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The Right to Life as a Right to Self-Determination about One's Life

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Present day medicine and biotechnologies from genetics and neurosciences to geriatrics and palliative medicine have extended the area of human influence on life, transforming the previously naturally given into a form of culture. Conceptions of the right to life still struggle with this changing status of human and other forms of life. Roughly three approaches try to provide answers: naturalistic theories that take the right to life as a protection of natural interests of the individual to live or plainly apply a biological concept of life; procedural theories that take the right to life as a form of mutual recognition and finally what I call «cultural approaches » that determine the concept of life on the basis of ordinary language or «intuitions».

In this paper I am going to defend the thesis that neither of these theories is sufficient for the conception of a fundamental right to life, although all provide necessary insights. The theory of the right to life as a legal right has to provide a normative concept of life that takes into account the systematic coherence with other fundamental rights and constitutional values. Based on this normative concept, the other theories can be integrated in their relative significance. The constitutional or international fundamental rights form what one could call an « image of man in law» – German: «Menschenbild des Rechts»– (Brugger, 1995, pp. 121 f.; Zichy, 2014, pp. 7 ff.). According to this ideal type, a person in law is an autonomous actor, whose development should be respected. This person is respected, when he unfolds his autonomy in discourse with others and should be protected by the law, if he is incapable of doing so by himself. The autonomy of the person gives its life a direction, thus throughout his biography (βίος) life (ζωή) becomes an expression of his personality.

In order to elaborate this conception, I will first discuss the above mentioned three approaches to the right to life, then sketch my own

position and finally draw a few consequences for the problems of the beginning and the end of life.

1. Theories about the Right to Life

1.1 Naturalistic Theories of the Right to Life

Two naturalistic theses can be distinguished here, a monistic and a dualistic approach that both understand «life » in the right to life in a biological sense.

1.1.1. Monistic Theories

Naturalistic theories of the right to life either define life by a natural quality or entrust the sciences this power to define life. They either have a monistic or a dualistic structure.

In a decidedly non-metaphysical way (Hoerster, 1996, p. 167), utilitarian philosophers argue that all fundamental rights protect individual interests –the interest to communicate freely, the interest not to be hurt, the interest to associate, to be treated equally, to participate in the economic and political processes and so on. If individual rights protect these interests, only persons capable of heaving interests can have rights. Since having interests requires a certain consciousness of oneself and of one's living conditions, beings without at least some forms of consciousness cannot have rights. Accordingly, neither early forms of embryonic life nor persons with severe brain dysfunctions have a right to life. It may, however, be in the interest of others to treat them as if they had rights or at least protect them. This interest of others may consist in legal security; it might, for instance, be uncertain whether or not an individual has a sufficient level of consciousness.

This general idea applies to the right to life as well: the right protects the interest of the individual to live. Since an individual has consciousness only on the basis of some functions of the brain and can express these interests only after birth, the right to life begins with birth (Hoerster, 1991, pp. 387 f.) or even shortly after birth (Singer, 1984, chap. 4) and ends when all consciousness-related functions of the brain cease to work ([partial-]brain death). Relevant is the moment of actually having the ability; arguments from potential interests are thus rejected from the beginning. Everyday experience and also experiments proved that neither the fetus

nor nearly borne have the interest to survive (Hoerster 1996, p. 168)[1]. Persons whose cortex is undeveloped cannot have consciousness either (partialbrain-death criterion). The right to life does not protect embryos and persons with heavy dementia then. Consuming embryo research, stem cell research and organ transplantation are widely permitted. At the moment of the respective measure, neither has the embryo an interest that would be violated, nor does his later interest to stay alive retroactively produce such an interest, nor is, finally, a potential interest a real interest that would be worth protection in this very moment.

This line of argumentation has been strongly contested. Its advantage is a non-metaphysical foundation of fundamental rights, clear criteria for medical research and therapy and the guarantee of equal protection of all human beings after birth (Hoerster 1991, p. 162). Furthermore, it convincingly argues based on a structure of rights. However, rights are not merely expressions of natural interests. Law evaluates and balances these individual interests. Before they become fundamental rights these interests have to pass the legal procedure for the recognition of interests. They have to be compatible with other rights and values of the respective legal order. In the end, individual interests are protected only if and insofar as they meet the formal and material legal criteria of the respective legal order. Their protection is then as much in the interest of others and society as it is in the interest of the individual.

Apart from these formal considerations it is questionable if these interests pop up out of nowhere with the embryo becoming visible by the fact of his birth. Certainly can an embryo, who dies before his birth not have an interest that he should have stayed alive, not used for medical purposes of research or not used for in vitro fertilization. In the moment, when according to Hoerster or Singer he would be capable of heaving interests, he does not exist anymore. However, in the moment of his birth, the child may have an interest that he is not designed in a way that pleases the interests of his parents or any other person, but in a way that he can live independently. With regard to his helplessness, the embryo before birth is in an analogous position as subjects of rights to protection.

These rights help people who are otherwise helpless. Given the goal of an autonomous life, in the moment of his birth the child has the interest of not entering a life independent of his mother in a manipulated way. Accordingly, even if we accept the interest theory of rights, we can at least identify an interest of a newly born child not to be manipulated previously.

[1] And are not merely incapable of expressing them. These interests only show up only after a couple of months after birth.

And also, the utilitarian position leaves embryos to the discretion of parents and physicians. This would instrumentalize them. The question, not yet to be decided here, is, whether a later human being –if we accept this distinction– can be treated just like any other object.

