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Future Persons and Legal Persons: The Problematic Representation of the Future Child in the Regulation of Reproduction

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Abstract: Increasingly, the law has been paying attention to the future child and the prevention of preconceptual harms. Regulation on procreation often appeals to the future child's interests in order to justify the prevention of the child's existence. However, besides bioethical critique, there is also a legal-theoretical problem that has been neglected so far. This article argues that the future child whose existence is prevented by an appeal to its own interests does not fit in the "regular" concept of law's subject: the legal person. This creates two representation problems: First, the law lacks the proper vocabulary to address and represent this non-existent entity. Second, the appeal to its own interests as a justification of the prevention of the child's existence creates a paradox, as the future child is treated as a subject and a non-subject at the same time. These two representation problems complicate the way law can "deal with" this singular entity. Since the vocabulary of the legal person is not equipped to articulate the future child, this article argues that further research is needed to understand what the future child is and how it functions in law.

Keywords: future child; preconceptual harm; legal person; non-existence; regulation of reproduction; representation

1. Introduction

In several Western legal systems, there has been an increasing amount of attention paid to the future child. Nowadays, we know more about risk factors linked to the child's existence that may cause physical or psychosocial harm, such as parents who lack the ability to raise a child, or severe genetic conditions. Since these types of risks can only be prevented before the child is conceived, the only way to prevent harm is to take the interests of the child into account before the child's conception. The interests of the future child constitute a normative guideline in the regulation on procreation issues. For example, restrictions on the use of assisted reproductive technologies (ARTs) and access to fertility treatments, or the criteria for embryo selection, are justified with an appeal to the future child's interests. What is important is that this regulation can result in the prevention of the future child's existence. This prevention is justified by the assumption that it is in the future child's interest not to be born at all. Some even claim that some children have a *right* not to be born [1]¹.

¹ Analogously, Buchanan *et al.* claim that every individual has a right not to be born into a life not worth living and that in most cases this right is respected, since most individuals have a life worth living. However, as will be discussed later, only in a limited number of cases a life not worth living can be assumed, so it might be that Vlaardingerbroek would still attributed a right not to be born to a case pertaining a life worth living. See ([2], p. 236).

The appeal to the future child's interests as a justification for legal measures has received much criticism, in particular in the bioethical debate². The most important point of critique, based on Parfit's non-identity problem ([6], p. 351), is that the appeal to the best interests of the future child cannot serve as a justification; since the children in the cases mentioned in this article will most likely have a life worth living, it cannot be assumed that they would be harmed by being brought into existence and that it therefore would be better for the child not to be born at all. Moreover, it has been argued that non-existent entities are not able to have interests [7] and that the anticipation of the future child by law by means of the so-called welfare principle is unjust, disingenuous and incoherent [8,9].

Despite this criticism, it is a fact that the future child gains increasing attention in law and that the appeal to its interests serves to justify regulation on procreation. For this reason, it is important to look further than the wrongful life-debate and entertain a legal-theoretical perspective on this issue. After all, beside the bioethical critiques, the rise of the future child in law also creates the *legal* question of the extent to which the law can address and represent this non-existing entity. However, up to now this question has been unaddressed.

This paper argues that the current legal vocabulary is unequipped in representing the future child. The future child is presented as a subject of interests and therefore a subject. However, it does not fit in the concept of law's subject: the legal person. The argument of this paper focuses on those cases in which the child's existence is prevented by an appeal to the future child's interests. Although this might only happen in a small number of cases, it is precisely this specific situation that has that result in two representation problems. First of all, legal vocabulary lacks the concepts to represent a non-existing entity with an interest in non-existence. Second, a representation paradox is created since the future child is treated as a subject and a non-subject at the same time.

In order to show that legal vocabulary lacks the proper concepts to represent the future child, I first elaborate several examples in which an appeal to the future child's interests is made in law (Section 2), in order to illustrate the role the future child has gained in law as a subject of interests. After this, I explore the extent to which the concept of legal personhood can be applied to the future child. I will do so by systematically analyzing three perspectives on legal personhood: the naturalistic approach (Section 3), the constructivist approach (Section 4) and finally legal personhood by anticipation (Section 5). The discussion of these perspectives will lead to the conclusion in the final section that law cannot represent the future child in its traditional legal vocabulary and that the current appearance of the future child in law is paradoxical, for it is treated as a subject and a non-subject at the same time.

