

## NATURAL LAW AS BIOLAW<sup>1</sup>

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**Abstract.** *This article investigates the use of natural law in biolaw from the specific perspective of an attorney practising before the European Court of Human Rights. Starting from an exploration of the question of who is a human and thereby to be protected under the European Convention on Human Rights (ECHR), particular emphasis is placed on the right to life under Art. 2(1) ECHR. It is shown that natural law can – and should – impact the interpretation of the European Convention on Human Rights and that concrete consequences follow from this approach, most notably the requirement to ensure that every human being, including the unborn, is actively protected as concerns the right to life.*

**Keywords:** *Natural Law, biolaw, European Convention on Human Rights, values, international law, bioethics, morals, biotechnology, right to life, prenatal life, abortion, in vitro fertilisation, chimera, Christianity, Catholic, Germany, Netherlands.*

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1 All views and opinions expressed in this article are only to be attributed to the author, all statements postulated in this article have been made in the author's private capacity.

## Introduction

Biolaw is concerned *inter alia* with the rights of a human person in the context of medical and scientific procedures. As such, it is connected to other fields of law, most notably human rights law. Biolaw has to contribute to facilitating medical and scientific progress while safeguarding the rights of humans and protecting other life. Finding a working balance between progress and protection becomes increasingly difficult when the potential benefits appear great and those who are put in harm's way are unable to speak for themselves. In an age of relativism, when the lines between the right and wrong seem to be blurred and when the law can no longer provide a yardstick for what is morally correct, Natural Law, which has regained some importance after the horrors of the *Shoa* and World War II, can provide guidance. This is particularly true when it comes to the treatment of the human person in the context of science and medicine.

This article is built on the premise that the personal scope of the right to life under Art. 2(1) of the European Convention on Human Rights<sup>2</sup> is to be understood so as to include all human beings regardless of their development, age, health or handicap, in particular the unborn human child.<sup>3</sup>

Not only is consensus hardly a relevant – or even a useful – category when interpreting human rights (after all, in a democracy human rights are also meant to protect the minority against the ruling majority), the wide-ranging diversity of legislation in the almost fifty states to which the Convention applies makes it virtually impossible to find much in way of a consensus on key bioethical issues, such as abortion, in one way or the other.

### 1. Who is Human?

While it appears obvious to everybody, whether someone (or something?) is alive, things become significantly more sketchy after taking a closer look. At the most basic level, we often find it difficult to define what amounts to life. Is somebody whose heart has stopped beating dead? Is somebody whose brain has stopped working dead? Is somebody who is brain-dead and who has had his organs removed for transplantation dead? After all, the organs still need to function in order to be transplantable, so there must be something there, is this something life? Or to look beyond human life: is a virus “alive”? One could argue that this is not the case because it requires a host to survive and multiply. But certainly it is something different from a stone. Minerals, on the other hand, are not considered to be alive even though they can grow. On a higher level the question can be raised which rights or benefits should be given to animals.

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2 European Treaty Series, No. 5; hereinafter – “ECHR” or “the Convention”.

3 See, e.g. Kirchner, S. The Personal Scope of the Right to Life Under Article 2(1) of the European Convention on Human Rights After the Judgment in *A, B and C v. Ireland*. *German Law Journal* 2012, 13(6): 783-792.

To give one example, the *Grundgesetz*,<sup>4</sup> the German constitution, is sometimes said to contain animal rights,<sup>5</sup> a claim which is incorrect in several regards. To begin with, Art. 20a of the *Grundgesetz*<sup>6</sup> does not deal with human dignity (that clause is Art. 1 GG<sup>7</sup>), in addition, the norm requires that consideration is given to the environment as well as animals, but it does not grant subjective rights to animals<sup>8</sup> (Common Law jurisdictions appear to me more ambiguous<sup>9</sup>). Even though, Art. 20a GG requires the state to enact laws that protect animals, such as the Animal Protection Law, the *Tierschutzgesetz* (TierSchG), the Law on the Protection of Animals.<sup>10</sup> Other states have experienced similar debates and usually some kind of differentiation is made between different types of animals. The German law protects vertebrates more than other animals<sup>11</sup> and gives special attention also to warm-blooded animals,<sup>12</sup> while in some states sentient species such as dolphins and great apes are given a *status aparte*<sup>13</sup> between other animals and humans.

The unborn child after conception is genetically identical with the unborn child at twelve weeks of gestation, with the newly born child, the teenager or the adult. Any distinction between the “beginning of life”<sup>14</sup> and the “beginning of personhood”<sup>15</sup> is artificial. The Convention itself does not contain an explicit restriction of the concept of personhood to born humans. Persons within the meaning of the Convention are also

4 Bundesgesetzblatt 1949, pp. 1 *et seq.*; hereinafter “GG”.

5 No author named – *Germany votes for animal rights*, in: CNN.COM, 17 May 2002, available online at <[http://articles.cnn.com/2002-05-17/world/germany.animals\\_1\\_animal-rights-human-rights-lawmakers?\\_s=PM:WORLD](http://articles.cnn.com/2002-05-17/world/germany.animals_1_animal-rights-human-rights-lawmakers?_s=PM:WORLD)> (last accessed on 9 November 2011).