1.1.2. Dualistic Theories of Natural Life as a Basis for the Right to Life

It may come as a surprise to find a couple of naturalistic conceptions here that would depart substantially from the monist position by arguing in favor of a protection of the embryo for its own sake. Many approaches to the right to life decidedly advocate a naturalistic conception of life. The German Federal Constitutional court, for example, considers the right to life as the «vital basis of human dignity and the precondition of all other basic rights»[2]. Others assume that life would merely be «the natural precondition of his [the persons, S. K.] actions» (di Fabio M/D/H-Art. 2 II marginal number 9; auch GG-Sachs-Murswiek Art. 2 marginal number 8) or consider «physical existence of man the precondition for his spiritual existence» (DreierGG-Schulze-Fielitz, Art. 2 II GG, marginal number 20; Kopezki, 2000, marginal number 20). Other commentators of the German Basic Law e.g. assume that the right intends «the protection of the biologicalphysical integrity of the beneficiary of fundamental rights»[3] (MüllerTerpitz, HBStR § 147 marginal number 7). However, stones and plants are also «physically there» (Anderheiden, 2001, p. 368). Therefore, there must be a distinguishing feature from these forms of existence, according to which human life is protected.

Some authors argue that only natural sciences could give relevant criteria to determine the concept of life. A reason for this is the need of a weak concept of life. If the concept were too demanding with respect to human qualities such as consciousness, the range of protection of the right to life would be too limited. In addition, to rely on a scientific conception of life would provide objective and reliable criteria that could prevent arbitrary decisions about life (von Mangoldt, Klein, Stark, Stark, Art. 2 II marginal number 192). For these reasons, some authors hold it that a certain selfdependence of life, self-regulation, self-organization,

[2] Judgments of the German Federal Constitutional Court, BVerfGE 39, pp. 1 ff., 42; 72, pp. 105, 115; 109, pp. 279, 311: «Das menschliche Leben stellt, wie nicht näher begründet werden muß, innerhalb der grundgesetzlichen Ordnung einen Höchstwert dar; es ist die vitale Basis der Menschenwürde und die Voraussetzung aller anderen Grundrechte».

[3] If not noted otherwise, quotations from German literature are my translations, S.K.

continuity, or persistence would be required. These criteria are understood in a scientific way. «Autonomy» does not mean self-determination by laws, but an independent metabolism establishing a constant distinction between internal and environmental procedures based on a certain genetic program (di Fabio, M/D/H-Art. 2 II marginal number 20). Identity is not a feature of an individual, by which it wants to distinguish itself from others or a historically built biography, but persistence over time (Knell-Weber, 2009, p. 12). Some refer to aspects of Systems Theory, especially autopoiesis as decisive criteria: An organism would live if it could continuously reproduce itself through operations mostly independent from its environment.

Different from the monistic conceptions, the dualistic theories of life either hold a fundamental right of preconscious life to be possible or proclaim life as a value and the objective duty of the state to protect it. For them the assumption of an individual right is justified because even an unconscious or anencephalic being has the potential of becoming a human being and its existence already is a human life. The objective theories claim that it does not necessarily make sense to recognize a being that lacks central capabilities necessary for consciousness as a subject of rights. Nevertheless, they assume that the objective dimension of both the right to life and human dignity impose a duty on the state to protect this human being (in General for Austria and the ECHR, Kopezki, 2000, marginal number 65). This protection is neither merely guaranteed in the interest of society, nor for the pragmatic reason that it may be difficult in fact to determine the exact beginning of life especially in the case of in vitro fertilization. Nor finally is this protection justified with respect to a later interest of the individual to live; the justification stems from the assumption that as long as a human being lives, it deserves the protection of human dignity.

This requires that it may not be instrumentalized for reasons of research, interests of parents. Consequently, human life deserves an objective protection before birth and after death. Some argue that in both cases the weight of the preservation decreases with the temporal distance from the decisive dates of birth and death. Authors differ also in the determination of the beginning of human life, although most in this group argue for the fertilization of egg and sperm as the relevant demarcation line. The German Federal Constitutional Court discussed whether or not the actual nidation in the uterus would be the relevant date, but ultimately left this issue open. Referring to the presumed traditional legal understanding of

the term[4], Austrian Courts hold that, under Art. 2 ECHR, human life would only be protected after birth[5].

By reducing the formal legal status of human life from the subject of an individual right to the beneficiary of a public duty to protect him, these theories increase the material level of protection with respect to the monistic theories. Human dignity and the objective value of life are the reasons for this protection. However, it is not clear what justifies the distinction between a living human being that is not only the beneficiary of a duty of the state, but also a subject of rights on the one hand and a living human being with lesser or no consciousness that does not on the other. Consciousness alone cannot be the reason, because there is no doubt that a sleeping person, a person with dementia or in coma is a subject of fundamental legal rights. It could be the physical disposition: Whereas the embryo may not yet have the predisposition for the cognitive functions of the brain necessary to develop consciousness and the heavily demented may not have it anymore, human beings after birth usually have it, even if they sleep or are in coma. Would this also imply that an anencephalic being could never become a person?

Philosophical concepts of personhood in the tradition of John Locke hold that continuous consciousness is necessary for being a person (Thiel, 2001, pp. 79 ff.). Being a person is again necessary to have individual rights. In law, this naturalistic presumption has been contested long time ago. Nineteenth century legal theory has shown that law is autonomous with respect to natural abilities and to moral criteria in acknowledging certain entities as legal persons or not. Accordingly, a certain entity is not a person in law because of its natural or social qualities, but because law makes it a subject of rights and duties (Kirste, 2013, pp. 74 ff.; 2009, pp. 189 ff.). Both, the natural and the juridical person (companies, associations) are legal persons, because they are subjects of certain rights and duties. Both, human rights declarations and national constitutions established a right that all human beings should be acknowledged as subjects of law and may not be treated as mere objects on two moral notions: First, that primarily all living human beings should be acknowledged as persons in law; and second, that the extensive animal-like use of people for medical research or forceful sterilization –namely

[4] Cf. I, 1, § 10 of the Prussian Allgemeines Landrecht: «Die allgemeinen Rechte der Menschheit gebühren auch den noch ungebornen Kindern, schon von der Zeit ihrer Empfängniß».

