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KOPAONIK SCHOOL OF NATURAL LAW PERCEPTION OF DIGNITY AND LEGAL DISCOURSE IN EUROPE

This article explores divergences between the legal perception on dignity held by the Kopaonik School of Natural Law, which is compliant to the Draft of Serbian Civil Code and the legal discourse that is effective at the level of the Council of Europe and/or the European Union. The main feature of the former is the recognition of the dignity status only to persons, and not beyond that formal category. Suchlike position on human dignity has been examined from the perspective of contemporary legal theory; the regional legal texts in Europe which emphasize the instruments referring to the field of biomedicine; the case law of the European Court on Human Rights (hereinafter: the Court); and the case law of the European Court of Justice (hereinafter: ECJ). The objectives of the research are to demonstrate that insular understanding of the agents of dignity is not tenable. The conclusion reached through the discussion is that restrictive normative tendencies on dignity agents cannot escape a criticism that includes the lack of an adequate definition; elitist undertones; discriminatory foundations; and the incompatibleness with international obligations of Serbia.

Key words: *dignity*. – *marginal life*. – *the Muslims*. – *biomedicine.*

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1. INTRODUCTION

This paper addresses the perception of dignity as it was presented in the introductory addressing at the 26th Annual Conference (hereinafter: the Conference) of the Kopaonik School of Natural Law[1] by distinguished professor Perović, the President of the Kopaonik School of Natural Law.[2] The reason to focus on this particular perception, which was entirely upheld in the relevant conclusions and messages of the Conference,[3] arises from its compatibility with the Article 84 of the Draft of Serbian Civil Code which safeguards dignity only to persons, that is, after birth. Accordingly, the critique of the perception concerned simultaneously refers to the narrowness of the Draft of Serbian Civil Code.

The Conference was devoted to the issue of human dignity. On that occasion, at the beginning of his addressing entitled "Natural Law and Dignity", Perović expressed his faith in "dignity as a set of human virtues". Through the relevant parts of his exposition, he addressed (1) general issues relating to dignity; its application and problems in this respect referring to dignity as "an all-encompassing institute of human virtues"; (2)the historical development of philosophical and legal-normative aspects of dignity referring to the main features of the Roman slave-holding civilization, Hellenic philosophical idea and philosophy of dignity in the New Era; (3) current legal standards as reflected in the international conventions that safeguard human dignity with a list of the most important documents and areas of application; and (4) a definition of dignity referring to its substance and its protection by means of legal and moral imperatives. As far as the latter point is concerned, Perović defined dignity as: "untouchable and inalienable all-encompassing institute of human virtues that are constantly kept in practice in an organised sociability."[4] While explaining the features that amount dignity, he attributed the cen-

[1] The Kopaonik School of Natural Law is an organisation comparable to the legal congress. In general, no coherent legal views are shared by its members.

[2] Professor Perović is also the chairman of the Commission for Drafting of the Civil Code. Odluka o obrazovanju Komisije za izradu Građanskog zakonika, (*Službeni glasnik*, br. 104/06), *http://arhiva.mpravde.gov.rs/lt/articles/zakonodavna-aktivnost/gradjanski-zakonik/*, last visited 19 June 2016.

[3] According to Governmental Commission for Drafting of the Civil Code previous conclusions and messages of the Kopaonik School of Natural Law initiated its appointment in 2006. See: *Draft of Civil Code of Republic of Serbia. General part.* Serbian Government, Belgrade 2014, 3, *http://www.kopaonikschool.org/dokumenta/A_Opsti.deo.pdf*, last visited 22 June 2016.

[4] S. Perović, *Final Document. General statements. Introductory Address. Messages*. Of the twenty sixth annual Conference of the Kopaonik School of Natural Law, Pravni život (Legal Life, Journal for legal practice and theory), Belgrade 2013, 33. *http://www.kopaonikschool.org/dokumenta/Zavrsni_ENG_2013_WEB.pdf*, last visited 13 November 2015.

tral place to the "human virtues". He maintains "The essence and substance of dignity, as already mentioned, are made out of human virtues and each of them is specific but, taken together, they make the integrity of the institute of dignity."[5] What are the exact virtues that amount dignity notion is the question which Perović considers a philosophical one, and recognizes that answer depends on "different systems dictated by various spaces, time dimensions producing different conceptions about the Good (virtue) or evil (scorn), and by acts and facts, by doing or failing to do."[6]

The most troubling with Perović's understanding of dignity is a consideration that protection and the duty of respect dignity depend on the degree of virtues. In this regard, he states that "There is also a question of degree of virtues to be included in the notion of dignity since this is important for its protection and the duty of respect."[7] Accordingly, dignity admits of degrees and it could be granted only to humans with appropriate cognitive abilities that enable them to adopt and manifest relevant virtues. Considering that Perović attaches recognition of the virtues to the "organised sociability", relevant virtues are only those that are *socially affirmed.* Although Perović's perception of dignity could be supported by some overseas scholars, I ascribe this approach to the Kopaonik School of Natural Law (the Kopaonik School of Natural Law Perception of Dignity, hereinafter KPD) for it departs from comparable theoretical positions to a certain extent and as such it vindicates insular frameworks of domestic legislation.

The first part of the paper refers to two main features of the KPD, the *set of human virtues* and the *socially affirmed* criterion for the determination of dignity agents. The former is briefly analyzed from the perspective of dignity status of the so-called marginal cases such as retarded human beings; the latter is analyzed from the aspect of Kantian theory of dignity, and from the perspective of dignity status of a recently marginalized religious group – the Muslims. The discussion further addresses the very conceptualization of the KPD comparing it with a settled bifurcation between objective and moral dignity. The first part ends with a discussion about the failure of the KPD to distinguish between agents of dignity and agents of personhood.

The second part of the paper examines KPD's positions from the perspective of the contemporary theory about first era issues and from the perspective of the regulation in the field of second era issues.[8] First era

[5] *Ibid.,* 34.

[6] *Ibid.*

[7] *Ibid.*

[8] Trifurcation of the challenges/threats in the field of the right to life protection to the first, second and third era issues has been presented in the unpublished research "Right

issues consider classic dilemmas in respect of the beginning of moral and legal subjecthood, protection, and relations between the right to life and abortion which arise out of natural reproduction. Within this subsection, I deal with the question whether birth makes a relevant moral distinction between humans in contemporary theory. Second era issues consider a new dilemma with regard to artificial fertilization and its relations to moral and legal subjecthood and granted protection. Within this subsection, I discuss the case law of the EJC concerning the conflict between the quest for prenatal life destruction for the purpose of a legitimate scientific enquiry and the dignity status of prenatal life itself.

