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# Protecting the human body: legal and bioethical perspectives from around the world

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# BASIC PILLARS OF LEGAL THINKING ON THE HUMAN BODY IN THE HUNGARIAN MEDICAL LAW: DIGNITY, SELF-DETERMINATION AND THE PRINCIPLE OF NON-COMMODIFICATION

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Does the law protect the human body as such? Or should one argue that the law protects persons, first and foremost, and that this form of legal protection includes also the physical aspects of personality: the human body, as well? With the possibility of organ transplantation between humans (cadaver or living organ donation) and with the creation of human biobanks, including embryo, gamete, and ovarian tissue cryopreservation, the cases in which human specimens, tissues, organs, and cells become subjects of the law have significantly increased. However, by examining these developing legal norms more closely, one may realize that the basis of most of the emerging legal provisions is still about general personality rights - such as protection of human dignity, the right to self-determination, the right to privacy, and the right not to be discriminated against. Among the emerging legal provisions, only a few aims solely to protect the human body, as a material and as a form of property. Consequently, in Hungary the human body is predominantly defended by general legal instruments, within the protection of personality rights(1) (in Hungarian: személyiségi jogok). The legal prohibition of discrimination based on genetic traits, or on the privacy and data protection laws of human tissues and DNA in biobanks, show all that the basic rights are applied in the context of the body, as well. Even the principle of non-commodification can

<sup>(1)</sup> Title XI Hungarian Civ. C.

be interpreted as a principle that aims to protect persons, and therefore their organs and cells should not be harvested with the aim of financial gain. Protection of solely material aspects of the human body can be observed only in lower level legal norms, such as in material transfer agreements and in biobank policies when, for example, biological samples are exchanged between scientists. In this chapter I will describe the legal protection of the human body mainly through two domains which are extreme as they deal mostly (at least in transplantation) with *post mortem* bodies; one on organ transplantation, and one in the special case of a brain dead pregnant patient in Hungary.

## I. – Fundamental norms on the human body in Europe

Although human dignity is often described as a genuinely European legal principle, surprisingly, at the regional European level, the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 does not expressis verbis recognize human dignity. Nevertheless, its Article 3 protecting everyone from inhumane or degrading treatment has been interpreted as implicitly safeguarding human dignity. In contrast, in the Oviedo Convention or in the UNESCO Declaration on Human Rights and Bioethics human dignity is one of the core principles that provides a basis for numerous rights.

In 1997 the Council of Europe developed very influential bioethical norms incorporated in the so called *Oviedo Convention*<sup>(2)</sup>. This Convention imposes a categorical ban on the commercialization of the human body in Article 21 by saying "The human body and its parts shall not, as such, give rise to financial gain" (3). The convention is based on broad consensus as already 29 countries have ratified it and 6 other countries have signed it without ratification. Interestingly no country submitted reservation concerning the categorical ban on financial gain. However, almost all reservations were related to transplantation itself and not to the financial gain possibly involved. Croatia (4), Denmark and Norway made a

reservation on the restriction of regenerative tissue donation by minors. Organ trafficking constitutes also a growing concern as the need for organ transplantation has been significantly increased (5).

In the Explanatory Note of the Convention it is clarified that under this provision organs and tissues, including blood, should not be bought or sold or give rise to financial gain for the person from whom they have been removed or for a third party, whether an individual or a corporate entity such as, for example, a hospital. However, technical acts (sampling, testing, pasteurization, fractionation, purification, storage, culture, transport, etc.) which are performed on the basis of these items may legitimately give rise to reasonable payment. For instance, this Article does not prohibit the sale of a medical device incorporating human tissue which has been subjected to a manufacturing process as long as the tissue is not sold as such. Further, this Article does not prevent a person from whom an organ or tissue has been taken from receiving compensation which, while not constituting remuneration, compensates that person equitably for expenses incurred or loss of income (for example as a result of hospitalization). The provision does not refer to such products as hair and nails, which are discarded tissues, and the sale of which is not regarded as a violation of human dignity.