6 Art. 20a *Grundgesetz*.

7 Art 1 *Grundgesetz*.

8 H. D. Jarass – *Art. 20a*, in: H. D. Jarass / B. Pieroth – *Grundgesetz für die Bundesrepublik Deutschland*, 10<sup>th</sup> ed., Verlag C. H. Beck, Munich (2009), pp. 528 *et seq.*, at p. 528.

9 *Cf. e.g.* Lubinski, J. *Introduction to Animal Rights*, 2<sup>nd</sup> ed., Michigan State University / Detroit College of Law, Detroit (2004), available online at <[http://www.animallaw.info/articles/art\\_details/print.htm](http://www.animallaw.info/articles/art_details/print.htm)> (last visited 15 November 2011), Chapter II, Part A.

10 Bundesgesetzblatt 2006, Vol. I, pp. 1206 *et seq.*

11 *E.g.* in § 4(1) sentence 1 TierSchG: „Ein Wirbeltier darf nur unter Betäubung oder sonst, soweit nach den gegebenen Umständen zumutbar, nur unter Vermeidung von Schmerzen getötet werden“. (A vertebrate animal may only be killed under sedation or otherwise, in as far as reasonable given the concrete circumstances, only while avoiding pain.)

12 § 4a TierSchG.

13 Originally describing one possible status of a dependent territory with relation to the mainland, in particular in the context of the Kingdom of the Netherlands, the term *status aparte* is used here in the sense that sentient animals, because they are animals, are not a sui generis category between humans and animals but that they have a special status with regard to other animals which goes beyond the special treatment afforded e.g. to vertebrae or warm-blooded animals (*cf.* the last two footnotes).

14 Rey, A.-M. *Coerced childbearing is tantamount to servitude – Comment on the judgment of the European Court of Human Rights of 16 January 2010*, 28 January 2011, available online at <<http://www.europrochoice-network.wordpress.com/2011/01/28/comment-about-abc-judgment-coerced-childbearing-is-tantamount-to-servitude>> (last accessed on 28 January 2011).

15 *Ibid.*

legal persons, such as corporations.<sup>16</sup> There is no basis in the Convention for the claim<sup>17</sup> that personhood, as far as natural persons are concerned, starts at a point later than conception. The language used in *X v. The United Kingdom*<sup>18</sup> to the effect that “the general usage of the term ‘everyone’ [...] and the context in which the term is employed in Article 2 [ECHR] tend to support the view that it does not include the unborn”<sup>19</sup> leaves plenty of room for debate. The unborn child is undoubtedly a human being, even before being born. Should it become technically possible in the future to have not only the fertilisation but the entire pregnancy *ex utero*, this criterion will become fully useless. Therefore we need to have a better definition of what it means to be a human being. The same applies to the case of human-animal hybrids, which already exist today.

As soon as humans are concerned in any way, we enter the realm of bioethics in the proper sense of the word. Therefore, if some human genes are implanted into an animal, it becomes an issue of bioethics.<sup>20</sup> Many states on paper prohibit the creation of human-animal hybrids or plan to do so,<sup>21</sup> at least beyond a certain point in the development of the embryo,<sup>22</sup> but the reality on the ground, in laboratories and hospitals, has been looking different for some time now: already more than five years ago, the Dutch company *Pharming* has created a human-cow hybrid,<sup>23</sup> albeit in the form of a cow with just one human gene.<sup>24</sup> It is the aim of this project to create milk which contains human

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- 16 Kirchner, S. *Private Military and Security Corporations as Rights Holders under the European Convention on Human Rights?*, on file with the author.
- 17 Rey, A.-M. *Coerced childbearing is tantamount to servitude – Comment on the judgment of the European Court of Human Rights of 16 January 2010*, 28 January 2011, available online at <<http://www.europeanprochoicenetwordpess.com/2011/01/28/comment-about-abc-judgment-coerced-childbearing-is-tantamount-to-servitude>> (last accessed on 28 January 2011).
- 18 EComHR – *X v. United Kingdom*, Application No. 8416/78, Decision of 13 May 1980, in: 19 Decisions and Reports (1980), pp. 244 *et seq.*
- 19 *Ibid.*, para. 9 / p. 7. Emphasis added.
- 20 Cf. MacDonald Glenn, L. *Ethical Issues in Genetic Engineering and Transgenics* (2004), available online at <<http://www.actionbioscience.org/biotech/glenn.html>> (last accessed on 31 October 2011).
- 21 In the United States, the Human-Animal Hybrid Prohibition Act of 2009 has been referred to the United States Senate Committee on the Judiciary on 9 July 2009 but has not been dealt with since, cf. Bill Summary & Status, 111<sup>th</sup> Congress (2009-2010), S. 1435, available online at <<http://thomas.loc.gov/cgi-bin/bdquery/z?d111:S1435>> (last accessed on 31 October 2011); see also 111<sup>th</sup> Congress: Bills Considered by the Senate Judiciary Committee, available online at <<http://www.judiciary.state.gov/legislation/111thCongress.cfm>> (last accessed on 31 October 2011) and 112<sup>nd</sup> Congress: Bills Considered by the Senate Judiciary Committee, available online at <<http://www.judiciary.state.gov/legislation/112ndCongress.cfm>> (last accessed on 31 October 2011).
- 22 DW staff (jen) – *British Nod to Embryo ‘Chimeras’ Raises Hackles in Germany*, in: DW-World.de, Deutsche Welle – Science, 21 May 2008, available online at <<http://www.dw-world.de/dw/article/0,,3351368,00.html>> (last accessed on 8 November 2011).
- 23 No author named – *A Dutch company looks to bring a protein created from transgenic cows to the American public. Is This Cow a Human-Animal Hybrid?*, in: Seed Magazine, 12 April 2006, available online at <[http://seedmagazine.com/content/article/is\\_this\\_cow\\_a\\_human-animal\\_hybrid](http://seedmagazine.com/content/article/is_this_cow_a_human-animal_hybrid)> (last accessed on 31 October 2011).
- 24 *Ibid.*

