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Bioethics in Democracy: Transforming the Clash of Absolutes into Human Rights Issues

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Summary

Unavoidable social consequences of its practices made bioethics a public policy field rather than merely an academic discipline. Such a development unavoidably implies governmental interpretation, action, inaction and decision-making regarding bioethical issues and practices, which further means that in setting bioethical standards, apolitical bioethics is not anymore a dominant form of discourse. For policy purposes human rights approach has become a dominant approach, particularly on the international level. International human rights law has already offered guidance on how to regulate medical and bioethical practices in order to protect individual interests that might collide with biotechnological advances or scientific research. Yet, while in the context of bioethics the rights talk in some cases can serve as the best framework to articulate moral consensus, in others, rights recognition can make the issue additionally mooted and invisible. The purpose of this chapter is to assess advantages and limits of the approach and examine whether it has led to a closer agreement on some of the thorniest topics, including euthanasia, cloning and abortion.

1. Introduction

Presenting a set of the most important constitutional issues including constitutionalism, democracy, the protection of fundamental rights and separation of powers, two American authors, Vicki Jackson and Mark Tushnet, begin their textbook on Comparative Constitutional Law with a chapter on abortion. The opening chapter comprises of the text and discussion on major abortion decisions from three different constitutional democracies – the United States, Canada and Germany.[1] For many who deal with constitutional law, this may be quite odd. Yet, Jackson and Tushnet's approach, although unexpected, can be easily justified. For quite a while, bioethics has ceased to be only a branch of applied ethics predominantly concerned with establishing what is a good and what is a bad conduct in medical settings and medical research. Today, there are a lot of examples showing that bioethics is about politics and politics is about power. This is valid not only for the national politics. Bioethicalization of politics has occurred even in the field of foreign relations. For example, in the process of Poland's accession to the European Union, a stumbling block in the negotiation process turned out to be the abortion policy. Polish representatives eventually obtained a reservation clause in which they announced that the government of Poland "understands that none of the provisions in the relevant treaties shall disturb the right of the Republic of Poland to regulate on issues of moral importance and concerning the protection of human life".[2]

[1] See Vicki Jackson and Mark Tushnet, *Comparative Constitutional Law*, (New York: Foundation Press; 2nd ed. 2006) 2-137.

[2] See more in Miriam Aziz, Constitutional Tolerance and EU Enlargement: The Politics of Dissent? in Spreading Democracy and the Rule of Law?, (ed.) Wojciech Sadurski et al. (Springer , 2006) 237-261.

The transformation of bioethics to biopolitics has been unavoidable, having in mind that many bioethical decisions are socially consequential. Therefore, as much as bioethical policymaking can rarely be free of politics, at the same time bioethical issues shape political agendas and play a significant role in electoral and everyday politics.

Additionally, social consequences of bioethical decisions have transformed some bioethical issues into human rights issues making thus globalization of bioethical policies more likely.[3] The language of rights has been used to address human rights challenges arising from an increasing number of issues, ranging from abortion, assisted suicide and organ donation to cloning, stem-cell research and genetic engineering. The most important policies to protect individual interests and avoid abuses in this area have already been formulated in terms of rights – respect for human dignity, the right to autonomy and self-determination, the right to informed consent, the right to refuse treatment, the right to privacy, the right to know and not to know and the right to physical and mental identity, illustrate the point.[4]

This tendency has been the reason for some authors to claim that human rights will eventually replace bioethics.[5] Others claim that human rights strategy in the context of bioethics could facilitate promotion of moral consensus better than any other concept designed to help us decide what is morally right.[6]

This chapter considers human rights strategy in resolving some of the thorniest bioethical issues such as euthanasia, cloning and abortion. My main aim is to show that eclecticism in allocating moral and legal responses regarding different bioethical practices is unavoidable as long as it is compatible with international human rights standards. Thus, nothing I will say in this chapter is meant to delegitimize the human rights protection within the context of bioethical policies. However, I will show that while in some cases rights talk can serve as the best framework to articulate moral consensus, in others, rights recognition can make the issue additionally mooted and invisible.