The main hypothesis of this research is that human dignity is not inherent in socially desirable virtues or formal categories but in life itself. If successful, this paper will demonstrate that Serbian restrictive normative conceptualisation of dignity and its agents is flawed.

2. KOPAONIK SCHOOL OF NATURAL LAW PERCEPTION OF DIGNITY

Like Perović, Jordan argued that dignity consists of "a collection of intangible, distinctively human goods" and this collection requires "moral virtue, appreciation of beauty, awareness of oneself as a unique individual, participation in human community, receptivity, and personal agency," and admits of degrees.[9] Mattson and Clark also note the use of dignity to denote a "virtuous comportment or behaviour".[10]

2.1. Dignity as a set of socially affirmed human virtues

Understanding of dignity as a *set of human virtues* departs from dominant understanding(s) that dignity arises from the "characteristics crucial to humans" such as self-consciousness; the ability to reason; and the freedom to decide on one's own way of life.[11] The first way of understanding attaches dignity to a certain (*socially affirmed*) behaviour, the manifestation of *virtues* while the second one to intrinsic proprieties. On one hand, this could be the KPD advantage over competing concepts

of embryos to be protected under European regional law" by Dragan Dakić. It was successfully defended on 3th June 2014 at the Institute for German, European and International Medical Law, Public Health Law and Bioethics of the Universities of Heidelberg and Mannheim.

[9] J. C. Matthew, "Bioethics and Human Dignity", *Journal of Medicine and Philosophy* 2/2010, 184.

[10] D. Mattson, S. Clark, "Human dignity in concept and practice", *Policy Sciences* 4/2011,303–319.

[11] See: L. Nordenfelt, "The varieties of dignity", *Health Care Analysis* 2/2004, 69–81.

which ascribe intrinsic worth to the features, capacities or *virtues* that are presumably crucial to someone's status, because it escapes a paradox that follows from the lack of paradigmatic features that all human beings possess.[12] On the other hand, the KPD rules out congenitally severely retarded human beings; the human beings who have suffered severe brain damage or dementia; and the human beings who have become irreversibly comatose from the dignity status as they are unable to demonstrate any virtue. This is the logical consequence of the essential inability to recognize and respect anything or anybody different from us or from what we do and how we do it (for instance, if animals don't communicate using speech like we do, we consider them to be morally inferior[13], as well as women for different reasons[14]). For, the KPD provides grounds for discovering "new forms of bigotry, and new groups of persons whose moral status has been unjustly diminished,"[15] in the future.

Introducing *socially affirmed* criterion contradicts to Kant's famous phrase that each person must be treated as an end in himself, and never simply as a means because *virtues* imply usefulness and devotion either to the society, either to others or both. "Holding to the [Kantian] principle of human dignity precludes, therefore, the instrumentalization of human beings for economic, social, religious, or political ideals."[16] For, according to the KPD, the person is not the end in him/her; he is reduced to the means of the fulfilment of the *affirmed* goals reflected in preferable *virtues*. This will not be applied if one society proclaims selfishness as the ultimate *human virtue,* and ascribes dignity exclusively to it.[17]An illusionary bypass of this logical error has been made by employing the Aristotelian *principle of the medium* (the average) as the determinant of virtue.[18] However, when applied in the field of dignity, this principle rests on utilitarian calculations. In this way, it is contradictable to the (inherent) Kantian model of dignity, as well.[19]

Another group of humans affected with a *socially affirmed virtues* criterion are the Muslims. In the secular society, a visible expression of

[12] M. Neal, "Not Gods But Animals: Human Dignity and Vulnerable Subjecthood", *Liverpool Law Rev* 3/2012, 179.

[13] R. G. Frey, *Interests and Rights: The Case Against Animals*, The Clarendon Press, Oxford 1980.

[14] See: M. A. Warren, *Moral Status: Obligations to Persons and Other Living Things*, Oxford University Press, Oxford 2000, note 4.

[15] *Ibid*., 9.

[16] N. Knoepffler, M. O'Malley, "Human dignity: Regulative principle and absolute value", *International Journal of Bioethics* 3/2010, 63–76.

[17] For further discussion refer to: P. Singer, *How are we to live? Ethics in an age of self-interest*, Random House, Melbourne 1994.

[18] S. Perović, 21–44.

[19] N. Knoepffler, M. O'Malley, 63–76.

religious beliefs sometimes conflicts with that of secular philosophy and virtues affirmed within it. This could be well displayed through the case law of the Court following to the French blanket ban on the wearing of the full-face veil in public places (hereinafter: the Bill). In the drafting process, the competent parliamentary commission criticized "a practice at odds with the values of the Republic", as expressed in the maxim "liberty, equality, fraternity".[20] In regard to the virtue of fraternity, the commission considered that a full-face veil represents its denial since it constitutes the negation of contact with others and a flagrant infringement of the French principle of living together (*le "vivre ensemble"*). Following to that, the commission made a proposal to adopt a resolution reasserting Republican values and condemning the wearing of the full-face veil as contrary to such values. The "Explanatory memorandum" to the Bill followed the proposal of the commission.[21]

Before the Court, French government argued that blanket ban on the wearing of the full-face veil was necessary in a democratic society in order to fulfill the "protection of the rights and freedoms of others" by ensuring "respect for the minimum set of values of an open and democratic society". According to the government, the effect of concealing one's face in public places is to break the social tie and to manifest a refusal of the principle of "living together" (*le "vivre ensemble"*).[22] Although the Court ruled out most of the government "protection of the rights of others" arguments, it, however, found that the impugned ban could be regarded as justified in its principle solely in so far as it sought to guarantee the conditions of "living together";[23] and that the ban imposed by the Bill could be regarded as proportionate to the aim pursued, as an element of the "protection of the rights and freedoms of others".[24] Thus, the Muslims who have built their identity on their religious practice fall short of *socially affirmed virtue–"le vivre ensemble"* and according to the KPD they fall short of dignity. Considering that dignity constitutes the main barrier to the misuse of humans in the biomedical research, could they be subjected to the biomedical experiments or they could not as they might have some *socially affirmed human virtues* to some degree? What about enslaving them to a degree that is proportional to the percentage of their dignity?

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[20] *S.A.S. v. France***,** Applicationno.43835/11, Merits from 1 July 2014. para 17.

[21] *Ibid*., 25.

[22] *Ibid*., 82.

[23] *Ibid*., 142.

[24] *Ibid*., 157.

