## Persoon en lichaam in het recht

van Beers, B.C.

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## Summary

***Person and body in the law. Human dignity and self-determination in the era of medical biotechnology***

As a consequence of the emergence of medical biotechnology, the human body is increasingly visible in the law. Within the regulation of biomedical practice the legal person is no longer only understood as the bearer of rights and duties, but also as a human being with a body of flesh and blood. The legal constructions that have been created to represent the realities of the human body in law are described and analyzed in this research.
Even though the law refers in diverse ways to the biological aspects of human existence, it is undisputed that the process of 'embodiment' of the legal person has been accelerated due to the advances in biomedical science. New concepts, categories and principles have been and are developed to provide a legal framework for this technology. More than in any other field of law, regulation of medical biotechnology confronts lawyers with matters of life and death. What does it legally mean to be human, to have a body, to be a person, to be born, to die and to be conceived? Especially the interpretation and elaboration of the concept of legal personality has come out to be of great importance in this process. In this book, I argue that the legal category of the person is the central notion in the legal-theoretical debate surrounding biomedical regulation.

Since medical biotechnology evokes questions about the status of the human body, the regulation of this field touches upon the foundations of the legal system. The human body goes beyond the *summa divisio* of law: the distinction between legal subjects and objects. On the one hand, one does not dispose of one's body as a random object or commodity. Instead, the body can be viewed as one of the constitutive components of personality and humanity. On the other hand, human persons are not completely defined by their bodies. A person is more than flesh, blood and bones. Man exceeds the physical aspects of life by choosing his own destiny and giving meaning to the biological aspects of his life such as birth, sexuality, family ties and death.
As a consequence, reflection about the relation between law and the biological aspects of human existence has become urgent. It is no less than the legal view of man, and the meaning of the fundamental principles of human dignity and self-determination, that are called into question by the possible biomedical interventions with human life. Furthermore, the juridification of the body brings about an intensification of public interference with the most intimate sphere of personal life. That raises the question to what extent the embodiment of the subject of law can and should go. In short, what should the role of law be in the regulation of biomedical technology?
Part I of my research is devoted to the legal framework of biomedical regulation, whereas Part II focuses on the meaning and interpretation of the legal concept of personhood.

In *Chapter 1* the book's themes are explored in broad terms. What is at stake in medical biotechnology? Why do the life sciences give rise to a renewed articulation and even reconsideration of the foundations of law? My thesis is that biomedical science forms the object of extensive regulation and innumerable legal prohibitions

and restrictions, because people fear that the view of mankind that underlies our existing moral and legal conceptual framework will be uprooted. This view of man is usually referred to as the subject of human dignity. The biomedical view of man conflicts with the view of man implicit in human rights to such a degree, that a restriction of the use and development of these techniques is thought to be imperative. Consequently, the relationship of the individual to his body has become the focus of legal attention. In the discussions about the possible use of biomedical technology, roughly two opposing views can be distinguished. Both correspond with particular concepts of man. Some authors call for the recognition of a right to bodily self-determination, while others advocate restrictions based on the unity of person and body that is presupposed by the principle of human dignity. The legal question is to what extent the law reflects these viewpoints.

To formulate an answer to that question, *Chapter 2* first investigates the ways in which the human body, body parts and derived human material are legally defined and qualified. The legal representation of the human body, which is indispensable in biomedical regulation, has turned out to be a challenge. The traditional legal vocabulary, in which the distinction between *persons* (personen) and *things* (zaken) is prevalent, falls short when it comes to qualification of the physical aspects of life. The human body is neither completely a person nor a thing. Despite these shortcomings, efforts are made to fit the body in into this dualistic qualification system. In that process the body is defined either as a special sort of thing, or a special part of the person. Traces of both approaches can be pointed out in law. In accordance with French legal doctrine I propose to view these two solutions as going back to two different traditions containing different concepts of legal personality.
In the artificialist tradition, which dates back to Roman law, the subject of law is a technical abstraction that does not necessarily coincide with persons from lived reality. For instance, some people could be deprived of legal personality, such as slaves, and several people could be legally conceived as one person. Because of its highly artificial nature, the human body is virtually absent in this approach. As a result the body can only be legally qualified as a thing. What remains from this tradition in our current legal system is that the body is still often legally categorized as a thing. This qualification is usually accompanied by certain limitations. In other words, the body is then viewed as a special thing, comparable to the concept of the *res extra commercium* from Roman law.
Contrastingly, in the naturalist tradition, the subject of law is viewed as a concept with ontological underpinnings and connotations. Legal subjects are considered to be the legal counterparts of real life people. This naturalization of legal personality has its source in medieval canon law. Over the centuries, this conception has become secularized. A contemporary manifestation of this approach lies in the concept of human rights and human dignity. Within this tradition it makes sense to legally define the body and its parts as special parts of human persons. A good example is the fact that physical damages qualify in Dutch law as a violation of personality (Article 6:106 par. 1 sub b BW).