By way of preamble, it is worth showing the political aspects of the contemporary bioethics debate, since the eventual transformation of some bioethical issues to human rights issues inevitably occurs within political setting.

2. Bioethicalization of Politics

Vatican's decision announced on June 29, 2006 that it would excommunicate any woman, scientist or politicians who participated in or facilitated research on embryonic stem cells hardly came as surprise to anyone.[7] Being an ecclesiastical entity based on a particular

[3] See UNESCO Universal Declaration on Bioethics and Human Rights, adopted by consensus in 2005.

[4] For more see e.g. Roberto Andorno, Global Bioethics at UNESCO: In Defense of the Universal Declaration on Bioethics and Human Rights, (2007) *Journal of Medical Ethics,* vol. 33, 150-154.

[5] See e.g. Thomas Faunce, Will International Human Rights Subsume Medical Ethics? Intersections in the UNESCO Universal Bioethics Declaration, (2004) 34 Journal of Medicine and Philosophy 296. For the response see Richard E. Ashcroft, Could Human Rights Supersede Bioethics?, (2010) 10 Human Rights Law Review, vol. 10, 639-660.

[6] Jonathan Mann, *Health and Human Rights,* (1996) British Medical Journal, vol. 312, no. 7036, 924-925.

[7] See in R. Alta Charo, *Politics, Progressivism, and Bioethics*, in Jonathan D. Moreno and Sam Berger (eds.), *Progress in Bioethics: Science, Policy, and Politics*, (Cambridge, Mass.: The MIT Press, 2010) 58.

religious philosophy, it has a sound right to decide who can be a member of the community or to prohibit bioethical policies that challenge fundamental religious beliefs.

The situation is different when it comes to similar secular attempts: such bans might become a bargaining chip for elections or might eventually end up in a constitutional crisis. The most recent example comes from Luxembourg. In 2009, Luxembourg became the third European country to legalize euthanasia. In the first reading, the country's parliament passed the law to allow assisted suicide and mercy killing by 30 votes to 26. According to then valid Constitution, in order to come to the force, Grand Duke Henri of Luxembourg should have approved and signed each parliamentary act. When it came to decriminalization of euthanasia, it turned out that the Grand Duke was on an opposite side to the Parliament. His opposition to the Bill on euthanasia led to constitutional crisis, which, in the end, brought a new constitutional arrangement. The legislature amended the Constitution so that the Grand Duke could only promulgate or formally announce the laws, rather than approve them. In other words, the Grand Duke's power to block laws was eliminated. After the Grand Duke was stripped of his executive power to veto laws passed by the parliament, the Bill on euthanasia was adopted in March 2009.[8]

Across the ocean, bioethicalization of American politics began with the *Roe v. Wade* decision, which mobilized the whole state in debating a right abortion policy and placed the abortion issue at the core of political struggles. However, it seems that bioethics was never as heavily politicized as it was in the Bush era. Hardly has any other recent issue, apart from the war against terrorism, provoked a dispute of such a level as the right to die issue has in the *Schiavo* case. Since no other case explains better the political dimension of bioethics, I will briefly summarize its contents and effects.