2.2. Incomplete conceptualisation of KPD

The KPD is not adequately conceptualised since it does not distinguish between the "subjective" and the "objective" dimensions of dignity i.e. Human Dignity and Dignity as Social Status,[25] or what Andorno calls inherent and moral dignity.[26] Due to that failure, the KPD proposes general gradation of dignity which is not defensible. Some consider that Cicero's work where he asserts that "the dignity that human beings have solely because they are human, not animals" implies this very distinction.[27] The distinction between inherent (Kantian concept) and moral dignity has been well known in recent decades. Gewirth distinguishes the dignity which all humans are said to have it equally from the dignity that depends on the behaviour of the particular person.[28] Nordenfelt attributes dignity to humans for no other reason than that they are human beings.[29] Dignity refers to "the intrinsic importance of human life" and requires that "people never be treated in a way that denies the distinct importance of their own lives."[30] Palk considers that this concept of dignity "possesses a passive character in that it is associated with the unearned worth of human beings."[31] Also, there is a broad consensus that inherent dignity does not admit degrees as it is inseparable from the human condition (intrinsic worth), is the same for all, cannot be gained or lost.[32] If we attach dignity only to a "certain cluster of virtues or excellences", and not to the value that is inherent, anything else is arbitrary determined and "could be claimed to be anything such as wealth or belonging to the 'right' race or sex . . . "[33]

From the inherent worth of human being, there has been derived the collective dignity of humanity which also has intrinsic worth and

[25] L. Nordenfelt, 69–81.

[26] R. Andorno, "Human Dignity and Human Rights as a Common Ground for a Global Bioethics", *Journal of Medicine and Philosophy*, 3/2009, 223–240.

[27] M. Rosen, *Dignity: Its History and Meaning*, Harvard University Press, Cambridge – Massachusetts 2012, 12.

[28] A. Gewirth, *Human rights: Essays on justification and applications*, University of Chicago Press, Chicago 1982.

[29] L. Nordenfelt, 69–81.

[30] R. Dworkin, *Life's dominion: Anargument about abortion, euthanasia and individual freedom,* Vintage, New York 1994.

[31] A. C. Palk, "The implausibility of appeals to human dignity: an investigationin to the efficacy of notions of human dignity in the transhumanism debate" *South African Journal of* Philosophy, 1/2015, 42.

[32] H. Spiegelberg, "Human dignity: A challenge to contemporary philosophy", *Human dignity. This century and the next* (eds. R. Gotesky, E.Laszlo), Gordon and Breach, NewYork 1970, 39–62.

[33] T. Regan, *The case for animal rights*, University of California Press, Berkeley 1983, 233–234.

therefore also deserves to be protected.[34] This derived collective dignity is understood as the background for the regulation of biotechnological developments that may affect basic features of the human species, like reproductive cloning and germ-line interventions. It amounts to a sort of "species solidarity." Rendtorff argues that the use of dignity refers to worth that is not only intrinsic, but fundamentally equal.[35] The KPD certainly amounts inequality between humans based on their capacities or motives to adopt or to manifest the proclaimed *virtues*. In this regard, Dupre, who recognizes the choice of including and—crucially—excluding certain people from a quality of life and degree of human rights "protection that 'normal' people can expect to enjoy", argues that "in this sense, dignity is tightly connected to equality and non-discrimination, as well as to the quality of democracy arising out of this."[36]

Unlike inherent dignity, that what was noted as moral dignity is not intrinsic. Like general proposition of the KPD, moral dignity is more specifically related to *behaviour* and stems from person's ability to freely choose *socially affirmed human virtues*. For, unlike inherent dignity, which is the same for all, moral dignity is not possessed by all individuals to the same degree.[37] Moral dignity is the one that humans may exhibit, lack or lose depending on every-day choices they make, whereas inherent dignity permanently belongs and inherently to every human as such.[38] These two dimensions of dignity are not "exclusive but complementary, in the same way that 'rights' and 'duties' or 'freedom' and 'responsibility' are complementary concepts."[39] Also, Riley considers that "dignity's commonality in legal discourse and its polymorphous nature...is not well served by the language of 'concepts versus conceptions"'.[40] It should be noted however that Feldman warned against the assumption "that the idea of dignity is inextricably linked to a liberal-individualist view of human beings as people whose life-choices deserve respect."[41] Neal considers that suchlike understanding of dignity as "a legal value may invite judg-

[34] D. Birnbacher, "Ambiguities in the concept of Men schenwürde", *Sanctity of life and human dignity* (ed. K. Bayertz), Dordrecht 1996, 107–121.

[35] J. D. Rendtorff, "Basic ethical principles in European bioethics and biolaw: Autonomy, dignity, integrity and vulnerability – towards a foundation of bioethics and biolaw", *Medicine, Health Care and Philosophy* 5/2002, 235–244.

[36] C. Dupré, "Dignity, Democracy, Civilisation" *Liverpool Law Rev* 3/2012, 263–280.

[37] R. Andorno, 231–232.

[38] A. Gewirth.

[39] R. Andorno, 233.

[40] S. Riley, "Human dignity: Comparative and conceptual debates", *International Journal of Law in Context* 2/2010, 117–138. Public Law 61–71.

[41] D. Feldman, "Human dignity as a legal value – Parts I and II", *Public Law* 2000, 61–71.

ments about which life-choices are not compatible with dignity, leading to state restriction of such choices."[42] Moral dignity could be normatively conceptualized but this implies the application of different particularisms in its interpretation. Perhaps it could be exclusively attributed only to persons.[43] Contrary to this, inherent or, as I prefer, objective dignity needs to be normatively recognized, otherwise laws fail short of legitimacy; its factual fundamentality claims for its normative universality.[44]

Further on, the KPD makes confusion between personhood and dignity, two substantively different categories. These two categories have different content and function. From the historical context, personhood is human chauvinistic legal fiction that has been introduced in an end to safeguard domination of the one elitist group over the rest of people. It is grounded on the different prejudices toward the powerless (slaves, blacks, women, indigenous people, Jews, Slavic, animals and so forth). It is nothing more than a mere selfie of the privileged ones that have succeeded in institutionalizing their accumulated power. According to Strawson, there is "the logical primitiveness of the concept of a person."[45] Rawls also rejects the claim that personhood is a necessary condition for having moral rights.[46] Contrary to personhood, human dignity "values us because of, rather than in spite of, or regardless of, our universal vulnerability."[47] It was introduced in the positive law after the ultimate failure of the Personhood grounded on the *socially affirmed virtues* which occurred during the Nazi age. Inherent dignity is the close reflection of Schweitzer's concept of Reverence for Life,[48] in the positive law. The function of dignity is to constitute personhood and not vice versa. As a category that arises from life, which is as such grounded in the natural law, and presents substantive basic norm,[49] dignity cannot be reduced to any formal category, including a person. The acceptance that dignity rests upon the *degree of socially affirmed virtues* that one obtained implies the categorization of humans to those who are fully dignified and those with lesser percentage of it. Therefore, the members of a human family who fall short of "grace, bearing and aristoc-

[42] See: M. Neal,177–200.

