

Embryo, human being and person in the Oviedo Convention

I. The three notions and the consequences of the distinction

This presentation aims to identify the embryo, the human being and the person. By doing so, we will achieve a better comprehension of the degree of protection reserved to each one of them.

A. The different subjects of dignity

i. Define the embryo, the human being and the person

The human being is an indisputably objective notion that describes a fact: the existence of a being, of an entity that includes the characteristics of the human species. To be qualified as a human being does not grant the quality of uniqueness; a human being is no different from any other human being, and even if there are differences, they have no importance for the qualification of their bearer as a human being. It is the uniformity and not the uniqueness that forms the notion of the human being. Every member of the human species is a human being; our presence in the world is enough to be part of humanity. The human being has neither thoughts nor emotions. It has no personality, no desire, no needs. Yet it has all the tools - brain, mind - to create one day links with the persons that surround it. The human being is a potential person, a person still asleep.

On the contrary, according to St. Thomas Aquinas, the human person is the supreme value. We are surprised to see that this term is used by St. Thomas Aquinas. Especially because it is a term more or less neglected until 1945. Its necessity was not apparent; the term man or human being could very well serve as a subject for human rights. The human person is prominent in national constitutions first; it is the subject of dignity. Yet none of these national constitutions provide a definition of the person. The reasons for this change of terminology do not concern so much legal technicalities as political ends. It is the UN that imposes the term because it is "neutral and general, ageless and sexless". So, originally the term person is characterized by a certain and desired universality; it is given the same meaning as the term human being or man, the only difference being that the former is more politically correct than the latter.

Nevertheless, the person goes beyond the human being in both meaning and complexity. What makes a human being a person is its socialization, which is the creation of relationships with other people around it. It is exactly this relational process that leads to the formulation of self-awareness; it is through the other that the being develops all its potential to finally become a person. For Emile Durkheim, the passage through society is obligatory: the human being becomes a person only through the intermediary of society.

Every person is first and foremost a human being, but the opposite is not true. The only moment in our life when we are only human beings is when we find ourselves in the state of the fetus. In its decision *X vs. United Kingdom* (March 13, 1980) concerning the right of the father to be consulted before an abortion, the European Commission for the Protection of Human Rights and Fundamental Freedoms (hereinafter ComEDH) lays the foundations of this distinction: the term person is reserved for the pregnant woman; the fetus is clearly deprived of this qualification. At the very moment of birth, the newborn is surrounded and therefore, the relational process begins. Even if they are abandoned right after their birth, another person has already decided for them and therefore society has conditioned their existence.

At this point it is inevitable to ask the question concerning individuals who are in a state of coma. Have they lost the quality of person? Can a person stop being one? The answer to these questions follows the same reasoning as that given above concerning the newborn abandoned immediately after birth: the individual who is in a coma does not lose his quality of person because his existence has been conditioned by society, by other persons who surrounded him at some point in his life.

Every human being becomes a person from birth and remains a person until the end of his life because "one is never - one can never be - alone". Not only is socialization necessary, but we can not escape it.

ii. Human dignity vs. personal dignity

Now the notion of dignity resumes the respect owed to its subject and that's why we have to distinguish the different kinds of dignity. There are two kinds of dignity: human and personal.

Many attempts have been made to define human dignity, the content of which remains uncertain until now especially because it is always to be completed. Unlike the personal dignity whose subject is the person, the subject of human dignity is none other than the human being. The latter as a member of humanity carries a dignity-responsibility; he carries a dignity that he must defend and to which he cannot renounce. Human dignity, which is about the human being and which is likely to be defined or at least perceived objectively and independently of its bearer, can compete with the autonomy of the person because by exercising one's autonomy, the person can attack his own dignity.

Through the personal dignity, the individual tries to rid himself of the responsibility that goes hand in hand with human dignity; of the responsibility that arises from his belonging to humanity. When the person assumes his autonomy, it is likely that his choices are not compatible with the ideal image of the man-member of humanity. More precisely, the confrontation of personal and human dignity is presented in the form of an antagonism between the respect of private life and moral imperatives. Human dignity, previously conceived for the purpose of serving the individual, now becomes a weapon against him in order to protect him from himself.