A personal tragedy of Tereze Schiavo, attached for ten years to life-sustaining procedures, turned to a family one when her parents stood against her husband's request to discontinue such treatment. Schiavo's husband petitioned the trail court to authorize termination of life prolonging treatment. By clear and convincing evidence, the trial court found that Tereza would have authorized the termination if she were competent to make a decision herself. A national and constitutional drama started after the Governor of Florida, despite several judicial decisions allowing discontinuance of treatment, issued executive order to continue pro-life treatment. The Supreme Court of Florida declared the Governor's act unconstitutional because it represented an unlawful delegation of legislative authority and a violation of the right to privacy. The US Supreme Court denied hearing the case. The case culminated when the former President Bush, signed into law a bill authorizing the federal courts to review the case. His signature came after both the Senate and the House of Representatives approved the bill. After the courts reaffirmed all previous decisions, Tereza Schiavo was finally "allowed" to die.[9]

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[8] Available at http://www.independent.ie/world-news/europe/duke-will-lose-veto-rights-over-bid-to-block-euthanasia-1562908.html. At present, the jurisdictions that allow some or all forms of a physician's assistance in dying are still in minority: the Netherlands, Belgium, Luxembourg and two American states, Oregon and Washington. For a detailed discussion on euthanasia see Violeta Beširević, *Euthanasia: Legal Principles and Policy Choices,* (Florence: European Press Academic Publishing, 2006).

[9] See *Bush v. Schiavo,* 885, So 2d 321 (2004 Fla.). See also Violeta Beširević**,** *The Gods Must be Crazy: Does a Constitution Speak about Bioethics?* (2007) 1 The Annals of the Faculty of Law Belgrade, International Edition, 120-121.

The constitutional ramifications of the *Schiavo* case could have been profound. The dispute involved the federal legislature, the President, the state's Governor and the courts. If the legislature, with the assent of Governor, had succeeded in what was attempted in this case, not only the judicial branch would have been subordinated to the will of other branches, but the individual rights including the traditionally protected right to self-determination would be severely curtailed. On the other hand, as Charo noted, the dispute could have been avoided if the members of the House of Representatives had not feared the ten-second spot "And he voted to kill poor Terri Schiavo" in the next election cycle.[10]

The fact that among the first decisions rendered by the president Obama, there was a decision to lift the ban on stem cell research from public funds (imposed by the Bush administration), further exemplifies the political dimension of bioethics. Thus, at the same time when he decided to close Guantanamo Bay, the President Obama sent a clear message that he was not afraid of human genetic enhancement.

Finally, the interplay between direct democracy and regulation of end-of-life decision making additionally shows that apolitical bioethics is slowly dying. Direct democracy is the political process that enables citizens themselves to draft and enact laws: it is lawmaking by initiative instead of lawmaking by the parliament, which is a regular way to enact laws in representative democracy. In both American states that have legalized physician-assisted suicide, Oregon and Washington, the change is the result of true grass-roots lawmaking – the laws legalizing assisted suicide in both states were enacted through citizen initiative. Whether, however, direct legislation damages rather than enshrines constitutional democracy is a different matter.[11]

If the relationship between bioethics and politics is so obvious, then the issue is: can bioethics transcend ideology? One way to do so is to transform bioethical practices into human rights claims. Consider some effects of such transformation.

3. Advancing the Hard Issues by Means of Rights

Bioethics is overfilled with controversial issues on which as Berns once noticed "there can be only one winner and one loser".[12] If placed under control of electoral majority, acrimonious questions like for example abortion, cloning or euthanasia, would induce governmental crisis or even paralysis or intensify political animosities. To avoid such a scenario, some countries opted to cast a debate into rights terms since rights talk tends to depoliticize the issues, hinder social conflict and cements further dialog. Yet, it is questionable whether the rights strategy has brought moral consensus closer or resolved the conflict in legally sound ways. Regulation of end-of life issues, cloning and abortion are good cases in point.

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[10] Charo, *Politics, Progressivism, and Bioethics, supra* note 7, 51.

[11] For paradigms to legalize euthanasia, see e.g. Beširević, *Euthanasia: Legal Principles and Policy Choices, supra* note 8, 361-376.

[12] Walter Berns, *Taking Rights Frivolously*, in *Liberalism Reconsidered*, ed. Douglas Maclean and Claudia Mills (Totowa, N.J.: Rowman &Allenheld, 1983) 62.