However, whether the human body qualifies as a special thing or as part of the person in specific circumstances, depends on external factors. Decisive in these decisions are fundamental legal principles, such as respect for physical integrity and human dignity. In *Chapter 3* an analysis is provided of these legal principles. Three legal systems are studied: the Dutch, French and European approach. In Dutch legal doctrine the right

to bodily self-determination has traditionally been heavily emphasized. One of the main points in this research is that this approach, however valuable and fundamental, cannot account for the innumerable legal restrictions on bodily self-determination that are posed within the regulation of biomedical technology. A one-sided approach based on self-determination fails to take into account the special status that the human body has in law, regardless of the way the individual experiences his or her body. In an era in which person and body can increasingly be separated by technological intervention, the law continues to adhere to the unity of person and body. This embodiment of legal personality is mainly brought about by the legal principle of human dignity.

Unlike their Dutch colleagues, French legal scholars have extensively and thoroughly analyzed the concept of human dignity, which has been recognized in French law as a fundamental principle within the regulation of medical biotechnology since 1994. The normative view of man underlying this principle is used as protection against possible risks of medical biotechnology to man, such as the instrumentalization, commercialization, bestialization, commodification and disintegration of human persons. This principle gives expression to the way the law offers protection to the human body even independently of the subjective experiences of one's body. Bodily self-determination is not the decisive factor in these matters, and is complemented by the principle of human dignity. The reason is that what is at stake in these matters is one's humanity and dignity, without which human freedom is not possible.

The question then becomes from which moment on self-determination results in a violation of the unity of person and body. Authors who argue that it should be up to the individual to decide when his human dignity is in danger, make use of an interpretation of *human dignity as empowerment*. Other authors claim that violation of human dignity, such as the instrumentalization and objectification of people, can take place even when the individual in question agreed to the degrading way he is treated or treats himself. These authors make use of an interpretation of *human dignity as constraint*.

In the case law of the European Court of Human Rights (ECHR) elements of both the Dutch and French approach can be detected. Yet in recent years the Dutch approach seems to become more influential, especially in the cases that revolve around Article 8, the right to private and family life. Since its *Pretty*-case from 2002, in which the principle of autonomy was underlined, the Court has set a development into motion which resulted in *K.A. & A.D.* in the recognition of the right to bodily self-determination.

*Chapter 4* focuses on the legal status of the embryo. Again a comparison is made between Dutch, French and European law. Like the human body, the embryo is neither person nor thing. It does not have legal subjectivity or any legal rights, but is provided special legal protection, which raises it above the status of a thing. Although legal scholars disagree as to the specific status of the embryo, there is a prevailing consensus that the embryo can be legally defined as a human being. As such the embryo occupies a special place in the law, based on the principle of respect for human life.