The Additional Protocol to the Convention on Human Rights and Biomedicine, concerning Transplantation of Organs and Tissues of Human Origin was adopted in 2002<sup>(6)</sup>. The Additional Protocol has much more detailed provisions on the legal safeguard of transplantation, including the removal of organs from the living donors. Article 10 requires that "Organ removal from a living

<sup>(2)</sup> Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Oviedo, 4.IV.1997.
(3) Art. 21.

<sup>(4)</sup> The Republic of Croatia excludes the limitation within Article 20, paragraph 2, subparagraph ii, of the Convention, which exceptionally allows the removal of regenerative

tissue from a person who is not able to consent solely when no compatible donor with the ability to consent is available, and the recipient is a brother or a sister of the donor. The limitation does not allow the removal of regenerative tissue (bone marrow) from a minor for the benefit of his/her parent. Such a limitation is not compatible with the Law of the Republic of Croatia in force (The Removal and Transplantation of Human Body Parts Act, published in Official Gazette n° 53 of 1991), which allows the transplantation of regenerative tissue from a minor for the benefit of his/her parent. The Republic of Croatia hereby protects the vital interests of an underage donor, thereby saving the life of the donor's parent who is of the utmost importance (for the minor).

The Republic of Croatia will apply Article 20, paragraph 2, sub-paragraph ii, of the Convention, to the effect that the receiver is a parent, a brother or a sister of the donor.

<sup>(5)</sup> The Council of Europe Convention against Trafficking in Human Organs was opened for signature on 25 March 2015.

<sup>(6)</sup> Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin, Strasbourg, 24 January 2002.

donor may be carried out for the benefit of a recipient with whom the donor has a close personal relationship as defined by law, or, in the absence of such relationship, only under the conditions defined by law and with the approval of an appropriate independent body".

Regarding the protection of the human body, two other Articles are highly relevant: one is Article 21 - Prohibition of financial gain and the other is Article 22 on the organ and tissue trafficking(7). The latter one is extremely laconic. Without any specific definition it simply says: "Organ and tissue trafficking shall be prohibited". Article 21 seems to give more room for interpretation. It states that the human body and its parts shall not, as such, give rise to financial gain or comparable advantage. Under this Article the following payments do not constitute a financial gain or a comparable advantage, in particular: compensation of living donors for loss of earnings and any other justifiable expenses (caused by the removal or by the related medical examinations;) payment of a justifiable fee for legitimate medical or related technical services rendered in connection with transplantation; and compensation in case of undue damage resulting from the removal of organs or tissues from living persons. All these forms of payment, however, are consistent with previous laws and consequently they do not offer more exceptions to the general ban on the financial gain. Further restriction can be found in paragraph 2 which provides that "advertising the need for, or availability of, organs or tissues, with a view to offering or seeking financial gain or comparable advantage, shall be prohibited."

Directive 2004/23/EC of the European Parliament and of the Council, dated 31 March 2004, on setting standards of quality and safety for the donation, procurement, testing, processing, preservation, storage and distribution of human tissues and cells deals with general matters of safety and quality of the use of human tissues, however Article 12 clearly states that donations and procurement should be made without financial incentives.

Article 13 of the Directive reinforces the principle of non-commodification stated already in the Oviedo Convention:

"(1) Member States shall ensure that donations of organs from deceased and living donors are *voluntary* and *unpaid*.

(2) Member States shall prohibit advertising the need for, or availability of, organs where such advertising is with a view to offering or seeking financial gain or comparable advantage."

Lots of expectation preceded the adoption of the Directive 2010/45/EU of the European parliament and of the Council of 7 July, 2010 on standards of quality and safety of human organs intended for transplantation. This Directive recognizes the need "for common quality and safety standards for the procurement, transport and use of organs at Union level" (8). Paragraph 7 continues that "unacceptable practices in organ donation and transplantation include trafficking in organs, sometimes linked to trafficking in persons for the purpose of the removal of organs, which constitutes a serious violation of fundamental rights and, in particular, of human dignity and physical integrity" (9).

