rights to file complaints to a Committee akin to those in place already in every other core international human rights treaty.[9] A communications procedure, certainly, fulfils a legal lacuna, yet it, likely, opens the Pandora's Box.

1.2 It is internationally confusing, I presume

From its inception, the CRC has been haunted by a very damning lack of definition as of who are the children entitled to the special protection endowed to every child.[10] The first article of the Convention sets the upper limit but remains silent on the lower, whilst the preamble contains a

2 Compare *O'Neill* 2002, p. 1.

3 *Bannor-Kristensen* 2012.

4 Constitutional Law Committee, Perustuslakivaliokunnan lausunto 16/2006 vp, 16 May 2006, Parliament of Finland. For a more detailed analysis of the debate and its aftermath, see *Kanckos* 2012. A constitutional analysis of the debate can be found from *Ojanen – Scheinin* 2011.

5 Affaire *Costa et Pavan c. Italie* (54270/10), Judgment, 28 August 2012.

6 UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 19 December 2011, United Nations, UN Doc. A/RES/66/138.

7 UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

8 At the time of writing (28 May 2014) there are 45 signatories with 10 parties.

9 UN Doc. A/HRC/RES/11/1 (2009), preamble. See also, UN Doc. A/HRC/WG.7/1/CRP.5. For more information on complaints procedure planned for the CRC, see *Langford – Clark* 2010.

10 See e.g. *Alston* 1990.

direct quotation from an earlier Declaration, whereby children are to be protected even before they are born.[11] Logically, then, children ought to be protected before they are born. However, accounts from the negotiations as well as later state practice tell a very different story: there is a limited or a non-existent protection to any of the rights of a child before birth. Rebuttals stating Vienna Convention on the Law of Treaties (VCLT)[12] as their authority are not only dogmatic but also illusory.[13] In a world where most every state puts the life of a woman before that of a foetus, it is a quixotic quest to protect the reading of the few against that of the many. Moreover, even those states establishing life at the moment of conception do not condone a reading where an embryotic life would be absolute.[14] If an embryo (or a foetus, more on that later) were to have a similar standing as children in general do, no one would accept terminating its life simply to save the life of its mother.[15] With such a clouded notion of life and of child, it is an initial hypothesis of the present work that, at some point, a complaint will be filed seeking to clarify the question of the beginning of life. An immediate follow-up to said hypothesis is: how the Committee on the Rights of the Child would answer to such a complaint?

Albeit interesting on its own right, the communications procedure is not the focus of this study. Rather, loci of focus are multifarious national, regional and international responses provided for the beginning of life, whether in form of a court ruling, an ethical recommendation or a convention between state parties. Even though vastly important, the private governance of these matters – especially with regard to biotechnology – is not treated due to restrictions of time and space. In a world of ever more privatised health care and humongous private medical research, the preclusion of private governance is admittedly a *faux pas*, but one taken intentionally. However, in order to provide more than a mere collage of responses, two concepts are employed to classify and structure the work, namely autonomy and dignity. The choice has befallen on these concepts as they are most apt to describe my own bewilderment. Whether they are capable of responding in a cogent fashion to the conundrum posed by the question 'What is a child?' remains to be seen. Both autonomy and dignity have a prominent position in traditional human rights narrative, even

[11] UN General Assembly, Declaration of the Rights of the Child, 20 November 1959.

[12] United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

[13] Such a reading is suggested by e.g. *Joseph* 2009.

[14] *Economist* 2013.

[15] E.g. where a child would be an ideal heart donor for his mother, no one would argue that the child ought to be sacrificed to save the mother's life.

though their prominence might be lesser in other, related fields of inquiry of the present study.

Even though a work in the field of international law, I will borrow much from a number of national jurisdictions as well as from fields of law that have no effective international legal regime. As life is – to a mild personal surprise – not a legal but rather a biological fact, there are some obligatory references to life sciences. The life sciences are central not only for purely descriptive use (i.e. how to name a cluster of cells at any given point of human development) but also as a raw material for much of the relevant legal debate, most notably in the field of biolaw. Thus where the traditional beginning of life debate was mostly theological (e.g. presence of a soul in a foetus), philosophical (e.g. consciousness of a foetus) and later medical (e.g. viability of a foetus), the present debate is framed as a particular amalgam of all these aspects with very different rationalities of science and humanities conflicting. Variegated backgrounds lead, in part, to a lack of bright-line rules, wherefore the concepts of autonomy and dignity are applied to provide some clarity where it is found otherwise wanting.

As the multiplicity of domains contributing to the debate of the beginning of life indicates, there is no shortage of prior research in the field. Alone the legal condemnation of, e.g., wilful termination of pregnancy dates to the 12th century in the Occident, and the existence of an abortion as a procedure reaches all the way to the antiquity.[16] Therefore, most of the world's religions have a view as of when a life begins and has had one way before any acclaimed 20th century court proceedings.[17] Similarly, philosophical inquiry has not been limited by the fact that there were no means to observe the life of a developing foetus before mid-1900s. Such studies are an obvious fuel to the present-day debate, but the arguments advanced in them are not visited in the present study. Likewise, the importance of Immanuel Kant's work for the concept of dignity and autonomy and to the universalistic aspirations of modern human rights and international law parlance is unquestioned, but reference to his works is kept to an absolute minimum. Other important, yet discarded influences include, inter alia,

[16] *Müller* 2012 suggests that even though there are categorical commands against killing to be found from e.g. theological writings, such as, the Bible, the formation of actual criminalization cannot be dated before 12th century without falling into anachronisms, see e.g. pp. 20–22, and, therefore, first 'criminal abortions' could be conducted only starting the twelfth century, see p. 22 ff. in passim. For an account of ancient origins of abortion as a procedure, see e.g. *Riddle* 1992, pp. 7–8, 46.

[17] Most religions have even had time to alter their stance on abortion during the history. For example, the present day Catholic belief of life commencement at conception can be contrasted to earlier accounts of the Catholic faith whereby life began at either 40 or 80 days after conception, depending from the sex of the foetus. See *Riddle*, op. cit.

Thomism, Galtonian eugenics and intellectual property law. They all are foundational for many of the arguments espoused, yet hardly referenced in the subsequent chapters.

Even with these extensive limitations, there is no short supply of earlier research, whether on the beginning of life, dignity or autonomy. The beginning of life as a legal question was kindled by the medical advances as well as the open-ended definition of the CRC. However, its existence as a self-standing legal problem was brief, and the debate has now moved, to a great extent, under the auspices of bioethics and biolaw. Nonetheless, some of the accounts from 1980s and early 1990s were used to contextualise the debate, most notably articles by Raimo Lahti[18] and Jane Fortin[19].[20] Their contribution can be compared to the more recent accounts, such as those by Elizabeth Wicks[21] and Jeff McMahan[22]. Both the early accounts as well as the latter ones seek to define, with some accuracy, the moment when the life begins, whilst essentially leaving it open. Lahti calls for reflexive structures to take into account medical development, Fortin and Wicks endorse a brain-development or consciousness argument whereas McMahan is supportive of infanticide under certain conditions. Although but a piecemeal representation of the debate, they fairly accurately indicate the ultimate dilemma faced by the Committee: there is support for the beginning of life at every given point of foetal development, from conception to birth and even beyond.

Nonetheless, most of the earlier and present accounts rely heavily on the medical possibilities as a reasonable boundary when defining the beginning of life. A question of beginning of life is, then, a simple matter of medical prowess; as more is learned from human development and better models from the development of human consciousness emerge, the instant of beginning of life changes. Even though philosophically sound arguments, they are lacking for an international legal response on the matter. First, they all assume that what makes a human a human is consciousness or mental capacity, not genetic constitution. Therefore, a normative lack of consciousness leads to the justification of termination of all forms of life, whether it is someone in persistent vegetative state (PVS)

[18] *Lahti* 1991.

[19] *Fortin* 1988.

[20] There is also massive early debate on justification of abortion. Much of said debate also reflects on the potentiality argument of human embryo to turn into a human being. Some references to debate held are scattered throughout the study, such as *Thomson* 1974 and *Marquis* 1989.

[21] *Wicks* 2010.

[22] *McMahan* 2002.

or a small child, not yet meeting the common standards for conscience. Second, screening technologies as well as other medical knowledge and equipment are expected to be similar globally. Even if there is no risk for an abortion conducted in a developed country at 24th week of gestation, it does not imply that abortion ought to be internationally accepted to that point as a measure to protect women, where the opposite might hold true for the majority of pregnant women. And finally, they all take a view that what is possible is also permissible. Although there were no "someone" but "something" terminated at earlier steps of human development, it in no fashion dictates an imperative not to protect that "something". After all, most would not be too welcoming to an idea of terminating animal pregnancies either simply because we can, thus, arguments for speciesism are not fully convincing.[23]

However, the opposition to these medical accounts is hardly convincing either.[24] Arguments for the potentiality of an embryo, it belonging to human species or harbouring a soul are as slippery slopes as the medical accounts. The potentiality argument leads to prevention of not only abortion and *in vitro* fertilisation, but also to ban of contraceptives. Human species argument is, indeed, speciesism and even if one would accept a special status of human (e.g. under *Imago Dei* doctrine), it would have to be extended to cover all forms of deprivation of life, whether through capital punishment, protection of others or withdrawal of treatment. An idea of soul is related to a particular world-view, which would be a troublesome basis for a common human condition. After all, not everyone believes in the existence of a soul, and even amongst those who do, there are countless different standards as of when soul is infused to a human being. For example, where the Catholic Church maintains that ensoulment takes place at conception, for the Islamic faith ensoulment occurs first during the fourth month of pregnancy.[25] I think that Jeremy Williams has it right that for all but the most extremist participants to the debate, the scope of foetal humanity argument is relevant, not whether there is any kernel of humanity embedded in a foetus at some given gestational moment.[26]

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[23] For example, there is already a full ban of animal testing for products considered mere vessels of vanity in the European Union. European Commission, Full EU ban on animal testing for cosmetics enters into force, 11 March 2013, IP/13/210.

[24] See e.g. *Joseph* 2009; *Marquis* 1989.

[25] For the Islamic faith, see *Sedgwick* 2006, pp. 101–102. The present stance of the Catholic Church can be read from, Catechism of the Catholic Church, paras. 2270–2275.

[26] *Williams* 2012, p. 126. Williams uses scope argument vis-à-vis abortion debate, yet it can be equally well extended to cover all beginning of life debate.

To weed out some of the incoherence in the beginning of life debate, as was suggested above, the concepts of dignity and autonomy are used. Yet, much like the beginning of life itself, dignity and autonomy are provided with numerous – often conflicting – explanations. For some they are synonymous,[27] for others precedence is to be given to autonomy,[28] whilst others argue for the primacy of dignity[29]. In much of the earlier bioethical research, human dignity has had a prominent position, as it has been underscored as a principle with seminal importance on numerous conventions, recommendations and professional codes relevant to biotechnological research and clinical trials.[30] There have likewise been numerous studies promoting autonomy's function as an explanatory principle for much of bioethical and, consequently, beginning of life debate.[31] It is for these reasons that both of these concepts are chosen and their capacity to explain judicial decision-making explored, leading to the final segment of prior research to be cited.

Whilst there is research aplenty on bioethics and biolaw, there is a surprising scarcity of analysis of relevant case law outside the Anglo-American courts. The European human rights system and its Strasbourg Court has received some attention, but even there predominantly as a narrative to explain national replies provided by chiefly English courts. For example, in Finnish and Swedish legal systems most of the relevant bioethical and biolegal questions are decided in collegial or administrative bodies with a limited transparency. Simultaneously, there have appeared a number of studies precluding the possibility for a common, international standard that would explicate bioethical and biolegal decisions.[32] These studies are embracing the value pluralism, whilst simultaneously rejecting it nationally: If a national solution to settle values is possible, also an international solution is possible, albeit any international solution is subject to instability, not

[27] *Macklin* 2003 argues that dignity is useless as it simply connotes the same as respect for individual autonomy.

[28] *Beauchamp – Childress* 2009. Although authors argue that they do not "imply that [autonomy] principle has moral priority over other principles", (ibid., p. 99) their account of autonomy leaves fairly little for other principles to settle. Also many a feminist bioethicist give primacy to autonomy, see e.g. *Burrell* 2003.

[29] *Andorno* 2009; *Foster* 2011.

[30] For literature, see e.g. *Beyleveld – Brownsword* 2001 and *Foster* 2011. From conventions, see e.g. Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention) and UNESCO's Universal Declaration on Bioethics and Human Rights.

[31] See e.g. *O'Neill* 2002 and *Beauchamp – Childress* 2009.

[32] See e.g. literature referred in *Hennette-Vauchez* 2009, p. 355.

because of the pluralism, but due to the structure of the international legal regime.[33] After all, many nation states have unprecedented value pluralism and yet the national courts have been capable of developing "common standards". Moreover, it is not possible for the eventual Committee to reject a complaint simply because it cannot find a moral consensus. And still, even the most remarkable studies of biolaw refer but to a handful of cases that are mostly shared between authors. Some national flavour is introduced every now and then only soon to be forgotten, and the choice of *loci classici* of biolaw is seemingly arbitrary. How come the French dwarf tossing has such a prominence for the dignity literature, whilst at the same time dignity cases from, say, Brazil are categorically ignored and the Japanese account of dignity is only mentioned and its existence is credited to the prominent Western influence on drafting the post-Second World War constitution.

The limited scope of biolegal case law referred to in the legal scholarship has an imminent effect to the cases cited in the present study. Obscure searches for what might be relevant nationally in a legal system I was not familiar with would only merit to a superficial analysis. Further, without any context where to position singular decisions, it would have been a futile and dishonest attempt to expand inquiry to novel territories. Thus, only limited additions to the recurrent corpus of cases are provided in terms of Finnish and, to a lesser extent, Nordic legislation and administrative practice with regard to bioethical questions. As such, the following study represents a rather marginal and mostly Occidental take on the concerns of bioethics and biolaw rather than providing a truly international perspective.

1.3 Rules of engagement

There are still a few clarifications to be made. The vocabulary used, whether unborn, foetus, embryo, zygote, blastocyst or gamete does not imply any moral or medical predilection. Rather, varied terms are used to simply illustrate the multiplicity of terms used to describe essentially similar issues. There is a medical nomenclature providing relatively precise boundaries for the use of different terms, yet even within said nomenclature there are no precise medical or biological conditions that would come to explain transition from one term to another (e.g. the moment when an embryo be-

[33] The structures of international legal system and their instability have been subject to eminent scholarship amid international critical legal scholars. *Loci classici* include, inter alia, *Kennedy* 1987 and *Koskenniemi* 1989. See also articles by e.g. *Korhonen* 1996 and *Polat* 1999. These themes are for the most part side-lined, though their presence is acknowledged.

comes a foetus is one).[34] Nonetheless, as a general rule of thumb, embryo is the preferred term whenever dealing with biotechnological aspects of the question. When reference to a specific kind of cells is made, e.g. totipotent and pluripotent, they are used in the meaning the original source provided them. As for the distinction of a foetus and an unborn, there are none, as they are used interchangeably. It is recognised that 'unborn' connotes more heavily than 'foetus' for a membership in the human community, but use in what follows subsumes no such bias. Similarly, ovum, egg, sperm, semen and gamete are used interchangeably.[35]

The terms bioethics, biolaw and biotechnology and their derivatives are all in a constant shift. Thus, any and every attempt to define these with any precision will be outdated to some. It is for these reasons that rather than arguing for novel interpretations or definitions for these terms, a reference is made to their respective Oxford English Dictionary entries. Bioethics is then understood as "discipline dealing with ethical issues relating to the practice of medicine and biology or arising from advances in these subjects", including also the ethical issues themselves. Biolaw lacks a dictionary definition, but it is customarily – as it is here – used to signify a legal response to bioethical problems. With biotechnology is meant "application of science and technology to practical problems of living; the study of interaction of human beings and technology". As such, other biotechnological applications (such as biotechnology in agricultural or industrial products) are not entailed in the use of biotechnology at present study. Definitions for other recurring concepts, most notably those for dignity and autonomy, are provided in subsequent chapters.

The study is divided into three chapters followed by conclusions. The first of these provides the solution, as it examines the legal response provided to basic bioethical problems by the legislators and courts around the world. As the solution is not singular but plural, the subsequent two chapters are devoted to concepts considered central at the outset for the classification of the legal response, i.e., autonomy and dignity. Relying on literature and the legal response cited in the first chapter, both the chapter for autonomy and the one for dignity seek to understand the multifarious legal responses through a prism of a singular concept, as a means to provide

[34] From the power of the words in the biomedical field, see e.g. *Jasanoff* 2005, chap. 6, where she explores the introduction of the notion of pre-embryo to the ethical debate in the United Kingdom, which came to justify medical operations on these embryos as they were categorized to belong to pre-humanity.

[35] As a basic introduction to medical themes of this study, studies in embryology and obstetrics were consulted. For embryology reference was made to *Sadler* 2012, in obstetrics *Collins et al.* 2008.

a common language to seemingly chaotic judicial response. In conclusion, the pretext – third optional protocol for the CRC – for the entire parlance on autonomy and dignity is returned to. Likewise, questions unanswered and ends running loose are unravelled, and, hopefully, answered before concluding with the work to be done.

2 OF PRAGMATIC UTILITY

2.1 Introduction

In the end of Cristian Mungiu's film *4 Months, 3 Weeks and 2 Days*, Otilia is heedlessly running in the dark back alleys, trying to disperse the unwanted foetus of her best friend Găbiţa. For them and their friendship, the question as of when life begins had become a pressing concern[36], as it has become for the vast scholarly literature concerning the life and its margins. The commencement of life is also of concern to a growing body of legal documents of varying pedigree from recommendations of ethics boards to international conventions. Permeating virtually all of these documents is a sense of uncertainty – of blindly stumbling into ordinances of a questionable permanence – where instead of establishing rights the legal documents are enshrining moral codes to justify nonfeasance by the legal community. Much like Otilia, legal scholars, practicing lawyers, and courts are stumbling in the dark with but meagre guidelines as of where to dispose the irksome question of life before birth.

Outcome from the stumble in the dark is a confusing set of legal principles that provide divergent response to the very fundamental question of when life begins. There are countless treaty provisions, innumerable court cases, and even more scholarship seeking to answer it. On the most general level there are few permanent classifications resulting almost always to a different outcome, most important of these being the conception of life *in utero* and *in vitro*. Furthermore, there are significant regional differences in responses as exemplified e.g. by the African Charter of Human Rights[37] and the American Convention on Human Rights[38]. However, past

[36] Paraphrasing *Singer* 2012, p. 348 ("Frågan om när livet börjar har blivit högaktuell.")

[37] Article 14(2)(c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Woman in Africa provides that state parties shall take appropriate measures to "protect the reproductive rights of women by authorizing medical abortion…".

[38] Article 4 of the American Convention on Human Rights states that the "right [to life] shall be protected by law and, in general, from the moment of conception."

these categorical differences there are no cogent answers to questions of life before birth. It is entirely seemly for a single jurisdiction to argue both in favour of recognising life for a foetus once it reaches viability and claiming that nothing is lost if a foetus dies at the 36th week of gestation, or, alternatively, to recognise an autonomous control over her body to a woman when deciding on an abortion whilst simultaneously negating agency from the exercise of said autonomy to conduct an illegal abortion. Whereas in the former case there is no independent standing for dignity of a foetus, it is of primordial importance in the latter scenario, albeit facts in both cases are alike.

Chapter is divided into two, *grosso modo*, equal headings following the first significant classification provided above, namely that of emergence of life *in vivo* (or *in utero*) and *in vitro* respectively. The purpose is to describe the legal documents, with further analysis saved for the following two chapters of this work devoted to dignity and autonomy. Subsequent treatment of cases and legal materials makes no claim of being either exhaustive or representative for the global debate on the matter, yet it tries to present the most recurring arguments used in the legal literature concerning the beginning of life through a wide range of legal documents.