[5] VerfGH, VfSlg 7400/1974; EKMR, Appl8416/79, DR 19,244 (249f); Appl17.004/90, DR 73, 155 (166f); also OGH, RdM 1999, 177 (182).

Jews and Sinti or Roma, but also so called «imbeciles» («Schwachsinnige»)– under the regime of National Socialism should never happen again. I am not going to reconstruct the full argument of human dignity here (Kirste, 2016). At this point, it suffices to conclude that not the natural quality itself decides about legal subjectivity, but that this is an autonomous legal attribution to a certain entity. Because of this, human dignity requires the recognition of all living human beings as subjects of law and not only as –even benevolently treated– objects. Against this principle, the distinction between living conscious human beings with individual rights and human beings without consciousness does not hold. The objective duty of the state to protect these persons without giving them the right to be protected would insofar use them as mere objects and not recognize them as subjects.

The revaluation of the content of the right to life together with a devaluation of its form is also problematic with respect to the naturalistic concept of life. Some authors consider life an autopoietic process, the elements of which are reproduced in a perpetual reference to previous stages of this process (Müller-Terpitz, HBStR § 147 marginal number 28 u. 35). May this conception refer to early stages of systems theory as elaborated in biology by Humberto Maturana and Francisco Varela, it does not take into account that there are not only natural systems, but also functional social systems. If we follow the lines of argumentation in systems theory, we also have to consider the differences between biological and social systems. All of them are autopoietic. In other words, all of them are, self-referential in their operations, but cognitively open to «noise» from other systems they observe. Already the information about the other system, however, is a construction of the observersystem following the code and programs of the observing system. In the case of the legal system this means that information about biological systems are at first «noises» that have to be given a legal meaning according to the code «law-non law» and programs like the constitution (Luhmann, 1993, pp. 43, 55). To sum up, it is not sufficient to postulate a concept of life inspired by systems theory, since autopoiesis is a mode of operation of all systems, and one has to take into account that natural just lie functionally differentiated social systems are self-referential (Luhmann, 1998, pp. 60 ff.). From this follows, that neither can jurisprudence merely adopt the concept of life from biology, nor can law merely take life as a natural fact as a basis of the constitutional right to life. Rather, law has to reconstruct the information from natural systems and give the term «life» a particular legal meaning. It would be self-contradictory and devaluate the theory of

systems altogether, if one accepted it in the field of biology but not in the field of law.

Even if one does not accept the perspective of systems theory in biology or in sociology, the adequacy of a naturalistic concept of life in constitutional law is questionable. One may not consider the problem one of a naturalistic fallacy, because these concepts of the right to life do not directly deduce a normative judgment from a mere natural fact (Anderheiden, 2006, pp. 1404 f.; for legal theory cf. Kelsen, 1960, pp. 11 f.). They rather consider the scientific knowledge not as binding, but as useful or rational for the concretization of the legal term the right to life. The problem is that such a concept may not fulfill the task it is supposed to fulfill, namely to be a suitable basis for the realization of the other fundamental rights. Lawyers relying on scientific findings, often introduce this as objective knowledge that it really is not, even among scientists. What is more, they cannot provide the normative criteria, what life should be (Anderheiden, 2001, p. 356). They have no criteria to delineate a heap of cells from cells of an individual human being (Knell, Weber, 2009, p. 47). There is not only one objective concept of life, from which we could start our legal argumentation. The dualistic concept of the right to life separates a biological life on the one hand so far from the more spiritual or communicative fundamental rights that apart from the status of being alive, life does not contribute to the realization of these liberties and is itself independent from them. Thereby it does indeed become an objective value, defined independently of the preferences of the individual that then cannot only be protected in favor of the individual but also against his intentions. The naturalistic «life» is a foreign element in law, not able to be shaped according to individual and cultural preferences.

This raises the question if we should not look out for a social conception of life as a basis of the right to life.

1.2 The Discursive Justification of the Right to Life

Doubts in the relevance of science are the notions that prompt other scholars to elaborate a procedural or discursive model of the right to life. Most famously, Jürgen Habermas (2001) has criticized naturalistic conceptions of life because they consider it only as a matter of private autonomy and lead to the suppression of its intrinsic value and the technization of its use. We extend the realm of the organic endowment that we give ourselves to the disadvantage of the nature that we are. Genetic technology shifts the frontiers of what Kant called «realm of necessity» into the sphere of contingency (p. 53). This has two consequences: First,

we can manipulate the formerly natural basis and organic starting condition of our self-understanding (pp. 28 f.). Thereby, secondly, we extend the range of our self-understanding and influence into the sphere of the other[6] (p. 28). This problem can neither be grappled with from the seemingly objective perspectives of either empirical sciences or religion (p. 61).

Worked out in discussing the example of the embryonic life, Habermas tries to construct the protection of life from the normal form of a moral discourse. The subject that only transforms the human body into the incarnation of the human spirit forms itself according to Habermas only in mutual relations to others (p. 61). Before its birth, however, the individual is not part of the language community that creates this process of mutual recognition as the basis of the formation of the person. Birth marks the beginning differentiation of the natural faith of the individual and his socialization (p. 61). Therefore the embryo does not lead a social life. Much like the dualistic conceptions of life, Habermas holds that the embryo is to be protected anyhow (pp. 66 f.). The generalized other would not want to depend in his life on these pre-commitments by others.