## II. - HUNGARIAN CONSTITUTIONAL FRAMEWORK

In the Hungarian law legal protection of a person and the protection of the human body are closely connected concepts which cannot be separated from each other except in some extreme cases, such as the protection of the corpse<sup>(10)</sup> or the protection of parts of human body in the context of transplantation<sup>(11)</sup>, reproduction and research. In other contexts the principle of self-determination stemming from the constitutional notion of dignity provides the basis for legal thinking. But even in the rare cases when the human body requires some special protection, the concept of human dignity is the starting point. The Hungarian Fundamental Law in Article I states that "Article I (1) The inviolable nature of human rights which cannot be disposed of shall be respected. It shall be the primary obligation of the State to protect these rights" (12).

<sup>(7)</sup> J. SÁNDOR, e.a., "Organ Trafficking, Organ Trade. Recommendations for a More Nuanced Legal Policy", in F. Ambagstsheer and W. Weimar (eds.), The EULOD Project Living Organ Donation in Europe Results and Recommendations, Lengerich, Pabst Science Publisher, 2013, pp. 147-175.

<sup>(8)</sup> Directive 2010/45/EU of the European Parliament and of the Council of 7 July 2010 on standards of quality and safety of human organs for transplantation, OJ, n° L 207.14 of 6 August 2010, § 6.

<sup>(9)</sup> *Ibid.*, § 7.

<sup>(10)</sup> See infra.(11) See infra.

<sup>(12)</sup> Adopted on 25 April 2011.

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One of the basic and core rights in relation to the protection of human body can be found in Article II. It states that "Human dignity shall be inviolable. Everyone shall have the right to life and human dignity; the life of the foetus shall be protected from the moment of conception" (13). Human dignity is emphasized here as the core right; however, one cannot find a further indication for the hierarchy between right to life and human dignity in the text of the Fundamental Law. In the field of biomedicine inter-rights conflicts occur frequently between the right to life and the right to

The other basic principle in protecting the human body can be found in Article III that provides constitutional provision in cases of inhuman and degrading treatment. "(1) Nobody may be subjected to torture, inhuman or degrading treatment or punishment, or be held in servitude. Trafficking of human beings shall be prohibited."

human dignity, for instance when a patient would like to defend

his/her dignity by refusing life sustaining treatments.

Paragraph (2) of Article III is perhaps the most relevant in the context of biomedical interventions and in the field of health care. "It shall be prohibited to perform a medical or scientific experiment on human beings without their informed consent." And in paragraph (3) "Practices aimed at eugenics, the use of the human body or its parts for financial gain, or human cloning shall be prohibited". One may argue that not only medical experiment (it would be better to say "research") but all medical treatment should be based on informed consent unless a Parliamentary Act provides exception, such as in the case of medical emergency. Protecting human beings against eugenic practices aims to avoid illegal birth control and sterilization of minorities but as the term *eugenic* has been used in many different contexts it is hard to find a clear scope of this provision.

## III. – PROTECTION OF THE HUMAN BODY IN THE MEDICAL LAW: MEDICAL RESEARCH, AND TRANSPLANTATION

Informed consent is the main legal principle governing therapy and research conducted on the human body in the Hungarian Health Care Act (14). In case of medical treatment it goes without saying that in the lack of the patient's consent no medical treatment can be performed except in specific cases (15). It is more problematic to ensure that adequate information is given prior to medical research(16) but informed consent is always requested. In even in those research protocols in which research is conducted not on humans but on human specimens. The notion of research on human beings has been significantly expanded since 1997 when the Hungarian Health Care Act formulated the basic rules on medical research on humans. Since then (17), medical research on the human body was understood much more broadly (18) by encompassing the research not only on persons but on the human genetic materials, human gametes, cells from the alive and dead human body, human tissues etc. (19) Irrespective whether cells, gametes or DNA are harvested from the human body for the purposes of research or therapy, consent of the person is an essential criteria in the law. A specific law has been adopted in 2008(20) regarding research on genetic material and data. New forms of medical research, such as research on human genetic data and research on human embryo follow all the legal norms on human dignity and self-determination.