3.1. Euthanasia Revisited: Unreasonable Distinctions

At present, most countries allow refusal of any recommended treatment including that of life saving or life sustaining.[13] In rendering non-treatments legal, much help has come from the rights talk: a consensus has been reached that a competent patient has the right to forgo pro-life medical treatment. Such consensus was almost exclusively built on the notion of individual autonomy and self-determination, which materializes by way of express and informed consent. Countries, however, took different position as to whether autonomy, which underscores the right concerned, has acquired meanings of bodily integrity, privacy, liberty or dignity. They also differ regarding the issue of whether a personal choice to refuse pro-life treatment classifies for constitutional or only for reduced level of protection. For example, the constitutional protection has been assumed in the United States. In other countries, the right to forgo life sustenance has been framed as a statutory or common law right or both. In a nutshell, an argument from autonomy (somewhere, like in Hungary, in combination with dignity), despite different regulatory regimes, proved to be a strong basis for upholding an assumption that life is not preferable to death in circumstances of painful and incurable illness.[14]

Now, although in my opinion the initial position is very similar, the situation differs dramatically with regard to legalization of active euthanasia in terms of individual autonomy. What minority asserts is that the respect for personal autonomy entitles a terminally or incurably ill person to decide about the time and manner of their death. Just as a person has the right to determine the course of his or her own life, a person also has the right to determine the course of his or her dying. Their further point is that the fundamental value of autonomy would be violated if others (the state, the doctor) continue a person's life against his will, which would make that life the one without freedom and autonomy. Therefore, the right to end life with assistance should be recognized, as it has been the case with the right to refuse any kind of medical treatment.[15]

However, there is a firm opposition to these allegations: a great majority of members of contemporary debate on euthanasia zealously argues that active euthanasia is not about autonomy because the value of autonomy lies not in making just any choice but the choices which are consistent with sound moral values. For the time being, this is official position in the most jurisdictions and there is no intimation that the right to forgo any kind of medical treatment could be transmuted into a right to end life with assistance. Active euthanasia, that is mercy killing and physician-assisted suicide, has been forbidden in most jurisdictions, while both or some forms have been legalized in the Netherlands, Belgium,

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[13] For US position see *Cruzan v. Director Missouri Department of Health*, 497 U.S. 261, 286 (1990); for UK position see *Re T* (adult: refusal of treatment) (1992) 4 All ER 649; *Airedale NHS Trust v. Bland* (1993) 1 All ER 789; for Canadian reference see *Rodriguez v. British Columbia (Attorney General)* (1993) 3 S.C.R. 519; *Nancy B. v. Hotel-Dieu de Quebec*, 69 CCC (3d) (1992); *Ciarlariello v. Schacter*, (1993) 2 SCR 119; for the position in Australia see *Secretary, Department of Health and Community Services (NT) v. JWB and SMB*, (1992) 66 ALJR 300; for the position in the European countries see Council of Europe Steering Committee on Bioethics (CDBI), *Replies to the Questionnaire for member states elating to euthanasia* (2003), http://www.coe.int/t/dg3/healthbioethic/activities/09_euthanasia/default_EN.asp?

[14] For a detailed discussion, see Beširević**,** Euthanasia: Legal Principles and Policy Choices, supra note 8, 157-260.

[15] Ibid. 26-27

Luxemburg, the American states of Oregon and Washington and Switzerland. To this list, one should add Colombia and Japan, although their official position is not clear.[16]

Among countries that have legalized some or all forms of active euthanasia the rights based strategy was successful in Belgium, Columbia and Japan. In Belgium, autonomy turned out to be a legitimizing principle in legalizing all forms of active euthanasia.[17] The Colombian High Court, which is the court to decide constitutional issues in this country, in a six to three decision, ruled that no person should be held criminally responsible for taking life of a terminally ill patient who had given clear authorization for doing so. The reasons for such a ruling were grounded on the determination that an individual's autonomy in some circumstances prevailed over the state duty to protect life.[18] Similarly, in Japan, the Yokohama District Court in the *Tokunaga* case emphasized that the patient must express a clear wish to end life before a doctor may assist the request.[19]