In a discursive turn of Kant's categorical imperative, a moral argument holds, if it is justified from the perspective of the generalized other. Certainly all education means an influence of parents, teachers and other partners in communication on the child and the adolescent. Towards these social influences, however, the individual person can develop a critical, self-reflective attitude, thereby overcoming this formation during his life. This is not possible with respect to the genetically manipulated life. The young person receives a body, of which he knows that it is technically transformed according to the preferences of others, a manipulation that cannot be revoked or changed by him, but only to be accepted (p. 31). Therefore, the genetic therapist should take the perspective that the future person could agree about the genetic treatment. This is not the case, if this person would have the impression to be manipulated only according to the preferences of the physician or his parents (p. 92). He is fixed to the life-plan of another (p. 105). Otherwise, this person must have the impression that he does not have the authorship about leading his life, that his

[6] «Die Grenze zwischen der Natur, die wir ‚sind', und der organischen Ausstattung, die wir uns selber ‚geben', verschwimmt. Für die herstellenden Subjekte entsteht damit eine neue, in die Tiefe des organischen Substrats hineinreichende Art des Selbstbezuges. Nun hängt es nämlich vom Selbstverständnis dieser Subjekte ab, wie sie die Reichweite der neuen Entscheidungsspielräume nutzen wollen autonom nach Maßgabe normativer Erwägungen, die in die demokratische Willensbildung eingehen, oder willkürlich gemäß subjektiven Vorlieben, die über den Markt befriedigt werden».

personality is not embodied in his life (pp. 96 f. and 100). The principle that noone may be irreversibly dependent upon the decisions of others, is violated by the asymmetrical relationship of the genetic therapist and the parents wishing to impose this influence on their child and the embryo or the person entering social life.

Habermas constructs the right to life in the speech-based discursive perspective of mutual recognition. The natural manipulation here becomes an unsurmountable burden of the later individual person. In this perspective life is not a mere natural fact, but an element of identity building. In this perspective, it makes a difference, if this life is naturally existing or given by us. It seems that Habermas is skeptical about the technical possibilities of contemporary genetics. This skepticism stems from the perspective of moral philosophy and social sciences on life, according to which life is a precondition of our self-understanding, self-consciousness and self-conception. Different from the dualistic perspective Habermas realizes that the state of this life for our consciousness is different, if it has developed naturally or shaped according to actors in the process of its development. The latter is justified only if performed in the perspective of the interests of the person to be born. The protection of the embryo is guaranteed for the sake of the later person after birth.

Habermas correctly realizes that the social status in general and the legal status –legal personhood– in particular is the result of a social, resp. a legal recognition. However, in the course of the 20th century many subjects (Jews, Sinti and Roma, handicapped persons, and others) have been denied the status of a legal person. Therefore postwar human rights declarations and constitutions have introduced a right of all human beings to be acknowledged as a legal person: human dignity[7]. This is the reason why human dignity has to take the burden of selecting the status of humanity. Thus, human dignity provides a right to take part in justifying legal discourses as subjects.

With respect to the transformation of nature into culture, Habermas' perspective is too limited though. Not only preimplantation genetic diagnostics, the extraction of stem and other cells, in vitro fertilization, consummative breeding of embryos, but the social and dietary behavior of parents before and during pregnancy and also –by Habermas decidedly excluded– medical live-prolonging therapies have transformed life from a naturally determined basis of the human person into a culturally formed product of human decision. The formerly given is more and more

[7] For details consider Kirste (2013).

transformed by medical art and technique and thereby disposable. This development is not only a struggle of biology against humanities; both have to be understood as forms of freedom. Therefore both have to be evaluated normatively.

Before we return to this aspect, I want to discuss cultural approaches to the right to life briefly.

1.3 The Right to Life from a Cultural Perspective

Opposite to naturalistic conceptions of the right to life, I understand under cultural approaches theories that refer to social convictions to determine this right and not to natural facts or interests. In «Life's Dominion», Ronald Dworkin (1994) –as one proponent of such approaches– starts his argumentation with the analysis of comparative studies in the history of legal regulations on abortion and comparisons between different present legal orders. He then turns to the American dispute about the right to life between republicans and liberals and finally refers to polls and the opinions of the major US-American churches (pp. 9-38). He does not enter his argument from the perspective of scientists, esp. physicians or biologists. In these debates he discovers a common mistake, namely to speak of rights of the embryo. Furthermore, he explicitly rejects the idea to introduce interests and basic rights as arguments into the discussion (p. 107). Instead, he holds that both, conservative critics and liberal proponents of a right to abortion start their argumentation from a common conviction that «in principle, life is inviolable» or in this sense «holy» (p. 122 f.). A core element of this «sanctity of life» as an objective value is the notion of dignity (p. 328). For Dworkin, of course, principle is a technical term. The observation that most people agree about this principle and that it can even be justified by different world views –religious, atheistic and others– is only the beginning of his argumentation. He acknowledges that although most supporters of these different perspectives agree that abortion and suicide are problematic, they have quite different conclusions about how to solve these problems (pp. 216, 270). Dworkin shares the position that to have a right requires the ability to have interests, but different from the naturalistic conception, he holds it possible that the embryo can be protected for its own sake. Here his concept of the sanctity of life comes into play. Under the influence of dignity all life is to be protected. This applies for the embryo in particular; other persons have a right to decide about the way they die. Heteronomous decision about this would be «inhuman tyranny» (p. 216, 270).