Protection of the human body often appears in the debates on the status of the corpse and in cases using the body of brain dead patients. Today the concept of death has become a more complex and more contested notion than ever before. First of all, the possibility of organ transplantation, moving an organ from a cadaveric source, has changed the medical approach to death. Although organ transplantation is a unique case, based on the declaration of brain death following special criteria; the body of the deceased donor is kept (for a short time) alive for the purposes of organ removal, to save the life of another patient. The patient may refuse post-mortem transplantation during his/or her life. Maybe this is

<sup>(13)</sup> This phrase indicates a stronger protection of the human foetus than the previous Constitution.

<sup>(14)</sup> Art. 15 Hungarian Health Care Act. on the patient's right to self-determination and Art. 20 on the right to refuse medical treatment.

<sup>(15)</sup> Ibid. Art. 17-18 in cases of medical emergency for instance.

<sup>(16)</sup> Ibid. Art. 159, § (1) e.

<sup>(17)</sup> Decree n° 23/2002 (V. 9.) of the Minister of Health.

<sup>(18)</sup> J. SÁNDOR, "Body Immortal", in J. Gunning and S. Holm (eds.), Ethics, Law and Society, Aldershot, Ashgate, 2007, pp. 123-135.

<sup>(19)</sup> Art. 1. Decree n° 23/2002.9 (V.9.) EüM r., aforementioned, relating to the medical research on human beings.

<sup>(20)</sup> The Parliamentary Act n° XXI. of 2008, relating to the protection of human genetic data, to the genetic research and testing and to the rules of biobanks.

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the reason why medical terminology and colloquial language are also very inconsistent and vague when e.g. an organ donor is either referred to as a "patient" or as a "deceased person". A "cadaver" is used in the context of medical research, organ transplantation, and in certain cases for education but e.g. a brain-dead woman's pregnancy can also be maintained for a certain period of time due to the available medical technology. In these cases, difficult issues arise also from ethical and legal points of view. The field in which one can clearly see that the law protects the human body is the field of post mortem respect to the human body. A dead body cannot be treated and disposed as a mere object because it has belonged to a human person. Research conducted on cadavers requires the approval of ethics committees and based on the consent either by the deceased's statement during his/her lifetime or consent by his/her relatives.

Organ transplantation went through a remarkable development everywhere since the middle of twentieth century. The first transplant surgery in Hungary, a kidney transplantation, was performed in 1962 but it was unsuccessful (21). The first successful kidney transplantation was carried out only eleven years later, in 1973. The first successful liver transplantation, occurred 22 years later in 1995. In Hungary, nearly 300 transplantations are performed each year. Hungarian legal regulations follow the approach of opting out and are based on the principle of presumed consent (22). Any objections should be reported to the family doctor. Such regulations are problematic for two reasons. On the one hand, it is assumed that the public is not aware that objections will be considered only if expressed in that manner. On the other hand, such regulations are also problematic in terms of practical implementation, as it may not be possible to find the statement of objection in the urgent conditions in which the use of the organs is taking place.

Hungary ratified both the Oviedo Convention and the Additional Protocol to the Convention on Human Rights and Biomedicine, on Transplantation of Organs and Tissues of Human Origin. This latter

(21) R.M. LANGER and F. PERNER, "Transplantation in Hungary - Preface on the Occasion of Transplantation Proceedings Becoming the Official Journal of the Hungarian Transplantation Society", Transplant Proc., July-August 2010, vol. 42, nº 6, pp. 2279-2280. (22) Art. 211, (1), Hungarian Health Care Act (amended by the Parliamentary Act nº CCLII of 2013).

one was ratified by the Parliamentary Act No LXXX of 2006(23). The European Parliament resolution of 22 April 2008 asked Member States "to remove, before January 2010, legislation that reserves donor organs for use solely within that Member State." For Hungary, joining Eurotransplant, the largest international donor exchange organization (currently representing a population of 125 million), may present an extraordinary opportunity to increase the limited number of available donor organs, and in particular, to find donor organs that better match recipients' profiles. Membership would, for example, multiply the chances of being allocated an organ for patients on the waiting list. In turn, organs for which no matching recipient is found in Hungary would not be lost, as they could be offered to patients in another member country.