2.2 Qui in utero est…

There is nothing particularly modern in recognising rights for a foetus, as right of an unborn to its father's estate dates to the classical Roman law.[39] What is characteristically modern, however, is a clash of "child's contingent rights and the mother's personal freedom",[40] i.e. emergence of an unborn as a subject of some rights *an sich* rather than as a container of future rights for a person-to-be. The extent of rights borne by an unborn is controversial from the vantage point of rights-based constitutionalism as legal personhood is a precondition of rights; as a consequence, most jurisdictions and legislatures the world over have been forced to opine upon the rights of the unborn. The courts have sought to answer primordial questions of ethics by formulating them as rights, or as Blackmun J in the Supreme Court of the United States' decision of *Roe v Wade* writes: "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."[41]

[39] See for example, *Digesta*, 1.5.26 of Mommsen's edition of *Corpus Iuris Civilis*.

[40] *Norrie* 2000, p. 225.

[41] *Roe v Wade* 410 U.S. 113 (1973) at 116.

With relative ease it is possible to find two lines of reasoning concerning relationship of a woman and child *en ventre sa mère*; on the one hand, foremost importance is granted to a question of viability, i.e. when a foetus would survive even outside *le ventre sa mère*, on the other hand similar significance is endowed to autonomous decision of the woman bearing the child. The latter stance is clearly articulated in an English and Wales case of *St George's Hospital NHS Trust v. S.*[42], where an exercise of autonomy triumphed even were it to "appear morally repugnant"[43]. Of concern in the case was a woman on her 36th week of gestation refusing a Caesarean section, even though she understood the risk posed to her and to her foetus would she pursue a natural delivery. She was admitted to a mental hospital based on an assessment by a social worker after her refusal of a medical operation and she was later transferred to a general hospital only to have the Caesarean section carried out there. The question brought before the Court of Appeal was, whether the refusal from treatment by a woman late in her pregnancy ought to be respected, even if such refusal could result to death of both the woman and her viable child. The Court found that for as long as one is of mental capacity to consent, the outcome of refusal to treatment is immaterial to the validity of such a refusal.

Other recurrent alternative referred above, that of viability of the child, was the one condoned by the Supreme Court of the United States in *Roe v Wade*. There question was whether state legislator had a right to criminalise abortion; the Court answered on the negative and found a statute criminalising abortion to be unconstitutional. However, in *Roe v Wade* Court's argument highlights the "define interest" of a State to protect woman's health and safety during the later stages of pregnancy.[44] Rather than recognising an unconfined autonomy of a woman, the Court pursued in its argument a balancing act between interests of society or community and that of an individual. When at least potential life is involved, there emerges an interest for the public to regulate on the matter. These two conflicting views, the one in *St George's Hospital NHS Trust v. S.* and the one in *Roe v Wade*, are hard to settle under a monolithic view on the legal status of a foetus: a limited timeframe for an abortion cannot be settled with a view that there is no personhood and no independent protection for a foetus from the autonomous decision of the woman in whose womb the foetus resides.

Even though apparently a simple question, the viability – or quickening as used to a similar effect in the older common law tradition – of a foetus

[42] *St George's Hospital NHS Trust v. S.* [1998] 3 W.L.R. 936.

[43] *St George's Hospital NHS Trust v. S.* [1998] 3 W.L.R. 936 at 937D.

[44] *Roe v Wade* 410 U.S. 113 (1973) at 150.

has proved out to be a difficult question to most courts. The question when an embryo turns into a foetus was of central importance in a case decided by Lyon Court of Appeal (*Cour d'Appel de Lyon*) concerning involuntary homicide.[45] The case, later to be decided by the Grand Chamber of the European Court of Human Rights, dealt with an unfortunate confusion leading to events that culminated into a clinical abortion of a foetus. Two women with the same surname had arrived for an appointment for two different operations, and by conducting the wrong operation on the applicant, the doctor pierced amniotic sac that two weeks later lead to a termination of pregnancy. Whereas Lyon Criminal Court (*tribunal correctionnel de Lyon*) had provided seminal importance to the concept of viability[46], the Court of Appeal found the question of viability devoid of any legal meaning.[47] Pivotal for the argument of the Court of Appeal was the remarkable scientific and medical progress, which had in a course of only a few years transformed formerly unviable foetuses viable; thus, founding the law on such a shifting foundation was deemed arbitrary and the court emphasised the causal nexus between the act and the outcome. As there were no standards of viability to adhere to, the court concluded there was a clear causation between the acts of the doctor and the termination of the life of the foetus.

However, the opinion of the Lyon Court of Appeal was not final; instead, an appeal was lodged to Court of Cassation (*Cour de Cassation*), which reversed the decision of the Court of Appeal.[48] In a striking line of argumentation the Court of Cassation finds that first and foremost, the Court of Appeal had misinterpreted the legal rule embodied in the Criminal Code; further, even if one were to admit viability of the foetus in the present case, there was no direct causal link between the act of the doctor and the death of the foetus at hand.[49] Thus, as the Criminal Code must be strictly construed, according to the Court of Cassation, there was no involuntary homicide and, therefore, the judgment of the Court of Appeal had to be reversed. To challenge the judgment of the Court of Cassation, the case was brought before the ECtHR, which decided the case in a Grand

[45] *Ministere Public c. Golfier François*, CA Lyon 13 March 1997.

[46] Argumentation of the tribunal correctionnel de Lyon is, for this part, referred in the decision Case of *Vo v. France* (53924/00), para. 19.

[47] *Ministere Public c. Golfier François*, CA Lyon 13 March 1997, finds that "la viabilité lors de la naissance, notion scientifiquement incertaine, est de surcroît dépourvue de toute portée juridique, la loi n'opérant aucune distinction à cet égard".

[48] Cour de cassation, chambre criminelle 30 June 1999, no 97-82351.

[49] Cour de cassation, chambre criminelle 30 June 1999, no 97-82351, para. 3 states "le lien de causalité entre la faute reprochée au docteur X... et la mort du foetus n'était pas direct, la cour d'appel a violé les textes susvisés".

Chamber composition of 17 judges.[50] Sensitivity of the question is well illustrated by the number of separate and dissenting opinions, amounting for the majority of the judges; seven judges filed separate opinions using two different formulations joined up by five and two judges respectively, further, three judges dissented decision, for which they filed two different objections. Through these separate and dissenting opinions together with the text of the decision, it is possible to trace three different stances to the question of life before birth, that have been addressed in a line of later jurisprudence of the ECtHR.

The first line of argument is provided by the applicant when she claims in the case that "[a] child that has been conceived but not yet born was neither a cluster of cells nor an object, but a person. Otherwise, it would have to be concluded that in the instant case [the applicant] had not lost anything".[51] It is a form of *a contrario* argument whereby the applicant shows that the empirical and ethical sense of loss are not 'nothing' but rather something, and the fact that the French legal system failed to provide a relief for such a loss of something is a manifest violation of everyone's right to life. That the term 'everyone' entailed not only those with legal personhood was, according to the applicant, shown by the fact that when providing legislation on abortion, the French law recognised a protection from the beginning of life, which was contrasted to the exceptional circumstances of an abortion. In other words, the respect of all human beings from the beginning of life was contrasted to the abortion conducted during the first ten weeks of pregnancy that formed an exception to this rule.[52] As is somewhat controversial, this very argument by the applicant is echoed in both of the separate opinions; the majority of the judges agreed that there indeed was something to protect yet the main ruling does not provide a right to life for a foetus. Hence, a majority of judges saw life in foetus yet considered it insufficient to found a violation based on article 2 of the European Convention on Human Rights (ECHR), but such a conclusion cannot be read from the Court's own reasoning but only from the separate and dissenting opinions filed. The right to life of a foetus can also be found from later dissenting opinions yet never as the main argument of the Court.[53]

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[50] Case of *Vo v. France*.

[51] *Vo*, para. 47.

[52] See e.g. Cour de cassation, chambre criminelle 27 November 1996, No 95-85118 ("Qu'en effet, la loi du 17 janvier 1975 n'admet qu'il soit porté atteinte au principe du *respect de tout* être *humain dès le commencement de la vie*, rappelé dans son article 1er, qu'en cas de nécessité et selon les conditions et limitations qu'elle définit;") (italics added).

[53] See e.g. partly dissenting opinion of Judge de Gaetano in Case of *P. and S. v. Poland* (57375/08), §1.

The second line of argumentation is that of right to privacy of a woman, which in the *Vo* case is used negatively to preclude foetal rights, but which has had a significant importance as a positive argument supportive to a woman's right to have a lawful abortion. In the *Vo* case, the Court is supportive to the argument by the French government whereby the foetus is protected through the legal protection provided to the pregnant woman. As such, there is no demand for an expansion of rights protected in the European Convention on Human Rights to cover also foetuses. The Court disconnects potentiality of life from life, and further states that "[t]he potentiality of that being and its capacity to become a person […] require protection in the name of human dignity, without making it a 'person' with the 'right to life' for the purposes of Article 2".[54] A similar argument used in a positive function to grant women a right to an abortion in conditions perilous to her life, is used in the case of *A, B and C. v. Ireland*, where the Court argues that

> [a] prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature.[55]

From therein the Court concludes that such a right is sufficiently protected by the fact that the state of Ireland provided a possibility for women to travel abroad to have an abortion on health and well-being basis.[56] However, a like restriction for abortion where there was a perceived threat to the life of woman, was not justified; rather, the court found that Ireland had a positive obligation to protect the private life (and thus of physical integrity) of an expectant woman seeking to terminate her pregnancy when the woman faced a threat to her life and limb.[57]

Weighing up various and, at times, conflicting rights of woman vis-à-vis unborn provides the third alternative to the argumentation.[58] There is an intrinsic admittance for independent rights of an unborn, yet their value when confronting rights of others is not absolute. Such an argumentation was also used by the Federal Constitutional Court of Germany in its, till now, only decision concerning abortion.[59] There the Court concludes that

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[54] Case of Vo v. France (53924/00), para. 84.

[55] Case of A, B and C v. Ireland (25579/05), para. 238.

[56] Case of A, B and C v. Ireland (25579/05), para. 242.

[57] Case of A, B and C v. Ireland (25579/05), para. 267.

[58] Case of *Vo v. France* (53924/00), para. 80.

[59] Based on *Groth* 2013, p. 436 fn. 1. Before German unification, the West German Constitutional Court provided in 1970s a decision wherein abortion was considered forbidden.

from the vantage point of the German Basic Law, the legal protection and, thus, the legal standing of an unborn is independent of the gestational week of pregnancy.[60] This does not, however, preclude a lawful termination of a foetus, as the protection of life is not absolute; rather, there has to be a settlement between conflicting rights with regard to the need for protection and the importance of the right protected.[61] A similar act of balancing of different interests was of paramount importance in the decision of the ECtHR in the case of *A, B and C v. Ireland*. There the Court was convinced by an argument by the government of Ireland whereby ethically sensitive questions were to be left to the margin of appreciation of a state. Nevertheless, such a right was not without limitations. Wherever there is no fair balance between the limitation and the interest sought to be protected by said limitation, it cannot be accepted. In the case of *A, B and C v. Ireland*, it was proportionate to limit autonomous right of a woman to physical integrity in the name of values and moral of the society writ large. However, the limits of balance were drawn to a point where life of the woman was at risk, giving primordial and superior ethical value to a woman over a pre-natal life.

There has globally been a marked legal rapprochement towards wider acceptance of abortion rights to women. Most of the South American countries, members of the American Convention on Human Rights, have legalised abortion under certain circumstances despite the wording of the ACHR, whereby life commences at conception. Also grounds for a legal abortion have been expanded to cover not only entitlement to termination of pregnancy when inducing risk to life of a woman, but also where foetus is diagnosed with a serious illness in pre-natal screenings or where pregnancy has started as a result of a crime. Moreover, there has been traditionally fairly extensive right to an abortion in Islamic countries, with the abortion being accepted up until fourth month of pregnancy.[62] Most of these developments are argued following narratives of internalised global abortion discourse, where paradigmatically western arguments are infused to different legal orders. An example of such argumentation is e.g. decision of the Supreme Court of India in case *Suchita Srivastava & Anr. vs Chandigarh Administration*.[63] In a much similar case as *St*

[60] BVerfG 28 May 1993, EuGRZ 1993 229, p. 243, "Das danach verfassungsrechtlich gebotene Maß des Schutzes ist unabhängig vom Alter der Schwangerschaft."

[61] Idem.

[62] See however present heterogeneity in Islamic counties with regard to the abortion, *Shapiro* 2013.

[63] *Suchita Srivastava & Anr. vs Chandigarh Administration*, SC, decided on 28 August, 2009. It is e.g. recognised by the Court that the abortion law from 1971 is "largely mod-

George's Hospital NHS Trust v. S. above, the question was whether a person suffering from a "mild to moderate mental retardation" could be forced to an abortion. The Court finds on the negative and argues, based on e.g. *Roe v. Wade* and UN conventions that the personal integrity and autonomous decision of a woman ought to be respected; consequently, the Court found no grounds to terminate pregnancy against the will of the woman despite her mental illness. The holistic approach suggested by the appointed expert's board found the willingness of an individual essential to termination, not her capacity to rear a child or communities negative stance to single parenthood.

An important role in said rapprochement can be attributed to various non-governmental organisations (NGOs) promoting women's reproductive rights. They have brought before UN based committees numerous cases challenging the restrictive abortion laws and lacking maternal health care. In the past such critique has been mainly voiced through the committee hearings of national reports either under Convention to Eliminate All Forms of Discrimination against Women (CEDAW)[64] or CRC. However, in recent years individual complaints filed in accordance with the CEDAW optional protocol has provided more credence to a global right for an abortion, at least where the life of the mother is at risk.[65] In a seminal decision of *L.C. v. Peru*[66], a Peruvian woman supported by an NGO (i.e. the Center for Reproductive Rights) successfully advocated a violation of her convention rights as she was denied access to abortion where denial posed a serious threat to her health and welfare. The Peruvian law recognised a right to abortion when the continuation of pregnancy would endanger the health of the expectant mother; however, the decision was left fully to the discretion of the treating medical facility without any efficient legal remedies to challenge said decision. To support her cause, the case law of ECtHR was extensively used to define what effective and accessible procedure entails.[67] The State

elled on the Abortion Act 1967" from the United Kingdom, para 11. References to Roe v Wade found from paragraph 23ff. and to UN Convention on the Rights of Persons with Disabilities at paragraph 26 and onwards.

64 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

65 Earlier decisions refused to recognise a right to abortion even when there was a grave danger to health of the mother and a lethal disease was diagnosed on the foetus (anencephaly), as in Communication No. 1153/2003, *K.N.L.H. v. Peru*, UN Doc. CCPR/C/85/D/1153/2003/Rev.1 of 14 August 2006. See however the dissenting opinion by Committee Member Hipólito Solari-Yrigoyen.

66 Communication No. 22/2009, *L.C. v. Peru*, UN Doc. CEDAW/C/50/D/22/2009 of 4 November 2011.

67 See e.g. Ibid., para 7.17.

party argued that national legislation ought to be taken into consideration, and further contended that "[i]t is not for the pregnant woman unilaterally to determine that the conditions for a therapeutic abortion have been met, but for the doctors".[68] The Committee sided with L.C. and considered that the Peruvian state had violated its convention duties in failing to provide medical services, "[t]hose services includ[ing] […] therapeutic abortion."[69]

Comparable to India and UN Committees, also Brazil has seen a gradual *de facto* and *de jure* expansion of abortion rights to the detriment of traditionally strong respect for foetal life. Whereas still in 2004, the Supreme Federal Court of Brazil found it criminal to conduct an abortion to an anencephalic foetus, in 2012 the Court overruled its prior decision and, thus, extended the scope of justified causes for abortion in Brazil to include at least some foetal disorders deemed particularly heinous to the quality of life.[70] Support for abortion and new abortion legislation has been mounting in Brazil, to a point where at present a law legalising abortion is under consideration by the legislator with marked support from the medical staff. In its traditional argument supporting foetal dignity, the Court had found all life, even short and painful, worth living. As Peluso J on his opinion against the preliminary injunction that authorised termination of pregnancy of anencephalic foetuses stated: "Suffering is not something that degrades human dignity; it is inherent to human life."[71] Even though there was a right to terminate pregnancy based on Court's preliminary injunction, the Court rescinded its former decision after just four months.[72] After eight years of discretion, there had been a change of course within the Court. For example, then President of the Court Marco Aurelio Mello, concluded that "the physical integrity of an anencephalic foetus, which, if surviving birth, will survive mere hours or days, cannot be preserved at any cost to the detriment of the fundamental rights of a woman".[73] At present in Brazil a regulatory process is on-going, which would expand the scope of legal abortion to cover first trimester of pregnancy (12 weeks).[74]

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[68] Ibid., para 6.8.

[69] Ibid., para 8.15.

[70] The denouncement of abortion right came after an initial interim measure entitling women to conduct abortion of anencephalic foetuses passed earlier in 2004.

[71] Translation and quote in *Diniz – Gonzalez Vélez* 2008.

[72] Ibid.

[73] Vote of the Rapporteur, Wednesday 11 April 2012. Original "A incolumidade física do feto anencéfalo, que, se sobreviver ao parto, o será por poucas horas ou dias, não pode ser preservada a qualquer custo, em detrimento dos direitos básicos da mulher", translation TS.

[74] BBC News, Brazil doctors' council backs abortion reform, 22 March 2013.

An entirely different answer to the question of intrauterine life is provided by another line of case law concerning the right to conduct an abortion by the woman herself. In decisions by the common law courts in Australia, England and Wales and the United States, right of a mother to terminate pregnancy with prescription drugs has been deliberated with varying outcomes. An interesting contrast to court-based deliberation is provided by the Nordic countries and their legislative approach. Both of these alternatives will be dealt briefly below. Even though widely divergent in their ultimate decision, these cases as well as acts of legislator show a common tendency to formulate the question entirely differently than what has been customary in questions of consent to treatment and termination of pregnancy. Even when a refusal from treatment has similar outcome as self-induced abortion and although medication used to terminate pregnancy are the same both in legal and illegal abortion, the very question is formulated in a different fashion. Here, rather than considering the autonomous intent of a woman decisive, much more weigh is given to societal needs to protect health of mother and that of foetus. A contrast to a traditional abortionist notion is poignant: no longer is a risk to health and well-being of a woman posed by an outsider, but rather her own actions are a source of danger. With such a new factual setting, the courts and legislators have had to struggle with an entirely different balancing exercise than before.

In *R. v. Leach and Brennan*[75], the case concerned a young couple in Queensland who went on to perform abortion otherwise unavailable by means of prescription medication brought to Australia by a relative of Mr Brennan.[76] The drugs taken (Mifepristone and Misoprostol[77]) by Ms Leach are commonly used by medical practitioners to conduct termination of pregnancy during its early stages. However, based on Queensland legislation dating back to late-19th century, administration and provision of a "noxious thing" to procure abortion is a felony with maximum sentence of up to seven years.[78] Queensland District Court, however, decided that even though drugs taken were noxious to foetus, they weren't noxious to the expectant mother; rather, misoprostol can be found from the World Health Organization's list of essential medicine.[79] Thus, self-induced abortion was not illegal even though there was no legal alternative for abortion. Decisive for the decision were likely the changed, more favourable attitudes towards

[75] *R. v. Leach and Brennan* (2010), Queensland District Court, not reported.

[76] *O'Shea* 2011.

[77] Commonly referred as RU 486. See for early debate *Porter* 1995.

[78] *O'Shea* 2011.

[79] Category 22.1. Oxytocics in WHO Model List of Essential Medicines. 18th list (April 2013).

abortion in Australia in general[80] – a fact that may have affected the jury vote – , as well as the outdated legislation which provided a legal loophole out from the sensitive question.