However, unlike the human body, the embryo's legal status is more variable and disrupted. One of the reasons for that is the embryo's constant development. In Dutch legal doctrine the fluctuating legal status of the embryo before birth is considered to be a reflection of its physical growth during this period. French lawyers however, stress the social and symbolic dimension of the scope of protection afforded to the

embryo. From this perspective it is not only the embryo's connections with humanity, but also the intentions with which the embryo was created and its relation to its parents that contribute significantly to the embryo's legal protection. I argue that both the Dutch and French approach can be identified in current legislation. Both the embryo's biological growth and its gradual socialization and symbolization are part of the process of the humanization of human life. This process culminates at birth, when the child enters the public world, in the attribution of legal personality.
In the context of the European Convention of human rights, the status of the embryo remains rather implicit. One of the reasons is that questions about the embryo give rise to strong ethical dissensus among the Member States of the Council of Europe. In such cases a wide margin of appreciation is usually allowed to Member States to resolve the matter. A more fundamental reason, however, is that the language of subjective rights is not well suited to express the level op protection afforded to human embryos. Because of the wide margin of appreciation allowed in these cases, the Grand Chamber of the Court did not provide an answer in its *Vo*-case to the question whether embryos qualify for protection based on the right to life (Article 2). Yet it is clear that even if embryos would have a right to life, it would be quite a limited right, since most States permit abortion, as the Court itself has also emphasized. In addition, the Grand Chamber of the Court ruled in *Evans* that embryos *in vitro* are definitely excluded from the group of persons with a right to life. In short, the level of protection provided to the embryo does not lend itself well to expression in term of human rights. Rather, I suggest in the concluding remarks of this chapter, the embryo is more often represented in this context as the object of human rights, such as the right to family life (Article 8), than as the subject of those rights.

In wrongful birth and wrongful life suits (*Chapter 5*) several themes from the preceding chapters come together: the right to self-determination, respect for human life, the legal meaning of birth, the two interpretations of human dignity and the relation between legal persons (with artificial personality) and human beings. A wrongful life suit offers a child that was born handicapped the legal means to protest against his or her congenital handicaps or even its complete disabled life, depending on the interpretation of the claim. The claim is only admissible if a doctor, obstetrician or medical researcher has deprived the prospective parents of the possibility to resort to an abortion of the child. The Dutch and French Supreme Court have recognized the wrongful life action, though they made use of different interpretations of the claim. I argue that both interpretations of the claim at some level pose a violation of human dignity.
In the Dutch Supreme Court decision *Baby Kelly*, the handicapped girl Kelly Molenaar was awarded damages for her entire life. The Court's reasoning was that separating Kelly's handicaps from her life would be too artificial, since she could not have been born without them. Although the Court argues that it did not thereby recognize a right not to be born, I try to show that what it did recognize was at least a legal interest not to be born. Her damages exist because she was not aborted. That way Kelly's life is measured according to some external standard, and is judged to be so pitiful, or "deerniswekkend" as the Supreme Court put it, that Kelly had an interest to have been aborted. I argue that this interpretation is at odds with the interpretation of human dignity as constraint.
In the French *Perruche*-decision, Nicolas Perruche was only awarded damages for his handicaps. To do that, the French Supreme Court had to rely on the legal fiction that Nicolas could have been born without handicaps. Although the Court thereby

prevented measuring Nicolas' entire life to an external standard, its decision is in conflict with human dignity at another level. The wrongful life fiction is based on a rather artificial conception of personality. When legal subjects are allowed to make their physical constitution the object of a lawsuit, although they could not have been born otherwise, a radical separation between legal persons and their bodies is effectuated. Since the principle of human dignity presupposes the unity of person and body, it can be argued that the wrongful life fiction thereby conflicts with the view of man implicit in human dignity.

In Part II of this research the relationship between legal personality and the biological dimension of life is investigated. For that purpose I distinguish three types of legal personality that are functional at different levels in the law: a technological-juridical personality, a biological-juridical vision of man and a symbolic-juridical personality. An understanding of these legal *personae* is necessary in order to understand the special function that law fulfils within the regulation of medical biotechnology.
In the technical-juridical approach (*Chapter 6*) legal personality serves a strictly technical goal: the attribution of rights and duties. From this perspective legal persons are no more and no less than points of legal imputation, legal-technical artifacts that are abstractions from physical reality. Although the technical-juridical personality is an indispensable legal construction enabling the allocation of rights and duties, it cannot satisfy within the context of the regulation of biomedical advances. The purpose of this concept of personality lies in the regulation of intersubjective relation between persons, not the intrasubjective of a person with his body. If this personality is nevertheless applied to regulate acts with the human body, the effect is a cartesian separation of person and body. From this artificial concept of legal personality the body can only be represented as a detached object, over which persons exert their subjective rights. Within this approach the special legal status afforded to the human body or human embryos cannot be explained, nor can this approach do justice to the special ties that exist between person and body. In short, the physical dimension of human existence cannot be properly represented through this concept of personality. It is too abstract, empty and technical to take the complex reality of the human body into account.