Pursuant to Section 211(1) of the Hungarian Health Care Act, organs and tissues may only be removed from the deceased if the deceased had not expressed any objections, prior to their death. (If the deceased was underage and no statement of objection is found, organ or tissue removal may only take place with the written approval of the legal representative of the deceased.) Experience in Hungary is that although relatives' consent is not required by law, donation in many cases is prevented by objections raised by the family of the deceased.

The safety of the organ donor is protected by numerous restrictions on organ donation, for example, only the following organs or tissue parts may be removed: one half of a paired organ, if its removal does not cause severe and permanent deficiency; the segment of an organ, if after its removal, the organ does not suffer significant functional loss; a tissue part that regenerates itself(24).

Autonomy is secured by prescribing that only legally competent persons may donate organs or tissue parts. In exceptional cases where the recipient is related to the donor, bone marrow, haemopoetic parent cell, or any self-regenerating tissue part may be donated (25). In these cases the consent of the legal representative of the minor becomes valid with the approval of the ethics committee of the hospital.

<sup>(23)</sup> Additional Protocol to the Convention on Human Rights and Biomedicine concerning Transplantation of Organs and Tissues of Human Origin (CETS nº 186).

<sup>(24)</sup> Art. 205, (1), Health Care Act.

<sup>(25)</sup> Ibid., art. 206, (5).

A person with restricted legal capacity may make this donation only if the donor is related to the recipient as direct descendant; a sibling of a direct descendant; a sibling; a direct descendant of the recipient's sibling<sup>(26)</sup>.

The donation of organs and tissue parts must be made without any monetary compensation<sup>(27)</sup>. The donor has the right to claim reimbursement of his/her costs, such as lost income as a result of the donation and any costs that are related to making the donation statement and travelling, but are not covered according to the contract with the health care system. These costs are paid by the state<sup>(28)</sup>.

Principle of non-maleficence can be observed by the further condition that before transplanting an organ or tissue part, the doctor who performs the transplantation must ensure that the condition of the donor is favorable enough to removing the organ or tissue part; that the transplantation is not contraindicated; that it is justified for the recipient; that the conditions for the recipient are favorable for the implantation, and that the organ is suitable for transplantation.

Before transplanting an organ or tissue part, the donor must be informed in detail, verbally and in writing about all significant conditions related to the intervention/operation, with a special attention to the long and short term consequences of the removal and lack of the organ or tissue part, and to the rule that in case of the death of the donor, he or she shall be subject to mandatory autopsy. The donor must be informed by a doctor not directly involved in the transplantation<sup>(29)</sup>.

The donor may withdraw his or her decision, without any form, before the organ or tissue part is removed. Even in case of valid agreement on the donor's part, the physician cannot continue the intervention involving the removal of an organ or tissue part, if new circumstances arise, which threaten the life of the donor or may lead to health impairment (30).

The agreement of the recipient concerning the transplantation must be a written consent. If the donor' health is compromised — beyond the immediate impairment that directly follows from the removal of any organ or tissue part — the donor becomes disabled or dies, and the physician and health worker conducting the intervention cannot be made liable, then the state will compensate the donor or his or her relatives for all damages that are not covered on the basis of the legal relations with the social security system.

## IV. – LEGAL USE OF THE HUMAN BODY IN THE HUNGARIAN CRIMINAL LAW

Perhaps the most specific protection of the human body can be found in the Hungarian Criminal Code<sup>(31)</sup>. In 1998 several new criminal law provisions were enacted subsequent to the adoption of the new Health Care Act. A new Title was inserted in the Criminal Code: Title II that deals with Medical Procedures, the Order of Medical Research and Criminal Acts against the Right of Autonomy Concerning Medical Procedures.

Several new types of crimes were defined and sanctioned; e.g. "illegal use of the human body, violation of the rules of research conducted on the human embryo and gametes, illegal use of the gametes". In Hungary, human trafficking was defined as a crime in 1998<sup>(32)</sup>.