Other cultural approaches start their analysis from ordinary language[8]. Applying the Rawlsian idea of overlapping consensus, Michael Anderheiden (2006), for instance, tries to determine the concept of life and its frontiers (p. 1405). He criticizes the erroneous trust many interpreters of the right to life have in the seemingly objective findings of natural sciences. The sciences need to make evaluations of their findings, need concepts to understand their phenomena. To determine the right to life does not mean to look out, what life «is», nor who the beneficiary of this right is, but to determine the meaning of the predicate «life» for an entity and under what circumstances this predicate can or cannot be attributed to a person (Knell-Weber, 2009, p. 11). All of this presupposes knowledge from humanities and jurisprudence in particular (Anderheiden, 2001, p. 356). Based on a careful analysis Anderheiden holds that according to this ordinary language usage of «life», irreversible death is opposed to life, potential consciousness is sufficient for the self-organization of life (Anderheiden, 2001, p. 372). Accordingly, beginning with nidation the embryo has a human life and this life is terminated only by an irreversible death, which is the total brain death, not only the death of the cortex[9]. Even the anencephalic being has a human life that needs protection (Anderheiden, 2001, pp. 360 f.). Hereby, similar to Habermas, the natural course of development is considered to be good, the deviation from it an act that need to be justified. Taken together, following this approach, human life is a self-integrating psychophysical entity (Anderheiden, 2001, p. 378).

These theories certainly meet arguments most others would also share. All of the above-mentioned theories mention «intuitions» or «the use of the term amongst people». The emphasis and systematic evaluation of intuitions and usages distinguish cultural theories from them though. Whereas both the naturalistic and discursive theories provide only supporting elements, for the cultural theories they are central.

Dworkin's argumentation makes clear that the dispute between contradicting positions can be solved by a commonly acknowledged general principle and a normative reconstruction of the conclusions from

[8] The framers of the German Basic Law would not have codified a technical legal term, but would have referred to the ordinary language, Anderheiden, 2006, p. 1406.

[9] Cf. Art. 3 II of the German Law on Organtransplantation, according to which death is «der endgültige, nicht behebbare Ausfall der Gesamtfunktion des Großhirns, des Kleinhirns und des Hirnstamms nach Verfahrensregeln, die dem Stand der Erkenntnisse der medizinischen Wissenschaft entsprechen, festgestellt ist».
Cf. Also the Austrian interpretation of Art. 2 ECHR, Kneihs 2009, marginal number 8; Kneihs, 1998, p. 238.

this principle, and by determining and balancing of contravening lower rank interests. However, one has to keep in mind that the guidelines from this procedure stem from the legal orders themselves. Intuitions and ordinary language may be influenced by media transporting values that run counter to the basic values of the constitution. Thus, they are in fact all but «natural». In the framing of a constitution (Switzerland), in legislation these opposite positions are debated, mediated and finally decided upon based on democratically legitimated institutions. Guided by the constitutional values and limited by competence and procedural restraints, democratic discourses debate about the issues of life with a higher legitimation than other discourses, although they are always prepared and accompanied by public and scientific discourses. Law has to decide the conflicting positions of the conceptions of life and neither leave it to the sciences nor to ordinary language, intuitions or moral discourses alone[10]. This does not imply that the whole argumentation should be left to the framers and legislators, but reminds us that the right to life is primarily a legal right and that this right has to be interpreted on a legal basis. This legal basis is no less a cultural foundation then other forms of discourses, although it is a particularly elaborate form of culture.

2. The Right to Life as a Right to Self-Determination about one's Life

2.1 Life has become a Symbolic Form

In his «Essay on Man», the philosopher of culture, Ernst Cassirer (1944), depicts man as a «symbolic animal». By symbolic abilities he transforms nature as well as archaic cultural products into rational and free symbols. Symbols are expressions of meanings in sensual objects. By «symbolic energy» he means the ability of men to give meaning to a sensual object[11]. Human beings cannot but symbolize in this sense. Already experience transforms the mere sensual data into a coherent impression. Cultivation of nature in agriculture does the same. The

[10] Different from here, Müller, Terpitz, HBStR § 147 marginal number 8.

[11] Cassirer, 1923, p. 79: «Unter einer "symbolischen Form" soll jede Energie des Geistes verstanden werden, durch welche ein geistiger Bedeutungsgehalt an ein konkretes sinnliches Zeichen geknüpft und diesem Zeichen innerlich zugeeignet wird. In diesem Sinne tritt uns die Sprache, tritt uns die mythisch-religiöse Welt und die Kunst als je eine besondere symbolische Form entgegen».

scientific activity brings the impressions into a reasonable and free form. Language, Art, Myth and also the law are such symbolic forms. In this sense the life of the human body too is not merely a natural fact, but also transformed into a symbolic form. Given his insufficient natural abilities and his adaptation to a particular ecologic niche, his symbolic abilities are not only a cultural luxury, but necessary for his survival: natural facts only make sense for him in their symbolic form (p. 29). The result is that man does «no longer live in a merely physical universe», but

> man lives in a symbolic universe. Language, myth, art, and religion are parts of this universe. They are the varied threads which weave the symbolic net, the tangled web of human experience. All human progress in thought and experience refines and strengthens this net. Man no longer can confront reality immediately; he cannot see it, as it were, face to face. Physical reality seems to recede in proportion as man's symbolic activity advances (p. 30).