*lactoferrin*,<sup>25</sup> a protein with many medical applications.<sup>26</sup> Similar projects involve human genes in rice<sup>27</sup> as well as in goats.<sup>28</sup> While the idea of a human-ape brain hybrid seems to be the stuff of nightmares, such experiments have already been conducted in 2001.<sup>29</sup>

Is an animal embryo that contains one specific human gene sequence, in the case of the transgenic cow the gene sequence that causes the human (and hence the cow's) body to produce already human *lactoferrin* enough to claim that this animal is in fact no longer a cow but a human? This seems to be hardly the case, but the question already becomes harder if, for example, 10 % or 25 % percent of the genome of a hybrid are human. Where should we draw the line? Are only genetically pure humans also humans within the meaning of the law and therefore worthy of protection? This, too, cannot be the solution since it would deny the human nature of patients who have received donor organs from animals, for example heart valves from pigs. Is it sufficient to have a genome which is 50-plus-x % human? Or would that line be simply arbitrary? In case of doubt, if we cannot exclude that the creature in front of us is human, we have to protect it / him / her.<sup>30</sup>

## 2. Natural Law and the Right to Life

Even if one accepts the idea that ethics may not always be based on *objective* truths,<sup>31</sup> law, as opposed to mere ethics, has to be objective because it applies to all members of a society. Law, also, has to be based on truth, otherwise it risks to be inherently unjust right from the start. While moral<sup>32</sup> truths may be more controversial, neither law nor ethics can ignore scientific truths, such as contemporary knowledge about the prenatal development of the unborn child. When it comes to moral truths,

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25 *Ibid.*

26 See Ward, P. P., Paz, E., Conneely, O. M. *Multifunctional roles of lactoferrin: a critical overview*, in: 62 Cellular and Molecular Life Sciences (2005), pp. 2540 *et seq.*, at pp. 2541 *et seq.*

27 *Ibid.*

28 *Ibid.*

29 Ourednik, V., Ourednik, J., Flax, J. D., Zawada, M., Hutt, C., Yang, C., Park, K. I., Kim, S. U., Sidman, R. L., Freed, C. R., Snyder, E. Y. *Segregation of Human Neural Stem Cells in the Developing Primate Forebrain*, in: 293 Science (2001), pp. 1820 *et seq.*, also published as Ourednik, V., Ourednik, J., Flax, J. D., Zawada, M., Hutt, C., Yang, C., Park, K. I., Kim, S. U., Sidman, R. L., Freed, C. R., Snyder, E. Y. *Segregation of Human Neural Stem Cells in the Developing Primate Forebrain*, in: Science Express, 26 July 2001, pp. 1 *et seq.*, available online at <<http://www.sciencemag.org/content/early/2001/07/26/science.10b0580.full.pdf>> (last accessed on 15 October 2011); Recer, P. *Stem cells may help in brain repair*, in: Gereontology Research Group – no title, 27 July 2001, available online at <<http://www.grg.org/StemCellMonkeyBrain.htm>> (last accessed on 7 November 2011).

30 Cf. Petre, J. *Chimera embryos have right to life, say bishops*, in: The Telegraph, 26 June 2007, available online at <<http://www.telegraph.co.uk/news/uknews/1555639/Chimera-embryos-have-right-to-life-say-bishops.html>> (last accessed on 31 October 2011).

31 Cf. Palazzani, L. *Introduzione alla biogiuridica*, 1<sup>st</sup> ed., G. Giappichelli Editore, Torino (2002), p. 9

32 Palazzani, L., *ibid.*, p. 11, seems to refer only to absolute moral-ethical standards *in abstracto*.

though, it might appear as if there were no absolute truth due to today's relativist and over-individualistic approach to ethics which lets everybody define 'truth' for him- or herself.<sup>33</sup> In this sense, there is a strong tendency in today's society to create our individual version of what we think is the truth. By doing so, we deprive ourselves of any external yardstick with which to determine whether what we think is the truth is actually so. At the same time, this perceived, self-made 'truth' is highly subjective. In fact, given that it is based on the notion of the freedom of the individual, it is as subjective as it can possibly be. Therefore, it is fundamentally inadequate for providing a basis on which to construct common rules. Because we cannot know for sure whether our personal 'truth' is really true, any rule based on it, would have to be manifestly unjust. Just as it is necessary to look for scientific truths and to take them into account when making or interpreting law, it is necessary to look for moral truths that are applicable to everyone.