Factually relatively similar is the case dealt in *McCormack v. Hiedeman*[81] heard before the United States Court of Appeals for the Ninth Circuit. Plaintiff, Ms McCormack, was in the main proceedings prosecuted from conducting an abortion by herself with prescription drugs ordered online. Through her act of self-induced abortion she had violated the Idaho state legislation, by not securing the right of the provider of drugs to act as a physician within the state. Establishing its decision on *Roe v. Wade*[82], *Planned Parenthood v. Casey*[83] and – as for the criminal liability of a woman conducting an abortion – *State v. Ashley*[84], the Court held that the plaintiff's exercise of her right to pre-viability abortion was subject to undue burden by the state legislation; therefore, a choice to use legally available drugs to perform abortion through medication, was an essential part of a more general doctrine of a right to conduct an abortion before foetus is deemed viable. Unlike in *R. v. Leach and Brennan*, the prescription drugs were legally available in parts of the United States and, hence, there was no need to retort to any analysis on the toxicity of substances and their impact to the health of mother. Further, the Court finds it generally accepted that under no circumstances is the woman herself to be held liable for self-conducted abortion. To this conclusion the court cites support from both statutes of states and jurisprudence of state courts.

In Nordic countries as well, the contributive agency of a woman on an illegal abortion is negated. The most recent legislative change on this field was issued in Finland, where the Criminal Code was modernised and the language of the legal definition of an illegal abortion updated in 2009.[85] The limited *travaux préparatoires* of the change provide an interesting play of dignity and autonomy, where the constitutional protection of dignity is expanded to cover foetal life. Thus, the constitution provides an impetus

[80] See e.g. Betts 2004.

[81] *McCormack v. Hiedeman*, 694 F.3d 1004 (9th Cir. 2012)

[82] Op. cit.

[83] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[84] *State v. Ashley*, 701 So.2d 338 Fla., 1997.

[85] Laki rikoslain 22 luvun muuttamisesta (373/2009) [Statute changing chapter 22 of the Criminal Code], Hallituksen esitys eduskunnalle sikiön, alkion ja perimän suojaa koskevien rangaistussäännösten muuttamisesta (HE 156/2008 vp) [Government proposal to the Parliament for changing the criminal code concerning the protection of foetus, embryo and heredity] and Lakivaliokunnan mietintö 2/2009 vp [Statement of Legal Affairs Committee] are the three relevant documents outlining the change, with the latter two signifying *traveaux preparatoires* for the legislative change that is codified in the former.

for the legislation to criminalise illegal abortion. An abortion is deemed illegal when it is not conducted by a physician, yet there is a general clause whereby a woman whose pregnancy is terminated may not be held criminally liable from the abortion. However, she may be subject to fines "to signal the public condemnation of the act".[86] The justification provided for the limitation in criminal liability is the harm woman causes to herself in subjecting to the treatment of an abortionist (*puoskari* in original). Use of prescription drugs to procure a miscarriage as in two cases cited above is not considered at all. Further, the rarity of cases brought before courts is considered evidence from the rarity of illegal abortion per se, with last cited case from the Finnish databases being from 1972. However, according to medical sources in 1990 there were still 36 women treated because of complications caused by illegal abortions from which also the woman was criminally liable at time. Instead of providing further justification as of why the woman whose pregnancy is terminated is not to be held criminally liable, a mere reference to other Nordic countries (outside Iceland) is made and their similar legislation. These statutes date to 1970s when neither RU 486 nor internet was available and when medical abortion was not a genuine alternative; who is the abortionist when medication is administered by the woman herself using drugs ordered online?

A criminal sentence in the case of *R. v. Sarah Louise Catt*[87] from Leeds Crown Court presages a problem to the categorical preclusion of woman's criminal liability shown in *McCormack v. Hiedeman* and Nordic statutes.[88] The facts of the case are very concretely related to the question of beginning of life, as in the case the pregnant woman administered misoprostol to procure her own miscarriage at 38th week of gestation using a like medicine as the ones used in McCormack's and Leach and Brennan's case. Ms Catt maintained that she had concealed the pregnancy from her husband and ordered the medication without his knowledge thereof. There is no identifiable 'abortionist' in the case, which would result to impunity of her acts in the Nordic countries like it would in the United States. There was no question whether the foetus was viable either, which would have precluded the option for a legal abortion in all of the above-mentioned countries. Cooke J held that the act was tantamount "to rob an apparently healthy child en ventre sa mere, vulnerable and defenceless, of the life which he

[86] Lakivaliokunnan mietintö 2/2009 vp, original "voidaan viestittää teon moitittavuutta sinällään".

[87] *R v Sarah Louise Catt*, 17 September 2012, Judgment, Leeds Crown Court, not reported.

[88] An earlier, relatively similar case where the abortion is performed in a clandestine chirurgical fashion is *R. v. Maisha Mohammed*, 2007 unreported. There as well a woman is convicted of child destruction for terminating a viable foetus.

was about to commence".[89] However, when comparing said decision to informed consent doctrine outlined in *St George's Hospital NHS Trust v. S.* the controversy is apparent. A refusal from treatment which leads to death of a foetus with similar certitude as administration of medication is a right of an expectant woman, whose omission to heed medical advice falls within the ambit of her autonomy, whereas an active deed to procure a similar outcome leads to a sentence of 8 years. One can consent to termination of a viable foetus through omission; one cannot consent to termination of a viable foetus through mission. The very foundational argument supporting abortion has been the beneficial health effects as well as the protection of woman's right to integrity even during her pregnancy. What was protected in *R. v. Sarah Louise Catt* was neither of these.[90]

2.3 …et in vitro?

> Cold for all the summer beyond the panes, for all the tropical heat of the room itself, a harsh thin light glared through the windows, hungrily seeking some draped lay figure, some pallid shape of academic goose-flesh, but finding only the glass and nickel and bleakly shining porcelain of a laboratory.[91]

Such is the Fertilizing Room responsible for the creation of human life in Huxley's *Brave New World* controlled by technicians "[m]aking ninety-six human beings grow where only one grew before. Progress".[92] The sensitivities explored in the dystopian future of Huxley that are for the

[89] Case of *R v. Sarah Louise Catt*, para. 15. See, analogically to the recent decision of the Canadian Supreme Court in the case of *R. v. Levkovic* [2013] SCC 25 of 3 May 2013 where Canadian Criminal Code s. 243 prevented one from concealing a body of a child delivered death at birth. The fact that it was uncertain when the death occurred (before, during or after the birth) was immaterial in the case and central to the question was general feasibility of a foetus to survive. The Canadian Supreme Court does not provide any strict gestational week when foetus are expected to survive, yet it suggests that such a time ought to be placed somewhere at or around seven months. Compare to French Court of Cassation's decision no. 130 of 6 February 2008, where viability was defined based on weight and gestational weeks as well. There the Court concluded that 22 weeks and at least 500 grams of weight were indicative of viability.

[90] A line of argument following public interest could be espoused following the case of *British Pregnancy Advisor Service v. Secretary of State for Health* [2011] EWHC 235 (Admin) where administration of drugs for medical termination of pregnancy were deemed to be within regulated activity and therefore limiting administration of misoprostol and mifepristone only to medical facilities subject to care quality assessment.

[91] *Huxley* 1977, p. 15.

[92] Ibid., p. 17.

most part abjured from the legal response in the evaluation of life and its commencement *in utero*, are a dominant theme for all of the discussion of life *in vitro*.[93] To procreate is a private matter, to do so in a laboratory is strictly public; *ordre public* and dignity are themes explored recurrently and attributed to singular germ cells and embryos as a token of respect for their essentially human origin. In discordance with an intrauterine embryo, the embryo in a laboratory is subject to detailed provisions regulating the minutiae of its treatment. However, much like the Courts concerned with the fate of intrauterine foetus, the Courts concerned with 'life on a petri dish' equally distance themselves from any ethical dimension their decisions might have. For example, the Court of Justice of the European Union in its judgment in the *Brüstle*[94] case merely states that "the Court is not called upon […] to broach questions of a medical or ethical nature, but must restrict itself to a legal interpretation of the relevant provisions".[95]

For the question of the beginning of life, most of the relevant regulation and case law concerning *in vitro* technologies are of more recent origin and more congruent than in the case of intrauterine development considered above. This is mostly attributable to the fairly technical regulation of the subject matter and its global or regional origin. Further, a patent for a technology that provides a cure for a vicious disease sounds more amicable than a termination of pregnancy, albeit both involve destruction of the very same embryo. However, as the technologies like *in vitro* fertilisation (IVF) have become increasingly quotidian so have the controversies related to some of its more divisive aspects received public attention (e.g. disposal or utilisation of any unused embryos and the ownership of frozen embryos). Safety valves harnessing wanton commodification of human have been the so-called morality clauses enshrined in all international intellectual property treaties relevant to biotechnological advancement; they contain either a general prohibition for patentability (and hence of commercial exploitation) of inventions contrary to *ordre public* or a more specific list of impermissible patents, which normally includes technologies of human cloning, etc. Both of said measures are recognised in the TRIPS agreement, wherein article 27(2) provides a general prohibition clause and 27(3) a specific list of subject matters that may be excluded from

[93] Huxley's imaginary has been vivid enough to inspire authors on bioethics to use it abundantly, to a point where caution over its use is necessary. See e.g. *George Annas* 2010, p. xx–xxi providing such a warning: "fantasy is not fact, […], and (science) fiction stories can, […], take on a destructive life of their own and overwhelm the political process."

[94] Case C-34/10 *Oliver Brüstle v. Greenpeace e.V.* [2011], I-9821.

[95] *Brüstle*, para. 30. See above a rather similar statement by Blackmun J with regard to the question of abortion.

patentability.[96] It is important to note that whereas the TRIPS agreement leaves it to national discretion ("may exclude") whether a patent shall be granted on these grounds, for example the European Patent Convention (EPC) precludes categorically such subject matter from the scope of patents ("shall not be granted").[97]

Cases and texts concerned are mostly those of European or American origin. Much of this bias is accountable to the simple fact that also most of the ethically sensitive research[98] as well as use of assisted reproductive technologies is centred here[99]. Obviously, it does not signify that a global standard ought to be established solely on the premise of actions of a selected few nations, yet at present they constitute the only veritable source material. This does not imply that scientific, philosophical and legal questions would be solely of Occidental concern. For example, many an Eastern Asian country has a significant research in embryonic stem cells[100] – a sensitive topic essential for the present discussion –, but limited access to relevant source material precludes possibility of a cogent analysis of issues of particular concern of Eastern Asian origin.[101] Moreover, much of the clinical testing of medicine has been extended to cover regions outside Europe and North America, even though the medical research and consumers for the products likely reside predominantly in those two regions. However, the increasing investments of countries like China, India and Brazil to biotechnological research are likely to alter the present Occidental and global North bias in the foreseeable future.[102]

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[96] For a more detailed analysis of the relationship between TRIPS and EU intellectual property rights (IPRs) legislation, see e.g. *Tritton et al.* 2008, pp. 61–135 *in passim*. See also *Kur – Dreier* 2013, pp. 70–83; 123–137.

[97] For an earlier survey regarding presence of morality clauses in patent law, see *Thomas – Richards* 2004, p. 97 and a status analysis of the European moral clause post-Brüstle in *Bonadio* 2012.

[98] *United Kingdom Intellectual Property Office* 2012, p. 7–8.

[99] ART Fact Sheet available at http://www.eshre.eu/ESHRE/English/Guidelines-Legal/ART-fact-sheet/page.aspx/1061, accessed at 30 April 2013.

[100] For an overview of research conducted on e.g. stem cells see internet portal http://clinicaltrials.gov/ct2/home for stem cell research conducted in Japan, Republic of Korea and China (total of 304 studies found in database at 30 April 2013).

[101] There are extensive similarities, however, with the use of e.g. embryos and embryotic stem cells in research in Europe and North America and Japan. For Japan see The Guidelines for Handling of a Specified Embryo (http://www.lifescience.mext.go.jp/files/pdf/30_82.pdf) and Guidelines on the Utilization of Human Embryotic Stem Cells (http://www.lifescience.mext.go.jp/files/pdf/n503_02.pdf), both accessed at 30 April 2013.

[102] For a brief synopsis of present concerns and practices, see *Presidential Commission for the Study of Bioethical Issues* 2011, pp. 20–28. For the risks of such a narrow view, see *Shimazono* 2009 seeking to explain vast differences in response to e.g. disability in prenatal genetic diagnosis when comparing Japan and European and American countries.

Main features of the relevant case law for the commencement of life has been related to the concept of patentability of innovations derivable from embryos and the use of assisted reproductive technologies and prenatal diagnostics. Human potential vested in an embryo has been of pivotal concern for courts' deliberation in *in vitro* questions of life; a protection of dignity of *in vitro* embryos as subjects to medical diagnostics has received notable attention, leading into rather different legal consequences from those explored above vis-à-vis embryo *in utero*. Even though biologically the subject matter – a human embryo – remains unaltered, answers are widely divergent, which is reflected also in the courts' decisions. Where the ECtHR is incapable to define neither any tangible conception for foetus or prenatal life nor any reasoned justifications for its termination, it found no trouble in deciding with unanimity that a protection of worthy potential life necessitates parents' right to have pre-implementation genetic diagnosis (PIGD), if use of assisted reproductive technologies is provided.[103] Similarly, the reluctance of Member States to define embryo was no impediment for the CJEU to define it, whereas a similar definition of a child – a concept equally vacuous in the EU law[104] – is hardly likely. Likewise, in the U.S. statutes and case law embryos *in vitro* are endowed with humanity early on, unlike their brethren *in utero*, with much controversy involved in research of embryotic cell lines.

Fertilisation of a human ovum "is such as to commence the process of development of a human being",[105] states the Court of Justice of the European Union in *Brüstle* without a modicum of hesitation. A capacity to develop into a human being is what makes an embryo an embryo[106]; furthermore, said capacity with concomitant human dignity is the foundational argument leading to an annulment of Mr Brüstle's patent due to it being excluded from the realm of patentability. Moreover, the very formulation of the exclusion from patentability refers to an entirely different concept of a human than what was espoused in the case law addressed above. Referring to an unpatentable subject matter, both the Biotechnology Directive[107] and the Court use a formulation whereby "human body at the various stages of its formation and development" cannot constitute a patentable invention.[108] In

[103] Arrêt *Costa et Pavan c. Italie* (No. 54270/10), para 71. The decision is an aftermath of 2004 legislation prohibiting pre-implementation diagnosis of embryo, see *Hanafin* 2008, p. 177ff.

[104] *Stalford* 2012, p. 20 et seq.

[105] *Brüstle*, para. 35.

[106] *Brüstle*, para 37.

[107] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions.

[108] Art. 5(1) of Biotechnology Directive.

other words, a human body emerges at creation of a human embryo, which, then again, comes to existence at fertilisation of a human ovum. Hence, any meddling with cells past the state of potentiality is a violation to humanity *an sich*. However, this does not extend past the area of patentability of said cells according to the ruling of the Italian Constitutional Court in the aftermath of *Brüstle*[109]; there were no material grounds to argue that the protection provided to embryos *in vitro* ought to be expanded to cover their absolute protection *in utero*.[110]

It is not only the courts' who are willing to formulate biotechnological questions in terms of dignity and respect for the entirety of human species. For example, in the Oviedo Convention on Human Rights and Biomedicine preamble refers to a need to respect human dignity as well as to the member states' consciousness "that the misuse of biology and medicine may lead to acts endangering human dignity",[111] Similarly, Universal Declaration on Bioethics and Human Rights recognises already in its preamble "that ethical issues raised by rapid advances in science and their technological applications should be examined with due respect to the dignity of the human person",[112] with a special article devoted to human dignity as a synonym for human rights.[113] However, whereas intergovernmental treaties and conventions provide a pivotal role for dignity, similar insistence is not to be found from international declarations by medical and scientific communities. Declaration of Helsinki emphasises the importance of risk management and good scientific practice with an isolated note on dignity in a line of other principles whose importance to medical practice are not further defined.[114] Likewise, in International Ethical Guidelines for Biomedical Research Involving Human Subjects[115], dignity is subservient to other concerns, and ethical concerns related to embryos and foetuses

[109] Corte constituzionale ref. no. 196/2012, of 20 June 2012.

[110] Id., "del dictum della Corte di giustizia europea, non altro recante che una 'definizione dell'embrione umano ai soli specifici, e limitati fini, della individuazione di cosa costituisce invenzione biotecnologica brevettabile ai sensi della citata direttiva 98/44/CE'" ["the dictum of CJEU provides nothing more than 'a definition for human embryo within the limited and specified framework of patentability of biotechnological inventions for the purpose of the directive cited (98/44/CE)'"].

[111] Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (hereinafter Oviedo Convention), CETS 164, preamble.

[112] Universal Declaration on Bioethics and Human Rights, preamble.

[113] Universal Declaration on Bioethics and Human Rights, article 3.

[114] *World Medical Association* 2013.

[115] *Council for International Organizations of Medical Sciences* 2002.

are unrepresented as such attempts "proved unfeasible".[116] There seems to be a conviction amid scientists and physicians that dignity is a useless concept[117], devoid of any particular use in practice, whilst of central importance for governments.

The biotechnological development and consequent legal doctrines seeking to frame these questions are bereft of any cogent convergence. In the case of *Costa and Pavan v. Italy*, the ECtHR concluded that PIGD to prevent genetic anomalies of particular gravity is to be accepted if the state allows an abortion on same grounds.[118] The Court underlines the significant difference between a child and an embryo vis-à-vis human dignity and respect[119], which the other pan-European court had found immaterial in *Brüstle* with regard to biotechnological patenting.[120] Moreover, there are no tools provided to analyse which anomalies are of sufficient gravity to be justified and what is the relation of rights of disabled on the one hand, and that of the parents to have *droit d'avoir un enfant sain*.[121] Whilst the Council of Europe urges its Member States to disallow early prenatal screenings for determination of sex and consequent sex-based abortion in order to bolster equality of sexes[122], it seemingly embraces the idea of prenatal screenings to allow for elimination of disabilities, without addressing the question whether such motives are sympathetic to respect of people with disabilities. An aprioristic denouncement of worthiness of a certain kind of life without further qualifications is certainly not what the Court sought to do, yet it is precisely what the Court's decision in *Costa and Pavan v. Italy* leads to; an embryo with a genetic anomaly subject to malaise without a cure presently available is subject to not be implanted or to be terminated through therapeutic abortion.[123]

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[116] Ibid, p. 12.

[117] *Macklin* 2003. International Ethical Guidelines for Biomedical Research Involving Human Subjects refers to Macklin's earlier study whilst concluding that ethical guidelines concerning foetus and embryos proved unfeasible.

[118] Arrêt *Costa et Pavan c. Italie* (no 54270/10).

[119] *Costa et Pavan*, para. 62.

[120] See supra.

[121] The argument for a right to have a healthy child is used by third parties supportive of the state. See *Costa et Pavan*, paras. 44 and 53.

[122] See PACE Resolution 1829 (2011) on prenatal sex selection and PACE Recommendation 1979 (2011) on prenatal sex selection. In an accompanied report PACE clearly recognises that PIGD technology enables selection of sex, and using PIGD to pre-select children of wanted sex is deemed morally dubious with reference to UN Interagency report: *World Health Organization* 2011. See PACE Doc. 12715 of 16 September 2011, Prenatal sex selection: Report, fn 17.

[123] *Costa et Pavan*, paras. 25 and 54. Further, see Committee on Bioethics, Background document on preimplementation and prenatal genetic testing, CBDI/INF (2010) 6.