The contemporary situation of the human sciences and technology fits well into this picture. The achievements in fulfilling the wish of otherwise childless parents to have children, to have healthy children, and scientific curiosity have led to an enormous extension both of our knowledge and of our capacities about biological foundations of healthy lives. And we decide not only if, and what kind of children we want –eugenetics are not new, we find considerations of this kind in Plato's philosophy– but also when it is suitable to have them («social freezing»). Genetics in particular have enlarged our promethean abilities to form human beings according to our preferences. Different forms of medical care have at the same time enlarged our life perspective towards the end. Although we are far from being immortal, we are less thinking of our lives as an «existence toward death» in Heidegger's sense, but deliberate about anti-aging and other live-prolonging measures (Knell, Weber, 2009, pp. 109 ff.). Organ transplantation, cardiovascular machines and other devices permit a substitution of central organs and functions of the body extending life-expectancy in many countries. By cardiovascular machines, we extend human autonomy over life and reduce the «autonomy» of autopoietically reproducing processes of life (di Fabio, M/D/H-Art. 2 II marginal number 21).

In this perspective, to speak of our natural dispositions is only an abstraction from the cultural form we give all natural facts (Höffe, 2015, pp. 89 f.). We abstract from the fact that indeed we shape this natural predisposition by science, by our interests and by our education. This

abstraction becomes reductionist if we consider our body, life and health as a mere objectivity and not as an incomplete material of our cultivation. We abstract from a necessary element if we think that we treat nature, when –following a preimplantation genetic diagnosis– in a genetic therapy we cure certain diseases. Not only medical art is involved here, but also the interests of the parents. No less than education, therapy too is culture. Therefore, to speak of life as a natural base of human personality is in fact an abstraction from the function this life plays in the hands of the person leading it and the others helping the person to cultivate it. To give the sciences the lead in deciding about the legal criteria of life is then necessarily reductionist.

Against the background of the philosophy of symbolic forms, these developments do not merely signify technical progress towards a rationalization of the sciences of life and the manageability of it. They are necessarily expressions of conceptions, of worldviews and of values. The vast discussions about the «quality of life» and its criteria (Nordenfelt, 1994), questions of the «good life», enhancement not only of physical functions but also moral enhancement by deep brain stimulation or gamma knife (Clausen, 2010, pp. 1152 ff.; Illes, 2012, pp. 65 ff.; Müller, Walter, Christen, 2014, pp. 295 ff.; Katzenmeier, 2012, pp. 130 ff.), the problems of prioritizing the scarce goods of medicine, but also even scientific core question of what are the criteria of life and what organ functions can indeed can be substituted by technical devises are questions about our evaluation of life and of our concepts of it. Does the living organism have a central steering organ that keeps us alive, thus, organ transplantation can be carried out without ending this life. Would a complete brain transplantation end this life? (Kawaguchi, Seelmann, 2003) And uppermost, what makes life a human life? All these new developments show that the liberties we gained by the scientific process with respect to our treatment of life shatter the objectivity of scientific techniques in treating, curing and enhancing life. Life itself has become a symbolic form!

This enlarged freedom with respect to our dealing with life has at least two consequences with respect to the right to life. Both were mentioned before: First, since life itself is shaped by human freedom, scientists do not provide more objective knowledge of what *should* count as life than other disciplines. Thus perhaps they even produce less, because they still have the naturalistic impression that their object is an objectively given entity and not yet a peace of their freedom, a piece of their technique a piece of art. And second, as all free action, this technical treatment of life and its shaping needs normative guidance.

We have to touch another problem here (at least briefly), which we did not previously discuss. A major voice in the discussion of the right to life are, of course, the churches. In its catechism, the Catholic Church considers life an eternal value and human beings from their conception as benefactors of rights[12]. Jews could refer to Jer 1,5[13]. Lawyers too sometimes consider values as objectively given measures for legal action (Kirchhof, 2001, p. 158). Utilitarian arguments against this position were mentioned above. Some of the dualist conception of the right to life argue based on strong believes. They weaken the formal status of the right to life and naturalize the concept of life in order to achieve the most effective protection of it in all forms and at all stages of human life. More explicitly than others the US Supreme Court has emphasized that religious believes are concerned in the debate about the right to life and that they are protected by privacy[14]. For some scholars this is the reason, why the state should refrain from regulating ethically delicate questions such as the right to life at all. In other countries parliamentary clubs or fractions relieve their members from the obligation to vote according to the party line, because they consider the ethics of life sciences a highly personal matter. However, this also shows the long diagnosed situation in ethics, namely that we simply do not have the objective background of commonly agreed upon values, including –counter to Dworkins intuition– the value of life. Therefore, we try to establish new seemingly objective innate moral criteria in vain (van den Daele, 2000, pp. 24-31).

Accordingly, the decision about the content of life faces a double challenge: Both, sciences of life and the background convictions about the central value of life have lost their objectivity. In both cases, a return to nature –to the natural form of life or to natural law– has become impossible. We therefore have to look for different solutions. Law does not have the function to limit the seemingly arbitrary possibilities of the sciences and medicine on the basis of seemingly objective and undoubtful values, but to produce procedurally and constitutionally legitimate criteria to come to terms with both. And this means to take into account that self-determined scientists decide about an actual or potentially self-determined living human being on the basis of self-determined moral criteria.

The purpose of these final legal considerations then is not to establish more demanding criteria for the right to life than the natural conceptions.

[12] Catechism of the Catholic Church, 2270.

[13] Jer 1,5; Ijob 10,812; Ps 22,10-11.

[14] Roe v. Wade 410 U.S. 113; 93 S. Ct. 705.

The idea is only to look for normative instead of merely natural criteria and to avoid arbitrariness at the same time[15].