From a Christian perspective, man should not meddle with creation by interfering with the procreative process<sup>34</sup> and abortion is prohibited *e.g.* by the Catholic Church. Ironically enough, the Court, although its jurisprudence on abortion is clearly at odds with the teachings of many religions, in particular the Christian faith, elaborated at length on the history of the installation of a *tour d'abandon* or foundling wheel (the precursor to what today is referred to as a baby hatch) by St. *Vincent de Paul* and its impact on the development of the French legal system in contradiction to the principle *mater semper certa est*.<sup>35</sup>

The basis for the prohibition of all forms of abortion in the Catholic faith is the Natural Law,<sup>36</sup> which also greatly influenced the development of international law<sup>37</sup>. The idea of the existence of a Natural Law has featured prominently in Catholic legal and philosophical thought<sup>38</sup> and continues to do so.<sup>39</sup> Yet, not only is the idea of Natural Law under attack in this time of moral relativism and increasing secularity, it also needs to pass the test whether it makes good law. *John Rawls* is of the opinion that

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33 *Cf. ibid.*

34 Rosenau, H., *Reproduktives und therapeutisches Klonen*, in: Amelung, K., Beulke, W., Lilie, H., Rosenau, H., Rüping, H., Wolfslast, G. (eds.) – *Strafrecht – Biorecht – Rechtsphilosophie*, Festschrift für Hans-Ludwig Schreiber zum 70. Geburtstag am 10. Mai 2003, 1<sup>st</sup> ed., C. F. Müller Verlag, Heidelberg (2003), pp. 761 *et seq.*, at p. 765.

35 ECtHR – *Odièvre v. France*, Application No. 42326/98, Judgment of 13 February 2003, para 15 *et seq.*

36 For an overview of the concept and its importance for Catholic bioethics see May, W. E. *Catholic Bioethics and the Gift of Human Life*, 2<sup>nd</sup> ed., Our Sunday Visitor Publishing Division, Huntington (2008), pp. 58 *et seq.*

37 *Cf. Tietje, C. Internationalisiertes Verwaltungshandeln*, 1<sup>st</sup> ed., Duncker & Humblot, Berlin (2001), p. 35.

38 See *e.g.* Catechism of the Catholic Church, available online at <[http://www.vatican.va/archive/ENG0015/\\_INDEX.HTM](http://www.vatican.va/archive/ENG0015/_INDEX.HTM)> (last visited 23 November 2011), ## 1954 *et seq.*

39 Pope Benedict XVI – *The Listening Heart, Reflections on the Foundations of Law*, Address to the German Federal Parliament, 22 September 2011, available online at <[http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2011/september/documents/hf\\_ben-xvi\\_spe\\_20110922\\_reichstag-berlin\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin_en.html)> (last accessed on 2 November 2011), the original German text is available online at Pope Benedict XVI – *Ansprache von Papst Benedikt XVI.*, 22 September 2011, available online at <[http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2011/september/documents/hf\\_ben-xvi\\_spe\\_20110922\\_reichstag-berlin\\_ge.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin_ge.html)> (last accessed on 2 November 2011).

no political good, regardless of its value, can be fully considered to be on *par* with potentially conflicting values which are rooted in moral, religion or philosophy.<sup>40</sup> The reason for this seems to be the fundamental difference in nature between political goods (or interests, be they framed as rights or not) on one hand and what *Rawls* refers to as “*transzendente Werte*”<sup>41</sup> (transcendental values<sup>42</sup>). If this were the case, the question behind this entire thesis would be moot since asking whether legal rules are compatible with a defined set of ethical rules would be akin to comparing pears with apples – and every pear, no matter its quality, will always fail at being an apple. Yet, *Rawls* errs in a crucial respect: he would be right, were there a multitude of “sources” for morals, philosophy, religion etc. and if political values would exist in a vacuum, untarnished, if you will, by those “transcendental” aspects. But both is not the case: if we keep in mind one premise on which this thesis is based, the assumption that there is indeed a Divine being who created all that exists and whom we refer to as God, we cannot exclude the idea of a Natural Law that has been set by the Creator and has been made accessible to His creatures, at least to us humans who know that we are capable of accessing this Natural Law through means of our conscience.<sup>43</sup>

But what is Natural Law? Natural Law<sup>44</sup> is not, unlike it is sometimes believed due to its importance for Christian (and in particular Catholic) legal philosophy, a divine law, i.e. a law set by God (as are for example the Ten Commandments), nor is it “vague religiosity”.<sup>45</sup> It is also not identical to international law (although there are some overlaps) or the *ius gentium* of antiquity. While international law, of which the Convention is a part, arises out of the consent of the subject of the international legal order, Natural Law is based on the natural, inherent, connection which exists between all created beings, in this case, between all human beings. Because this connection is a consequence of the fact that humanity has been created – from the perspective of believers – by God. From a Christian perspective it is also God who is the ultimate reason for the existence of Natural Law.<sup>46</sup> Yet, Natural Law also applies to non-believers. Therefore, it has to be independent of any specific faith, religion or world view and has to be accessible by everybody. The tools to understand the commands of the Natural Law are both reason and conscience. Although one might have the impression that the

40 Rawls, J. *Der Vorrang des Rechts und die Ideen des Guten*, in: van den Brink, B., van Reijen, W. (eds.) – Bürgergesellschaft, Recht und Demokratie, 1<sup>st</sup> ed., Suhrkamp Verlag, Frankfurt am Main (1995), pp. 153 *et seq.*, at p. 178

41 *Ibid.*

42 The text by *Rawls* was published in German, the term ‘transcendental values’ is my translation of the German term employed in the publication cited.