[43] See: P. Lee, R. P. George, "The Nature and Basis of Human Dignity", *Ratio Juris* 2/2008, 173–193.

[44] For discussion about "Factual and Normative Claims to Universality" refer to M. Jovanovic, "Are There Universal Collective Rights?", *Human Rights Review* 1/2010, 19–24

[45] P. F. Strawson, "Persons", *Essays in Philosophical Psychology* (ed. D. F. Gustafson), Anceor Books, New York 1964,402.

[46] J. Rawls, *A Theory of Justice*, Harvard University Press, Cambridge 1971, 12.

[47] M. Neal, 177–200.

[48] See: A. Schweitzer, *Out of My Life and Time: An Autobiography,* Holt, Rinehart & Winston, New York 1933, 233.

[49] M. Neal, "Respect for human dignity as 'substantive basic norm", *International Journal of Law in Context* 1/2014, 38.

racy'[50] in character simultaneously fall short of dignity and they impose no duty of respect for. Despite contemporary efforts to develop the ability to detect dignity violations beyond those committed during the WWII, the KPD falls below the presumed minimum of detective abilities. In fact, the KPD reinforces the very essence of the philosophy that has resulted in white males ruling out everyone but themselves from the legal standing. The KPD template has not been removed from etymological Latin roots where the word *dignitas* denotes a social status commanding respect. *Virtue*-based universality implies moral imperialism because it rests on a level of social or ethical consensus that simply does not exist.[51] Suchlike "universality" of dignity also fails to distinguish itself from discriminatory foundation that is innate in Hellenistic philosophy.

3. APPLICABILITY OF THE KPD TO THE PRESENT DAY CONDITIONS

The recognition of rights only to person is kind of legal tradition in Serbia.[52] In order to challenge this ultimate position of domestic legal thought, professor Milan Palević and Dragan Dakić argued that contemporary recognition of the dignity of prenatal human life is going to have constrictive reflections to access abortion on the European continent.[53] They relied this claim on the case law of the Court which had previously elucidated that Article 2 and Article 3 of the Convention on Protection of Human Rights and Basic Freedoms (hereinafter: the Convention or European Convention) referred to the unborn with implied limitations. In regard to that, within the section II – RIGHT TO FREEDOM, subsection *Freedom of Personality*, the Concluding Plenary Session of the Conference announced the message with the following relevant statement: "Until the child is born we may not speak of it as a holder of rights since foetus and the embryo are only a life in the process of origination; they may be protected only against unlawful abortion."[54] Having in mind that

[50] S. Riley, 117–138.

[51] See: T. Caulfield, A. Chapman, "Human Dignity as a Criterion for Science Policy", *PLOS Medicine* 2/2005, 736–737.

[52] This also refers to the recognition of the dignity. See: D. Franeta, *Ljudsko dostojanstvo kao pravna vrednost,* Pravni fakultet Univerziteta u Beogradu, Beograd 2015, 48–55.

[53] M. Palević, D. Dakić, "Perspektive zaštite prenatalnog života na Evropskom kontinentu", *Pravni život* 2013,139–154.

[54] "Final Document. General statements. Introductory Address. Messages. Of the twenty sixth annual Conference of the Kopaonik School of Natural Law", *Pravni Zivot* 2013, 57, *http://www.kopaonikschool.org/dokumenta/Zavrsni_ENG_2013_WEB.pdf.*, last visited 13 November 2015.

the message was derived from "general support"[55] and this is, however, a political and not a scientific argument, I do not intend to discuss it further. Instead, I am going to discuss if the birth makes ultimate moral distinction between humans in contemporary theory like it does according to Kopaonik School of Natural Law.

3.1. Birth as determinant of legal and moral status

In accordance with the KPD, there is the statement of the message concerning this part of the research: "until the child is born we may not speak of it as a holder of rights (...)."[56] In the concerning statement, birth is taken as the boundary line between "a life in the process of origination" and the paradigmatic holder of moral rights – a person. Prior to the scientific development which clarified when human life begins, this confusion was common in philosophical debates. Personhood Theory in general made no distinctions between the morally significant notion "person" and the notion "human being". For instance, Thomson states: "Most opposition to abortion relies on the premise that the fetus is a human being, a person, from the moment of conception."[57] Also, and more explicitly, Wertheimer says: "First off, I should note that the expressions 'a human life,' 'a human being,' 'a person' are virtually interchangeable in this context."[58] Such confusion "constructed as denying the individual's 'humanity'", Sapontzis noted as burdensome to moral theory and practice.[59] He calls it "a historical accident".[60] Therefore, the essential argument of Personhood Theory in favour of abortion permissibility was a false belief that a *conceptus* is not a member of *Homo sapiens* which precludes it from the concept of moral status. Like that outdated and generally abounded approach of Personhood Theory, the statement draws the line at the right to life for societal and legal purposes that conflicts with "boundaries in biological reality."[61] Following scientific development which clarified that human life is created at *syngamy*,[62] Personhood Theory clearly di-

[55] *Ibid*, 47.

[56] See: *Ibid,* 57.

[57] J. J. Thomson, "A Defence of Abortion", *Philosophy and Public Affairs* 1971, 47.

[58] R. Wertheimer, "Understanding the Abortion Argument" *Philosophy & Public Affairs* 1/1971, 69.

[59] S. F. Sapontzis, "A Critique of Personhood", *Ethics*, 9 1 (1981), 610, note 8.

[60] *Ibid*, 613.

[61] J. Glover, *Causing Death and Saving Lives*, Penguin, London 1977, 127.

[62] K. M. Downs, "Embryological Origins of the Human Individual", *Controversies in Science & Technology* 2/2008, 3. Philosophers accepts that fact and developing their discussions with no attempts to denial it, see: D. Parfit, "We Are Not Human Beings", *The Royal Institute of Philosophy* 2012, 7.

vided itself to the system of humanism and the system of personism. After it has been conformed to the scientific facts, the theory of birth is reflected through Europe, where the recognition of legal status of a human at the moment of his or her birth is the common legal standard.[63] However, in accordance to the word of developmental biology, this legal standard does not entirely preclude human beings in the prenatal stage from moral status or even right to life.[64] It should be emphasised herein that legal recognition of the right to life before birth does not mean *per se* recognition of legal capacity i.e. personhood to the unborn.[65] For, contemporary theory and practice distinguish between right to life agents and the agents of personhood.[66], [67]

If we neglect the apparent failure of the statement to distinguish between right to life agents and the agents of personhood as well as between a human being and a person, we can grant that the authors of the message have intended to follow a subversion of the theory of birth. Unlike determinants suggested by different personistic theories, birth cannot be regarded as a characteristic of a personhood candidate. It is not a *virtue* or capacity of an entity whose personhood relays on it. It is a biological event arising from mother's corporal abilities. Theory of birth rests on two main arguments; the first refers to the membership in our social community, while the second refers to the structural position that is changed through this event.