2.2 The Legal Concept of the Right to Life

In this final part of the paper, I am going to defend the thesis that as the core of the right to life we have to understand the right to a self-determined decision about one's own life.

As the theory of social systems, but also the normativistic positivism of Hans Kelsen and finally Ernst Cassirer's Theory of Symbolic Forms have shown, the meaning of natural facts in culture in general and in law in particular does not stem from the observation of nature, but from the fit into communicative systems, into the system of norms or into the cultural world of symbolic forms. The sciences and medicine are not superfluous of course, but their primary task, in this context, is to determine when and under what conditions the normative prerequisites are fulfilled, criticize the legal regulations or make new proposals that could later be transformed into law. We cannot rely on them to determine, what human life in a legal sense is, when it begins and when it ends.

Given the diversity of philosophical, religious and other convictions about the value of life, for the determination of the legal concept of life we cannot rely on them either. By its normatively regulated procedures and its basic values and rights, law itself has to give an orientation for the legal definition of life (Kneihs, 1998, p. 237).

For this purpose the ideal-typical image of man, modern constitutions and declarations of human rights sketch can be helpful, although in most of them, the right to life ranks as the most important or one of the most important rights. The other fundamental rights protect individual freedom in the largest sense. Accordingly, life is first individual life and not life as an objective value[16]. From the time an individual human life can be identified until this is not the case anymore, this life should be protected[17]. Individuality presupposes negatively the distinction from others. Therefore the genetic code is one prerequisite. Since we do not consider twins to be one legal person, but two, since they are addressees of different

[15] For a skeptic criticism of this attempt, see von Mangoldt, Klein, Stark, Stark Art. 2 II marginal number 192.

[16] The German Constitutional Court speaks of «jedes Leben besitzende menschliche Individuum» (BVerfGE 39, pp. 1 ff. (37)).

[17] BVerfGE 88, pp. 203 ff., 251 f.: «Jedenfalls in der so bestimmten Zeit der Schwangerschaft handelt es sich bei dem Ungeborenen um individuelles, in

rights and duties, as long as twins can form out of the originally conceived cells, they do not have an individual life in a legal sense. The European Charta of Fundamental rights explicitly speaks of the right to life of «persons». Thus, from conception on the genetic code makes it clear that this being belongs to the human species and has a *human life*. Because it is not an individual existence, however, it is not yet the life of a human being[18]. It should be protected with respect of the possibility of the later individual life as a human being, but does not have an individual right to life. In this state, human dignity too is indeed protected as the dignity of the species and not as an individual life (di Fabio, M/D/H-Art. 2 II marginal number 30). Thus the production of embryos or consuming embryo research is impermissible.

Human rights protect freedoms in a legal sense, in all areas in which a person gives itself an identity, communicates, associates with others and thereby leads a self-determined life independent from state influence. Apart from these negative rights positive rights protect the individual, where he is incapable of realizing freedom by himself, for example because he lacks education or cannot act at all. Active rights provide the legal possibility for the individual to participate in the deliberation, enactment, interpretation and enforcement of his rights so that he is not only a mere object of benevolently granted rights and duties, but also their author. Most fundamental, however, is the right in his status subjectionis, by which I mean the right to be acknowledged as a subject of law and not a mere object (Kirste, 2014, pp. 177 ff.). This right to human

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seiner genetischen Identität und damit in seiner Einmaligkeit und Unverwechselbarkeit bereits festgelegtes, nicht mehr teilbares Leben, das im Prozeß des Wachsens und Sich-Entfaltens sich nicht erst zum Menschen, sondern als Mensch entwickelt (vgl. BVerfGE 39, 1 [37]). Wie immer die verschiedenen Phasen des vorgeburtlichen Lebensprozesses unter biologischen, philosophischen, auch theologischen Gesichtspunkten gedeutet werden mögen und in der Geschichte beurteilt worden sind, es handelt sich jedenfalls um unabdingbare Stufen der Entwicklung eines individuellen Menschseins. Wo menschliches Leben existiert, kommt ihm Menschenwürde zu (vgl. BVerfGE 39, 1 [41])».

18 The German Law on embryonic research speaks of an embryo and of embryonic cells from the moment of the unification of the core of the stem cells: § 8 ESchG vgl. auch § 3 StZG.

dignity is the basis for all other rights, although for particular reasons, it entered the legal arena only as the latest right. Human dignity protects the individual not only in this or the form of action, but in its ability to act at all, even if he cannot realize this potential (Kirste, 2013, pp. 63 ff.).

Whereas the other negative, positive and active rights protect the actual freedom, human dignity protects the subjectivity as such, the potentiality of being free in a legal sense. The central preconditions for this is to be acknowledged as a legal subject or as a legal person.

If then the self-determined person in a community is central for the image of men in many constitutions and human rights declarations, life too should be considered as an expression of freedom (just as health is). The right to life should be considered the right to lead one's life according to one's own preferences. The right to life is not primarily a right to a certain state, but a negative right, not to be oppressed in the self-determined conception of one's life including not to be killed and a positive right to the preconditions of the autonomous decision how to lead one's life. The latter includes the right of the embryo to enter life in a way that the later child and adult can lead it in a self-determined way.

Since life is not a natural fact, but subject to the free decision of all persons concerned with it –scholars in the life sciences, physicians etc.– the freedom of the person, whose life is concerned and the scientific and professional freedoms of the others have to be balanced[18]. Since the living person is most affected by these decisions, his freedom should generally prevail.

Beginning and end of life are not mirrored. In his embryonic state, the human being enters live in a mostly dependent state, gaining more and more autonomy by realizing his potentials to be free. Not to lose this autonomy at the end of life, may be a reason to reject life-prolonging measures. We do not want to lose neither our autonomy nor become biologically dependent.