Section 175/B has been in force since March 1, 1999. This Article defines human trafficking when someone sells, buys, transfers, exchanges or acquires someone else. This can be punished for up to three years in prison. The punishment increases from one to eight years if the victim of trafficking is under the age of 18 or if he or she has been deprived of their freedom, or if the purpose of trafficking is labor, sexual services, perversion or the illegal use of human organs or if it is done in an organized manner and for profit (33).

<sup>(26)</sup> *Ibid.*, art. 206, (2).

<sup>(27)</sup> Ibid., art. 207, (1).

<sup>(28)</sup> Ibid., art. 207, (2).

<sup>(29)</sup> Ibid., art. 209, (1).

<sup>(30)</sup> Ibid., art. 209, (4),

<sup>(31)</sup> Parliamentary Act n° C. of 2012 relating to the Criminal Code Chapter XVI, dealing with the Crimes against the Rules of Medical Interventions and Research; see Sect. 168-175.

<sup>(32)</sup> Act IV of 1978 relating to the Criminal Code Title III, entitled "Crimes against freedom and human dignity".

<sup>(33)</sup> The referring Article 175/B § 5 of the Penal Code has been amended. The amendment, which came into force on 9 August 2009, aiming at aggravating the punishment of those, who commit trafficking in human beings on a child under 12 for the purpose of sexual intercourse,

Based on simple grammatical analysis of the *actus reus* of Section 173/I. it becomes clear that this Section goes much beyond the classical cases of organ trafficking and any acquisition or simple placing human specimens, including organs, as well as gametes in the market would constitute the crime of "illegal use of a human body". In addition selling human body and its parts in a business-like manner (34) constitutes an even more serious form of crime (35). Furthermore even preparation for the illegal use of the human also constitutes a misdemeanor (36).

Under the Hungarian criminal law since 1998 certain medical procedures that are conducted without the consent of the person shall also be punishable<sup>(37)</sup>.

## V. – CONCEPT OF HUMAN DIGNITY IN SPECIFIC CASES: VIABLE, NON-VIABLE FOETUS AND BRAIN DEAD PREGNANT WOMAN

Sometime in the summer of 2013 the fight for the life of a pregnant woman was lost in Hungary. The case was revealed only months later in November 2013(38). What the public knows from newspaper articles, is that a few months earlier, a 32-yearold woman was in coma and could not be saved after a couple of days, and was declared brain-dead. At that time she was in the 15th week of her pregnancy. In the summer of 2013 the brain-dead mother's life functions were sustained for 92 days in Debrecen, and then the doctors delivered an apparently healthy foetus by performing a Caesarean-section. The C-section could be performed because of the successful cooperation of several specialists: among others, anaesthesiologists, endocrinologists, gynaecologists, neonatologists, intensive care experts participated in maintaining the pregnancy. The C-section was performed in the 27th week of the pregnancy. This case is also the result of a heroic technological effort from the medical team.

forced labor, or to produce forbidden pornographic material. The maximum penalty was raised from 15 years to 20 years of imprisonment.

Based on what we know about the Debrecen case it can be supposed that the members of the family shared the same view, and all of them wished to save the life of the foetus. So the outstanding and successful attempt of keeping the patient alive took place perhaps not at their explicit request but by all means with their approval. The case was announced to the public months after the C-section had taken place, for the sake of protecting the family and avoiding the identification of the child. The hospital team therefore basically took over the role of the parent and caretaker of the foetus, and dozens of medical professions contributed to maintaining the pregnancy despite the fact that the mother was considered deceased.

There has also been cases, in which shortly after the death of a pregnant woman it has still been possible to deliver a mature foetus developed in the womb. But new methods of intensive care have recently resulted in the increase of such special situations when the life functions of a brain-dead patient, even including her hormonal function, can be artificially sustained, which enables prolonging pregnancy even of a brain-dead woman for a certain period of time, even until the delivery of the foetus with Cesarian-section. While in case of the terminally ill patients the life-sustaining treatments raise ethical questions, nowadays the possibility of an artificially maintained pregnancy is also an issue. Such an outstanding medical intervention significantly depends on the available medical technologies, on professional expertise and substantial financial resources. In these cases, difficult issues arise also from ethical and legal points of view concerning the dignity and the rights of private life and reproduction of the late pregnant patient and the family. In these rare situations the issues are very different from those of euthanasia.