The first argument claims that from the moment of birth, a human being starts to socialize and interact with other members of a social community. The capacities for self-awareness which rests on "human experiences" also starts to develop. Warren considers social interaction and self-awareness as essential to personhood. According to her, the person normally comes into existence only in and through social relationship.[68] If we find that social abilities of a new-born do not differ from those of an unborn just before birth, it means either birth has no personhood significance or infanticide is something equal to abortion. In this regard, some agree that birth can make no difference to moral standing. Tooley claims that neither

[63] C. Enders, "A right to have rights-the German Constitutional concept of human Dignity", *NUJS Law Review* 3/2010, 258.

[64] German Federal Constitutional Court, February *25,* 1975 (BVerfGE39,1) and May 28,1993(BVerfGE88,203).

[65] See: Section 1 *Beginning of legal capacity* of German Civil Code, *http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0025*, last visited 13 November 2015.

[66] Same at: E. Wicks, "The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties", *Human Rights Law Review* 2/2012, 209.

[67] For critic on such distinction refer to A. Plomer, "Foetus right to life, The case Vo v France", *Human Rights Law Review* 2/2005, 317, 319.

[68] M. Warren, "The Moral Significance of Birth" *Hypatia* 4/1989, 46–64.

late abortion nor early infanticide is seriously wrong because an entity cannot have a *strong right to life* unless it is capable of desiring its own continued existence.[69]Also, Giubilini and Minerva argue that the so– called 'after-birth abortion' (killing a newborn) should be permissible in all the cases where abortion is, including the cases where the newborn is not disabled. They rely such claim on the following arguments: (1) both fetuses and newborns do not have the same moral status as actual persons; (2) the fact that both are potential persons is morally irrelevant and (3) adoption is not always in the best interest of actual people.[70]

The arguments of the cited authors are sufficient to disclose considerable objections to the moral significance of birth, and a sequent possibility of the extension of prenatal rights over children' lives. Also, it is obvious that accepting this theory would introduce a location criterion as a decisive fact for the right to life agency. When a woman delivers a viable infant while his twin sister remains in the womb, then he will be granted with right to life protection while his sister won't. It should be noted herein that even Thomson considers that the foetus has already become a human "person well before birth."[71] According to Warren, it is not a change of location what makes birth morally significant, it is "its emergence into the social world"[72] which calls for a *stronger* protection of the new-born. However, the social abilities of the new born are equivalent to those of an *in vivo* or *in vitro* embryo. The social interaction, which the new born causes, has the same content as it has had at the moment when the mother became aware of her pregnancy. For, I don't see how suchlike embracement into our social community could distinguish between the new-born and *in vivo* or *in vitro* embryos in a morally significant way. Birth is a kind of social initiation which is important to some people, as baptism or circumcision are to some other people.

The second argument conforms to biological reality according to which birth marks the point from which the structural position of a human being is definitely changed. It is no longer solely dependent on bodily functions of the irreplaceable individual. Theory of birth in the EX-YU legal discourse predominantly relies on the gestational connection which brings the structural disposition of prenatal human life. Essentially, it rests on the assumption that the one who dominates has the unlimited power over the powerless. Such position, of course, cannot be grounded on any main

[69] M. Tooley, *Abortion and infanticide*, Oxford University Press, Oxford 1983, 41.

[70] A. Giubilini, F. Minerva, *After-birth abortion: why should the baby live*? *http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.full.pdf+html*, last visited 29 August 2015.

[71] J. Thomson.

[72] M. Warren (1989), 46–64.

stream ethical theory;[73] it is the construction of different isms. Singer says "If a being suffers, there can be no moral justification for refusing to take that suffering into consideration".[74] Warren accepts that the interests of an entity with capacity for suchlike sentience require some consideration in utilitarian calculations, or that it be treated as an end and never merely as a means.[75]According to Harris, vulnerability is constitutive element of dignity.[76] The Convention Institutions granted that gestational connection imposes limitations (but not preclusion) to unborn life protection when conflicts to the mother's interests.[77] According to some, this is a unique gestational connection which justifies women's typically greater control over reproduction.[78] According to Karnein, the power of the gravid woman to deny her assistance precludes embryos from the right to life protection.[79] Simultaneously, this author does not deny that persons need protection most "when they are still early embryos."[80]

The application of suchlike help-dependant criterion is troubling in respect to premature infants who also require help to maintain vital functions. As noted by Wicks, this makes personhood and belonging protection dependent upon the state of modern technology and its availability to a particular fetus.[81] In that regard, she states that it "seems to be something absurd about a moving boundary, so that we might say 'last year this fetus would not have been a person at this stage, but since they re-equipped the intensive care unit, it is one'".[82] Apparently, technological progress brings various possibilities and increscent awareness about moral significance and even moral status of healthcare robots.[83] One of the

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[73] J. H. Solbakk, "Vulnerability: A futile or useful principle in health care ethics?", *The Sage and book of health care ethics* (eds. R. Chadwick, H. ten Have, E. M. Meslin), 2011.

[74] P. Singer, *Animal Liberation: A New Ethics for Our Treatment of Animals,* Harper Collins, New York 1975, 5.

[75] M. Warren (1989) 4.

[76] George Harris, *Dignity and vulnerability: Strength and quality of character,* University of California Press, Berkeley-Los Angeles 1997.

[77] *R. H. v Norway,* Application No. 17004/90, Decision of 19 May 1992.

[78] See: S. Sheldon, "Gender Equality and Reproductive Decision-Making", *Feminist Legal Studies* 12/2004, 303, 312.

[79] A. Karnein, *A Theory of Unborn Life: From Abortion to Genetic Manipulation*, Oxford University Press, Oxford 2012, 17.

[80] A. Karnein, 61.

[81] E. Wicks, *The right to Life and Conflicting Rights of the Other,* Oxford University Press, Oxford 2010, 19.

[82] E. Wicks (2010), 125.