43 Catechism of the Catholic Church, available online at <[http://www.vatican.va/archive/ENG0015/\\_INDEX.HTM](http://www.vatican.va/archive/ENG0015/_INDEX.HTM)> (last accessed on 23 November 2011), # 1956.

44 On the history of Natural Law thought see Malbon, J. *Natural and Positive Law Influences on the Law Affecting Australia’s Indigenous People*, in: 3 Australian Journal of Legal History (1997), pp. 1 *et seq.*, at pp. 5 *et seq.*

45 *Ibid.*, at p. 6.

46 On the connection between Christian faith and the protection of the individual through international law see Eyffinger, A. *Christianity and International Humanitarian Law*, in: 15 Sri Lanka Journal of International Law (2003), pp. 29 *et seq.*

idea of Natural Law had been abandoned even by Catholic legal philosophers after the Second Vatican Council,<sup>47</sup> this view seems overly simplistic because the *magisterium* of the Catholic Church continues to refer to the Natural Law,<sup>48</sup> which is also admitted by those who seem to doubt the Church's dedication to the concept of Natural Law.<sup>49</sup> The universal values inherent in Natural Law have led to the emergence of international human rights law as well as to a closer look at human dignity, which was a fairly new legal concept at the time<sup>50</sup> (of course, human dignity was nothing new – what was new was the idea that it could be put in legal terms). Natural Law applies to all humans *qua* human. Although there is the idea that this renaissance of Natural Law has failed,<sup>51</sup> even the technocratic approach<sup>52</sup> prevalent in many domestic legal systems today has not led to the death of the concept of Natural Law: the label 'Natural Law' might not be popular anymore but the essence of it still exists in international, and in particular European, Human Rights Law.

Natural Law is law. After legal positivism has been largely discredited due to the crimes which were committed under its cover in the last century, we have moved beyond *Carl Schmitt*. But even if one works from the premise that there are rules of Natural Law which serve a more fundamental justice and with which positive laws can be at odds, legal positivism as such is not per se incompatible with the notion that there are higher, unwritten laws.<sup>53</sup> Yet, in the case of laws which not only allow the killing of innocent children with impunity,<sup>54</sup> but which even employ the notion of rights in the context of access to abortion, the conflict with the demands of justice becomes evident at the moment one accepts that the unborn child is a human being from the moment of conception. The recourse taken by the German *Grundgesetz* to the responsibility of the people towards God and man<sup>55</sup> as well as to human dignity<sup>56</sup> are examples of this move forward. But the post-positivist conception of law is not only inherently based on

47 Römelt, J. *Menschenwürde und Freiheit – Rechtsethik und Theologie des Rechts jenseits von Naturrecht und Positivismus*, 1<sup>st</sup> ed., Herder, Freiburg im Breisgau (2006), p. 10.

48 Pope Benedict XVI – The Listening Heart, Reflections on the Foundations of Law, Address to the German Federal Parliament, 22 September 2011, available online at <[http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2011/september/documents/hf\\_ben-xvi\\_spe\\_20110922\\_reichstag-berlin\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin_en.html)> (last accessed on 2 November 2011).

49 Römelt, J. *Menschenwürde und Freiheit – Rechtsethik und Theologie des Rechts jenseits von Naturrecht und Positivismus*, 1<sup>st</sup> ed., Herder, Freiburg im Breisgau (2006), p., p. 11.

50 Shaw, M. *International Law*, 4<sup>th</sup> ed., Cambridge University Press, Cambridge (1997), pp. 43 *et seq.*

51 Römelt, J. *Menschenwürde und Freiheit – Rechtsethik und Theologie des Rechts jenseits von Naturrecht und Positivismus*, 1<sup>st</sup> ed., Verlag Herder, Freiburg im Breisgau (2006), p. 19.

52 Somek, A. *The Spirit of Legal Positivism*, in: 12 German Law Journal (2011), pp. 729 *et seq.*, at p. 729: "Legal Positivism is dead, isn't it? We are all legal realists now. We believe, by default, that what really matters in law emerges from some judicial process."

53 Munsonius, H. *Kirchenrecht zwischen Positivismus und Bekenntnisbindung*, in: 56 Zeitschrift für evangelisches Kirchenrecht (2011), pp. 279 *et seq.*, at p. 290.

54 Cf. Araujo, R. J. *Abortion – From Privacy to Equality: The Failure of the Justifications for Taking Human Life*, in: 45 Houston Law Review (2008-2009), pp. 1737 *et seq.*, at pp. 1747 *et seq.*

55 *Grundgesetz*, Preamble.