A further quarrel over embryos is fought within another field of modern biotechnology namely, frozen embryos. In the case of *Evans v. the United Kingdom*, the applicant sought before the ECtHR to claim sole ownership to fertilised ova after consent upon which fertilisation had been based had ceased to exist.[124] As much as there was a question of right to procreate it was a question of legal status of fertilised embryos. Where the authority in *Brüstle* found all totipotent embryos subject to respect as embodiments of inherent humanity, in the factual setting of *Evans*, similar embryos were treated as property subject to contractual obligations of consent.[125] The problem of the issue is illustrated by the applicant's claim before the Court whereby

> The impact of the consent rules in the [national legislation] was such that there would be no way for a woman in the applicant's position to secure her future prospects of bearing a child, since both a known and an anonymous sperm donor could, on a whim, withdraw consent to her use of embryos created with his sperm. Part of the purpose of reproductive medicine was to provide a possible solution for those who would otherwise be infertile. That purpose was frustrated if there was no scope for exceptions in special circumstances.[126]

If one was to fertilise the harvested ova before using them, it would be tantamount to taking a risk of losing the right to procreate based "on a whim" of the other party. Would the eggs have remained unfertilised and stored simply for future use, such a conflict of interest would not have emerged.[127] A right for an individual to decide whether to be a parent or not was deemed a justifiable cause to prevent childbearing from the other with whom the consent was originally given to procreate.

Similar concerns as the ones addressed in Evans were brought a year later before the U.S. Supreme Court in form of a writ of certiorari in the case of *Roman v. Roman*[128]. The Court denied the writ, which granted further

[124] Case of *Evans v. the United Kingdom* (no. 6339/05).

[125] See case of *Parillo v. Italy* (no. 46470/11) [GC]; the case concerns property rights (Protocol 1, art. 1 of the ECHR) of genetic parents over an embryo.

[126] *Evans*, para. 63.

[127] However, such technology as to preserve fertility of unfertilized ovum was not available at the time. At present the technology of oocyte cryopreservation is deemed a viable alternative to embryo preservation (see e.g. special issue of *Fertility and Sterility*, vol. 99 (2013), issue 6). Thus, the argument supported by the ECtHR drawing analogies to a man facing cancer treatment and prospective infertility are misguided as semen even at the time preserved its fertility when frozen.

[128] *Roman v. Roman*, 193 S.W.3d 40 (Tex. App. 2006).

credence to arguments whereby individuals may sign valid disposition agreements over embryos that override whatever constitutional rights they might have had to procreate. At dispute was a rather similar scenario as the one in *Evans*, i.e., a divorced couple with a number of cryopreserved embryos for disposition of which there was a binding and an enforceable contract. Absent in *Roman v. Roman* as in *Evans* are considerations whether it was proper to control embryos through contractual means or whether they also are subject to some, even if rudimentary, constitutional protection of human rights. In Evans the dissenting opinion addresses the human dignity as a central value of the ECHR, yet fails to mention embryo in any other than in a technical fashion. In *Roman v. Roman* frozen embryos are considered as community property divisible between the parties through mediation or court proceedings. Where ownership of an embryo is precluded from the realm of commercial exploitation, there is nothing preventing said disposition of embryos in the realm of family law; likewise, where a traditional Kantian view prevents property in body and e.g. to germ cells, embryos seem to fall outside the scope of these provisions. They are neither property to be freely disposed for their patentability nor subjects of constitutional protection as evidenced by their free contractual disposition as community property.[129]

A more technical question of embryos and their destruction is raised vis-à-vis the conduct of research on embryos with federal assets in the case of *Sherley v. Sebelius*.[130] In many ways analogical to the question set forth in *Brüstle*, the U.S. Court of Appeals considered the question in a different light. Whereas in *Brüstle* of concern was a patent given to Mr Brüstle for an invention, which necessitated destruction of an embryo in order to gain embryotic stem cells required for the actually patented innovation, in *Sherley v. Sebelius* the question was whether federal funds can be used to stem cell research even though there is a statutory prohibition for federal funding to research wherein embryos are destroyed. Where CJEU held that the entire process of acquisition of stem cells has to be reviewed to assess whether embryos were destroyed, the Court of Appeals held that what was relevant was the actual research project, albeit the embryonic stem cells were originally, at some point, created by destroying an embryo, such a prior act was inconsequential to the justification of later research using the

[129] See for argument in favour of *sui generis* nature of embryos in e.g. *Walin* 2008, p. 781 et seq., even though she argues in favour of human dignity approach precluding embryos from the realm of property. However, such a presupposition is hard to settle with the legal developments of late illustrated above. In common law context, see e.g. *Harmon – Laurie* 2010.

[130] *Sherley v. Sebelius*, 689 F.3d 776, 402 U.S.App.D.C. 178.

same stem cell lines. Where the European Union took a holistic approach, the approach condoned by the U.S. Court of Appeals was singular to the case at hand without due consideration as of what was the original source of the stem cell lines to be researched. Much of this can be accounted to the very different status of so-called morality clauses in the evaluation of patentability.[131]

These differences were put to the fore after the decision of Enlarged Board of Appeal (EBoA) of the European Patent Office (EPO) in *WARF/Stem Cells*[132] decision. An earlier decision by the U.S. patent office had held stem cell patents issued by Wisconsin Alumni Research Foundation (WARF) patentable after review, whereas EBoA deemed the patent impermissible. The EBoA held in its decision that "the commercial exploitation of human embryos was [never] regarded as patentable",[133] which serves "one of the essential objectives of the whole [Biotechnology] Directive to protect human dignity".[134] In *Sherley v. Sebelius* it was held irrelevant that in order to achieve stem cell lines embryos have to be destroyed, whereas in *WARF/Stem cells* the Board merely refers to the fact that "[b]efore human embryonic stem cell cultures can be used they have to be made".[135] All in all, the interpretation of the European courts has stretched the relevant time period to cover the entire process, whereas the courts in United States have underlined the importance of a particular act – whether of funding or creation of stem cell cultures. However, it appears that both the European and the American system take an equally negative stance towards destroying of embryos to create stem cell cultures, yet by framing the question differently the outcome is different.

Some of these framing questions relevant also to the protection of embryos are to be found from the case of *Association for Molecular Pathology, et al. v. U.S. Patent and Trademark Office, et al.*[136] (hereinafter, Myriad Genetics) when it was treated by the Courts of Appeals for Federal Circuit. At stake were patents granted to single genes used in diagnosing a heightened risk to breast and ovarian cancers. The Court found a DNA sequence, even if it can be found within the human genome, patentable as such. The Court argued that isolating a single DNA from a

[131] See e.g. *Shum* 2010.

[132] Decision of the Enlarged Board of Appeal dated 25 November 2008, G 2/06. Official Journal EPO, 5/2009 306–332.

[133] *WARF/Stem cells*, p. 18.

[134] Ibid., p. 22.

[135] Ibid., p. 23.

[136] *Association for Molecular Pathology, et al. v. Myriad Genetics, Inc., et al*, 689 F.3d 1303 (2012).

longer sequence of DNAs forming the chromosome is, in and of itself, markedly different from a product of nature as genes naturally appear within chromosome and never as isolated DNA.[137] The case was granted a writ of certiorari where the U.S. Supreme Court unanimously decided to limit the scope of patentability of genes from that of the Courts of Appeals' decision; only complementary DNA (cDNA) deprived of introns was patentable as it required human interference.[138] Whilst following its former precedents in preventing patenting of naturally occurring DNA, the U.S. Supreme Court does provide a criterion based on which a gene might depart from the realm of nature and become a patentable subject matter. As such, the Myriad Genetics makes it possible, following prior precedents of the Supreme Court in *Mayo Collaborative Services v. Prometheus Laboratories Inc*.[139] and *Diamond v. Chakrabarty*[140], to patent a special kind of embryo with a greater chance for happiness and longevity using cDNA and pronuclear microinjection.[141] Whilst falling squarely to the realm of dystopian future proclaimed by Huxley, there is seemingly nothing preventing monetization of prospective vitality of future generations in the US patent system.[142]

2.4 On pragmatic futility

"Does the present inability of ethics to reach a consensus on what is a person and who is entitled to the right to life prevent the law from defining these terms",[143] asks Judge Costa in his separate opinion to ECtHR's decision in the case of *Vo v. France*. It seems that Costa's question is somewhat misguided. There are numerous definitions even within the instance wherein Judge Costa serves to the question who is entitled to the right to life. The question of the beginning of life gains a different answer when asked from the vantage point of what is accepted conduct of the state as it does when

[137] *Myriad Genetics*, p. 44 et seq.

[138] *Association for Molecular Pathology v. Myriad Genetics, Inc*., 569 U.S. (slip. op. at 16) (2013).

[139] *Mayo Collaborative Services v. Prometheus, Inc.*, 566 U.S. 132 S. Ct. 1289 (2012).

[140] *Diamond v. Chakrabarty*, 477 U.S. 303 (1980).

[141] Whilst prospects of success for the process are slim the possibility of human transgenesis is recognized in basic English course books (see e.g. *Meisenberg – Simmons* 2012, p. 178) as well as in public government sites (see e.g. http://www.genome.gov/10004767, last visited 28 May 2014).

[142] *Rose* 2007, see e.g. p. 31–40.

[143] Case of *Vo v. France*, para. 7 of the Separate opinion of Judge Costa.

asked from the perspective of an individual. Further, if the individual seeks to tinker with life *in vitro* she is subject to much more arduous dictates with regard to the beginning of life than those meddling with a foetus *in utero*. Where in *Vo* the ECtHR found it sufficient to safeguard the life of the foetus through mother, in *Costa and Pavan* the very same court found no protection from the acts of the mother. Likewise, the CJEU has refused to provide a definition to a number of central concepts of personhood that are relevant to e.g. European citizenry relating to the unborn whereas it found no trouble in defining the embryo with utmost clarity.

When moving past regional courts to national courts, there is no additional regulatory certainty for the definition. For example, in the U.S. courts it is a constitutional right to have an abortion yet it is not unconstitutional to protect an embryo from destruction; there are no second-thoughts in recognising an additional sanction for crimes targeting an expectant mother that also likely cause damage to child-to-be, but similar sanctions for administrating drugs in lethal doses are unconstitutional. Or as in Brazilian Supreme Court, one can recognise the life's commencement at conception and, yet, condone abortion of foetus diagnosed with grave disabilities. Not to mention the Nordic countries with their liberal stance on abortion as embodiment of personal integrity, yet their total negation of any female agency in questions of illegal abortion. It is an autonomous decision worthy of respect to abort, yet to do a clandestine abortion is self-harm from which the woman cannot be held liable for. Indeed, the terms are defined as in recent case of *R. v. Levkovic* or in the French Cours de Cassation decision from 2008, yet the confusion remains. References to very perennial values of human rights are commonplace, yet there seems to be no agreement what such rights essentially contain. It is with these open-ended questions that the subsequent chapters commence their quest for tentative answers.

3 THE CONSTITUTION OF LIBERTY

3.1 Introduction

The precedent chapter scanned out the legal dogmatic answer to the question of commencement of life by surveying national and international case law, yet it was able to provide scant in terms of consensus. Discordant courts, codes and conventions amount to a cacophonous global order with only few harmonious tunes. It was initially suggested that the interplay of autonomy

and dignity merit much to this legal confusion; however, the introductory notes barely scratched the surface of the purported meaning for autonomy and dignity. Moreover, thus far there has been no attempt to clarify why it is argued that there is no answer provided by the international law for the question of pivotal importance for the Convention on the Rights of the Child. Anyhow, a whole slew of legal solutions of diverse pedigree were provided above to address this very question of when life begins. It is argued that precisely the multiplicity of answers provided is illustrative of a lacking consensus and absence of even the most elementary legal solution. Arguably, any proof derived from the realm of reproductive rights or patentability of biotechnological innovations is, as such, unrepresentative as a solution to the very different question of when childhood commences in accordance to the article 1 of CRC. Thus, the purpose of the bulk of legal dogma cited above is to illustrate perennial values attached to the unborn from conception to birth, in order to assess the worth of such values for the problem at hand.

Autonomy as a self-standing legal principle cannot be found from any of the international human rights treaties.[144] Nonetheless, it is a perennial principle of the entire liberty narrative, so dominant in the Occidental thought globalised during the 20th and 21st centuries.[145] If there is a singular definition of liberty *qua* autonomy endorsed by much of the post-Washington consensus world order[146], it is the one provided by Friedrich Hayek. For him and much of the neoliberal thought[147], liberty is an exemption from coercion – an essentially negative definition, where personal predicament (i.e. lack of nutrition, funds, etc.) is of no detriment to one's liberties. Rather they are like "a fire or a flood that destroys my house or an accident that harms my health",[148] that is, acts of God past human control and as such

[144] Of this long-standing confusion of autonomy and its various connotations, see *Hannum – Lillich* 1980, p. 858 starting the article they argue that "'[a]utonomy' is not a term of art or a concept that has a generally accepted definition in international law", though admittedly their focus is on governmental autonomy rather than private autonomy.

[145] Such connection is also commonplace in biolaw and bioethics literature, see e.g. *Annas* 2005, p. xiv ("American bioethics has principles, they are mostly drawn from American law, including liberty (autonomy)…").

[146] For Washington Consensus and its aftermath and Hayek's legacy in law critically, see *Nicol* 2010.

[147] Neoliberalism originates from the field of economics wherein it has expanded to cover virtually all of the social sciences. One of the earliest and most influential statements for neoliberalism is put forth by *Friedman* 1960: "The point of view from which I shall examine the role of government […] is that of a liberal in its original sense […] but that, in the light of changing currents of thought, I am now beginning, perhaps too hopefully, to call the 'new liberalism.' Such a liberal regards the market as the only means so far discovered of enabling individuals to coordinate their economic activities without coercion." (p. 4)

[148] *Hayek* 2011, p. 204.

inconsequential to the realisation of a personal liberty. Thus, autonomy would signify relatively unhindered right for an individual to decide over herself and her life[149], although it would not entitle anyone to have her wishes or desires to be respected. Such negative definition of liberty *qua* autonomy would imply a right to abortion and a right to subject embryos and foetuses to clinical research, but the fulfilment of said aspirations would depend entirely from the material wealth of the individual and the willingness of others to accept his goals. It is this form of autonomy that is shown in *St. George's Hospital NHS Trust v. S*.[150], that is, an unfettered autonomy to prevent others from interfering with your personal choice irrespective of the moral condemnation of the community.

The other facet of autonomy is detailed in the seminal article of Isaiah Berlin, originally marking his inauguration.[151] He outlines two very different concepts of liberty, one negative espoused by likes of Hayek, and another positive developed by the likes of Rousseau and Hegel. As Berlin notes "a frontier must be drawn between the area of private life and that of public authority". In the realm of public authority, the realisation of liberties and freedoms, and, thus, of autonomy, is subject to interests of others, where in the confines of private life, all coercion would be absconded. To make the matter clear, Berlin underlines the importance of means to enjoy from freedom (and subsequent autonomy) through a rhetorical question: "What is freedom to those who cannot make use of it?" Whereas in Hayekian negative autonomy one is free from coercion by fellow men, in Berlinian positive autonomy one is free to fulfil ones fullest potential and have support from the society in achieving it. The positive dimension of liberty and of autonomy is well-illustrated in the aforementioned cases dictating a mandate for the states to provide efficient access to abortion where legislation so provides. For example, *L.C. v. Peru* and *A, B and C v. Ireland* rely to positive elements of freedom and autonomy, whilst bestowing obligations to states.

Past this very rudimentary conceptual throat clearing, the concept of autonomy appears both elusive and ephemeral. It contains elements of agency and liberty, but what else?[152] Is it autonomy to have genetic make-up of an embryo verified before it is implanted to woman's uterus? Or would autonomy best describe a right to have an abortion? These and other

[149] A mounting critique to such a minimalist position of liberty has been an emerging theme on much of autonomy debate during the past two decades. See for such a critical stance e.g. *Flikschuh* 2012.

[150] See supra.

[151] *Berlin* 1986.

[152] *Beauchamp – Childress* 2009, p. 100.

questions where private rights and public concerns conflict are hard to settle with precise norms; rather, the evaluation of them is principle-like to follow Alexy's renowned classification. However, it says fairly little from the content of autonomy and provides scant guidance as of how future legal conundrums ought to be solved. To say one is to balance between diverging interests and fulfil the purpose and function of each principle to its utmost potential does not address the question itself: how courts are supposed to succeed in it even if they would command unlimited capacities of Dworkin's Hercules? Such a problem is recognised by Alexy outright: "if the openness of a norm combines with fundamental disagreements about its subject-matter, then the stage has been set for a major dispute",[153] for which the case-law can even add.[154] The cases cited above and the great diversity in the legal response globally illustrate that even if there would be an elementary agreement on the content of autonomy, there most certainly is no agreement as of its importance and scope when balanced against interests of the public.

An adjoined question to the relation of autonomy with other legal principles is the question as of who are entitled to protection of autonomy. It is but a relatively recent debate on the rights of women, disabled, elderly and children that has revealed how far-reaching limitations there are set for those who are not deemed as paradigmatic bearers of rights. For example, to Brownsword "the paradigmatic bearer of rights is one who has the developed capacity for exercising whatever rights are held",[155] obviously limiting the scope of those endowed with autonomous rights. It is therefore considered no travesty for a statute to provide a legal guardian with a right to decide on far-reaching violations to the physical integrity of those outside the group of "paradigmatic bearers of rights"; in Finland, for one, the termination of pregnancy can be requested by a legal guardian[156] on all grounds recognised by law (including e.g. lowered capacity to take care of a child)[157], even though there is no direct harm to the physical or mental health of the expectant mother from said pregnancy. Such a formalistic reading of the scope of autonomy *ratio personae*, either instils too great a trust to rationality of paradigmatic bearers of rights or is too eager to denounce rationality from those outside its scope. Even if one would be fully incapable of rearing a child there is no right for the public

[153] *Alexy* 2002, p. 2.

[154] Ibid., p. 3.

[155] *Brownsword* 2008, p. 18.

[156] Laki raskauden keskeyttämisestä (1970/239) [Act on Termination of Pregnancy], section 2.

[157] Ibid., section 1(6).

to interfere with a decision to have one if you are generally deemed as having the capacity to exercise discretion, yet a presumption of ineptness based on group characteristics is a sufficient and necessary condition for such a public action.[158] These questions are further accentuated when of concern are beings unable to formulate any response (e.g. foetuses).[159]

The chapter is divided into three sections each exploring a particular facet of autonomy relevant to the commencement of life discussion. First, treating the doctrine of informed consent and its relation to autonomy, second, underlines predominantly technological concerns posed to autonomy debate. In the third and final section, the position of autonomy in the field of human rights is analysed based on the cases cited in the second chapter.

3.2 An autonomous consent

Procreation, reproductive rights and assisted reproductive technologies abound discussion on the importance of consent of an informed kin. A basic premise for much of this parlance is consent as a trump, overriding reasons of other sorts.[160] Once someone can show consent or lack thereof, the argument ends. Therefore, it is hardly surprising that questions of correct consent and its inherent qualities have garnered much attention. Also, a vast number of cases cited in the precedent chapter have a say on consent and its formation. The narrative supporting the importance of consent is twofold. On the one hand, it has a powerful emancipatory justification, in which it is considered a vessel of feminine empowerment – an instrument of control over one's own body –[161], on the other hand, consent is deemed to belong to the realm of private and unhindered liberty, wherein the public may not interfere.[162] Both of the narratives have a common origin condemning, respectively, paternalistic interventions by the male sex or by the society writ large.

Predominantly, when we human beings procreate it is a consequence of a consensual decision made by both parties. However, it is not unheard of that a pregnancy is a result from an act that lacked either consent or

[158] A critique of such formalistic stance within the framework of dictates posed to Member States of UN Convention on the Rights of Persons with Disabilities is provided by *Buch – Kerzner* 2010.

[159] See e.g. *Schmidt* 1997.