[83] D. J. Gunkel, The Rights of Machines: Caring for Robotic Care-Givers at Machine Medical Ethics (eds. S. P. van Rysewyk, M. Pontier), Springer International Publishing Switzerland 2015,151–166,

possibilities that arose from the time laps between fertilization and gestation is the replaceability of the unwilling genetic mother. For, *in vitro* embryos do not depend on bodily functions of the irreplaceable individual, and certainly they are in a better structural position than those *in vivo*. Also, by means of lavage, it is possible to remove an embryo from the woman's body (for pre-implantation genetic diagnosis or even transfer to another recipient), which also affects its legal status.[84] If we grant that personhood and belonging protection depend upon the state of modern technology, then, according to Warren who opposes that possibility, we are forced to "make a hazardous leap from the technologically possible to the morally mandatory".[85] The significance of birth is reduced only to normative, and as we are getting closer to an artificial replacement for the unborn child's connection to a woman's body, birth may no longer have even suchlike significance, "and conception may take its place."[86]

Theory of birth faces firm critiques from both camps of the abortion debate. The defensibility of help-dependant criterion could be observed from the analogous perspective referring to the question when protection ceases to exist. It is not far from reality that someone's bodily parts and organs, except brains, could be successively replaced with artificial devices.[87] Although this entity is not able to survive without assistance, Warren claims that we would be morally obliged to accord them a moral status and belonging right to life protection due to their mental and behavioural capacities that are comparable to ours.[88] Also, comatose patients are in a radical help-dependant position. In neither of these situations, a structural disposition precludes the powerless from the right to life protection or from moral status.

3.2. The KPD in the context of regional legal texts in Europe

To consider that only the person merits the rights arising from dignity (such as the right to be protected from inhumane and degrading treatment or prohibition of slavery), as it has been argued by the KPD and reflected in the Article 84 of Serbian Draft of the Civil Code,[89] implies that all human and non-human non-persons are not dignity agents. Contrariwise, according to Andorno, inherent dignity plays a central role in

[84] M. Ford, "Evans v United Kingdom: What Implications for the Jurisprudence of Pregnancy?", *Human Rights Law Review* 1/2008, 182.

[85] M. Warren (1989).

[86] A. Karnein, 24.

[87] L. R. Baker, "Big-Tent Metaphysics", *Abstracta SPECIALISSUE I*, 2008, 9.

[88] M. Warren (2000).

[89] See Draft of the Civil Code *http://www.kopaonikschool.org/dokumenta/A_Opsti.deo.pdf*, last visited 13 November 2015.

legal instruments relating to bioethics.[90] Graaf and Deldenargue consider that Kantian and relational dignity is useful in medical ethics.[91] If we, contrary to this discourse, take that man is the measure of all things[92] in transhumanists sense, then the KPD may receive some support from that camp of debate on bioethical issues.[93] In this regard, the Universal Declaration on the Human Genome and Human Rights (UDHGHR)[94] that was omitted from Perović's list of the most important legal texts which safeguard dignity[95] states that "the human genome underlies the fundamental unity of all members of the human family as well as the recognition of their *inherent dignity* and diversity. In a symbolic sense, it is the heritage of humanity". Thus, transhumanism has been rejected in the most explicit way. Another moment which should be stressed herein is Hippocrates' influence on the development of the norms dealing with bioethics.[96] The UDHGHR seeks to unite reflections on the practice of medicine derived from Hippocrates with those conceptualized within international human rights law.[97]

It could be considered that the protection of dignity is the governing objective of all major regional instruments in Europe. Although the European Convention does not contain any reference to dignity protection in its wording, the Convention institutions stressed that the main purpose of Article 3 is the protection of human dignity.[98] Also, the significant legal source, which addresses dignity protection, is the EU Charter of Fundamental Rights which in Article 1 declares that human dignity is inviolable and requires both respect and protection. The EU Charter provides a special protection to dignity in the field of medicine and biology, as important to European constitutionalism. Borowsky sees the EU Charter of Fundamental Rights as a potential instrument to improve the legal protection for embryos which, at European level, (he argues) has so far not been particularly strong.[99] According to Starck, the resolution of the Eu-

[90] R. Andorno, 231.

[91] R. van Der Graafand, J. J. M. van Delden, "Clarifying appeals to Dignity in Medical Ethics from an Historical Perspective", *Bioethics* 23,3 (2009), 151–160.

[92] S.Perović, 22.

[93] See: C. S. Lewis, *The abolition of man,* Harper Collins, New York 2001, 84–85.

[94] Adopted unanimously and by acclamation by the General Conference in 1997 and endorsed by the United Nations General Assembly in 1998.

[95] S. Perović, 31.

[96] See: Explanatory Memorandum of the Preliminary Draft Declaration on Universal Norms on Bioethics, 21 February 2005 para.12.

[97] *Ibid.*

[98] *Tyrer v.The United Kingdom*, Application No.5856/72*,* Merits from 25 April 1978.

[99] C. Starck*,* "Embryonic Stem Cell Research according to German and European Law", *German Law Journal* 7/2006, 638.

ropean Parliament (strictly speaking, non-binding declarations of legal policy) from 15 January 1998 reflects the acknowledgement that the human person is created by the fusion of the cell nuclei and that this person's human dignity is entitled to protection from this moment in time.[100] When it comes to dignity and its protection at regional scale, however, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (Convention on Biomedicine)[101] and its additional protocols are of crucial importance. Although this Convention has been binding for Serbia since December 1st, 1999 and it presents the only regional source that has the word "dignity" in its title, Perović missed to refer to it, as well.[102] The reason for that could be in the fact that the Convention on Biomedicine has a modest impact on domestic legislation in Serbia.[103]

The Convention on Biomedicine in the first paragraph of Article 1 imposes the protection of the dignity and identity of *all human beings*. The drafters of the Convention on Biomedicine used the phrase "all human beings" and this could open doors to debating whether such term refers to embryos *in vitro,* similar to that whether the term "everyone" in the Convention refers to the unborn. In this context, Beyleveld and Brownsword argued that the term "all human beings" in this Article requires contracting parties to protect the dignity and identity of all human beings, and it is intended by the drafters to be broader than "everyone" in the Convention. This claim could be firmly grounded on the positions of the Convention institutions, which have recognized that an embryo belongs to human race.[104] Such recognition could qualify *in vitro* embryos for protection of dignity afforded to all human beings equally. In regard to the application of Convention on Biomedicine to prenatal life, Beyleveld and Brownsword conclude that "Article 1 breaks a clear compromise: while those signatories who cannot agree that the *conceptus* is a bearer of human rights are to be allowed to persist with this belief, all signatories are required to accept that, in the name of human dignity, the *conceptus* is a protected entity".[105] Further, the Explanatory Report on the Convention on Biomedicine states "a generally accepted principle that human dignity and the identity of the human being [must] be respected as soon as life [begins]".[106] In support of the claim for dignity status of prenatal

[100] *Ibid*, 636.

[101] It was opened for signature on 4April1997 in Oviedo, came into force on 1 December1999.

[102] S. Perović, 31.

[103] See: D. Franeta, 54.

[104] *Vo v France* Application No 17004/90, Merits, 8 July 2004 para 84.