The personal dignity is as elusive as its subject. It is a notion that does not admit previously designated content, or it is impaired at its very essence. This type of dignity recognizes its subject in the face of the person and that is exactly why it does not include the idea of uniformity; the person is unique and his dignity, which is defined by him, is also unique. Every person has a different conception of his dignity. This individualized dignity may be at odds with the dignity of humanity and may also be contrary to the general interest.

The primary function of the personal dignity is to serve as a balance against human dignity and the obligations it implies. Personal dignity corresponds to an image of the

individual that is not ideal and illusory, but realistic and real. The person cannot be autonomous if he is imposed the ultimate goal of assimilation to the ideal Human. The concept of personal dignity makes it possible for the person to define his own ideal.

B. Domains where the distinction matters

There are two domains still quite problematic, where the above distinction matters. Those are the interruption of a pregnancy and the end-of-life decisions.

- i. The beginning of life: interruption of pregnancy (when does the embryo become a human being?)

The case *Vo vs. France* (2004) is representative of the difficulty when it comes to define the embryo and its rights. In this case, there are two women with the same name who are on the same day in the same hospital. The first is six months pregnant and the second wants to have an IUD (intrauterine contraceptive device) removed. Because of the homonymy, the doctor makes a mistake of patient and makes the pregnant woman undergo an operation of removal of IUD. During the operation, the doctor pierces the water pocket, which causes a loss of amniotic fluid. The reconstitution of amniotic fluid being impossible, a therapeutic interruption of pregnancy is considered necessary. The applicant claims to be an indirect victim of the violation of Art. 2 whose unborn child was the direct victim. The Court declares the application inadmissible on the ground that there is no direct victim, that is to say that the fetus cannot be considered to hold the right set forth in Article 2; it is not a person. While the judge makes the distinction clearly, his approach is in fact rather evasive: “At European level, the Court observes that the question of the nature and status of the embryo and / or the fetus is not the subject of a consensus [...] the Court is convinced that it is neither desirable nor even possible at the moment to answer in the abstract the question whether the unborn child is a "person" within the meaning of Article 2 of the Convention”. The judge leaves a

margin of appreciation to the States here. The distinction is therefore not definitive and could be challenged in the future¹.

And this is exactly what happened six years later. Despite the consistent case law on the issue of voluntary interruption of pregnancy, a recent judgment of the ECHR deprives the pregnant woman of her freedom of choice. It is the judgment A, B and C delivered on 16 December 2010 in which the Irish law containing a general abortion ban is challenged. The only exception is when the life of the pregnant woman is in danger and exclusively within the first twelve weeks of pregnancy. The Court considers that the pregnant woman's right to respect for her private life should be measured against one of the other competing rights and freedoms, including those of the unborn child. The judge does not hesitate to recognize rights - the content of which can legitimately be questioned - to the fetus for the sole purpose of not pronouncing the Irish law contrary to the ESDH Convention. His judgment is, moreover, based on a motive that has long since disappeared. It is the motive of morality that justifies in this case the state interference in the private life of the pregnant woman.

These cases do not carry any obvious questions regarding bioethics, but they all contribute to the definition of the embryo. Is it a human being? Does it have the right to life? If the Court asserts that it is permitted that the national law bans the interruption of pregnancy since day one, in the end is there a difference between a human being and a person? Recognizing rights, even abstract ones, does not elevate the embryo in any rang, but it degrades the person, their value and their freedom to make decisions concerning them directly.

- ii. The end of life: assisted suicide (does human dignity impose itself on personal dignity?)

Assisted suicide is very often confused with passive, active or indirect euthanasia. In order to identify this sub-category, it is necessary to distinguish between these four notions. Active euthanasia is defined as the "deliberate administration of lethal substances with the intention of causing death, at the request of the patient who wishes to die, or without his consent, on the decision of a relative or the medical profession".