[160] See *Dworkin* 1984.

[161] See e.g. *Dickenson* 2007.

[162] See e.g. *Siegel* 2012.

intention to procreate. And when there is no intention or acceptance for the pregnancy, its continuation is subject to *ex post facto* consent or acceptance. If such an acceptance cannot be construed, recourse to termination of pregnancy is an obvious course of action in much of the Occident (and elsewhere). A paradigmatic example of such a scenario, recurrently encountered by the courts, is where pregnancy is an outcome of a rape or other form of sexual abuse as, e.g., in the cases of *L.C. v. Peru* and *S. and P. v. Poland* mentioned briefly above. To force a woman to proceed with the pregnancy under such circumstances would be a grave violation to her right of bodily integrity and disrespect for her right to decide.[163] Outside such clear-cut cases, the emancipatory argumentation through consent is much more strained. For example, Siegel argues – with regard to a decision of the Colombian Constitutional Court, to allow legislature to criminalize abortion in cases of consensual sex – that such an approach "presumes that for women, consent to sex *is* consent to procreation",[164] without a modicum of consideration that, *ipso facto*, for men the consent to sex is under all circumstances a consent to procreation, as there are few who would argue in favour of man's right to demand an abortion.[165]

To underline the problem of consent as a trump argumentation with regard to abortion, it is possible to reverse the situation. What if a man is raped and, consequently, the rapist ends up being pregnant. Take a recent example from Toronto, where a young man was allegedly raped by four women.[166] If consent to procreate would be the sole argument, then, obviously, the raped man would have a right to demand for an abortion. After all, he cannot be anymore forced to parenthood and personal turmoil than a woman raped. Furthermore, there is no more consent here on behalf of the man raped to have sex or to procreate than had the victim been a woman. It becomes obvious, that essential to the right to have an abortion for those pregnant by rape is not the lack or presence of their consent and, hence, the

[163] An illustrative example from a philosophical point of view is provided by *Thomson* 1974 using vivid imaginary of a person attached to a machine to uphold the life of a concert violinist forced to stay connected for the next nine months to exemplify the life of a pregnant woman.

[164] *Siegel* 2012, p. 1074–1075, emphasis in the original.

[165] Men's right to family life and through it a decisive command over women's decisions to abort are not protected, as evidenced by the now established case law of the ECtHR, see e.g. cases *H. v. Norway* (17004/90) and *Boso v. Italy* (50490/99). In the US courts a similar ruling was given in *Planned Parenthood* case cited above.

[166] Vidya Kauri, Four women wanted in alleged sex assault of 19-year-old man in downtown Toronto, National Post of 7 April 2013, available at http://bit.ly/143uBBy (accessed 19 May 2013). A powerful, literary, example of past impunity of female rapist in Finland is Märta Tikkanen's novel *Man kan inte våldtas* ("Man cannot be raped").

right to have an abortion cannot be found solely on such claims either.[167] A more reasoned approach would be to argue e.g. based on restorative theory of criminal law that woman has a right to restore her life to the state it was before the heinous act. Or to use the human rights narrative of physical integrity to argue that such decisions simply belong to a woman by the very definition of them having to carry the physiological burden of pregnancy. The obvious problem with the latter alternative, in the eyes of many, is that it expands the right to abortion to all pregnancies, irrespective of their consensual or non-consensual origin and makes the decision of abortion solely a subject to deliberation of the expectant woman.

But informed consent has a much wider reach than simply questions relevant to right of a raped to have an abortion.[168] Its reign in medical law is revealed by decisions like *St. George's Hospital NHS Trust v. S.*, where once consent is correctly issued it trumps all counter-arguments, irrespective of their apparent qualities. From a Kantian perspective, it is purely rational for us to condone such a maxim, whereby all transgressions to our body are subject to our acceptance.[169] There are, however, two precise requirements for informed consent; one demands patients to understand information they are provided with, whereas other calls for a capacity to analyse granted information to formulate a decision.[170] Moreover, before a court or a treaty can formulate any doctrine of consent, it must first endorse a particular conception of both autonomy and consent.[171] Thus, diverse responses to informed consent can relate to a number of factors ranging from different demands set for the medical information provided to the individual's capacity to assess the relevance of the provided information. A particular problem of inconsistency emerges, which in and of itself might be detrimental to the very idea of legitimacy of legal rule.[172] An example provided by Charles Foster on the inherent inconsistency of the informed consent argumentation within the British courts is the case of *Re L (Patient: Non-consensual Treatment)*[173], where a woman suffering from

[167] Alternative argument would be to base rape on a property model, see *Phillips* 2013, p. 42–64.

[168] In general from informed consent and its limits, see e.g. *Schneider – Farrell* 2000 and *Herring* 2012, pp. 149–220.

[169] From Kantian rationality as a foundation of autonomy, see *Lindley* 1986, pp. 13–27,

[170] *Schneider – Farrell* 2000, p. 108ff.

[171] *Maclean* 2008, p. 113. Of various conceptions of autonomy, see e.g. *Dworkin* 1988, p. 5–6.

[172] Argument against inconsistency in the public answer to the margins of life questions, see *Friberg-Fernros* 2008, p. 19–27.

[173] *Re L (Patient: Non-consensual Treatment)*, [1997] 8 Med LR 217.

needle phobia was deemed to have lacked faculties to provide a consent to have a caesarean section.[174] The lack of capacity of the woman was, according to the court, a sufficient reason to disregard any allegations of non-consensual treatment. The court failed to provide, however, an argument how a needle phobia is sufficient to annul consent or lack thereof to a treatment where demands for a natural delivery by S. in the St George's Hospital case was not. Outcome from both decisions would have been the same, both are equally considered bad choices by the society writ large, yet both are independent decisions by wholly independent actors. If fallacy of our beliefs, emotions or sensations is to be a decisive element for the autonomous nature of our consent, whose standards are to dictate the boundaries within which said feelings are to still count as autonomous? A retort to second-order desires as truly decisive to consent renders humane aspirations more important than genuine capacity to act.[175] I might desire a virtuous career as an international civil servant,[176] yet I may in fully autonomous fashion decide to work for a multinational firm responsible from repeated violations of human, environmental and societal rights.

In order to analyse the breadth of autonomy to consent, an informative vantage point is to look for those decisions and persons who do not meet the threshold of autonomy. It has been commonly agreed upon that there are groups of people for whom we do not recognise autonomy. Traditional categories include, inter alia, children, disabled and elderly, but there are several other categories to be found the world over (most notable of which would be women and girls). For example, a refusal from a treatment by a 10-year-old because he happens to have a needle phobia, would not even be considered as a violation of autonomous consent, even though a 10-year-old most certainly is capable of recognising what he is afraid of equally well and quite as reasonably as an adult with similar fears and phobias.[177] The difference lies not in the content or the autonomy of the consent, rather it resides on the one showing the consent. Particularly problematic from said vantage point are categories with vast internal disaggregation; such are transgressions to the rights of disabled to autonomously decide to lead a full life, including but not limited to, a right to family life. A wide-ranging practice of forced sterilisations and forced provision of contraceptives are but some aspects of said phenomenon to control procreation of those

[174] For the argument, see *Foster* 2009.

[175] On criticism of second-order desires, see e.g. *Beauchamp – Childress* 2009, p. 100–101.

[176] Of virtuous musings of an international civil servant within the United Nations, see *Orford* 2011.

[177] Of said argument and others, see *Lindley* 1986, pp. 117–139.

deemed lacking the capacity for an autonomous informed consent.[178] Even though e.g. the ECtHR has underlined the importance of consent and presence of grave consequences to the health of the individual to override such consent,[179] the aforementioned Finnish act on termination of pregnancy shows no limits to public deliberation on the capacity of a disabled to rear a child.[180] Considering how Article 23(1) of the UN Convention on the Rights of Persons with Disabilities recognises the right to family life for disabled and furthermore, the rights of disabled are recognised in the ethical guidelines of obstetrics and gynaecology[181], it is a troubled doctrine of eugenics rather than paternalism that is shown in the Finnish practice. Furthermore, many of the classifications of mental illnesses are imprecise and decisive is the opinion of those treating the individual, rather than any objectively verifiable condition, albeit such are also entailed by definition.[182] As with children, the disabled are treated as a singular category of people with innately more limited set of rights, which is reflected in their more limited control over their life, even in the walks of life where they are fully capable to provide a meaningful consent.

Value of autonomy and consent as a legal paradigm to solve the enigma of the beginning of life is further hampered by the self-induced abortion cases referred above. If autonomy is to have any meaningful content in defining the scope of consent, it has to have a foreseeable and cogent application. The self-induced abortion cases are riddled with a logical problem: if consent is a necessary condition for the acceptability of a medical operation, and consent is present in a medical operation, does that consent not constitute an integral part of said procedure. To disentangle consent from an operation makes consent meaningless. Recourse to self-harm as a

[178] For the forced sterilizations of mentally disabled women, see the case of *Gauer et autres c. France* (61521/08).

[179] See e.g. *Case of X v. Finland* (No. 34806/04) of 3 July 2012, para. 218 ff.

[180] To clarify the sparse definition of the Finnish law, an email correspondence was conducted with three officials of Finnish government responsible from the execution of said provisions. Communication in file with the author.

[181] FIGO, *Ethical Issues in Obstetrics and Gynecology of October 2011*, p. 124.

[182] See e.g. Wired magazine's article Inside the Battle to Define Mental Illness of 27 December 2010 at http://bit.ly/dWq2Sm (accessed 17 May 2013) by Gary Greenberg, where the author of Diagnostic and Statistical Manual of Mental Disorders (DSM), Allen Frances, quips that "there is no definition of a mental disorder. It's bullshit. I mean, you just can't define it." Or a more recent article from by Lena H. Sun, "Psychiatry's revamped DSM guidebook fuels debate", Washington Post, 17 May 2013 at http://wapo.st/14bHEh3 (accessed 17 May 2013). In Sun's article the debate referred to concerns new and modified categories of mental health e.g. an added category for a binge-eating disorder and more lax definition of ADHD in the new, fifth edition of DSM. From social construction of psychiatric and psychological knowledge, see *Rose* 1999.

justification for a categorical denial of an autonomous consent and agency is equally problematic; after all, there is arguable self-harm from deferral of treatment where it might lead to a permanent disability or death of the patient and, yet, such consent is not overridden but rather is cherished as a manifestation of the autonomous will of a patient. Thus, it is possible for a pregnant woman to consensually administer medication to induce a termination of pregnancy that would be unlawful not only to medical professionals but to everyone else, without any limits to her autonomy. However, the justification for this is the lack of autonomy as would she be autonomous, she would not be entitled to administer said drugs that are reserved for physicians or other medical professionals only. In other words, the autonomy is protected by defining its exercise as antithetical to autonomy, which justifies impunity. Even a materially minimal conception of autonomy necessitates logical consistency.[183]

Autonomous consent, it appears, is no trump. It is a trump when it provides a paradigmatic bearer of rights the control over himself, but even then it trumps only when the community of other paradigmatic right-holders consider such an action as genuinely rational, using our culturally dictated and temporally shifting metrics for defining such rationality. For those on the fringes of autonomy, consent provides little if anything. It is "their" lesser capacity to reason, "their" inconsiderate needs and "their" argumentation that is faulty not "our" framework for defining what autonomy and consent means.[184] As David Hume once wrote, "'Tis not contrary to reason to prefer the destruction of the whole world to the scratching of my finger",[185] thus it hardly ought to be against reason to let most anyone decide from their own life, if we bestow such right to some. A second-order desire hardly is any better guidance than a first-order one, if in reality all choices are independent of any naturalistic moral compass dictating the correct sentiments and desires.

3.3 Autonomy and scientific knowledge

The general lack of content for autonomy *qua* informed consent has not stifled its extensive use as a justification for virtually all biomedical treatments, albeit "[i]t is not as if doctors offer patients a smorgasbord

[183] See e.g. *Dworkin* 1988, p. 7.

[184] Of these insights of theirness and ourness I am indebted to *MacIntyre* 1999. See with relation to disabled e.g. p. 2.

[185] *Hume* 1739–40, T.2.3.3.6.

of possible treatments and interventions, a variegated menu of care and cure".[186] Whereas traditional means of procreation entail an autonomous decision to choose how many, when and with whom to have children,[187] a person subject to assisted means of procreation only has a choice of do's-or-don'ts. Likewise, there are no grades or shades of autonomous choice with regard to prenatal diagnosis; either you participate on diagnosis or you don't, either you terminate the pregnancy or you don't, etc. Even though autonomy is portrayed as a principle, it functions as a norm.[188] The greater the requirements of information, the more strained the relationship of autonomy and consent becomes.

An integral element of medical ethics is the doctrine of informed consent, providing a strong credo to wills and wants of the patient. To be informed, however, is a quagmire of its own, even though recurrently tagged along with consent and autonomy. Novel challenges posed by new technologies of reproduction are multifarious. The most underscored challenge is related to disparity of information between patient and those providing treatments, as information paired with individual autonomy "may increase the autonomy of those in positions of power",[189] enabling them to act behind the veneer of manifest autonomy that reflects more the desires of those providing treatments than desires of patients. Other particular concerns evoked by new technologies were already briefly referred to above with the case law: legal status of frozen embryos, prenatal genetic diagnosis and prenatal screenings. Even though they are unique legal problems, they enshrine much the same values in conflict, i.e., autonomy of the parents to dictate when to bear and beget a child vis-à-vis those of the human tissue to enjoy particular dignity as a member of human species.

Regulating risks – environmental, genetic, biological, etc. – is a cornerstone for much of modern society and regulatory agency.[190] Public acts are, however, not the sole province of risk parlance; rather, consciousness of risks has been transposed to the wider circles of society, therein entailed individual decision-making in realms of health. A risk to health may be introduced in positive terms (e.g. eat tomatoes to stay healthy) or in negative terms (e.g. eat animal fats and risk a cardio-vascular disease). In the realm

[186] *O'Neill* 2002, p. 38.

[187] See, however, above vis-à-vis rights of disabled to family life (see supra) and the notable exception of Chinese one-child policy and a recent development in Myanmar (née Burma) where Muslim Rohingya minority is limited to two children.

[188] See for an authoritative account, *Beauchamp – Childress* 2009, pp. 99–148.

[189] *O'Neill* 2002, p. 3.

[190] *Locus classicus* for risk society at large is *Beck* 1992. For regulation of risks, see *Hood – Rothstein – Baldwin* 2001.

of biomedicine, risks are purely negative and unavoidable: there is a 1:80 chance for a child with a disability, not a 79:80 chance for a healthy child. An autonomous choice, as depicted by the courts and legislators, requires an individual concerned to solicit her personal desires when encountered with such information and, consequently, to act according to these predilections. Yet, an introspection of desires might prove futile when there is no information on which to found these desires. Edwards syndrome, Huntington's disease or Gaucher's disease might not reveal much to any of us, but they are genetic disorders that could be traced in diagnosis before birth. Further, they all mark a deviation from the ephemeral standard of health[191], causing ailments of varying degree for which the presence can be diagnosed with some certainty. As such, diagnosis can be perceived as a means to abolish uncertainties and, thus, allowing an autonomous choice. But the diagnosis to abolish these uncertainties itself, at least during pregnancy, poses a notable risk, in the common parlance of riskiness (i.e. ½ to 1 per cent lead to miscarriage). An illustrative case in point is a Finnish information leaflet on prenatal screening for expectant parents. Use of risk factors starts on the very first page (e.g. "three in hundred […] are found to have a structural or chromosomal abnormality") and continues throughout the leaflet.[192]

To assess uncertainties framed in risks, it is customary to place trust on those deemed to possess best faculties to evaluate the information provided. With regard to the genetic disorders or the purpose of prenatal screenings, it is prevalently the medical professionals whom we trust.[193] It leads to a paradox whereby the amount of information provided by prenatal screening essentially diminishes the role of autonomy, as the additional information is assessed in medical terms. Whereas with questions of consent explored above, where refusal from treatment was understandable and concrete to the patient and his desires, in prenatal screenings overlapping risks are highly abstract. A risk of personal ailment and distress of parents and a possible torment of a yet unborn child is compared to an imperilment of the same unborn child to miscarriage. In other words, "technical experts are given pole position to define agendas and impose bounding premises

[191] On the fleeting notion of health and its definitions, see e.g. *Herring* 2012, pp. 5–7. The authoritative notion of health for many legal scholars is provided by the World Health Organization. For WHO "[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". (Preamble to WHO Constitution). See also a welfare account to health and human enhancement espoused by *Savulescu – Sandberg – Kahane* 2011.

[192] *National Institute for Health and Welfare*, Prenatal screening: A guide for expectant parents.

[193] *Clark* 2002; *O'Neill* 2002.

a priori on risk discourses."[194] And as shown by e.g. Mianna Meskus, the trust amounts to a fairly uncritical acceptance of medical information as a foundation for moral choices,[195] though the amount of so-called false positives (i.e. diagnose of a disease although there is no disease) is not non-negligible even for the genetic disorders best known.[196]

The problem with the use of medical information and medical expertise is not limited to abortion decisions, but is a more generic trait of different moral frameworks. For many scientists and physicians, decisions are evaluated based on their foreseeable outcome and its positive consequences for the society or a segment thereof, whereas for parents not only the framework of analysis might differ but also the innate worth given to an act. The latter, commonly called deontological stance provides actions with innate moral value, whereas the former, referred to as consequentialist, places importance to likeable results of a decision. Therefore, it is entirely rational from the vantage point of a public health care provider to support an abortion of a foetus diagnosed with a genetic disorder leading to significant savings for the public health care in times of austerity, and it is equally rational for the parents to oppose it. Thus, transferral of decisive autonomy to those commanding medical expertise not only changes the locus of agency, it can also alter the modus of evaluation. In biotechnological discussion, these arguments are commonly advocated with relation to stem cell research. It is readily available also in much of the public debate, as reporting of a recent discovery of a novel technology of stem cell cloning[197] shows, "[o]ther researchers agree with [Shoukhrat Mitalipov] and argue that the possible benefits of the research outweigh the [ethical] concerns."[198]

Even though accentuated in individual decision-making, pole position the technical experts have is firmly established at courts and legislators.[199] Legislators regulate on un-founded premises and courts decide in absence of accurate information. For example, during the national proceedings of *Evans v. the United Kingdom*, an analogy was drawn between an infertile man and an infertile woman.[200] It is accurate to state that the biological and medical fact of infertility might be the same for both sexes, but at the

[194] *Lash – Wynne* 1992, p. 5.

[195] *Meskus* 2009, p. 185. An earlier account from the American experiences on amniocentesis *Rapp* 1999, chap. 9 pp. 220–262.

[196] See e.g. *Ekelund, et al*. 2008 reporting a 5.2% false positive rate for Down syndrome.

[197] *Tachibana et al.* 2013.

[198] *Rob Stein – Michaeleen Doucleff*, "Scientists Clone Human Embryos to Make Stem Cells", NPR News 15 May 2013, http://goo.gl/JEpgp (accessed 16 May 2013).

[199] In more general terms with regard to expert knowledge, see e.g. *Kennedy* 2005.