With respect to the end of life it means, that in the same amount as medicine has developed ever better methods of prolonging life, the individual should have the right to decide not to become dependent on these devices and terminate his life. We lose autonomy over our lives, when the cortex has ceased to operate and even the biological independence, when the main brain functions terminate and we need artificial respiration (Knell, Weber, 2009, pp. 48 f.). Therefore, we have to acknowledge a negative dimension of a right to life, namely a right to die when and how this person wants to[19]. Only this right can ultimately secure

[18] This is a major issue in biomedical ethics, cf. Beauchamp and Childress.

[19] This is counter to the predominant opinion in constitutional interpretation, cf. di Fabio M/D/H-Art. 2 II marginal number 47; Dreier-GG-Schulze-Fielitz Art. 2 II GG, Marginal number 32; accordingly, Art. 2 ECHR does not oblige the contracting states to punish active assistance to death, Kopezki 2000, marginal number 21; formerly the European Court of Human Rights rejected this negative dimension (Pretty v. United

dying in dignity. Since it is a *legal* right only, for the person having the wish to die there may still be moral or religious duties not to realize this wish. Law is not intended to execute these duties though. This right does not impose any duty to nurses or physicians to help. It also does not open the door to desperate situations of loneliness in dying: Relatives, nurses and others have the duty to offer help for patients, who want to live, and to relieve them from burdensome and unbearable circumstances as much as possible. They may even try to convince the patient to stay alive; if he refuses, however, this wish is the ultimate authoritative legal will. This all is an expression of the positive dimension of the right to life: public authorities are obliged to secure free decision of the individual over his life. This includes measures to shield the individual from pressure by others and not to be pressed by grave circumstances to finish his life. Public authorities are also required to provide procedural precautions for the clear determination of the free will of the individual to put an end to his life (Kneihs, 2009, marginal number 23).

However, the dead body is not merely a «partial sum of organs» as disintegrated leftovers of the former human body (Müller-Terpitz, 2009, HBStR § 147 marginal number 32). They have been formed by the whole biography, the experiences, the habits (good and bad), and the way of life of the person, whose brain now does not function anymore. Patient's testaments and other forms to interpret the wishes of the patients help to guarantee their self-determination even against a benevolent care.

With respect to the beginning of life, the legal image of man as a self-determined person in a society should also direct the evaluation of actions. As Habermas and others have shown, the right to lead an autonomous life is infringed, if not made impossible, if life is irrevocably formed by decisions in the interest of others, be they physicians or parents, who want impose their preferences -to have an intelligent and beautiful child etc.– on the child. This would mean to instrumentalize the life of their child. The return to the natural conditions of life is no solution (Enders, 2003, p. 669). They should orient their decisions by the goal of promoting later autonomous decisions of their child –although admittedly this is a vague criterion. Preimplantation genetic diagnosis, can help the future autonomy, if it does not lead to the abortion of the child. Handicapped persons may

Kingdom 29.04.2002 – 2346/02); in his most recent decision, he accepted the decision of physicians and the wife of the comatose victim of a car accident, to let the unconscious patient with no perspective to improve his situation die, Lambert and Other v. France, EGMR 05.06.2015 - 46043/14.

prefer their lives and possible experiences over the decision not to live at all.

Consuming embryonic research or the production of embryos for the only reason of research violates human dignity of these embryos.

Since human dignity calls for the recognition of all human beings as legal subjects and not as mere objects, and since to be a legal subject means to have rights, from its beginning on human life should be protected not only as a duty of the state, but also by the right to life as a fundamental right. Legal personhood is not as demanding a concept as moral personhood. A certain coherence of the subject and selfdependence is sufficient, as juridical persons show.

With respect of the legal image of man as a person capable of self-determination in society, we can finally determine also the legal beginning of life. It begins, when the first predisposition of the ability for self-determination is developed[20]. Since the genetic code is determined by the fertilization, twins can form, at the moment it seems that nidation is the point in the development, when life, becomes human life[21]. From this moment on, it will continue as human life, even if not all capabilities and organs will be developed. Even the anencephalic embryo and other beings, whose development is inhibited, remain human beings with a human life, although their cognitive abilities may resemble other forms of life.

Since the ancient philosophy of Aristoteles, via medieval metaphysics to modern theories, life has always been considered as an independent or self-dependent, continuously developing or autopoietic entity. The form of self-dependency is different in different forms of life. In all of its structure and in its central values and human rights, law requires a self-reflective form of self-dependency, according to (mostly) rational reasons, namely autonomy or self-determination. Autonomy is the basis of our legal personhood, but it is also the basis of the specific influence we have on our lives. It needs protection even if it is not yet or cannot unfold itself or is infringed by deceases. Because of it, men do not only «have» a life that needs protection, but *lead* their individual life and in a historic and

[20] Different from Quante (2002, pp. 64 ff.), in the legal context we cannot begin with decidedly non-normative concept of the beginning of life. The beginning of life is a debated question and therefore needs a normative decision. A criterion for this should be provided by law. Quante's analysis of the concept of personal life is helpful though, because law uses a personal concept of life. It applies the concept of a personal life, because the right to life has to be interpreted within the systematic context of other rights, especially human dignity, autonomy etc.

[21] GG-Sachs-Murswieck Art. 2 Rn. 145.

biographic process thereby individualizing their lives ever more [22]. Autonomy is not the sole reason, why live is protected, but an autonomous life in this sense is its ultimate goal. This needs protection in all stages of live. The right to life then is the right to self-determined decision about one's life.

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