¹ §84-85 Vo vs. France

What is important here is that the consent of the patient is not essential to cause his death. This is an approach that can be achieved even without any express will of the patient, or even against his will. Passive euthanasia is not significantly different from active euthanasia in that it can still occur without the patient's consent. The only point that varies is that deliberate administration of lethal substances does not take place, but simply refusal or termination of life-sustaining treatment. Indirect euthanasia is not different from the other two cases of euthanasia - active and passive - from the point of view of the patient's consent. It can also take place against the wishes of the patient or without seeking consent. The change lies in the way to cause death. The immediate objective of indirect euthanasia is not to train the patient's death, but to appease his suffering. For this purpose, analgesics are administered which have the side effect of causing the death of the patient.

Assisted suicide is distinguished by the fact that the will of the patient is always present. The expression of this will is express, deliberate, persistent and conscious. It is the patient himself who asks to die. He would commit suicide himself if he could; it's his diminished physical faculties which prevent him from killing himself. In the case of assisted suicide, the patient himself performs the act of death, guided by a third party who has previously provided the information and / or the means necessary to commit suicide.

In the Pretty case concerning assisted suicide, the Strasbourg judge admits an interference with the applicant's private life, which he considers justified by the protection of the rights and freedoms of others, that is to say by the protection of the right to life of the applicant herself. The Court protects the sanctity of life, even when it is no longer desired. Her rights are protected against her will because she is by definition considered as vulnerable and thus, her consent is not valid. What is more interesting in this historic decision is that the judge declares the applicant a 100% capable of providing a valid consent, but because of her being in a terminal condition she has to be considered vulnerable. In other words, she is no longer considered as someone unique, she is no longer a person.

The sanctity of life also used to drive the reasoning of the Canadian judge on assisted suicide. In the famous Rodriguez case the judge states that the right to liberty cannot be separated from the principle of the sanctity of life. Nevertheless, the Supreme Court of

Canada has separated its views from the ones of the European judge in another historic decision which was unanimous and had to do with assisted suicide. The Canadian judge dismissed the Rodriguez case he had delivered in 1993 with the Carter decision of the 6th of February 2015. According to this decision, every adult capable in the eyes of the law who gives their consent and who suffers an incurable, persistent, serious and intolerable illness can accept help to commit suicide. Those conditions are to be verified separately in every case. So the person is given his uniqueness back.

II. The three notions in the Oviedo Convention and in the jurisprudence of the European Court of Human Rights

The question is where does the Oviedo Convention stand with regard to those notions? To answer this question we will look into the content and the context of the Convention.

A. The content and the context of the Oviedo Convention

i. Specific articles and matters concerned: valid consent, self-determination and self-provision

The Oviedo Convention refers naturally to all of the notions mentioned above as its purpose is to protect the identity of the human species as well as the right to self-determination of every person.

In the preamble there is a reference to the “human being both as an individual and as a member of the human species”. This means that the Oviedo Convention seeks to protect not only the humanity in the human being but also the uniqueness of every single individual. The preamble also refers to “human dignity”, which is the most familiar term to describe human value. The term “person” is mentioned when it comes to qualify the consent as valid, and that is in the fifth article.

Of course, the explanatory report gives rather convincing explanations as to the choices made, and better yet, as to the questions left unanswered.

ii. The explanatory report: person vs. society

First of all, it becomes clear by the report that the drafters adopted a clear distinction between the notions of human being and person. According to the ninth paragraph, the term human being has been chosen because of its neutral nature and its universal force, thus following the same pattern as the drafters of the Conventions set to protect human rights after the Second World War. Obviously, the socialized individual, in other words the person, is not an unknown concept (§14). On the contrary, it occupies a fundamental place in the construction of the Convention as its interests come before the interests of the society. It becomes clear that a conflict between the personal interests and the interests of society is probable, but it can be avoided by arousing public awareness in a way that there will be no risk of bruising human dignity, which is shared by everyone, by the individually defined personal dignity, in other words by personal and in many cases intimate choices.

Nevertheless, the human being in the sense of the human species is the one that prevails all. So, according to the explanatory report there are three levels of protection. First comes the human species and its identity, then the person and finally society and science.