[200] *Evans*, para. 23.

time of the legal proceedings, prospects of storing an ovum were vastly different from that of storing sperm.[201] Ms. Evans had no genuine alternative to fertilising her ova to enable further procreation, whereas purported Mr. Smith with testicular cancer could have equally well stored his sperm for later use. It is accurate to say that the law *de jure* was the same for man and for woman (i.e. use of a fertilised embryo was subject to partner's consent), but *de facto* there were no similar avenues to pursue (i.e. it was not a feasible alternative to retort to oocyte cryopreservation, whereas cryopreservation of sperm was commonplace and efficient). Therefore, an analogy of legal facts was not backed by medical facts, which led to application of law that was entirely dissonant from the medical facts. Alternatively, there is ample evidence of scenarios wherein the opposite has held true: an influx of medical knowledge trumps other concerns, as with innovative treatments.[202] The legal response to innovative treatments has been diffuse, and any transgressions on the rights of practitioners to perform novel treatments are often met with disdain and critique.[203] In other words, when traditional clinical practice is insufficient for provision of cure and care, the subsequent acts of medical practitioners are mostly intentionally unregulated because of the mounting criticism of the medical experts. A novel treatment is heralded always as a saviour of human kind, and a failure in treatment leads to the "natural outcome", which medicine for the time being was, sadly, unable to avert – there is but a narrative of success surrounding these technicians of human.[204]

Albeit transgressions to individual autonomy are the most far-reaching with regard to informational disparity, there are other notable concerns to

[201] For history of cryopreservation of sperm, see *Walters et al.* 2009, p. 4. With regard to oocyte (egg) cryopreservation, see *Gook* 2011. Essentially, sperm has been stored successfully from 1950s onwards whereas preservation of eggs was still very much experimental in late 1990s and early 2000s, when Evans together with her partner decided on storage of embryos. *Sheldon* 2010, p. 62 states that "At the time Evans was treated, however, no successful pregnancy had ever resulted from stored eggs".

[202] *Chan* 2013.

[203] For example, Summary of the responses to the public consultation on Regulation (EC) No. 1394/2007 on advanced therapy medicinal products, SANCO/D5/RSR/iv(2013)ddg1. d5, p. 3: "The high requirements of the Regulation were blamed for the disappearance of some innovative products from the market."

[204] A narrative of success is well-illustrated in e.g. recent news of two-year-old receiving new trachea made from her stem cells. Carl Franzen, Two-year-old girl receives new trachea made from her own stem cells", The Verge on 30 April 2013, http://bit.ly/15X-PGNW (accessed 11 June 2013). Even a death of patient is a success for this narrative, John Lichfield, Face and hand transplant patient dies, The Independent on 16 June 2009, http://ind.pn/11cNN9D (accessed 11 June 2013). The physician conducting the operation is quoted saying in the news reporting death of a patient how "operation […] had taken transplant surgery into important new territory".

autonomy created by new technologies. It has been over thirty years from the birth of the first human born with the help of technology, yet many of the questions relevant to these technologies are still left unanswered. As was shown with cases like *Evans v. the United Kingdom*[205] and *Roman v. Roman*[206] above, the doctrine of consent serves an important function also on technological domain of autonomy. It is here that whimsical wishes of paradigmatic right-holders reign supreme; rather than considering consent as a singular act, taking place at the moment of fertilisation of the embryo – as is the case with the more traditional means of procreation –, consent in the past was considered immaterial to the consent in the present. The doctrine of consent shown in *Evans* and *Roman v. Roman* is hard to settle with the more recent decision of the CJEU in *Brüstle*: if a fertilised embryo is a member of human species worthy of our respect, how can withdrawal of consent dehumanise said subject to a level of being a mere object disposable through contract? As the margins of life have become tangible because of the advanced technology, the autonomy has had an *effet pervers* of extending right of transaction to cover human species, albeit such transactions in the past have been deemed tantamount to treating humans as means rather than as ends to follow the Kantian dicta.

Expansion of diagnostics to cover foetuses and embryos has amounted to variegated issues of conflict between dignity and autonomy. In *Costa and Pavan v. Italy*[207] the aforementioned self-fulfilling prophecy of medical knowledge is illustrated, even though the argument employed by the ECtHR seeks to found its legal reasoning as the sole logical conclusion from the premises. In *Costa and Pavan*, the Court justified pre-implementation genetic diagnosis of an embryo for genetic disorders if an abortion would be possible on same grounds. Thus, if abortion is justified on eugenic merits (i.e. due to a foreseeable disability or a condition deemed undesirable), the expansion of genetic knowledge leads to expansion of these merits. Further, health and its definition are constantly re-negotiated and what today is considered healthy might tomorrow be deemed inhumane suffering and *vice versa*. Also, as argued by many a philosopher, if we had technological capacity to improve our human condition it would not only be advisable but imperative to act in such a fashion.[208] Arguably, *Costa and Pavan* paves a way to not only voluntary but also mandatory human enhancement; when in possession of information that might be detrimental

[205] See supra.

[206] See supra.

[207] See supra.

[208] See e.g. *Savulescu* 2007.

to the health and happiness of a child-to-be, it indeed would be immoral not to improve such condition. With all likelihood parents would embrace the idea of healthier, fitter, more intelligent and well-behaving child in similar all-embracing fashion as they have embraced medical opinion on Down syndrome.[209]

A growing sentiment of risk and its aversion has been the most tangible outcome from the instrumental rationality of science becoming the informant of individual and public choice in the actions concerning the unborn.[210] To suppress the risks, ever greater concessions are made to quell abnormalities; in a systematic fashion of Foucauldian biopolitics, we learn to control our own hereditary, as any deviations from the standard of health is a detriment to genuine happiness.[211] Our second-order desires are moulded to avoid risk and eradicate sources of it, despite our better knowledge that risks cannot be removed from our life, no matter how closely we are surveying ourselves. A presence of risk signals a moment of termination. An autonomous agent no longer can function without the information that enslaves him to act in its accordance; cornerstones of autonomy – liberty and agency – are devalued to merit but to simplistic utilitarian calculations.[212] If a child is healthy, it and I or we as parent(s) will be happier, on the contrary, if it is a bearer of genetic disorder life will be but misery for it and me or us. Therefore, it is but rational to terminate pregnancy or destroy the embryo for it is the harbinger of misery. Even though a valid and important argument, its encroachment to cover all of debate on the status of unborn is unnerving. Life, even a good life, amounts to much more than a simple state of being healthy.

3.4 Human rights, autonomy and biotechnology

Narrative of human rights promotes non-interference of states and agency of individuals; human rights are a discourse of personal freedom, of choice

[209] *Skotko* 2009.

[210] Instrumental rationality as an embodiment of Enlightenment mission is illuminated and explored by *Horkheimer – Adorno* 1973. They argue that such rationality has no place for emotions or metaphysics; rather, everything ought to be subject to exact calculations.

[211] See e.g. *Armstrong* 1995 and *Meskus* 2009.

[212] From an instrumental value of medical knowledge, see e.g. *Tammela – Nuutila* 2008. They argue that disregard of medical knowledge is tantamount to negligence and alleviated only with more relevant information, i.e., medical information. As such, their argument is much akin to what has been proposed by Žižek 2008, pp. 18–19 with regard to globalisation: the sole remedy to correct failures in globalisation (or in medical knowledge) is to adhere to its doctrine with an ever greater vigour.

and faculty to make reasoned choices. Biotechnology is totalitarian. There are no choices to be made, agency to respect or freedom to cherish: it is a narrative of probabilities and facts, devoid of humane interference. Humanity is a condition cured by biotechnology. As such it is why there has been but limited interest to marry human rights and biotechnology, even though bioethicists consider the present state of non-communication deplorable.[213] Could the human rights narrative redeem autonomy from the jaws of biotechnological discourse? It is argued that precisely through marrying autonomy with human rights, autonomy has become *conditio sine qua non* for much of bioethical and biotechnological parlance. By alluding the foremost value of autonomy as a rudimentary human right – essential for the felicitous enjoyment of a number of human rights as freedoms – biotechnological narrative may lean heavily on justification of consent for virtually all transgressions of human rights as understood within the traditional human rights narrative. Dialectic emerges where both sides argue for the promotion of human rights with autonomy at the epicentres of them both; the one side has human rights as a core concept with independent value, the other as an instrument to shadow criticism towards its practices.

The parlance of choice as a fundamental human right is the foremost tool for the vast bioethical debate initiated by those leaning more towards natural sciences (e.g. physicians, medical researchers, biologists, etc.), whereas more traditional human rights narrative relies on metaphors and ephemeral notions of balance and private or public interest. Richard Ashcroft notes that morally fundamental role of rights is nigh universally denounced by bioethicists; therefore, rights are necessarily embodiments of other, more fundamental moral concepts "be that autonomy, or interests, or community membership".[214] Such concept is antithetical to traditional concept of human rights espoused in legal academia, where human rights are morally imperative as they are rights belonging to everyone because of humanity, not some additional condition that needs to be fulfilled. Alternatively, human rights can be treated as simple dictates of power systems devoid of any moral significance: as a mere issuance of positive law with no connection or attempt to answer the question what would be desirable. Further, there are those who reject the entire concept of human rights. Thus, it is hardly surprising that marriage of concepts with either having no agreed upon core meaning leads to a most unruly couple. Beyleveld and Brownsword illustrate a similar dichotomy with regard to bioethics

[213] See e.g. *Freeman* 2008.

[214] *Ashcroft* 2008, p. 39.

and dignity, by referring it on the one hand as empowerment, on the other as constraint.[215] For a bioethicist rights narrative is a constraint, for a traditional human rights scholars, an empowerment. Both parties, however, use the narrative of autonomy to justify either constraints to domain of human rights or enlarge its dominion.

The bifurcation of autonomy to serve two masters, both hailing at times from common origins (i.e. Kantian philosophy), is discernible also in courts' argumentation. Most apparent this dualistic nature of autonomy is when juxtaposing courts' arguments in matters of assisted reproduction and stem cell research. In *Roman v. Roman*, the Texas court of appeals reiterates relevant U.S. case law from *Davis v. Davis* to *re Marriage of Witten*, concluding that agreements on status of cryopreserved embryos are enforceable. These agreements, when signalling autonomous consent are binding and their impact for the embryo are immaterial. Autonomy functions in role of empowerment: it empowers progenitors to enjoy their civil rights to beget children through the exercise of their autonomous will. As a corollary of such rights, autonomy cannot be withhold from leading to inimical outcome, i.e., to not have children. The right is to have children and to have that private decision respected, not a right to implant fertilised embryos; thus, the right to unabridged liberty to decide on private life would be the fundamental or human right (e.g. in U.S. context it would be the fourteenth amendment, in the ECtHR jurisprudence it is art. 8). In strictly private sphere, autonomy is endowment in its pristine form, with constraints not being constraints to the right, but manifestations of its exercise.

The tables are turned when dealing with stem cells and their use as part of medical research and medication. In *Sherley v. Sebelius*, the statutory provision in Dickey-Wicker Amendment – a budget provision preventing U.S. federal funding to research wherein embryos are destroyed for creating stem cell lines – did not prohibit funding research projects where stem cells were merely used. The seemingly unambiguous decision by the courts on the matter, departs, however, greatly from what has become the law of the land with regard to cryopreserved embryos. It is precisely here that autonomy serves as a constraint. Science is public as is federal funding; consequently, it is the autonomy of *demos* dictating, rather than that of an individual agent. Public is, by definition, a limitation to unhindered actions of private, even though from any cogent moral or legal stance, there might be no distinction. If the vantage point to *Sherley v. Sebelius* is an embryo and its destruction, it cannot possibly be settled with the contractual model embraced by the same jurisdiction with regard

[215] *Beyleveld – Brownsword* 2001, p. 11.

to destruction of cryopreserved embryos. The American argument has no place for dignity parlance and the recent attempts to impregnate embryo with personhood is paradigmatic of this;[216] after all, would an embryo be a person it would be entitled to respect of its privacy and life through constitution by virtue of innate autonomy of every person, not innate dignity of every person.

Autonomy comes, thus, to explain some of the disarray within responses to commencement of life. It is pivotal most notably in informed consent discourse carried over to virtually all areas of the beginning of life discussion. Nevertheless, there are important short-comings inherent in autonomy, rendering its application arbitrary at best. Autonomy in and of itself, particularly in medical decision-making, is often handed to professionals, whose instrumental evaluations and subsequent decisions of risks and their impact might be inimical to desires of those whose purported autonomy is in question. Moreover, there are significant limitations to those endowed with autonomy, preventing inclusion of embryos or foetuses within its conceptual boundaries. To stretch these boundaries to accommodate entities without mental capacities commonly attached to consciousness (at early pregnancy) and agency (at late pregnancy) would call for a revision of many of the categories of old, including but not limited to those of children, disabled, people in vegetative state, etc. As Friberg-Fenros argues, a more coherent legislature towards the life at its margins is endorsed by societies with more stringent regulation covering embryos.[217] But how much from the actual autonomy we are willing to sacrifice in name of some consistency?

A problematic tension lies at the heart of the debate on the legal question of life's beginning. It is a tension between the women's rights, parental rights and foetal rights. Price of bright-line rule in these questions at national, and even more so at international level, would be degrading some of these rights as they have been gradually established. If procreation is fully a female business, as some of the women's right advocates illustrate it, only thing achieved is replacement of a patriarchal rule with a matriarchal one. Where parental rights are the centrepiece of legal response to the

[216] A personhood debate has evidenced a number of state legislatures voting on amendments to existing statutes with an effect that right to life belongs to every human being at any stage of development, essentially expanding right to life and personhood to embryos. At least in North Dakota such an amendment is proposed for vote in November 2014, see Laura Basset, North Dakota Personhood Measure Passes State House, Huffington Post 22 March 2013, at http://huff.to/11qtkPF . See e.g. Maya Manian, Lessons from Personhood's Defeat and website of PersonhoodUSA actively promoting personhood amendments to multiple states at http://www.personhoodusa.com.

[217] *Friberg-Fenros* 2008, pp. 52–59; 267–289.

question, it might undermine rights of both women and foetus; for example, a strong reliance to right of a father to become a parent, prevents abortion from women based solely on the wishes of their partner.[218] Yet, it is without a doubt the most controversial topic in current Occidental debate to rely on protection of foetal rights; recognition of such rights would amount to a denouncement of the very purpose of the feminist emancipation and the women's right movement. To grant a foetus even a rudimentary set of rights is always going to limit rights of a pregnant woman.

Foetus has gained, however, gradual support for its rights within the realm of technology. As an ever-increasing percentage of couples in the Global North encounter infertility, they also encounter constraints to their autonomy that have been established to protect foetal rights. These constraints include e.g. the prevention to clone a human being or to create life through ectogenesis (i.e. growth of human being in entirely artificial environment) found in a number of biotechnology treaties, declarations and conventions. But even less categorical limitations are placing a strain on parental rights to decide when and with whom to beget children. When the Court of Justice of the European Union provided its *Brüstle* decision, it became apparent that a fertilised embryo would have protection as a legal subject of a special kind – not yet a person, but certainly not goods either. For women's and parental rights it meant that their sphere of application had become more limited as the realm of foetal rights had expanded; although the Italian Constitutional Court is likely right in interpreting the decision as having application only within the realm of patents and technology, it is with aid of that very same technology that many procreate. Even if biotechnological innovations had been but of marginal interest to human rights narrative before, with *Brüstle*, totipotent and pluripotent cells ought to be treated with similar reverence as the Latin adages of old.

4 REASONABLY DIGNIFIED

4.1 Introduction

It is customary to start a treatment of dignity by listing its demerits.[219] Alternatively, a voice of a great Edwardian era author is adapted with which dignity is proclaimed to belong to all members of human species. It

[218] Obviously, this also applies to same-sex couples with assisted fertilisation.

[219] For a particularly poignant critique, see *Brownsword* 2008.

is as if dignity could not be approached with reason alone but recourse to emotions would be essential to fully understand its moral value. Whereas autonomy (and law in general) is portrayed in terms of logical conclusions and moral imperatives, dignity is depicted with fluffy bunnies and lofty ideals. Predilection to essentially subjective character of dignity is – from the perspective of beginning of life debate – both misleading and unfortunate. First, it is misleading because dignity has garnered a notable support from numerous courts and treaties, transforming dignity more towards a precise norm with a well-framed focal core than an exalted ideal. Second, it is unfortunate as it debases much reasoned debate to a mere sectarian babble of fiendishly outdated biblical ideals. Yet, through this subjective confusion dignity has resisted attempts of classification within the international legal community for long, with but recent interest shown to its promise by what could be described only as an avalanche of scholarship.[220]

Quite unlike autonomy, dignity has a solid foothold on a number of, formal and informal, international and regional legal treaties. In the post-World War II era it has been recognised in numerous national constitutions as well as in the basic constellation of international human rights regime.[221] Further, there are countless court decisions seeking to define dignity. With the traditionally cosmopolitan musings of international law, the moral fragments of international legal order, such as dignity, are, however, problematic. Were dignity to have a precise meaning outside strictly normative framework, there would have to be a common global value community, which has proved out to be a nigh impossible goal even at a national level.[222] Therefore, dignity is either something truly Gewirthian it being found on the fact that one belongs to human kin or, alternatively, it ought to be defined collectively in an international public deliberation that even champions of deliberation do not consider a feasible alternative. Such a pessimistic stance to the promise of dignity leads, logically, to its revocation; there is no need for dignity which either everyone has by definition or everyone has a right to provide a definition for. The species argument is staunchly criticised by many advocates of human rights and proponents of consequentialist views of technology, and considered ethically unfounded.[223] Whilst a philosophically sound argument that "attempt to

[220] See e.g. *Griffin* 2008, *Rosen* 2012, *Kateb* 2011, *Capps* 2010 and *Waldron* 2013a.

[221] *Mahlmann* 2012, p. 371 for a non-exhaustive list of nation states with a constitutional reference to dignity. The list includes inter alia Finland, Germany, Mexico and South Africa. As for international treaties, see *Beyleveld – Brownsword* 2001, p. 12 ff.

[222] See in general, *Brownsword* 2009.

[223] E.g. *Waldron* 2013b, *Brownsword* 2009, p. 30 ff. and *O'Neill* 2002, p. 6–7.

privilege the members of particular species" are arbitrary at best, it seems pragmatically rational; [224] courts and tribunals are mostly for human beings and by the very fact that conventions and legislations are written by humans, we as members of a singular species are being privileged however arbitrary it might be philosophically.

Whereas autonomy found no shelter from the international treaties, it was served with a laundry list of definitions;[225] *au contraire* dignity is omnipresent in international human rights and bioethical treaties, yet there are no definitions for it outside strictly relativistic ones derived from (mostly) Western philosophy or all-encompassing categorisations of humanity *qua* dignity. It is following this dichotomy (relativity v. humanity) that the present chapter is divided. In a third concluding section of the present chapter, what is revealed by this Sisyphean task of relative humanity is reflected with a focus on both the black letter law and the case law cited in the second chapter.

4.2 Dignitarian crusade

"Dignitarianism, it cannot be emphasized too strongly, is a red light not an amber light ethic",[226] that is, for those supporting protection of dignity, there can be but a total condemnation of actions undermining dignity according to Roger Brownsword. It appears, however, that courts do not agree with Brownsword whilst using dignity in their bioethical argumentation. From the German *Bundesvervassungsgericht* to the Brazilian *Supremo Tribunal Federal*, numerous courts have been able to accommodate dignity as a constraint whilst regarding it as "an amber light", leaving it for the court to dictate whether the consequences of actions violating dignity ought to be withheld. The German abortion decision is a prime example of such balancing of interests whilst undoubtedly establishing inalienable dignity to a foetus. The courts have been equally unsympathetic to Brownsword's formulation of dignitarianism in questions of biotechnology. In *Costa and Pavan v. Italy*, the European Court of Human Rights shows utmost respect for embryos, but finds their human dignity secondary to dictates of reasonableness and coherence, as it does in *Evans v. the United Kingdom*.

[224] *Brownsword* 2009, p. 27.

[225] See e.g. *Dworkin* 1988.

[226] *Brownsword* 2009, p. 39.