[105] D. Beyleveld, Roger Brownsword, *Human Dignity in Bioethics and Biolaw*, Oxford University Press, Oxford 2001, 32.

[106] The Explanatory Report to the Convention on Biomedicine para 19.

life, there firmly stands Additional Protocol to the Convention on Biomedicine concerning Biomedical Research that protects the dignity and identity of all human beings[107] and it refers to research on foetuses and *in vivo* embryos.[108] Following the opinion on the ethical aspects of research involving the use of human embryos in the context of the 5th Framework Programme (23 November 1998), The European Group on Ethics in Science and New Technologies at the European Commission has examined controversies on the concept of the beginning of life and 'personhood' and submitted opinion that "human embryo, whatever the moral or legal status conferred upon it in the different European cultures and ethical approaches, deserves legal protection." Hence, Kersten sensibly concludes that all living beings,who are the product of human procreation, are entitled to the protection of human dignity, whether the act of procreation was performed naturally or extra corporeally with human (germ line) cells.[109] With no intention to undermine the importance of the meaning and conceptualization of dignity,[110] the answer to the question whether dignity presents a legal principle[111] or a fundamental right[112] cannot affect dignity status of the human non-persons. This claim receives a sound support from the Court's statement that prenatal human life requires "protection in the name of human dignity, without making it a 'person' with the 'right to life' for the purposes of Article 2."[113] The practical effects of the prenatal life's dignity status are reflected through the regulations and the practices in biomedical research.

3.2.1 Legitimate scientific inquiry versus dignity of prenatal humans

To date, the practical importance of dignity has appeared to be insignificant when it is faced with a curette or any other primitive tool. Insignificance is a common trait of the achievements of civilization when faced to primitivism. As handling tools have been transformed into sophisticated instruments, and primitivism is articulated with conscientiousness and knowledge, the importance of dignity is transforming from theoretical and illusory into practical and accessible. The limits to the protective range of

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[107] Adopted by the Committee of Ministers on 30 June 2004.

[108] See: Article 1 and Article 2 of the Protocol.

[109] J. Kersten, *Das Klonenvon Menschen,* Jus Publicum, Tübingen 2004, 403, 554.

[110] See: A. Schulman, *Bioethics and the Question of Human Dignity*, University of Notre Dame Press 2009, *http://www3.nd.edu/~undpress/excerpts/P01307-ex.pdf*, last visited 29 August 2015.

[111] German Federal Constitutional Court, 16 January 1957 (BVerfGE6,32,36) and 15 February 2006 (BVerfGE 115,118,152).

[112] German Federal Constitutional Court, February *5,* 2004 (BVerfGE109, 133, 181).

[113] *Vo v France* Application No 17004/90, Merits, 8 July 2004 para 84.

dignity are bordered with the interests arising from the expectations of the scientific and research potential of embryonic stem cells. In the field of biomedicine, the dignity status of embryos conflicts with the freedom of research that was introduced in the international law,[114] but both with implied limitations. For, the effect that the application of dignity produces in the field of biomedicine has been observed by a number of scholars who have different viewpoints. One camp of the discussion argues that the operation of dignity is a limiting factor to biomedical progress.[115] However, dignity truly has the potential to amount a barrier to using embryos as mere objects,[116] and prevent any research on them other than for their own benefit. In line to that, Articles 16, 17 and 18 of the Convention on Biomedicine set up a series of conditions to protect research subjects,[117] and forbid embryo creation for research. The Convention on Biomedicine states that "where the law allows research on embryos *in vitro*, it shall ensure adequate protection of the embryo" (Art. 18(1)).

In regard to embryonic stem cell research, national legislations in Europe are divided between two concepts which provide different extents of embryo protection. Such concepts have their origin in cultural particularities, historical circumstances, political views, etc. French stem cell regulation and its chronology is a good example to support this claim.[118] The highest level of protection is afforded to the embryo by the regimes which consider it as a person in the traditional sense, or provides it with a right to life from conception.[119] At the other end of the spectrum is the view that the embryo is unworthy of any protection and may be used for any means, including as a laboratory artefact. This approach, which reflects the KPD, is not adopted by any European state.[120] The second re-

[114] For further discussion refer to Amrei Sophia Muller, "Remarks on the Venice Statement on the Right to Enjoy the Benefits of Scientific Progress and its Applications (Article15(1)(b)ICESCR)", *Human Rights Law Review* 10 (2010), 765–784.

[115] See: R. Macklin, "Dignity is a Useless Concept", *British Medical Journal* 2003, 1419; R. M. Green, *Babies by Design: The Ethics of Genetic Choice,* Yale University press, 2007, 4; G. Kateb, *Human Dignity*, Harvard University Press, Harvard 2011, 1–3.

[116] See: Opinion No.15 of the European Group on Ethics Regarding Ethical Aspects of Human Stem Cell Research and Use.

[117] This source simultaneously recognizes need for such research for the sake of progress, see: Article 13.

[118] S. Hennette-Vauchez, "Words count: How interest in Stem cells has made the embryo available – a look at the French law of bioethics", *Medical Law Review* 17/2009, 59–61.

[119] Irish Constitution (BunreachtnahÉireann) art. 40(3)(3) *http://www.irishstatutebook.ie/en/constitution/*, last visited 28 August 2015. German Law for Protecting Embryos, 1990, *Federal Law Gazette,* (BGBl.IS.2746), *http://www.gesetze-im-internet.de/eschg/BJNR027460990.html*, last visited 28 August 2015.

[120] See: S. Halliday, "A comparative approach to the Regulation of Human Embryonic Stem Cell research in Europe", *Medical Law Review* 12/2004, 42.

gimes accept a middle way approach, "introducing gradualist approach", whereby the protection afforded to the embryo is dependent upon its stage of development.[121] Accordingly, the spectrum of national legislation in Europe encompasses a regulation which permits embryo research and their creation for such purposes as well as the procurement of human embryonic stem cells from supernumerary embryos in certain circumstances;[122] it also prohibits the procurement of human embryonic stem cells from any embryos including supernumerary or otherwise.[123] However, neither of those regimes denies dignity status to prenatal life. In the literature, Europe is recognized as a "pro-regulation" region,[124] with zones of regulated prohibition rather than regulated permission.[125] Dignity status of prenatal life has been used as a justification for restrictive approach to embryonic stem cells research. For instance, in an attempt to regulate time laps between procreation and pregnancy and prevent the misuse of artificially created embryos, *The Law for Protecting Embryos* (ESchG) was passed to protect embryos *in vitro* from the moment of fertilization, providing prenatal life with a wider scope of protection from moment in time prior to the relevant law on abortions recognizes that pregnancy has begun.[126]

The next issue which is affected by the embryo's dignity status concerns the patentability of the inventions originating from embryonic stem cell research. The important legal text for further discussion is the Directive on the Legal Protection of Biotechnological Inventions (Directive, 98/44/EC).[127] The Directive introduces human dignity into European Union patent law in the field of biotechnological inventions. It presented an important complication for the regulatory construction of the Directive.[128] The Article 6(2) (c) of the Directive excludes the uses of embryos for commercial and industrial purposes since those practices are consid-

[121] *Ibid.*

[122] Netherlands, The Embryos Act 2002 (*Wet houdende regels inzake handelingen met geslachtscellen en embro's: Embrowet* (2002)).