56 Art. 1 (1) *Grundgesetz*, cf. also Menke, C., Pollmann, A. *Philosophie der Menschenrechte – zur Einführung*, 1<sup>st</sup> ed., Junius Verlag, Hamburg (2007).



ideas which themselves are rooted in Natural Law, post-positivist law shares a crucial characteristic with Natural Law: it is knowable. Post-positivist legal thought is centered on the idea that law is law in as much people, that is, those who are under the law, know that it exists.<sup>57</sup> An international lawyer will immediately make the connection to a classic aspect of the sources of public international law, the requirement for state practice to be based on *opinio juris* in order to be able to contribute to the creation of customary international law. It is not enough for a state to act in a certain manner to create customary international law, the state has to act in this manner, and not otherwise, because it considers itself bound by this law. In the same way, natural law, the law which is pre-existent and essentially given by God, can be found, can be discovered by everyone through the use of our conscience. The Natural Law is “written on the heart”<sup>58</sup> of each and every human, regardless of religion, and which is therefore accessible, in other words, knowable, by all of use. When we follow our conscience, we do so because we have tapped into this knowledge of Natural Law, we know the law and act accordingly – because our conscience tells us to do so. But what then is the position of the Natural Law regarding abortion and euthanasia? That every being which is alive wants to be alive – a small animal running away from a predator, the natural shyness of animals, somebody who is sick and wounded fighting for his life, a mother caring for her baby despite material hardships – we all are, by our very nature as living beings, pro-life. Life is generally perceived as something which is good. Concerning euthanasia, many who favour euthanasia do so on the basis of an understanding of the importance of a high quality of life which comes closer to Nazi ideologies of “life which is not worth living”<sup>59</sup> than to Christian views. Suffering is not bad per se, rather, it is a part of life, not an excuse to end life. While in the context of euthanasia, life is understood as only ‘counting as a life’ if it is a life free from pain, in the context of abortion the problem is in so far different as that the unborn child is yet too small to be visible from the outside. The mother does not feel her unborn son kick, her unborn daughter move in her womb etc. But the child is there and only because he or she is in the early stages of gestation it does not mean that the child is less human or less alive. The Natural Law position regarding abortion is the same as regarding euthanasia: we all have a right to life from conception to natural death. But is this really Natural Law in the sense that everybody can identify abortion as something that is wrong? Despite wishes by many pro-abortion advocates to the contrary, concerning abortion, there is still a sense that it is wrong in principle – why else would states feel the need to legislate on this issue, were it not for the unspoken knowledge that abortion was not right. If it were clearly and undoubtedly right, no state would have to legislate because everybody would know

57 Forgó, N., Somek, A. *Nachpositivistisches Rechtsdenken*, in: Buckel, S., Christensen, R., Fischer-Lescano, A. (eds.) – *Neue Theorien des Rechts*, 1<sup>st</sup> ed., Lucius & Lucius, Stuttgart (2006), pp. 263 *et seq.*, at p. 263.

58 Johnson, P. E. *The Law Written on the Heart – A Review of Written on the Heart: The Case for Natural Law by J. Budziszewski* (InterVarsity Press, 1997), available online at <<http://www.arn.org/docs/johnson/jbudz.htm>> (last accessed on 2 November 2011).

59 Cf. also Schmid-Tannwald, I. *Gestern ‘lebensunwert’, heute ‘unzumutbar’*, 2<sup>nd</sup> ed., Zuckerwerdt Verlag, Germering (2000), pp. 167 *et seq.*

that it is ok to kill one's child. Rather, it is the case that abortion is wrong, yet for states, or at least many states, including the majority of those states which are parties to the European Convention on Human Rights. Even those who use the label 'pro-choice' do not necessarily claim that abortion is right – rather they say that the woman should choose. Unless they are themselves in the position that they might have to make this choice, those pro-choice activists can pretend to have a clean conscience because the decision is to be made by the woman, because the burden is on the shoulders of the woman, who needs support rather than the burden of uncertainty and sin in addition to the challenges that already are ahead of her. All too often, those who advocate abortion later fail to support those women who are left behind traumatised after having had an abortion and it all too often falls to non-governmental projects intended to help those women.

But if everybody can access, see and understand the demands of the Natural Law, no value can be said to exist independently of this law. Therefore, philosophy, as well as religion, morals and even political convictions are the result of man's struggle with this law in our hearts. They are different emanations of the same thing, regardless of how they are framed or labelled. We often may not understand it, we might misunderstand it, and obviously we often enough completely disregard it, but hardly anybody can claim not to have had a chance to reflect on the question whether something is right or wrong. This is not so much a question of competing ideals or values – I fully understand if somebody were to find my values wrong or even repulsive, the number of threats and insults I have received in the line of my pro-life advocacy work certainly indicates that many people in fact do so. Rather, it is about our ability as humans to be able in principle to draw the line between good and evil.<sup>60</sup> Wanting to help a pregnant woman who does not know how to feed her child will normally be a good idea – executing this idea by suggesting that she have an abortion on the other hand is evil – even more so if the person suggesting so would have the material means to help the woman.