First of all it is important to distinguish between the artificial sustainment of the pregnancy of a brain-dead woman and the case when the pregnant mother is in a severe, terminal status but is still able to make decisions, and she has an advanced pregnancy. We know a lot of similar cases from the medical literature (39), and in situations when the mother is able to make decisions, she decides, but if she is no longer competent her relatives, acting as substitute decision-makers, make the decision representing her will. It means

<sup>(34)</sup> Art. 459, § 28, Crim. C. defines business-like manner when the source of income comes from repeatedly committed crimes.

<sup>(35)</sup> Art. 175, § 3, b), Crim. C.

<sup>(36)</sup> Art.175, § 4, Crim. C.

<sup>(37)</sup> This provision is also kept in the new 2012 Criminal Code. C. "Egészségügyi önrendelkezési jog megsértése", art. 218.

 $<sup>(38) \ \</sup> See: http://figyelo.hu/cikkek/92-nappal-az-agyhalal-utan-adott-eletet-gyerekenek-egy-debreceni-anya.$ 

<sup>(39)</sup> Such as in the Angela Carder case in US (In re A.C., 533 A.2d 611, 612 [D.C. 1987]).

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that in these cases the personal autonomy rights of the patient govern. If she cannot express her will, the closest relatives may express her wishes. It is even a much more complex situation when the patient should be declared dead and the pregnancy is still in an early stage. In this case, if the efforts for the prolongation of life failed, declaration of death means the death of the foetus, as well. If the pregnancy is already in an advanced stage, the mature foetus may have been delivered with C-section and sustained in an incubator; but in such cases when there are several months left of the pregnancy and the pregnant mother dies, generally there is nothing to do but accept that the patient has deceased.

Finding a legal solution is made even more difficult by the fact that we have to consider the status of the body as different in a man versus a woman in the case of reproduction. While a woman can carry to term the foetus even after the death of her husband (and it is legal according to Hungarian law), it is generally not possible after the death of a woman. Only in extreme cases can artificial support of a woman's bodily functions be maintained to save the life of the foetus but this may also infringe on the dignity of this woman

Due to the improvement of reproductive technologies nowadays a lot of posthumous pregnancies and births take place after the death of the father, but in case of the prolonged coma or terminal status of a pregnant woman who is no longer able to carry the burden of pregnancy, there are much more difficult medical and ethical questions which have to be answered. Should the medical team allow keeping the body functioning as an incubator, which is only possible in exceptional cases, in agreement with the presumed will of the woman either declared by her during her life or being represented by her relatives? Otherwise the world of  $The\ Matrix^{(40)}$ would come to life and it could inevitably result in the woman's body being considered as a human incubator that is kept alive like a machine.

In most countries, if we would like to use the current legal regulations as points of reference, we can only build on distant analogies regarding the pregnancy of a brain-dead mother. It is because regulations of abortion or prenatal care do not apply to

(40) In the science fiction movie, Matrix the machines "grow" humans to provide a source of power.

a brain-dead woman. Law deals with these issues in terms that the woman is still alive or perhaps as a terminal patient. In case of a deceased person, law deals with regulations concerning organ transplantation or autopsy at most.

Although at the moment the number of such cases seems to be very low, however, as intensive care develops, the number of potential conflicts between the wish of family members and the medical team may significantly grow in the future. Therefore - in my opinion - the artificial prolongation and sustainment of life and pregnancy of a brain-dead mother will soon require a regulation that is based on the declarations made by the dead person during her lifetime(41). In the absence of such statement a careful ethical assessment may become necessary. In my view the general right of refusing medical treatment cannot be applied in these cases, as we are not talking about a patient who faces life-threatening danger or terminal status but about the cadaver of a brain-dead person. Neither can the restriction of the personal autonomy right of a pregnant woman come into question (which I believe has become quite broadly applied in the healthcare law of Hungary), because this is a profoundly different situation. Besides the personal autonomy and mourning rights, the stage of the pregnancy must also be taken into consideration. The case of a viable foetus can be judged differently than that of an unviable foetus in the case of an early pregnancy, when the body of the mother is used only as a biological machine operated as an incubator. There are definitely such women who in their wills request that the life of their foetus be sustained at any cost given their family background or to ensure the survival of descendants. But there can be cases when the proper family background does not exist, and the mother would like to pass away with dignity without further intervention on her body. This must also be respected. Of course, there are such cases when the request of the mother during her life or of the family after her death is vain, since the survival chances of the foetus are slim and the likelihood of birth defects very high, and therefore their request related to the sustainment of the pregnancy is unfeasible from a medical aspect. A brain-dead pregnant woman represents such a