The problem is that later on the drafters of the Convention proclaim equal respect to the individual and to the human species (§15). This affirmation could lead as to believe that the fetus and the pregnant woman are bearers of the same rights. The confusion grows even more by the blunt statement according to which they deliberately left undefined the term “everyone”, “toute personne” in the French version, because of the different moral values of the member States. This means that the fetus could end up being the subject of the right to life in the same measure as the pregnant woman. And so, if the pregnant woman’s life is in danger because of the pregnancy or at the cost of it, then two equivalent rights to life are to be balanced and respected. And that, even though the fetus is 100% depending on the pregnant woman and wouldn’t even exist without her.

B. The Oviedo Convention in application

We've come to establish the meaning of the Convention as to the subject of the rights protected as well as the goals pursued. It remains now to examine whether the spirit of the Convention is actually present in the cases treated by the European Court with regard to the Convention.

The Oviedo Convention is present in four main cases of the Court. The first one is the case *Vo vs. France*, which we have already examined. The Convention is referred to in order to justify the definition given to the embryo and its rights. Thus, in §84 the Court repeats exactly what the drafters had already explained in the report. And that is that when definitions are not given it is done so deliberately. That's the case with the term "everyone" as subject of the right to life.

The second case is the case *Raëlien Suisse vs. Switzerland* related to the human cloning. It's about the website of an organization promoting the idea of human cloning and the Court affirms that this is absolutely forbidden by the Oviedo Convention.

The third case, *Parrillo vs. Italy* is extremely important for two reasons. Firstly, because even though Italy has not ratified the Oviedo Convention, the Court thinks that it's a text that complements the European Convention of Human Rights and thus, it is an instrument which can serve as guidance to interpret the ECHR. So, the Court uses the article 18§2 of the Oviedo Convention that prohibits the creation of human embryos for research purpose, in order to establish the extent of the respect of private life announced in the article 8§1 of the ECHR. Secondly, because it clarifies that the donation of embryos created in the first place to be implanted, can actually be donated for research purposes if the implantation does not take place. In this case the donation was finally forbidden but not because of the Oviedo prohibition. It was because one of the donors was no longer alive and so, there was no way to have his consent for the donation.

The fourth case is the case *Lambert vs. France* (2015) concerning end-of-life decisions when the person is no longer in position to provide a valid consent. Mr. Lambert was the victim of a traffic accident during which he sustained severe and irreversible brain damage. He was fed and hydrated artificially for 2 years. At the same time he received several language lessons in order to establish a communication code as well as

physiotherapy. None of all this had any effect on him. On the contrary, after medical examination it was established that he remained in a chronic neuro-vegetative state characterized as “minimally conscious plus”. After having consulted a specialist, Mr. Lambert’s wife decided to withdraw artificial nutrition and hydration, while Mr. Lambert’s parents were opposed to such a decision. The Court referred directly to the Oviedo provisions on consent (articles 5 and 6) as well as to the article relevant to previously expressed wishes (article 9). The Court took into account the fact that according to the Oviedo Convention no one can be forced to undergo medical treatment without having given his or her informed consent. Mr. Lambert’s wife assured the internal jurisdictions on many occasions that her husband would not have wanted to continue living his life this way. Also, the medical personnel that took care of Mr. Lambert noticed that he was trying to reject treatment. Based on this information as well as the conclusion of the expert who examined Mr. Lambert, the Court agreed that continuing any treatment provided from now on would be disproportionate. So, if it were to be interrupted, the article 2 of the ECHR would not be violated. *Lambert vs. France* is a fundamental case where the Oviedo Convention and the principle of personal autonomy that it promotes thrive on any moral or religious perception of life and death.

What’s astonishing is that no mention is made to the Oviedo Convention in the case *Pretty vs. United Kingdom*, even though it concerns end-of-life decisions and it is up until now a flagship ruling that has not been overturned and that recognizes for the first time the right to personal autonomy; a right diffused in every article of the Oviedo Convention.

To conclude, we can see by the case law that the Oviedo Convention is a text with growing importance which is applied even against states that have not yet ratified it. In addition, it is obvious that there are two domains that suffer from unclarity and those are the termination of pregnancy and the end-of-life decisions. Even though impressive steps have been made, definitions of the subjects of the rights still need to be clarified and personal autonomy needs to be promoted even more at the expense of moral or religious restraints.