[123] For instance, German Law for Protecting Embryos. (1990). *Federal Law Gazette,* (BGBl.IS.2746). *http://www.gesetze-im-internet.de/eschg/BJNR027460990.html*, last visited 29 August 2015.

[124] R. Brownsword, "Regulating human genetics: New dilemmas for a new millennium", *Medical Law Review* 12/2004, 15.

[125] See: S. Halliday, 40.

[126] A. Karnein, see also: German Criminal Code (1998), *Federal Law Gazette,* (I, p. 945, p. 3322) § 218 of the German *StGB*, *http://www.iuscomp.org/gla/statutes/StGB.htm#218*, last visited 29 August 2015.

[127] *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31998L0044&from=EN*, last visited 11 August 2015.

[128] Refer to M. Varju, J. M. Sandor, "Patenting stem cells in Europe: The challenge of multiplicity in European Union Law", *Common Marker Law Review* 3/2012, 1020.

ered to be contrary to *ordre public* or morality.[129] The European consensus on this may be also represented by the Convention on Biomedicine and its provisions on human dignity and the non-commercialization of the human body (Arts. 1 and 21).[130] Practical and authoritative meaning of those principles has been reflected through the case law of the ECJ. In *Brustle v Greenpeace*,[131] three questions were evoked and all of them refer to different aspects of prenatal life's dignity status. First, how the term 'human embryos' should be interpreted under the Directive; second, whether commercial exploitation for scientific research comes under the definition of 'uses of human embryos for industrial or commercial purposes'; and third, whether an invention, which uses an embryo at any stage, is precluded from patentability. The first question is particularly important for this research since it defines the agents of dignity in the entirely opposite way as compared to that of the KPD and the Draft of Serbian Civil Code.

Despite the lack of consensus regarding the status of an embryo and definitions of the embryo across EU Member States, the ECJ was of the opinion that it was its role to make a legal decision regarding the definition of the term "embryo" in the context of the Directive.[132] The ECJ considered that any activity which affected human dignity must not be patentable and, due to its concern with the protection of human dignity, it was of the view that it should give a wide definition to the term "human embryo".[133] As a result, the ECJ defined that a "human embryo" includes a "fertilised egg, a non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted or a non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis" as they are capable of developing into a human being.[134] According to this verdict, the potential to commence the process of developing into a human being is that what counts for moral and dignity status, regardless of the stage of development and the question whether such potential is natural or artificial.[135] Along with fertilized eggs, the judgment expands a judicial commitment to the protection and

[129] See also: Article 53 (a) of the European Patent Convention.

[130] See: M. Varju, J. M. Sandor, 1020.

[131] Case C–34/10, October 18 2011, *http://curia.europa.eu/juris/document/document.jsf?text=&docid=111402&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=138779*, last visited 29 August 2015.

[132] *Ibid.*, para. 30.

[133] *Ibid.*, para. 34.

[134] *Ibid.*, para. 36 and 38.

[135] *Ibid*, para 50. The artificially synthesized entities i.e. bearers of artificial developmental potential are precluded from this definition in the latter verdict of the EJC in the case C-364/13 International Stem Cell Corporation, December 18 2014, *http://curia.europa.eu/juris/liste.jsf?num=C-364/13*, last visited 13 June 2016.

a dignity status even to the human cells that are at the stage as early as *totipotency.* At that stage, human stem cell lines, zygote, blastomeres, embryoblast have the potential to generate all types of differentiated cells and potential for self-organisation (gastrulation, basic body plan and individuation).[136] For, even those ontological stages of human life that are lower than the stage of the embryo or the stage of the foetus are dignity agents. Considering that the Court recognized embryos as members of human race, and that the ECJ defined when they begin their existence, we could conclude that in the rest of Europe, according to judicial pronouncements of regional judicial bodies that are compliant to the common opinion of the developmental biology, human beings start to exist from the moment of *syngamy*. Furthermore, in the light of the scientific developments, the ECJ recognized that neither the sole moment of fertilization nor the moment of transplantation of the cell nucleus into the ovum are exclusively relevant for the purposes of creation of a human life. As science develops, it is to be expected that very soon we will be able to induce commencing potential in more and more rudimentary forms of cell formation or even single cell. Consequently, in the opinion of the ECJ, such potential takes precedence over the research potential of embryonic stem cells. Dignity status safeguards the bearers of the commencing process against the use for scientific purposes, other than for scientific purposes which are useful for them.[137]

4. CONCLUSION

The KPD cannot escape a criticism that includes the lack of an adequate definition, elitist undertones, and discriminatory foundations, as well as a large conflict potential and the incompatibleness with international obligations of Serbia. A historical lesson should be accepted: dignity cannot rest on *socially affirmed virtues*. Furthermore, dignity cannot be limited only to the *set of human virtues*. Both human and non-human non-persons are the agents of dignity. Although we may be confused in this regard by cultural particularities, historical circumstances, political or ideological views, subjectivism, etc., we cannot neglect scientific development, normative activities and the course in the case law of the regional judicial bodies that took place in the last few decades and shaped European legal landscape. In respect to the dignity status of human non-persons, we cannot overlook theoretical, normative and judicial regulation of the field of biomedicine. The common opinion of all of these three

[136] Data taken from: H. W. Denker, "Potentiality of embryonic stem cells: an ethical problem even with alternative stem cell sources", *J Med Ethics* 32/2006. Table 1.

[137] See: Case C–34/10, October 18 2011 para 42 and 46.

sources of law is that dignity status of prenatal life has a great protective potential in the field of biomedicine. From the aspect of legal sources, at least in the European Union, dignity status of prenatal life is not disputable. There is a theoretical disagreement about protective range of that status and not about the status itself. Even so, an undisputable protective range of dignity safeguards prenatal life against (the uses of) destruction for industrial or commercial purposes, and commercial exploitation for scientific research. States' margin of appreciation is excluded in this regard. For it appears that prenatal life receives a greater protection through dignity than through the presumed right to life, but the protection of dignity cannot be achieved without the protection of the right to life.

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