The two other types of legal personality offer ways to recognize the reality of the human body on a legal level. Furthermore, in the biological-juridical approach the biological representation of man is transposed to a legal context (*Chapter 7*). Although this strategy can be identified in various legal texts, and is to some extent inevitable in the regulation of medical biotechnology, I hope to show in this chapter that we must strive to keep the fundamental distance between law and biology in place. Not only are law and biology separated as parts of the domains of *Sein* and *Sollen*, but also can the attempt to abolish this distinction result in the denial of the mediating and humanizing function of law. The law is not an extension of biomedical reality, but offers a symbolic and institutional mediation of biological facts and biomedical technology. As soon as medical and biological criteria start to dominate in law, and a biologization of law is set in motion, law is practically reduced to a facilitator of biomedical advancement. The law would not be able give an autonomous interpretation of reality anymore, and would become subservient to a biological view of the world and what it means to be human.
Moreover, especially in the practice of biomedical technology this view is doomed to fail. Biological characteristics are not a given anymore, but have become susceptible

to change and alteration. For example, the boundaries of birth, death and the difference between the sexes have become blurred and subject to certain political an individual choices.
Last but not least, the reductionist view of man that biology and medicine offer is at odds with the view of man implicit in human dignity. In a biological approach concepts as freedom, equality and human dignity are non-existent. Therefore, the subject of human dignity necessarily transcends the biological aspects of life.

*Chapter 8* contains an analysis of the subject of human dignity, which I call symbolic-juridical personality. Human dignity can be understood as a normative, counterfactual view of mankind. In a way, this personality is based on a *homme rêvé*, a dreamt man, since it offers an idealized view of man. In that respect, this personality shows a resemblance to the technical-juridical personality, with which it shares its artificial nature. At the same time however, the principle of human dignity has been able to become the central principle of biolaw, precisely because of its ability to take the physical aspects of existence into account and to give those aspects a legal meaning. That means that the symbolical-juridical personality is connected to the biological-juridical conception of man too.
In other words, through this personality the biological dimension of life is incorporated in law without reducing man to his physical characteristics. In the principle of human dignity the technical and biological approach of legal personality come together. That way human dignity offers a legal expression of the double dimension in which human life takes place: man is both body and mind, determined and free, part of a bigger whole and an individual. In that sense human dignity can be understood as an expression of the irreducible nature of mankind. This legal principle offers protection when biomedical technology threatens to reduce man to an instrument, commodity, object or animal. For example, reproductive cloning is prohibited, because the international legal order fears for the instrumentalization of the clone to the wishes of his parents.
The importance of this legal conception of man lies in the way it enables us to give a legal expression to what it *means* to be human. People are more than just their bodies, and human embryos and bodies are in their turn more than just ordinary objects. The discussions about the regulation of medical biotechnology are not so much about what human bodies, organs, embryos and corpses would be on a factual, empirical level, but what their symbolic value is to us. The main argument in this chapter is that a legal approach of biomedical matters cannot do without a symbolical dimension. When the realities of life in the biological sense are translated to legal language, symbolic connotations are inevitable.
In French legal theory this function has been called the symbolic or anthropological function of the law. In the regulation of biomedical developments the law fulfils a humanizing function. Through the legal principle of human dignity the law, now more than ever, provides a way to collectively define and give meaning to the biological and physical aspects of life. The membership of the human species becomes the basis for inalienable rights, birth becomes the condition for legal subjectivity and dead bodies are protected as sacred objects. Now that medical biotechnology confronts us with new forms of human life, for which traditional representations fall short, such as the frozen embryo, the pulsating braindead body, the human organ that is no longer connected to one body, the totipotent stem cell that can still acquire many forms and the artificial heart valve that was created out of human tissue, the law increasingly

fulfils an essential and decisive function in the definition and representation of these new forms of human life.