In other countries where active euthanasia is permissible, the rights talk has been of no help in making all or some of its forms legal. Even though the patient's request is a prerequisite for lawful active euthanasia in the Netherlands, autonomy has never been the legitimatizing principle. The Dutch preference for active euthanasia has more to do with insistence by doctors and the Medical Association that under certain circumstances euthanasia is a legitimate medical procedure, than with a demand for individual rights. In 1984, the Dutch Supreme Court ruled that the respect for the right to self-determination and assistance to a fellow human being in need, guarding his dignity and ending his unbearable suffering, cannot be considered a view so generally accepted as correct throughout society, that it can support conclusion that euthanasia is legally permitted and therefore not punishable.[20] As soon as the autonomy argument had become disputable, the Dutch shifted the focus of the discussion from patients and their autonomy to doctors and their responsibility under criminal law and allowed mercy killing and physician assisted suicide upon the doctrinal principles of criminal law. In short, the existence of the right to die has never been an issue in the Netherlands.

Yet, when placed under international human rights scrutiny test, the issue whether autonomy embraces a choice of when and how to die, has been differently resolved. Namely, reservations about the potentials of fundamental value of autonomy to legitimize active euthanasia have been exploded by the ruling of the European Court of Human Rights in the case *of Pretty*. In this case, the Court clearly spelled out that personal autonomy in the sense of the right to make choices about one's body, including that of when and how to die is a fundamental concern epitomized in the concept of private life protected by the Article

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16 Columbia's highest court decriminalized euthanasia law in 1997. However, Columbia's Congress has never transformed the decision into a piece of legislation. In Japan, despite a clear law against euthanasia, two court decisions (from 1962 and 1995) laid out criteria that a physician must meet to perform active euthanasia for a patient legally.

17 For more see John Griffiths, Heleen Weyers and Maurice Adams, *Euthanasia and the Law in Europe*, (Oxford: Hart Publishing, 2008).

18 See in Norman Dorsen, Michel Rosenfeld, András Sajó and Susanne Baer (eds.), *Comparative Constitutionalism,* (St. Paul MN*:* Thomson West, 2003) 568.

19 See Alison C. Hall, "To Die With Dignity: Comparing Physician Assisted Suicide in the United States, Japan and the Netherlands", (1996) 74 Washington University Law Quarterly 803, n. 202, n. 211.

20 See the *Schoonheim* case. The English translation is available in John Griffiths, Alex Bood and Helen Weyers, *Euthanasia & Law in the Netherlands*, (Amsterdam: Amsterdam University Press, 1998) 325-326.

8 of the European Convention of Human Rights.[21] Thus, the enmity of those who oppose legalization of active euthanasia cannot anymore be lavished on autonomy, at least not within the European jurisdictions. Whether this right should be given a modicum of effectiveness is a different issue.[22]

In sum, the contested nature of the right to self-determination still represents an obstacle to make, under certain conditions, active euthanasia legal in presence of terminal illness. Consequently, being indeterminate, rights can sometimes obstruct rather than promote moral consensus.

3.2. Cloning Revisited: False Foundations?

Incompletely theorized agreements on a concrete specification of rights can also make the contested bioethical practice additionally mooted and invisible.[23] Making reproductive cloning illegal by using the language of rights shows how unduly assertive the language of rights can be in promoting moral consensus. I shall justify this claim by summarizing important aspects of human dignity and the right to life placed at the core of the legal ban.

Human dignity and the right to life are currently viewed as the main safeguards against cloning of humans. The UN Declaration on Human Cloning, adopted without a consensus in 2005, invites countries to prohibit all forms of human cloning inasmuch as they are incompatible with human dignity and the protection of human life.[24] Some recently adopted constitutions include the prohibition of human cloning, as well. The Serbian and the Montenegrin constitutions include this prohibition within scope of the right to life.[25] I will now examine how controlling dignity and life as legal values can indeed be in the adoption of anti-cloning laws.