2. The Interests of the Future Child in Law

As a result of developments in procreation technology, we have gained more control over procreation itself. ARTs and contraception, for example, make it possible to influence who may procreate, which child will come into existence, and under which circumstances. Obviously, controlling birth and the conception of new life is a highly sensitive matter and the development of reproductive technology has led to morally sensitive questions: Should everyone have access to fertility treatment? Under which conditions is embryo selection (PGD) acceptable? Should some people be prevented from having children at all costs? These questions are addressed within regulation on procreation and can result in restrictions on the use of ARTs and access to fertility treatment. In several West European legal systems, such restrictions are usually justified by an appeal to the interests of the future child.

For example, in the ECHR case *S.H. et al. v. Austria*, the Court was confronted with the question of whether a ban on heterologous use of fertilization techniques³ was a violation of Article 8 of the

² This critique has been elaborated by among others [2–5].

³ Heterologous artificial reproduction techniques are treatments that, besides, for example, IVF or artificial insemination, involve the use of donated gametes, instead of the gametes of the couple involved. The Austrian government argued that the use of donated gametes in combination with ARTs could increase the possibilities of "selecting" a child. Moreover, they argued that it could lead to the exploitation of women and undermine traditional forms of motherhood.

Convention⁴. The right to private life ex Article 8 also covers several aspects of procreative autonomy: According to the Court, it includes the right to “respect [...] the decision to become a parent or not”⁵ and the right of a couple “to make use of medically assisted procreation techniques” for the purpose of conceiving a child⁶. The prohibition of heterologous use of fertilization techniques constituted a breach of this right. The Austrian government claimed that the ban was justified in order to protect several interests, such as the interests of the female donors, but also the interests of the future child. With the help of the current legislation in Austria (including the prohibition on heterologous techniques), the government aimed at safeguarding the future child’s wellbeing⁷ and its interest in knowing its (genetic) descent⁸.

Additionally, Italian legislation on fertility treatments illustrates that the interests of the future child provide a ground for not only banning several techniques, but also regulating access to fertility treatments. In a Review of the subject conducted by the Italian Parliamentary Commission for Social Affairs, it was claimed that the ban on heterologous techniques was necessary to prevent a violation of the psycho-social welfare of the child ([10], p. 85). Similarly, the exclusion of homosexual couples and single women from fertility treatment was justified in order to avoid “psycho-social damage to the child, which can result from parenting models which are not consolidated” ([10], p. 88).

Another example of the appeal to the future child’s interest can be found in UK law, in which “the welfare of the child” is explicitly mentioned in the Human Fertilisation and Embryology Act. Section 13(5) holds that “[a] woman shall not be provided with treatment [. . .] unless account has been taken of the welfare of any child who may be born as a result of the treatment [. . .].”⁹ Initially, the legislator did not intend this welfare principle to be an eligibility requirement; the principle merely placed a responsibility upon the fertility clinics ([11], p. 4). However, in 2005, the Human Fertilisation and Embryology Authority (HFEA) pointed out that there was considerable uncertainty about the interpretation of this principle, since the legislation provided no guidance on this point. After a survey, the HFEA concluded that the welfare of the child principle should be understood as the responsibility of the clinics to collect information from patients on possible risk factors to the child’s wellbeing. Although the principle of treatment implies that patients seeking treatment should not be easily refused, the HFEA Code of Practice states that a treatment should be refused if the fertility centre involved concludes that the resulting child¹⁰ “is likely to be at risk of significant harm or neglect” or if they “cannot obtain enough information to conclude that there is no significant risk” ([12], Section 8, 15)¹¹.

The interests of the future child are also a normative guideline in Dutch regulation on access to fertility treatments and embryo selection (PGD). The medical, professional guidelines for moral contraindications for fertility treatments¹² provide physicians with standards of conduct for excluding patients from fertility treatment based on non-medical, but moral reasons. Interestingly, the only moral reason mentioned in the protocol is “the wellbeing of the future child”. If there is a reasonable expectation that the quality of the resulting child’s life will not meet the standard of reasonable wellbeing, proceeding with the fertility treatment and enabling the child to come into existence would be a violation of that future child’s interests. This could be used as a justification for terminating the

⁴ ECHR 3 November 2011, Application no. 57813/00 (S.H. *et.al.*, *v.* Austria).