But because many political values are inextricably connected to “transcendental”<sup>61</sup> values, to continue to use the term employed by Rawls, one can be measured against the other. Therefore, it is indeed possible – and scientifically legitimate – to ask whether a defined set of legal rules lives up to the standards imposed by a defined set of ‘transcendental’ rules – in our case, whether the right to life under the European Convention on Human Rights, in particular regarding abortion, but also with regard to euthanasia, is compatible with the demands imposed by Catholic bioethics. This is not to say that rules of Catholic bioethics were of a higher order in a hierarchical sense than the ECHR.<sup>62</sup> To think so would lead to falling back to *Rawls'* mistake that values would hardly matter.

60 Cf. already Chapters 2 and 3 in *Genesis*.

61 Cf. Pope Benedict XVI – The Listening Heart, Reflections on the Foundations of Law, Address to the German Federal Parliament, 22 September 2011, available online at <[http://www.vatican.va/holy\\_father/benedict\\_xvi/speeches/2011/september/documents/hf\\_ben-xvi\\_spe\\_20110922\\_reichstag-berlin\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/speeches/2011/september/documents/hf_ben-xvi_spe_20110922_reichstag-berlin_en.html)> (last accessed on 2 November 2011).

62 Kirchner, S. *Relative Normativity and the Constitutional Dimension of international law: A Place for Values in the International Legal System ?*, in: 5 German Law Journal (2004), pp. 47 et seq., at p. 52.

### 3. Application to the Interpretation of the European Convention on Human Rights

Applied<sup>63</sup> to Art. 2 (1) ECHR, Natural Law's concern for all human beings from the moment of conception requires us to interpret the personal scope of the norm to the effect that it also includes the unborn child,<sup>64</sup> indeed all human beings from conception to death, although the definition of death is still as unclear as the definition of the beginning of human life has long been – and given the beginning debate on the permissibility of the brain death criterion for organ donations it seems fair to say that there will be need for debate on this issue as well.

What does the interpretation of the personal scope of Art. 2 (1) ECHR presented here mean for current issues, such as in-vitro-fertilisation and pre-implantation diagnostics? The same that it means for abortion: the margin of appreciation doctrine is important and does not need to be abandoned *per se*. But when it comes to the question of what human life is, states must not be given a margin of appreciation. Rather, the concept should be replaced in those cases by an autonomous concept of the definition of human life which needs to be based on the best available medical and scientific knowledge. In political discourse, at times scientific knowledge is ignored. The notion that the embryo is just a collection of cells and not yet human is a leftover of the idea of the biogenetic principle, according to which it was thought that every human child in the womb repeats the evolution of the entire species, hence that we start as a kind of small fish and only later develop into a child. This idea was discredited already almost half a century ago,<sup>65</sup> yet it seems to persist in the minds of many. This ignorance of scientific knowledge must not spill over into legal discourses. If law is to remain relevant, it has to be rooted in reality and while law sometimes can be considered a tool to change reality, this is not the case when it comes to simple biological facts. As long as states are unwilling to adapt their domestic laws to the biological reality of the continuous development of the unborn child and of the fully human identity of the old, sick, elderly and handicapped, the Court is called to take action. At the same time, and this is the other side of the medal, will states be free to act in this manner as long as the Court grants the states which are parties to the European Convention on Human Rights the wide margin of appreciation which they currently enjoy.

63 On the consequences of failing to take Natural Law considerations into account see e.g. Malbon, J. *Natural and Positive Law Influences on the Law Affecting Australia's Indigenous People*, in: 3 Australian Journal of Legal History (1997), pp. 1 *et seq.*, at p. 2.

64 See also Kirchner, S. *The Personal Scope of the Right to Life Under Article 2(1) of the European Convention on Human Rights After the Judgment in A, B and C v. Ireland*, in: 13 German Law Journal (2012) forthcoming; Kirchner, S. *Abortion and the Right to Life under Art. 2 of the European Convention on Human Rights*, in: 9 IUP Journal of Environment and Health Care Law (2010), Nos. 1 & 2, Jan. and Apr. 2010, pp. 10 *et seq.*

65 Blechschmidt, E. *Wie beginnt das menschliche Leben?. Vom Ei zum Embryo*, now available in the 8<sup>th</sup> ed., Christiania-Verlag, Stein am Rhein (2008); see also the interview which the late Prof. Dr. Erich Blechschmidt gave to PUR Magazin, available online at <<http://www.aktion-leben.de/Abtreibung/Embryonal-Entwicklung/sld01.html>> (last accessed on 8 November 2011).

It would not only be wise were the Court to abandon the margin of appreciation in the context of the right to life in favour of an autonomous concept – the Court is even obliged to do so: ignoring scientifically proven reality to avoid unpleasant obligations by recourse to the doctrine of the margin of appreciation is simply *abus de droit*, which is prohibited by general principles of law<sup>66</sup> which are part and parcel of Public International Law by virtue of Article 38 (1) lit. c of the Statute of the International Court of Justice and which therefore in turn have to be taken into account by the Court because, even though the ECHR is a self-contained regime, it is still part of Public International Law as a whole.