The examples Brownsword provides as well as numerous other cases, however, show dignity in a different light;[227] these cases speak of dignity as a simple means to reach a wanted outcome – a legal safety valve. Yet, when everything is dignity, nothing is.[228] Such use of dignity is, indeed, commonplace: dignity is violated by surveillance, same sex marriages, dwarf-tossing, video games, taxation, etc.[229] Moreover, there are decisions by courts where dignity is used in a cogent fashion, but with an outcome which depicts more a smokescreen hiding the essential problem than a genuine argument. For example, in *Gonzales v. Carhart*[230] the U.S. Supreme Federal Court articulated with human dignity to prevent physicians from using so-called partial birth abortion to terminate pregnancy.[231] Whilst true that mutilation of a foetus certainly violates every conception of dignity, the fact that the Court fails to recognise possible reasons related to the health of the mother to use said procedure, makes dignity a simple constraint here with no apparent gains but many probable losses.[232] If termination of a foetus is the outcome of the procedure in all instances, ought not the foremost concern lie on the health and safety of an expectant mother, rather than on ephemeral dignity of a foetus? In *Gonzales v. Carhart*, the Court condones dismemberment of a foetus, but denies decapitation of one.[233] How respect for human dignity justifies one while vilifying the other merely comes to show the strength of Brownsword's classification of dignity as a simple red light constraint in certain instances.[234]

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[227] E.g. the recent case of *N.K.M. v. Hungary* (application no. 66529) of ECtHR shows fairly well to what extent concept of "dignity" can be expanded. During the national proceedings, the Hungarian Constitutional Court argued that particularly high taxation having effect *ex nunc* would be a violation of human dignity, as unconstitutionality of an act could be attested only when the act was in violation of dignity. As such, dignity serves as safety valve for the courts to argue that virtually all transgressions of private sphere are violations of dignity.

[228] This is also argument put forth in *Frankenberg* 2003, pp. 283–295.

[229] For a fascinating list of what dignity means in its everyday use is provided by *Rosen* 2012, pp. 3–4.

[230] *Gonzales v. Carhart*, 550 U.S. 124 (2007).

[231] See *Annas* 2010, pp. 129–142 for a fuller (critical) analysis of the case. A different take is provided by *Arkes* 2007.

[232] All life does have similar respect, thus, even when foetus is denied of personhood and human life, it exists as an organism. As mutilation of animals is not justified, so is not of foetuses.

[233] *Gonzales v. Carhart*, U.S. 550 124 (2007), p. 151.

[234] Ibid., p. 157, "The [challenged] Act expresses respect for the dignity of human life", as it proscribes "a method of abortion in which a fetus is killed just inches before completion of birth process". Thus, dignity does not protect a foetus from killing, but from killing at a certain location deemed closer to life.

A relative dignity shown in *Gonzales v. Carhart* is much akin to the criticism directed towards "modern liberal autonomy" by (Catholic) natural law scholars. If dignity does not have a specified content, but rather is defined *in casu*, there is no authority to claim dignity in the first place. To state that something is dignity entails its non-relative nature, which runs counter to the very relativity of dignity argued in multifarious courts and treaties.[235] Either tossing all people is wrong, or dwarf-tossing is not wrong, as there is no different dignity of a person of smaller posture than there is one of somewhat larger. This seemingly inherent quality of dignity is noted also in the recent landslide of dignity literature. For example, Michael Rosen notes how "[t]he interesting question, then, is not: are the uses of 'dignity' variable? – who could deny it? – but why is this so?"[236] To the legal question of life's beginning said conundrum is also apparent: the courts endorse mother's human dignity through showing respect to her personal integrity and personal choice and, simultaneously, they argue in favour of human dignity provided to the foetus.[237] Whilst conducting an abortion, both cannot have their dignity thus defined respected.

In the international treaties this dual character of dignity can be traced to the fundamental constellation of the post-Second World War international legal order. Whereas in the Universal Declaration dignity is perceived within the kernel of humanity ("all human beings are born free and equal in dignity and rights"), the Geneva Conventions depict a different dignity based on a respectful treatment of everyone. In the Common Article 3 of the Geneva Conventions following acts are condemned even within an internal conflict:

> a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> […]
> c) outrages upon personal dignity, in particular, humiliating and degrading treatment.

In the purpose of the Geneva Conventions, a violent death does not signify violation of dignity, but rather, personal dignity is called for when sheltering prisoners of war from humiliating and degrading treatment.[238] It gives

[235] For critique of modern liberal autonomy and its inherent incoherence from the (Catholic) natural law perspective, see e.g. *Laing* 2004.

[236] *Rosen* 2012, p. 7.

[237] Such notion of dignity as used by Brownsword is staunchly criticized by *Foster* 2011, pp. 62–66.

[238] For this I am much indebted to *Rosen* 2012, p. 59 ff.

support to the view that merely by depriving a foetus from its life – even whilst admitting it has a life and a dignity – does not imply that there would have been a violation of dignity. The strained causal nexus between life and dignity entertained by many and evidenced in Brownsword's "dignity as a red light" metaphor, is found on a particular reading of dignity exemplified in the Universal Declaration, rather than in the plethora of other documents embodying dignity in a formulation calling for respectful treatment. *Gonzales v. Carhart* supports the latter reading of dignity, even though there the U.S. Supreme Court's interpretation of what amounts to dignified treatment is curious. It is not the life of a foetus that is protected with dignity, but rather the community's sentiments of what is a dignified fashion of terminating its life.

In the international fora such a relativistic concept of dignity is problematic to say the least. A good illustration of the slippery-slope of the argument based on dignity is the Groningen protocol when compared to preconceptions of worthy life elsewhere. Following the Groningen protocol, medical professionals in the city of Groningen in the Netherlands are entitled to perform euthanasia on neonates diagnosed with severe abnormalities.[239] What is defined as severe abnormality and how it ought to hinder the life of a neonate is decided *in casu* by the medical professionals and parents. A medical condition deemed as an antinomy to human flourishing amounts to termination of such a vicious life. Another interpretation of human flourishing and its realisation is provided by examples wherein neonates are subject to a "ritual murder" due to their perceived condition. For example, in the concluding observations of the Committee on the Rights of the Child to Guinea-Bissau's 2nd to 4th periodic reports such acts are targeted to "albinos, children with disabilities, twins and other children who were accused of practising witchcraft".[240] In the relativistic conception of dignity where dignity is a quality of both an individual and a community, the prospects of individual thriving may be equally hindered by accusations of witchcraft as it is by diagnosis of *spina bifida*.

From my own, Occidental perspective, ending a life of a neonate because of her being an albino is barbaric. However, if an albino child is to live a short, painful life of misery outside community shelter and nutrition, how is maintaining such life about to increase human flourishing. Is it not a greater act of humanity and dignity, thus, to terminate such life? Albeit a seemingly abhorrent outcome, it is identical to the conclusion drawn from

[239] *Verhagen – Sauer* 2005.

[240] Committee on the Rights of the Child, Concluding observations on the combined second to fourth periodic reports of Guinea-Bissau, adopted by the Committee at its sixty-third session (27 May–14 June 2013). UN Doc. CRC/C/GNB/CO/2-4, paras 28–29.

the past experiences with the Groningen protocol. One of the authors of the protocol, A A Verhagen, concludes his survey of the past years of the application of the protocol with a following remark:

> The outcome in such a situation is clear: the baby will die soon; If the parents wish to shorten that course, and organise their child's death more in the way they have envisioned it, shouldn't euthanasia be available for them?[241]

The first step is the same in both instances – the baby will die soon; either as an outcast or due to failure in his life-supporting organs. For the second step, the willingness of parents to organise the death of a child, the difference might be more readily available, yet there is no doubt that as Finns have internalised the biopolitical control over their genetic heritage,[242] a similar internalised control could be in place in other communities with regard to other perceived deviations from a standard neonate. Surveillance and eradication of Down syndrome is no more reasonable than similar surveillance and eradication of albinos. Following the argument of Verhagen whereby the moment of termination of life has no moral bearing,[243] the simple fact that the capacity to perform prenatal diagnostics differ ought not to result in a moral and legal condemnation of practices that equally seek to improve human condition. For example, an abortion of one of the twins or that of a disabled child could easily be conducted in many a developed country, transferring the ethical question to an earlier date and seemingly concealing it from the gaze of international legal community.

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[241] *Verhagen* 2013, p. 295.

[242] See supra.

[243] *Verhagen* 2013, p. 295 concluding that if second trimester termination is permissible why should not an euthanasia on parents request be equally permissible. Verhagen's article appeared on a special issue of Journal of Medical Ethics (vol 29, issue 5) titled Abortion, infanticide and allowing babies to die, forty years on, including numerous arguments both supporting and condemning the infanticide. As Julian Savulescu points out in his editorial to the special issue, there was much public controversy from the content of the issue even before its publication as an article by Alberto Giubilini and Francesca Minerva, After-birth abortion: why should the baby live? was published freely online prior to publication of the whole issue. Giubilini and Minerva are in favour of similar point of view as Verhagen, i.e., that there should be no distinction made between an abortion and an infanticide.

4.3 Samsaian metamorphosis

"As Gregor Samsa awoke one morning from uneasy dreams he found himself transformed in his bed into a gigantic insect."[244] Quite alike, human dignity was for the latter half of the 20th century merely a catch-phrase and sloppy moral justification for human rights.[245] At the turn of the millennia and with the raise of biotechnology, human dignity has found an entirely new purpose in defending that which was deemed non-human in prior abortion trials, but which in a petri dish evinced a metamorphosis.[246] An embryo representing all of humanity, and what better way to represent humanity than through dignity – a value attested to every member of human species. Certainly, a totipotent human embryo holds the potential to develop into a full grown human, yet such potential is as present in a zygote as there is a kernel of magnificent statue in a lump of bronze it could be argued. Did the metamorphosis of dignity from peripheral, second-grade ethical dogma of mild moral philosophical intrigue to a full-fledged norm-like principle of international law change anything, or whether the rest of the international legal regime refuses to change to accommodate the metamorphosed dignity?

Charles Foster advocates for a novel, more stringent interpretation of human dignity in medical law, seeking to dethrone Beauchamp and Childress's four principles. For Foster, dignity is a more fundamental moral notion than autonomy or benevolence, lurking in the background simply waiting to be unearthed. An essential element of Foster's reading of dignity is its tristratal structure embodying dignity of human species, of communities and of individual. Thus, rather than acting as a trump (or a red light), dignity would seek to balance diverse justified interests of these different stratum. As such, Foster's account is reminiscent of Michael Rosen's two-level classification of dignity that Rosen finds indispensable for explaining why dignity of deceased ought to be respected. For Foster e.g. decision on allocation of funds in public health care (communal inter-

[244] *Kafka* 2002, p. 5.

[245] One can date such a sea-change to Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23. Dignity occurs in the document numerous times and is specially annexed to biotechnological advancement at para. 11.

[246] An interesting analysis of the change of narrative within the particular debate of abortion in the United States is provided by *Siegel* 2008. She finds that the original choice argument is transformed to support antiabortion discourse rather than its original abode in pro-abortion group. A rather similar development is noted in Italy by *Hanafin* 2008 with regard to assisted reproduction legislation.

est) can trump an individual's dignity interest;[247] therefore, the maximal human flourishing deemed as the ultimate goal of Foster's formulation leads to rather similar outcomes as utilitarian models, with the difference that there are deontological prohibitions to a range of acts.[248] In essence, Foster's formulation of dignity refocuses the calculus from maximizing autonomy to maximizing dignity. Obviously, even though he seeks to downplay innate problems of his formulation, the balancing act between diverse interests remains as central for Foster as it has been previously for example to conflicts of various human rights.[249]

Even though Foster considers dignity as a foundational or perennial value of all bioethical thinking, it could be argued that his formulation reflects the same as utilitarianism–human rights–dignity triangle does for Brownsword[250] or health law–bioethics–human rights web for Annas[251]. Whereas for Brownsword and Annas the act of balancing takes place between different fields of inquiry or philosophical frameworks, for Foster everything is tucked under a single nomenclature of dignity. According to Foster, there is mounting evidence that whenever a court encounters a "hard case" in bioethics, the sole possible solution resides in dignity; whether it is ECtHR's article 8 jurisdiction or sadomasochist cases akin to *R v Brown*[252] a dignity argument is put to the fore.[253] Yet, the value of dignity is relative to the individual and even where recognised as of central importance by all of the justices or judges, they can well establish a different valuation of dignity's worth. To come to explain such disparity within dignity, the different tiers or strata of dignity are needed. Even where individual's dignity would not be violated (e.g. in death), the community could feel offended. An example of such a dignity argument was the vehement outcry

[247] Foster provides an example of providing life support to a young person in persistent vegetative state (PVS) with no hope of recovery versus another with incurable cancer. Whereas the allocation of funds for the PVS patient would provide more life-years, the value of a month to a person with a cancer with family and relatives to say goodbye to would outweigh these years, according to Foster.

[248] Here Foster uses an example of a young girl "with profound learning disabilities" lying naked before the eyes of young boys. The girl enjoys the attention and the boys enjoy the view. However, for Foster there is a diminishment of dignity for the society as a whole and, thus, it ought to be considered reprehensible even though it has a positive utilitarian function. *Foster* 2011, p. 2.

[249] For example, *Foster* 2011, p. 155; "[t]he fact that dignity does not provide a definitive answer does not begin to suggest that it is not useful."

[250] *Brownsword* 2008a, p. 21 and *Brownsword* 2008b.

[251] *Annas* 2010, p. xxi.

[252] *R v Brown* [1994] 1 AC 212.

[253] *Foster* 2011, pp. 85–110.

by numerous human rights organisations after an internet video showed a Syrian rebel leader eating the heart of a fallen enemy soldier.[254] It was certainly not an outrage created by the family of deceased nor even his compatriots but the (Occidental) humanitarian community – our collective sentiments for dignity were violated.[255] These are the sort of arguments Foster – and Rosen to a lesser extent – seek to extend to cover dignity dialogue in bioethical decision-making, question of commencement of life therein included.

Outcome of dignity's metamorphosis are still not readily available. There are decisions by courts the world over referring to dignity. Some of those decisions use dignity as the centrepiece. Dignity is, indeed, prevalent in biomedical parlance within the courts (e.g. *Brüstle*) and treaties (e.g. UN and CoE treaties on biotechnology).[256] However, whether dignity remains mere lip service to lofty ideals embodied in it or a genuine commitment to human flourishing cannot be deduced from the scattered remarks and a few court decisions. A concession to relativity of human dignity is, obviously, a concession undermining the fundamental importance of dignity. Balancing divergent interests of not only individuals but of communities and humanity itself is a truly Herculean task. Where in here locates an embryo, foetus or a small child is clouded. As case law cited above comes to show, there can be dignity in pain and aversion of it; dignity in death and dignity in birth. Even though Foster and Rosen come some way to explain these peculiarities, they leave a norm-seeking lawyer or judge with little concrete to rely on. A calculation of flourishing with numerous competing interests is equally impossible as a utilitarian attempt to count human happiness. Embracing utility together with deontology and virtue provides novel insights but leaves same old riddles unresolved.

The cases Foster and other advocates of dignity refer to for a normative account of dignity are the same ones referred by antagonists of dignity as prime examples of its relativistic credentials. Fundaments of dignity in the European human rights regime are founded on *Pretty v. the United Kingdom*.[257] There the Court concludes that "[t]he very essence of the Convention

[254] Human Rights Watch, Syria: Brigade Fighting in Homs Implicated in Atrocities, 13 May 2013 available at http://bit.ly/17lYopD (accessed 18 July 2013). Therein a reference is made to the Rome Statute of ICC and respect for personal dignity, whereupon is included, according to Human Rights Watch, "humiliating, degrading, or otherwise violating the dignity of a dead body".

[255] Such a violation was already recognised by Grotius in his *De Jure Belli ac Pacis*, Bk II, chap. 19. Reference from *McCrudden* 2008, p. 658–659.

[256] A remarkable survey from the presence of dignity is *McCrudden* 2008.

[257] Case of *Pretty v. the United Kingdom* (2346/02).

is respect for human dignity and human freedom",[258] whilst maintaining that no violation for said dignity manifests from the fact that state does not provide an individual with a possibility to an active euthanasia. Within the realm of biolaw similar status is granted to dissenting opinions in likes of *Evans*. There the dissenting judges find formal contractual approaches adopted by the majority wanting, and rather than respecting a contract and state's margin of appreciation, more attention should be given to the special circumstances of the case. According to the dissenting judges, this would better reflect "the very purposes of the Convention protecting human dignity and autonomy".[259] However, recognition of dignity as a core value of human rights in the ECHR and even one for core bioethical questions (i.e. significance of consent of competent adults) does not imply that it would be used as a decisional tool by the Court; rather, it appears a mere window-dressing when other arguments fail. Nonetheless, it does not imply failure of dignity as e.g. its primordial importance in *Brüstle* indicates. Curiously enough, human dignity seems to have more credence in the intellectual property law than on the human rights law.

A rather similar role for dignity as purported by Foster with regards to biolaw in general (in England and Wales) is suggested by Reva B. Siegel for the U.S. abortion debate in particular.[260] She deems dignity a value that bridges communities divided in the heated abortion debate of the United States.[261] Her argument – based on U.S. Supreme Court's *Casey* and *Carhart* decisions – is that undue burden test introduced in *Casey* uses dignity as a measurement for the scope of an acceptable abortion law. For Siegel, as for Foster, dignity is the underlying supernotion that can come to explain the vastly divergent conclusions drawn from a singular source. Where Foster uses concepts of communal and species dignity alongside individual dignity, Siegel attaches dignity to various rights-narratives: dignity in valuing life, liberty and equality. Even though analytically more confused a set of notions, Siegel provides for dignity-theory that which Foster fails to – a concrete formulation of dignity in action. Yet, neither of them can escape Robert Alexy's remark vis-à-vis German dignity jurisprudence that there is "a single concept and varying conceptions of human dignity", with different conceptions bundling different conditions.[262] Thus, Alexy's remark

[258] Ibid., para. 65.

[259] Case of *Evans v. the United Kingdom* (6339/05), para. 13 of the dissenting opinion.

[260] Siegel 2008.

[261] Ibid., p. 1702.

[262] *Alexy* 2002, p. 233.

on two norms of dignity,[263] as an absolute rule and as a relative principle, might shed some light to what both Siegel and Foster indicate with their dignity notions, i.e., that (bio)law is to respect dignity at all instances (rule), yet there are different venues to find significant kind of dignity at hand (principle). Individual, community and humanity (or life, liberty and equality) are principles of dignity, each guiding to a particular reading of the absolute dignity rule. Dignity, once recognised, then, indeed, becomes a trump (or a red light) with an important caveat necessitating a prior negotiation on the frontiers of dignity.

4.4 What is left is but little worth

According to Christopher McCrudden "the idea of dignity has become a central organizing principle in the idea of universal human rights",[264] albeit one with a plethora of different readings. As suggested in chapter two above, there is a significant difference in the legal response to the beginning of life between the traditional human rights on the one hand and the medical law or biotechnological law on the other hand. It is argued that much of this difference is to be accredited to different readings of dignity on these related fields of legal inquiry. Whereas in a global context the human rights reading might be a preferable outcome for defining the commencement of life and finding an acceptable balance between various, conflicting interests, in the specific realm of developed countries with extensive access to healthcare and means of assisted reproductive technologies, such a narrative will be hopelessly insufficient to account for the enigma that is posed by the advancement of medicine. Moreover, a two-tiered solution whereby traditional human rights conflicts are solved using a given formula whilst biotechnological questions are solved through means of contractual autonomy of individuals is lacking.

If, as argued by e.g. Foster, Siegel, Rosen and numerous others, both human rights and biolaw share a common concept of human dignity, which is deemed essential as an "organizing principle" to the human rights and as recognition of human genus of even the most primordial of human genetic material for the biolaw. Although in all judicial decisions analysed by McCrudden, dignity serves not as an independent claim but as a support to other constitutional rights claims, it can be seen to have a special function

[263] Ibid., p. 64.