As a legal value, dignity has not gotten one particular meaning, nor has it been precisely defined. In Germany, human dignity is raised to the level of the highest constitutional value and a source of all other rights. The same is valid for Hungary. Although the French Constitution of 1958 does not refer to dignity, in so-called bioethics decision of 1994, the French Constitutional Council reminded that human dignity had been reaffirmed and proclaimed in the preamble of the 1946 Constitution and concluded that the protection of human dignity against all forms of enslavement or degradation was a principle of constitutional status. According to the Supreme Court of Canada, dignity, within the meaning of equality, is one of the underlying principles upon which the Canadian society is based, despite of the textual insufficiency in the Canadian Charter of Rights and Freedoms. The

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[21] *Pretty v. the United Kingdom*, Application No. 2346/02, Judgment of 29 April 2002, para. 62 - 64.

[22] The European Court of Human Rights did not find in *Pretty* that the blanket ban on assisted suicide violated Article 8 of the European Convention of Human Rights because such interference with one's personal choice was justified as necessary in a democratic society, for the protection of the rights of others, particularly of the weak, vulnerable and those not in a position to make decisions about assistance in ending life. See *Pretty v. the United Kingdom*, para. 74.

[23] Yet, Sunstein argues that societies often have incompletely theorized agreement on a general principle – incompletely theorized in the sense that people who accept the principle need not agree on what it entails in particular cases. See in Cass Sunstein, *Designing Democracy: What Constitutions Do*, (*Oxford, New York*: *Oxford University Press*, 2001) 56.

[24] See 59/280 UN Declaration on Human Cloning, section (b).

[25] See Article 24 of the Serbian Constitution and Article and Article 27 (2) of the Montenegrin Constitution.

American Constitution is also silent on the issue of human dignity. It is not quite clear what has prevented the United States Supreme Court to develop a comprehensive concept of human dignity, but a concept, similar to the German or Canadian, which would give meaning to the human dignity slogan, is notably absent from the American constitutional jurisprudence. The point is that in the American constitutional system other values – including liberty, autonomy, free speech or privacy have been used in adjudicating issues that in essence concern dignity.[26]

There is another point. Within a particular constitutional system, the meaning and significance of dignity are conditioned largely by historical and cultural factors as well as constitutional tradition. On one hand, it is claimed that human dignity is a notion, which precedes human rights and that – as a concept – it belongs to the pre-political or pre-judicial realm. On the other hand, by using the terminology of rights, it is described as the right to be recognized as a person, the right to have rights or the right not to be humiliated. It has also been articulated as the right to subsistence. Sometimes the meaning of the right to dignity overlaps with other rights – in particular with the right to liberty, privacy or personal autonomy or it acquires the meaning of equality. Therefore, no matter how ethically strong the human dignity concept may be, it is questionable whether it has anything to add to the legal argument with regard to the ban of reproductive cloning in many countries where human dignity does not represent the source of law.[27]

The same conclusion can be reached with regard to the right to life. The revolution in medical technology has contributed to the prominence of the sanctity of life doctrine, which appears in religious and secular form. Common for both forms is that human life is inviolable, has intrinsic value and therefore must be respected and preserved. Unlike ethics, the judicial jurisprudence has rarely dwelled on the issue of what makes life sacred. For instance, American courts have recognized the sanctity of life as a significant state interest in balancing against the patient's right to refuse pro-life measures, but the case law is often short of explanation of what makes life sacred.[28]

In addition, although the right to life is chiefly understood as the right not to be killed in an arbitrary way, the right to life has several different aspects. Take for example the right to have one's life saved, absent from the American legal system, but codified as a legal obligation in most European countries. There is also a discussion about the right not to be born, which has even gotten a short-living judicial confirmation in France, and the opposing claim – the right to be born, which is a central claim in many countries against abortion or therapeutic cloning.[29] Since it is suspected that human cloning will bring about detrimental consequences for human life, one may claim that this necessarily implies the existence of the right to a good life, which is strongly supported in making non-treatment decisions and zealously rejected with regard to active euthanasia.

