

## Is het menselijke embryo een persoon ?

### Unjust Laws Are Often Enacted on False Perceptions

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“From a legal point of view, is an embryo a human being?”

What good is such a question? Does one ask whether a tadpole is a batracien from a legal point of view? This question reveals the widespread confusion between reality and law, between facts and norms. This confusion results from our apprehension of reality whose social or normative representation tends to be perceived immediately to the detriment of its first factual reality.

#### **Law is not reality**

Law deals with objects and objective facts which are exterior, but when the fact is a mystery and our mind struggles to apprehend a reality, such as an embryo or a foetus which is difficult to see or touch, we form our own idea about it. This personal idea represents reality but makes it lose its uniqueness and fragmentises it, because one must admit the possibility of a plethora of ideas like these. The law, as a social representation of reality therefore comes to impose a common conception which reunites this diversity of views and so restores the appearance of an accessible reality which is united and shared, thereby replacing reality. In actual fact however, the law only interposes between us and reality; it is the projection of our representation of reality. We are thus led to believe that the law would have the power to define what an embryo is since the law or the social norm would be the only intelligible reality. It's pure illusion!

The smaller the understanding of the reality, which the law deals with, is, the greater the law's independence with regards to the constraints of what is real will be.

Yet, it is true that the law must reach a verdict on what can be done with a foetus or an embryo. This is normally the law's role- not to define what it is but to determine the appropriate relationship between persons and things. However, to legally qualify an embryo and to decide what can be done with it, we must know beforehand what the embryo is in itself. This is a pre-legal question and as such, it is normally not determined by lawyers but by the competent authority who does not derive his knowledge from law. If no superior science to law in the order of knowledge (theology, metaphysics, science) provides a definition of the embryo, the law will give its verdict alone.

The law should not be both judge and judged: it should not be able to define the norm and at the same time its object. Yet, the law does not only claim to regulate human behaviour but also claims to be next to science or to replace science, metaphysics and theology, as a form of knowledge: a “democratic knowledge” that does not result from the observation of reality but the expression of will. The law therefore has the ability to contradict what is real and sometimes pretends to substitute it. It would substitute it even more easily since the reality would be mysterious or would have been rendered muddled and unintelligible. This new reality, legal but nevertheless wrong, only exists through the institutionalized will of the society; and this general will is also largely democratic fiction.

#### **Humanity without borders**

The doubt concerning the nature of the embryo is not that much about the factual aspect of the question

(prenatal development of life is well known), it is particularly about the definition of humanity. This is not the first time this question has been asked; in diverse places and eras, society hesitated on the delimitation of humanity's borders; should it exclude primitive or certain disabled people, should it include certain animals like bears and monkeys? Are certain beings only partly human? Indeed, society no longer shares humanity's objective criteria.

The reference to notions of dignity or liberty is only a consensual last resort which is adequately large and imprecise to sweep our questions under the carpet. They are a moral description of man but do not say who man is. Since humanity necessarily gives itself criteria, every moral criterion (dignity, capacity, autonomy), may be arbitrary and allows certain categories of beings to be excluded from this humanity.

As well, the reference to the animation (the moment there is union between the body and soul) as criteria of humanity is rejected in the West. This supernatural character has provided a criterion of humanity which is outside our own capacity, but we are not able to have a direct and tangible knowledge of the soul.

The fact that the issue of the humanity of the embryo is asked in our era is not in itself the expression of moral and spiritual regression (apart from the issue of abortion) but a consequence of the progress of our scientific knowledge which confronts us with this new human reality just like with primitive people in the past. Therefore one must admit that an embryo looks visibly less human than a "savage".