[264] *McCrudden* 2008, p. 675.

particularly in the beginning of life context;[265] that of recognising something as a member of human species and thus subject to protection of not only moral decency but one endowed with protection of human rights. It extends the ontological notion of human being. Precisely this function of dignity is illuminated by respect for deceased[266] or by the CJEU in its *Brüstle* decision. The dignity narrative expands the realm of personhood to cover those no longer persons equally well as it encompasses those not yet persons. Precluding pregnant women from execution of capital punishment and allowing them a special status of protection in warfare are but some means of the traditional human rights and humanitarian law narrative to extend protection of humanity towards the unborn without recognising unborn with a specific set of rights. As a particularly modern condition, humanity's technological prowess has provided means to monitor and diagnose an unborn in unparalleled fashion. By attesting human characteristics to a foetus (inter alia pain, sex, chromosomal constitution), a decision targeted to a foetus is humanised whilst simultaneously the humanity of a foetus is denounced e.g. through its termination, as noted by Martin Scheinin.[267]

The relative as well as absolute dignity arguments explored above both stem from a common origin, namely that of human flourishing. Even a close reading of the numerous court cases referring to dignity as foundational does little to resolve the dispute between those advocating dignity as a red light and those supporting it as a more or less approach. It is argued, following Alexy, that both arguments for dignity are materially the same, simply laying emphasis on a different phase of court's argumentation. A multi-pronged balancing account of Foster et al. is temporally prior to red light dignity identified by Brownsword. For the beginning of life argumentation, dignity provides a simple narrative tool with which to establish foetal rights in the liberal rights narrative. Autonomy of paradigmatic bearers of rights, most notably that of a pregnant woman, is limited to accommodate the emergent humanity of an embryo titled dignity. Therefore, reasonably dignity argument ought to have greater value in cases where there are no opposing rights of autonomous right bearers. However, as the extensive jurisprudence on storage of frozen embryos come to show, this is not universally true. On the other hand, in stem cell cases the dignity argument has been effective, whether as a limitation to funding or as a block on patentability.

[265] *McCrudden* 2008 p. 681 ff.

[266] To follow a long line of international law scholars, I feel obliged to refer to Sophocles' *Antigone*, an illuminating story from the inherent conflicts of rule of law and traditional values.

[267] *Scheinin* 1998.

The different impact of dignity in these biotechnological cases, it is argued, can be explained by the different narrative structure or framing of the questions in stem cell and cryopreservation cases. The embryo storage questions are first and foremost about begetting a child, forming a family – private life of individuals. The wider community interest identified by numerous dignity authors of late is absent from the cryopreservation debate even though the subject matter, totipotent embryo is the same as in the stem cell cases. Biotechnological research and employment of novel technologies for advanced medical use, on the other hand, is strictly public. Same public-mindedness is deployed also in the recurrent example of the literature with respect for deceased. For example, in the *travaux preparatoires* of the Finnish act regulating burial,[268] the importance of opinions of the family as well as general convictions of the society towards respect of human bodies are central.[269] Transfer of focus from private to public puts to the fore the more general sentiments of the public writ large; positing embryo, rather than individual decision, at the centre of attention protects the kernel of humanity stored in an embryo. Reasons for such a reading of dignity are varied, yet they seem to echo relatively well Foster's classification, where individual dignity is, to a great extent, equivalent to personal autonomy, whereas more communitarian modes of dignity stress importance of humanity *an sich*.

Like in the realm of biotechnological jurisprudence, also in the matters of abortion, woman's responsibilities, etc. with regard to the beginning of life, a similar distinction can be drawn. Framing questions public-first results in a condemnation of acts of expectant women. In *R v. Levkovic* the public desire for information from children dying at birth and the protection of life born babies was the ground for constitutionality of an informing duty; in *R v. Sarah Louise Catt*, damage to a viable yet unborn baby was contrasted to damage to a born child and a member of the society. On the flipside are cases like *St George's Hospital NHS Trust v. S.*, where narrative is that of an individual choice, partly due to the harm caused to mother herself from abstention of treatment. Similarly, most of the high courts' providing their first ruling on abortion, whether in 1970s (e.g. *Roe v. Wade*) or in 2010s (e.g. the anencephalic foetus decision by the Brazilian Federal Supreme Court), frame the question of abortion as predominantly personal, thus avoiding much of the debate on-going in public. From the vantage point of subject matter, these decisions are therefore exceedingly incoherent,

[268] Hautaustoimilaki, 2003/457.

[269] Hallituksen esitys Eduskunnalle hautaustoimilaiksi, HE 204/2002 vp. Yleisperustelut, 1. Johdanto: "on otettava huomioon […] vainajalle läheisten ihmisten tunteet sekä yleensäkin ihmisten peruskäsitys siitä, miten kuolemaan, vainajiin ja hautaamiseen tulee suhtautua."

but framing them as narrative games of private and public and, thus, as subject to different principles of dignity reveal their inherent coherence for an Occidental liberal reading. A constant struggle to re-negotiate the frontier of public and private, then, is decisive for the dignity's role in the legal response to the beginning of life question.[270]

5 CONCLUSION

"It was supposed to be so easy", are the words starting the Streets album, *A Grand Don't Come for Free*, telling a tumultuous life journey of a young man losing a thousand pounds. Likewise, it was supposed to be so easy to provide a legal definition of a child, when I initially pondered the possible ramifications of the third optional protocol for the Convention on the Rights of the Child. Like the protagonist of the Streets, little did I know that the answer would not be found from the faults of others, but from my own acts and omissions. When a rewinding sound plays and everything clicks into its proper place at the end of the album, it is much like my own inquiry. My apologies are no less sincere at the end than they were at the beginning, nor am I more capable to provide a meaningful explanation to my counterinstincts. Yet, I know where to look for the answers, even if there would be none to be found.

The initial assumption on centrality of autonomy and dignity indeed did prove out to be fruitful beyond my wildest expectations. It might be a distortion caused by the flawed hypothesis that now, when concluding my work, it seems that every meaningful explanation of the beginning of life has to evolve from these concepts. They are the source of answers and precisely there resides their main flaw: the answer is in plural, not in singular. I had hoped to find coherence amid all the legal cacophony surrounding these questions – a pristine Kelsenian Grundnorm – that would have provided not only solace but understanding of my own counter-intuitive choices. Looking from where I am now, it is not surprising that there is no coherence or a monolithic legal truth; rather, what I have found is a genuine confusion not because we are unable to know, but because we are unwilling to acknowledge. The reluctance shown towards the instrumental rationality

[270] Such arguments from the importance of balancing of different interests are commonplace. For example, *Arellano* 2010 provides one for Mexico, Siegel discusses such in US context when comparing Casey and Carhart case law. In biotechnological debate, similar tactics are in use, as exemplified by Hanafin's take on discursive changes in Italy prior to regulating assisted technics of reproduction.

of science as the sole source of true knowledge and guidance is not to be relinquished but cherished as a truly human achievement, however frustrating and unsystematic such an achievement might appear.

My foray to the legal response (Chapter 2, Of pragmatic utility) ought to have prepared me for the, now, obvious conclusion. When within the boundaries of a single jurisdiction, a court may value autonomy of a woman to choose not to conduct a medical operation to save a foetus in late pregnancy and condemn a woman from terminating a pregnancy as in the United Kingdom, it is not entirely surprising to figure out that there is no global answer to the question. Further, the case law and legislation led to one of my earliest lessons of the debate: under no circumstances the protected subject is the foetus, even where the narrative structure of justification might appear such. A more meaningful classification for analysing the legal discourse has been the one drawn between the private and the public, rather than one between the mother and the foetus. Although at first glance damning to the very prospects of my endeavour of positing the foetus within the framework of CRC, the lack of independent standing of a foetus merely comes to enforce the status of any underlying values, i.e., autonomy and dignity in the present study.

Moreover, the analysis of precedents and legislation revealed that whilst a foetus might not have an independent standing, an embryo most certainly does. It is a curious *coup d'état* through biotechnology, which has re-positioned also the foetus at the centre of attention. The prevalence of assisted reproductive technologies in the Europe and US has made the use of fertilised embryos essential for countless pregnancies and simultaneously made regulation of embryos essential not only for science but to some of the most intimate family decisions. The result has been an interesting amalgam of private and public interests governing the same subject matter. Whereas in situations where mother's and foetus's rights conflict, the balance tips predominantly in favour of the mother, a like conflict-ridden relationship is lacking for embryo questions. This is best exemplified in limited yet significant stem cell jurisdiction. In essence, the question appears to be a relatively simple if portrayed in the context of beginning of life debate writ large: there is nothing remotely life-like in a two-day-old human embryo. And still, recognition of membership in community of human is the answer provided by e.g. the Court of Justice of the European Union. It follows from the premise of an embryo being member of human species that also a foetus is.[271] Similar narrative methods are employed by those who seek to

[271] After finalizing these thoughts I have come to familiarize myself with the arguments of Roberto Esposito whose *Bios* and *Third Person* start their journey from heights where

enhance protection of human foetuses whether through legislation or courts.

It was insights akin to these, which provided the raw material for analysis in chapters 3 (The Constitution of Liberty) and 4 (Reasonably dignified) respectively. Using arguments stemming from the vast literature and reflecting those arguments with what I had seen on the case law made some of the most popular arguments appear strenuous at best. Significance of autonomy touted in most of bioethical and biolegal literature could not come to explain many of the decisions. Also, an adherence to the rule of autonomy would have led to outcomes not supported by any of the courts and legislatures visited. Nonetheless, the very core of the autonomy argument, i.e., advocacy of personal liberty, is impossible to set aside as it is foundational not only to the commencement of life question but to the whole western concept of human rights. The problem is deeply embedded to the very Newspeak of human rights that have come to dominate much of the post-Second World War international legal debate.[272] For example, the consent doctrine – the usual suspect for autonomy in medical law and ethics – cannot be extended to cover all bioethical decisions. When abortion rights are construed as lack of consent to beget a child (as with cases of rape), the corollary of such arguments is utter nonsense as I sought to demonstrate with examples such as man being the victim of the rape leading to pregnancy.

Like consent, also other embodiments of autonomy lead to legal outcomes that are not supported by a single jurisdiction, when autonomy's explanatory power is put to a test. Recklessness and outright destructive behaviour is rarely provided a shelter from law, yet strong autonomy argument together with non-existent counter-faction (i.e. not recognising a legal personhood to a foetus as is the case with most jurisdictions and legal systems the world over) results to such a behaviour. A call for balance or moderation with regard to some but not other facets of autonomy is what renders its sole dominion over matters of primordial life unsatisfactory. It is due to these apparent flaws in autonomy arguments that dignity is retorted to. Dignity is perceived by its advocates as that vessel of moderation and balancing autonomy calls for, whilst its critics suggest that it is nothing more than relativity in shady guise of moderation. Be it as it may, dignity has become prominent as a safety valve for both traditional beginning of life debate (i.e. abortion, harm during pregnancy, etc.) as well as its bio-tainted brethren. The independent worth of dignity, however, has remained dubious for

I never reached in my own work.

[272] Only after finishing my conclusions Samuel Moyn's book *Last Utopia: human rights in history* has come to my attention. Thus, it might be better to date the emergence of human rights narrative to 1970's than to the post-war era.

most jurisdictions and legislatures. In a word, dignity is often called for but seldom used. It might be promoted to value of utmost importance and yet recourse to it will prove little in terms of results as was seen in *Vo* and *Pretty* cases of the European Court of Human Rights.

To have something worth calling conclusions for, it has to be admitted that the Committee sitting and deciding on a complaint filed under the Third optional protocol of the CRC will face an unresolved riddle. There are a few clear guidelines, but those were obvious even without much of a study: Some form of an abortion right exists nigh universally and is also endorsed by other UN bodies, wherefore life of a foetus can under no interpretation be absolute. Any further conclusions are muddled by the present day pluralism, which cannot be superseded by any amount of new scientific data. All arguments of foetal pain or consciousness are merely novel ways to seek support for old moral philosophical dilemmas dressed in the fanciful garments of science. The amount of neural connections a foetus has is immaterial to most people's moral commitment to foetal life and, moreover, to suggest such an arbitrary number as a foundation for ethical decision-making would be the worst form of speciesism, as it naturally leads to respect of only human foetuses. Even if these allegations of speciesism and instrumental use of scientific data are omitted, there remains a further question whether the legal remedies are possible or effective to settle such issues.

To answer these questions is, obviously, past anything I can possibly construe here in form of conclusions. I tend to agree, however, with Judge Costa who clearly demarcated law from ethics and medicine. Although there is no consensus what a person, life or humanity entails does not mean that courts ought to preclude legal answer and merely refer to some form of margin of appreciation doctrine. Moreover, if authors, who proclaim that it is impossible to reconcile divergent value judgments of vastly different cultures, are right, law remains the last guardian capable of reconciliation. After some two hundred years of triumph of evolution theory there are still many who believe we are all God's creation, it is, thus, quite unlikely that any future medical or biological advances would resolve an equally fundamental value problem and lead to moral consensus. With regard to evolution, significant and persistent opposition has not prevented states, courts and international community from embracing it. Where Darwin was able to provide to multitude of species with a natural explanation, it is not outlandish to expect that the international legal community would be able to deduce a sound legal explanation, even if instable, for what the concept of child means within the framework of a treaty.

"But in this twilight our choices seal our fate" whispers Marcus Mumford at the end of Mumford & Sons' *Broken Crown*, a track – fittingly – laden with biblical references. It is in the eternal twilight of moral and medical uncertainty that the question of beginning of life will eventually be settled by the Committee founded by the Third optional protocol for CRC. It can decide not to answer the question like so many judicial instances before it and simply leave it to national discretion, though such a decision would be uncharacteristic for the Committees monitoring core human rights treaties. After all, they are more known from their judicial activism than moderate and careful interpretation of global legal zeitgeist. Further, any decision the Committee will eventually make will be activism for some as the present debate places life all over the human existential continuum, from fertilised embryo, through ephemeral viability to birth and beyond. Even the most mundane of all choices, that of embracing "somewhere there in the middle" is bound to be interpreted as embracing abortion, destruction of life and diminishment of women's rights. The twilight reigning over the margins of life is populated with countless bright lights, each drawing more or less convincing explanations for life like moths.

Midst all the uncertainty and vagueness, some of these bright lights have become more alluring to me than others. I already announced my affair with autonomy and dignity and trust to the capacity of international legal regime, all of which are likely ill-found to many. If anything, I have sought to underline the importance of dignity that I was personally first to discard without hesitation. It is not a form of dignity as espoused by the Catholic or any other faith, neither one synonymous to personal liberty and choice. It is reminiscent of Alexy's two-tiered solution, with Foster's categories to guide recognition of the dignity principle. Its promise to beginning of life debate is, to me, expansion of consideration where the limits of my own autonomy towards a non-subject lies. If someone were to challenge my decisions, I would hope they would employ some of the arguments I have grown fond of. My contempt was not towards life's sanctity or a foetus being an image of god, but towards the community of my family I am willingly a member of. Of my guilt, I am not entirely certain, but it should not free me from consideration as there are categories past right and wrong. After all, I like everyone around me, respect my autonomy to make decisions I find reasoned, but the child of mine is a living testament that I might make lousy use of my autonomy every now and then.

You can never fail at start with a quote from a Nobel laureate, but for the end I should find something of my own to say. I have already re-iterated countless times my perplexity *qua* anger *qua* resentment. Those are still

present, even more than at the beginning as I have come to understand that much of my decision was dictated by something I had not even considered. I was domiciled to think and act like a proper hereditary-conscious citizen of Finland. My precious autonomy was worth nothing as I failed to exercise it. To figure out that much is a reward in itself. It is a sad state to find oneself wrong, a state I have become all too familiar during the writing process. Rather than managing to dethrone the vile king and saving the princess, I find myself in the same state of bewilderment and awe as I was when my counterinstincts took control over me. Therefore, there is but one way to end. I am sorry. I am so sorry.

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Toni Selkälä

HÄMÄRÄN RAJAMAILLA: KANSAINVÄLISOIKEUDELLISIA POHDINTOJA YKSILÖAUTONOMIASTA JA IHMISARVOSTA SEKÄ NIIDEN MERKITYKSESTÄ ELÄMÄN ALULLE

Artikkeli käsittelee kansainvälisen oikeuden kysymystä elämän alkamisesta ja elämän alkamisen ajankohdasta. Lähtökohtana tarkastelulle toimii vastikään voimaan tullut Yhdistyneiden kansakuntien lasten oikeuksien sopimuksen kolmas lisäpöytäkirja, joka mahdollistaa yksilövalitusten käsittelyn lapsen oikeuksien komiteassa. Koska lasten oikeuksien sopimus jättää määrittelemättä elämän alkamisen ajankohdan, artikkelin perushypoteesina toimii kysymys siitä, miten komitea tulee ratkaisemaan lasten oikeuksien sopimukseen jääneen sisäisen käsitteellisen jännitteen. Tämän perushypoteesin ohella artikkeli arvioi oikeusperiaatteisiin rinnastuvien yksilöautonomian ja ihmisarvon kykyä jäsentää ja selventää kansainvälisen oikeuden elämän alulle antamaa määritelmää.

Artikkelissa aihetta lähestytään niin oikeuskäytännön kuin -kirjallisuudenkin valossa, kuitenkaan sitoutumatta sen tarkemmin mihinkään yksittäiseen oikeudelliseen tutkimusmetodologiaan. Oikeuskäytännön kohdalla tarkastelu perustuu pääosin länsimaisten ylimpien oikeuksien antamille tuomioille kysymyksissä, jotka liittyvät elämän alkamisen tematiikkaan. Tämän ohella käsitellään rajatummin pohjoismaista elämän alun sääntelyä. Oikeuskäytännön sekä säädösten tarkastelun keskiössä on ennen kaikkea oikeudellinen argumentaatio sekä esiintuodun argumentaation jännitteisyys. Oikeuskäytännön pohjalta muotoutuu moniääninen ja usein kontekstisidonnainen kuva elämän alusta. Tämän oikeudellisen moniäänisyyden analyysi muodostaa artikkelin keskeisen sisällön.

Yksilöautonomian ja ihmisarvon käsitteiden merkitystä oikeuskäytännön ja säädösten arvioinnille perustellaan artikkelissa yhtäältä niiden merkityksellä tuomioistuinten argumentaatiossa, ja toisaalta näiden periaatteiden saamalla tuella oikeuskirjallisuudessa. Artikkelissa yksilöautonomian ja ihmisarvon sisältöä ja määritelmiä tarkastellaan kriittisesti. Tämän kriittisen luennan tarkoituksena on paljastaa oikeudellisen argumentaation sumeus ja sumeuden oikeudelliselle tulkinnalle aiheuttama epävarmuus. Tulkinnan epävarmuuden seurauksena myös oikeuden tarjoama vastaus elämän alulle vaikuttaa ristiriitaiselta ja osin perustelemattomalta.

Artikkelin keskeinen tulos on ennen kaikkea oikeuden jännitteiden tunnistamisessa, mitkä nousevat esiin oikeuden pyrkiessä selventämään niitä oikeudellisesti merkityksellisiä tosiasioita, joiden avulla elämän alku tulisi määritellä. Artikkeli ei siten tarjoa oikeaa sen paremmin kuin muutakaan

tulkintaa siitä, miten lapsen määritelmä, sellaisena kuin se lasten oikeuksien sopimuksessa esiintyy, tulisi ymmärtää. Sen sijaan artikkeli pyrkii tunnistamiensa perusjännitteiden pohjalta osoittamaan, minkälaiset tekijät vaikuttavat kansainvälisen oikeuden tarjoamassa tulkinnassa elämän alulle. Tuon vastauksen vakaus, perusteltavuus ja pysyvyys riippuvat siitä, miten onnistuneesti oikeudellinen argumentaatio kykenee yhdistämään yksilön autonomisen oikeuden päättää elämästään kollektiivin intressiin ylläpitää elämää.