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[26] For a detailed discussion see Violeta Beširević, *Unlocking Human Cloning: Does A Constitution Help?* , in *Perfect Copy? Law and Ethics of Reproductive Medicine*, ed. Judit Sándor, (Budapest: CEU Center for Ethics and Law in Biomedicine, 2009) 97-116.

[27] Ibid. 105.

[28] For more see Beširević**,** Euthanasia: Legal Principles and Policy Choices, supra note 8, 101-106.

[29] For the right not to be born see the *Perruche* judgment of the Civil Supreme Court delivered on November 17, 2000. However, the *Perruche* judgment was overruled in 2002 by the French Parliament, which adopted the law envisaging that "no one can sue for damages for the sole fact of their birth".

With regard to human cloning, the claim has been made that the right to life implies that all persons "have the right to have been conceived, gestated, and born without genetic manipulation."[30] In other words, this approach implies the existence of the right to have been born in a certain way. The alleged right to have been born in a certain way may question the existence of the right to be conceived in a manner which does not require sexual intercourse – with the help of artificial insemination and *in vitro* fertilization, which are now established methods of procreation. Moreover, one can claim that this is not a fair reading of the right to life and point out that the right to life primarily implies protection against the arbitrary taking of life. Therefore, human reproductive cloning does not threaten the right to life because it is the process aimed at creating life and not taking of human life.[31] Thus, although I do not consider the right to life as a strong argument in favor of reproductive cloning, I found it to be an equally weak point against this procedure.[32] This has been recognized in the EU Charter of Fundamental Rights, which is now the legally binding instrument for the EU member states, where reproductive cloning is banned within the provision guaranteeing the right to the integrity of the person.[33]

I also want to refer to the argument that human dignity needs to be protected because it is closely connected with the right to life, which in itself implies the right to make choices about one's life. In other words, the right to life, linked with autonomy, is an important reason to protect human dignity. On this point, one should emphasize that a similar claim has been made in the discussion about active euthanasia. To remind: an applicant in the case of *Pretty* claimed that the right to life was about decisional autonomy, but the European Court of Human Rights resolutely rejected this assertion.[34] The right to life, the Court argued, was unconcerned with issues related to the quality of life or what a person chose to do with his or her life. According to this court, this was the issue of the right to privacy. Accordingly, it is not that the issue of decisional autonomy has not gained recognition under the law – it has – but this has not occurred with a scope of the right to life. The Hungarian Constitutional Court, prone to support a link between the right to life and human dignity, explained in its euthanasia decision that the unity of the right to life and dignity applies only in the context of one's life being arbitrary taken by others.[35]

To recap – it is highly questionable whether the practice of reproductive cloning falls within the ambit of the right to life or some other constitutional guarantee has a stronger potential to justify the state interest in regulating this issue. It is also questionable whether the request to respect human dignity always implies prohibitive regulatory regime regarding human cloning. In those jurisdictions where human dignity is a source of law, like in Germany or Hungary, argument against reproductive cloning may be stronger than in jurisdictions where this request is not articulated as a fundamental principle of law. In other countries, human dignity and the right to life mostly serve in drafting symbolic rather

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30 See the approach of the American NGO – *Council for Responsible Genetics*, defined in the Article 10 of its Model Law on Genetic Rights, (2000) 13 GeneWatch 3.

31 See Stephen P. Marks, Tying Prometheus Down: The International Law of Human Genetic Manipulation, (2002) 3 Chicago Journal of International Law 115, 126.