It seems that this biological path is the only one our society can use to determine the boundaries of humanity. Using a biological criteria allows abandoning the moral idea of humanity as defined a priori and conditioning who man is, so that it only conserves human qualities which not every individual can than equally possess. This implies starting from what is real. The subject of humanity (the embryo, the fetus, the child, the adult, the handicap person, the elderly) can exist independently of possessing all moral qualities that distinguish man from the rest of nature. If humanity obeys biological criteria, it is not a mystery and obliges us. Claiming not to know who is human -by disagreeing with the concept of humanity- allows one not to be obliged to respect a being which can be rejected by abortion or exploited by biotechnology. At the opposite, referring to a biological criterion leads to accepting that every individual life is a continuum from conception till death, regardless of the legal definition of the beginning of life and of death.

Therefore, "from a legal point of view, is the embryo a human being?" This depends on whether the "democratic knowledge" which informs the law is true to the scientific, metaphysic and theological knowledge or if it would rather move away for political reasons such as allowing abortion.

### **Human being below the Pyrenees, a 'thing' above**

National laws reach varying verdicts on the nature of human embryos to the extent that a pregnant woman travelling around is sometimes carrying a human being subject to the law and sometimes an undefined 'thing', depending on which borders are being crossed. This notwithstanding, there is also the legal distinction added to the complexity of the nature of the embryo. With regards to the embryo and the human foetus, the law distinguishes between a human being and a legal person and dissociates legal protection (particularly the right to life) from the quality of the legal person. One might assume that every human being is a legal person and immediately benefits from the right to life. This is however not or no longer the case. A being can benefit from legal protection without necessarily being recognized as a legal person. This was the case in the past regarding slaves and today human embryos who are, according to Italian law for example, regarded as subject legally protected but not as persons. The relation between these closely correlated concepts has been distended to make room for abortion. There is however a tendency of not recognizing the embryo as a human being and legal person, but rather as an object or a being that belongs to the human species or a stage in the biological development of a person and as such shares in human dignity. An embryo, just like a corpse, is not entirely a

person but deserves a certain degree of respect depending on the political will at the time.

### **Absence of a European agreement regarding the nature of an embryo**

The Council of Europe's Convention on biomedicine targets the research on the embryo and protects "every person" without deliberately specifying if embryos are persons. The Convention also uses the term "human being", by stating the need to protect the human being's dignity and identity. Concerning this point, the States specified that "It was acknowledged that it was a generally accepted principle that human dignity and the identity of the human being had to be respected as soon as life began." It is intentionally elliptical.

The Court of Justice of the European Union (CJEU) in a *Brüstle v. Greenpeace* judgment in 2011 was led to define the term embryo under the directive which prohibits the patenting practices involving the destruction of embryos. This court held that the notion of a human embryo should be more widely understood as those of cellular organisms that benefit from the legal protection accorded in respect to human dignity from the moment they have the capacity to trigger the development of a human being. This prevents the patenting of procedures that involve the destruction of embryos, not in the name of the right to life or because embryos could be persons but because they are part of humanity and are therefore covered with human dignity.

The European Court of Human Rights considers that no European consensus exists concerning the legal definition (what is true), nor the scientific definition (what is false) of "the beginning of life". Nevertheless, the Court underlined that one can find a "common ground between States that the embryo/foetus belongs to the human race." The Court adds that "[t]he potentiality of that being and its capacity to become a person [...] require protection in the name of human dignity". Consequently, the Court finds that "the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere" so that "it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 of the Convention". That notwithstanding, the Court does not exclude the possibility that an embryo could be a person: it has always refused to consider the embryo to be a person because the European Convention on Human Rights "is silent as to the temporal limitations of the right to life", "so that it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life." (See *Vo v. France*, July 8, 2004 and *A. B. and C., v Ireland*, December 16, 2010).

After referring the determination of the quality of the embryo to the national authorities, the Strasbourg Court adopts the point of view that this issue would be political and not legal. However, politics is not in a better position than the law to say what the human embryo is: in 1979, the Parliamentary Assembly of the Council of Europe recognized "the rights of every child to life from the moment of conception." In 2008, this same Assembly promoted abortion. Legislatures and the courts are more places of confrontation of wills than oracles of what is just and true.

In fine, if we human beings doubt ourselves and are unaware of what gives us our human nature, the will for power at work in positive law can only exploit this ignorance, but certainly not reduce it.