<sup>(41)</sup> B. GYÖRGY and F. BÉLA, "Eletem legszebb töténete" (The Most Beautiful Story in my Life), Magyar Narancs, available at: http://magyarnarancs.hu/tudomany/prof-dr-ballagyorgy-ujszulottgyogyasz-prof-dr-fulesdi-bela-intenziv-terapias-szakember-a-de-oec-elnokees-dr-torok-olga-szulesz-egyetemi-docens-89731.

complex legal case that has been created by the latest technological possibilities of intensive care, and in which the rules of abortion or the right to refuse medical treatment cannot be applied. The regulations concerning the removal of organs from a cadaver are the ones that may be the closest legal situation to apply, though in a legal sense the foetus is not considered a cadaver organ. Based upon the known international cases we can conclude that serious legal debates arise mainly when the family, in particular the husband (life partner), makes a decision that is different from that of the medical team. I believe that the body of a pregnant woman cannot be considered as a mere object either in her lifetime or after her death, since if it were so, the principle of equal respect of women and their dignity would be damaged. New medical imaging technologies now contributed to the perception that the human foetus is seen as more 'living', it is more personalized. We should be glad to be able to save the lives of more and more foetuses and new-born babies nowadays, but dying should also be respected.

### CONCLUSIONS

As we have seen in Hungary the protection of the human body and personhood are closely intertwined concepts in the law. We protect the person, not just the human body, when the law expresses respect for the origin of the cell, tissues and organs. Principle of non-commodification is perhaps the only body-bound and particularly European concept, based on the notion of human dignity but further elaborated in the Oviedo Convention in the context of biomedicine. Still the core element in this principle can be found in the concept of human dignity. One may assume that the protection of the human body can be examined in isolated cases of cadaver donation and in the case of brain dead pregnant women. But in those cases when the person is no longer capable of expressing his/her wish, the law takes into account either the previously expressed wish alone or its interpretation by close relatives. As it follows, even in these extreme cases there is a constant search and respect for human dignity, as the protection of the human body refers to the broader notion of personality rights.

# THE PROTECTION OF THE HUMAN BODY IN ITALY ETHICAL AND LEGAL PRINCIPLES

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#### I. – The human body and the person

The Italian legal system is an integral part of the tradition of Roman law, as is the case in most European countries. The Italian Civil Code of 1942 is inspired by both the Napoleonic Code (1804) and the German Civil Code (BGB, 1900). The key principles underlying the protection of the person and the human body are therefore common to all legal systems in Continental Europe deriving from these two civil codes. As a general principle, the issue of the protection of the person is quite close to the Romano-Germanic legal tradition. The German Pandectist school of the 19th century, in particular, brought the principles of Roman law from the Justinian compilation into the rights of the person: non-commercial subjective rights. Non-commercialisation is the element that characterises all rights relating to the human person. We traditionally use the expression "personality rights" to qualify subjective rights of protection.

The human body has never been part of legal discourse: it has only recently begun to be included in legal analysis, with the emergence of biotechnology, as we will see later. The jurist's reasoning uses representative symbols, models passed down for over two thousand years. These are (legal) forms that symbolise the material reality. Rather than referring to the human body, the jurist uses concepts such as "the person" or "the subject of law". The legal world is like a mirror that reflects the image of a man without a body. The legal element he relies on is not the body, but its likeness. The legal element is a formal element,