Moreover does the application of a margin of appreciation to the right to life run counter to the spirit and aim of the Convention, which is the most effective protection of human rights, what already follows from the full title of the Convention, the Convention for the Protection of Human Rights and Fundamental Freedoms? Article 31 (1) of the Vienna Convention on the Law of Treaties,<sup>67</sup> which in this respect only codifies the existing customary law,<sup>68</sup> requires the term “everyone” in Art. 2 (1) ECHR to be interpreted not only in the ordinary meaning of the word – which might leave some room for doubts – but also “in good faith”<sup>69</sup> as well as “in the light of [the Convention’s] object and its purpose”.<sup>70</sup> The purpose of the Convention is the protection of human rights against abuses, which requires a human rights-friendly interpretation of the Convention and therefore a wide interpretation of the personal scope of Article 2 (1) ECHR. Such a general human rights-friendly approach in interpreting the applicability of a norm does also not burden the states too much because it does not limit their ability to place limitations on said rights as far as the Convention allows them to do so. Also, the effective protection of human rights makes it necessary to ensure that the core of human rights is protected in any case and there is no human right more fundamental than the right to life. The scope *ratione personae* of the most fundamental of all human rights certainly is the wrong place for states to claim a more narrow interpretation of the Convention.

## Conclusions

As long as the risk of abortion hangs over a human life, as long as the European Court of Human Rights remains committed to granting states great freedoms in applying the Convention and as long as even a single state party to the Convention has not enacted

66 Byers, M. *Abuse of Rights: An Old Principle, A New Age*, in: 47 McGill Law Journal / Revue de droit de McGill (2002), pp. 389 *et seq.*, at p. 397, available online at <<http://lawjournal.mcgill.ca/documents/47.2.Byers.pdf>> (last accessed on 4 November 2011).

67 11 United Nations Treaty Series 331, hereinafter “VCLT”.

68 Cf. in general Schrever, C. *Diversity and Harmonization of Treaty Interpretation in Investment Arbitration*, 7 February 2006, available online at <[http://www.univie.ac.at/intlaw/pdf/cspubl\\_85.pdf](http://www.univie.ac.at/intlaw/pdf/cspubl_85.pdf)> (last accessed on 4 November 2011).

69 Art. 31 (1) VCLT.

70 *Ibid.*

domestic legislation aimed at protecting the right to life under all circumstances, the way we make use of the European Human Rights system is flawed. The system itself can work and can become a valuable tool for the right to life movement. The current application of European Human Rights law, though, is incompatible with Catholic bioethics. The main reasons for this are a lack of courage on the part of both the Court and the states parties as well as a disconnection between those in power and the Catholic faith. Therefore, from a religious perspective, in the long run, the new evangelisation of Europe will be necessary first in order to create the religious conditions necessary to change the legal protection of the right to life which we all require since they day we were conceived. From a legal or rational perspective, the arguments presented here might provide a first step towards a complete end to all abortions and a fuller protection of every human life.

Natural law concepts can be made useful in terms of biolaw not only on the abstract but also on a very concrete level in as much natural law requires due consideration to be given to every human being, regardless of age, health or status.

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## PRIGIMTINĖ TEISĖ KAIP BIOTEISĖ

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**Santrauka.** *Bioteisė yra susijusi su žmogaus asmens teisėmis medicinos bei mokslinių tyrimų srityje. Egzistuoja ryšiai tarp bioteisės ir kitų teisės šakų, ypač – ryšiai su žmogaus teisėmis. Kartu pastebima vis dažniau aktyviai aptarinėjama abejotino adekvatumo teisinė reakcija į daugumą naujų technologijų. Kalbant apie žmogaus teises ir visų pirma – teisę į gyvybę, susitarimas neturėtų būti tinkamo interpretavimo sąlyga.*

*Negimęs vaikas iš karto po apvaisinimo yra genetiškai identiškas negimusiam arba bet kuriuo vėlesniu metu gimusiam vaikui. Teisė privalo būti grindžiama tiesa, nes priešingu atveju ji rizikuoja tapti iš prigimties neteisinga nuo pat pradžių. Nors moralinės tiesos gali būti labiau prieštaringos, jokia teisėkūra negali ignoruoti mokslinės tiesos, pavyzdžiui, šiuolaikinių žinių apie negimusio vaiko vystymąsi nėštumo laikotarpiu.*

*Šiandieninio mokslo žinios apie gyvenimą iščiose palaiko seniai egzistuojančią prigimtinės teisės nuostatą dėl negimusio vaiko teisės į gyvybę. Be to, faktas, kad abortas nėra teisė, yra žinomas bent jau tam tikru lygiu (kitu atveju nebūtų poreikio teisės aktuose numatyti baudžiamąją atsakomybę už abortų darymą).*

*Klabant apie teisės į gyvybę taikymą asmenų atžvilgiu pagal EŽTK 2 (1) straipsnį, požiūris, kad prigimtinė teisė rūpinasi visais žmonėmis nuo apvaisinimo momento, reikalauja besąlygiško pripažinimo, jog minėtoji norma galioja ir negimusio vaiko atžvilgiu, nes iš tikrųjų žmogaus egzistavimas prasideda nuo apvaisinimo, o baigiasi mirtimi.*

**Reikšminiai žodžiai:** *prigimtinė teisė, Europos žmogaus teisių konvencija, vertybės, tarptautinė teisė, bioetika, moralė, biotechnologijos, teisė į gyvybę, abortas, apvaisinimas in vitro, krikščionybė, katalikybė, Vokietija, Nyderlandai.*

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