⁵ ECHR 10 April 2007, Application no. 6339/05 (Evans *v.* the United Kingdom), para. 71.

⁶ ECHR 3 November 2011, Application no. 57813/00 (S.H. *et.al.* *v.* Austria), para. 78.

⁷ ECHR 3 November 2011, Application no. 57813/00 (S.H. *et.al.* *v.* Austria), para. 65.

⁸ ECHR 3 November 2011, Application no. 57813/00 (S.H. *et.al.* *v.* Austria), para. 67.

⁹ The full section entails that “[a] woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth”, and does also take the interests of existing children into account.

¹⁰ Or any existing child of the family.

¹¹ See also ([11], p. 8).

¹² NVOG Mogelijke morele contra-indicaties bij vruchtbaarheidsbehandelingen (1.0), 4 June 2010. These guidelines are an elaboration of the physicians’ legal duty to act in accordance with the medical professional norms.

fertility treatment¹³. With regard to pre-implantation genetic diagnosis (PGD)¹⁴, the Dutch Secretary of State of Public Health stated that the treatment is only acceptable if it benefits the future child that will be born as a result of the procedure¹⁵. If the future child runs an increased risk of a serious disease, PGD is in the future child's interests, for it (as the Secretary of State claimed) provides the possibility to prevent the child from suffering from a life affecting disease¹⁶. For the same reason, selection on other grounds, such as gender or HLA-type, is not allowed, unless the future child itself runs the risk of a (gender-linked) condition. Only then would the application of the technique (also) serve the interests of the future child, and not only the interests of the parents or an ill sibling¹⁷.

Furthermore, a recurring question in the Dutch public and political debate is whether the interest of the future child can also require forced contraception. In 2010, a member of Parliament suggested that in case of "irresponsible parenthood", *i.e.*, in cases of extreme child abuse or neglect, the State should have the power to enforce contraception on parents to prevent another child being born to such parents. The MP argues that the child would have no interest in growing up with such parents, since this would constitute too much of a risk that this future child would also become a victim of neglect, abuse or poor upbringing¹⁸. Although this proposal never resulted in legislation, there is still an ongoing public debate concerning the question of whether the government should prevent children from being born in order to protect their interests and wellbeing [13–17].

In sum, these examples show that, in several West European legal systems, the assumed interests of the future child are used as an important justification for restrictions on the use of procreation techniques and access to fertility treatment. In some cases, as in the Dutch medical professional guidelines, it is the only justification. The appeal to the future child's interests has several implications, however. First, when the interests of the future or resulting child are taken into account, the "child" is not conceived. Therefore, the interests are attributed to an entity that does not even exist, making this "future" child the subject of interests. Additionally, these interests of the future child apparently justify legal measures that prevents the child's conception: If a fertility treatment is not performed, the child in question will never be born at all, just like it will never come into existence if it is deselected in the PGD process or its conception is prevented through forced contraception. Of course, the prevention of the child's conception will only occur in a small number of cases, but what is important is that, if the child's existence is prevented, this is justified by the appeal to its own interests. In other words, in these specific cases, the subject of interests is not only non-existent, but, as a direct result of the attribution of the same interests, the subject will never come into existence at all. Since it is assumed that the regulation is properly justified because it serves the future child's interests, the regulation attributes to the child an interest in its own non-existence. After all, the regulation implies that, rather than being born into a life with the risk of being harmed, it is in the interest of the future child not to exist at all.

This article focuses specifically on those cases in which the future child's existence is prevented because of its assumed interest in non-existence. The assumption of this interest in non-existence is quite controversial. Many philosophers have discussed whether and when an interest in non-existence can be assumed in the wrongful life debate ([2–4]; [5], p. 9; [18], p. 17; [19,20]). The most important point of criticism in this debate is that an individual can only be harmed by being brought into existence—and consequently have an interest in non-existence—if he or she has "a life not worth

¹³ According to ESHRE Task Force, the physician has even an obligation to refuse treatment if the predicted wellbeing falls below the standard of reasonable wellbeing [8].

¹⁴ In PGD embryos, created through an IVF procedure, are tested on a specific, genetic condition, such as Huntington's disease, after which only unaffected embryos are used for further pregnancy. This method guarantees that the child, once born, will not have the severely, life affecting condition.