32 Beširević, Unlocking Human Cloning: Does A Constitution Help?, supra note 26, 107.

33 See Article 3.

34 Pretty v. the United Kingdom, para. 39.

35 Decision 22/2003 (IV. 28.)

than meaningful anti-cloning legislation. At this stage of the scientific development, I am prone to support a provisional ban on reproductive cloning based on a stronger constitutional ground than it is the right to life and human dignity. That for example, could be the interest to protect public health and safety or the right to physical and mental integrity.[36]

3.3. A Short Note on Abortion

The final claim I want to examine is the claim that rights talk legitimizes a particular view in the debate and thus does not allow democratic legislators to work out compromises. To support such a conclusion, an example of abortion regulation in the United States is usually offered. Namely, ever since the US Supreme Court has ruled that, within first trimester of pregnancy, abortion is about a woman's right to choose, despite different signals and still ongoing moral debate, it has become obvious that the Supreme Court would not question legality of abortion.

Some argue that this approach shows no respect for community interests and views of those who see abortion as murder.[37] This is an issue which requests longer analysis, but for the purpose of this discussion, I would suggest that a different approach does not make more room for compromise, either. Take for example the situation in Germany. Unlike the US Supreme Court, the German Constitutional court had twice ruled in favor of the state obligation to protect fetal life and stayed silent on the woman's right to choose. Yet, such an approach has not rendered current regulatory regime in Germany remarkably different from that in the United States. In both countries, under certain conditions and after various informational, counseling and waiting restrictions, abortion is generally available early in the pregnancy, while later in the pregnancy it is available to protect the life or health of the mother, as well as in cases of serious fetal deformity, rape or incest.[38] Accordingly, regulating abortion by means of representative democracy is not necessarily more compromise oriented than it has been the case of the regulation in terms of rights.

4. Concluding Remarks

Unavoidable social consequences of its practices made bioethics a public policy filed rather than merely an academic discipline. Such a development necessarily implies governmental interpretation, action, inaction and decision-making regarding bioethical issues and practices, which further means that, in setting bioethical standards, apolitical bioethics is not anymore a dominant form of discourse. However, as I have shown in this chapter, it is not only that bioethics has been transformed into biopolitics but also bioethical issues have become a significant bargaining chip in electoral and everyday politics.

Generally, public policy can be defined as a decision or action of government that addresses problems and issues forming the foundation of laws. Human rights approach has become a dominant approach in setting bioethical standards, particularly on the interna-

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[36] Beširević, Unlocking Human Cloning: Does A Constitution Help?, supra note 26, 110.

[37] Mary Ann Glendon, Abortion and Divorce Law in Western Law: American Failures, European Challenges (Cambridge, Mass.: Harvard University Press 1989).

[38] See more in Richard E. Levy and Alexander Somek, *Paradoxical Parallels in the American and German Abortion Decisions*, 9 Tulane Journal of International and Comparative Law 109 (2001).

tional level. For policy purposes, international human rights law has already offered guidance on how to regulate medical and bioethical practices in order to protect individual interests that might collide with biotechnological advances or scientific research.

While in the context of bioethics the rights talk in some cases can serve as the best framework to articulate moral consensus, in others, rights recognition can make the issue additionally mooted and invisible. Thus, it is self-evident that no medical treatment or research should be carried on without an individual's consent or amount to torture or degrading treatment; it is also self-evident why the right to privacy, non-discrimination or access to urgent medical care must be guaranteed. However, as I have shown, it is not self-evident that human rights approach brings moral consensus on some controversial bioethical practices including euthanasia and abortion closer, or qualifies as superior policy form for their regulation. In addition, I have also shown that human rights approach neither always implies a meaningful response for drafting anti-cloning laws. Thus, eclecticism in allocating legal responses regarding different bioethical practices is unavoidable. Whether the law has a right to impose morality is, however, the issue for a different discussion.