¹⁵ *Kamerstukken II 2005-2006*, 30 300 XVI, nr. 136, 3.

¹⁶ *Kamerstukken II 2005-2006*, 30 300 XVI, nr. 136, 12.

¹⁷ *Planningsbesluit PGD 2009*, p. 8 and Article 26 Subsection 2 Embryo Act.

¹⁸ *Kamerstukken II 2009-2010*, 32 405 nr. 2.

living". That is, if the quality of life is so low that non-existence would be preferable ([5], p. 16). The problem is that, in most of the cases described above in which an interest in non-existence is assumed, it is not evident that the future child would indeed have a life not worth living, since its quality of life would not be so poor that non-existence would be preferable ([3], p. 97); [21], p. 75). This means that these children would not (necessarily) be better off if they are never born at all, and thus there would be no solid justification for the prevention of their existence.

Because of the increasing appeal to the future child's interests in law, despite the criticism, it is pivotal to look beyond the wrongful life debate and explore the extent to which law is capable of representing this unique entity. Since the future child is presented as a subject, namely, the subject of interests, the question rises whether it can be presented in law with the help of the concept of the law's subject: the legal person. The legal person is the actor in law and the subject of legal rights and duties¹⁹. It is a complex concept, since most legal systems have no consolidated "law of the person", *i.e.*, a unified set of rules concerning legal personhood and which defines the legal person. Instead, in the words of Naffine, law is inconsistent in its definition of the legal person ([22], p. 176). Different areas of law have different perspectives on legal personhood and attribute different features to it ([23], p. 371). Still, some main perspectives on legal personhood can be distinguished, so the question is whether the future child fits in any of these perspectives.

In the following sections, I elaborate on three perspectives on legal personhood which are dominant in the legal doctrine of several West European legal systems²⁰. First, it describes several naturalistic approaches, in which the legal person is understood as a reflection of the human being of daily life, and shows that the future child as a non-existent entity does not fit in any of these approaches. Second, it moves on to a constructivist approach in which the legal person is seen as a legal-technical construct that can be applied to almost anything. However, even if the legal person was merely an artificial construct, it still cannot conceive the unique qualities of the future child as it does not address the connection between the future child and the actual child it may become. Third, a perspective on legal personhood in which this connection is addressed is explored, namely, legal personhood by anticipation. It will be argued that the future child also does not fit in this approach, since its existence is prevented, and that there is therefore no entity to anticipate.

3. Legal Personality as a Reflection

Naturalistic approaches conceive the legal person as a reflection of the human being of real life: an entity with a physical body who thinks and has emotions and desires. According to this perspective, the human being has specific qualities that separate it from other entities, such as animals or trees, and that offer ground for legal protection. These qualities are reflected in the legal person. Therefore, the legal person has distinctive features, and not every entity can have legal personhood. There are different views on which feature is most characteristic for the human being and therefore for the legal person. In the following, I will discuss the three most important sub-perspectives of the naturalistic approach, which respectively focus on biological features, rational features and metaphysical features.

3.1. Biological Features

The connection between the human being and the legal person is illustrated by the biological features of the legal person that can be found, for example, in the temporal boundaries of legal personhood. The beginning and end of the legal person are orientated in accordance with the biological boundaries of life; the legal person begins once the human being is born and ends when the human

¹⁹ The set of rights and duties can differ per individual person.

²⁰ See for example [24] Chapters 6 and 7, for the influence of these approaches in the Dutch and French legal system, and [22] for the influence of these approaches in common law countries, including the UK.

being dies. This implies that, with some exceptions, the legal person exists parallel to the human being of the physical reality.

This biological feature, the requirement that the entity has to be born in order to have legal personhood produces an important obstacle for perceiving the future child as a legal person. After all, the boundary of birth is not easily overstepped. The ECHR case *Vo v. France* shows the reluctance of the European court to grant a viable fetus the right to life in order to protect it from involuntary abortion²¹. Besides the morally sensitive nature of the issue, attributing legal personhood to an embryo may also cause practical problems; not only would it cause a conflict between the rights of the fetus and the rights of the mother, thereby making abortion problematic, it would also make stem cell research no longer acceptable, as it breaches the possible embryo's rights. Bearing this in mind, it would be even more unlikely to attribute legal personhood to the future child; not only is the future child not yet born, it is not even conceived.

However, the temporal boundaries of legal personhood are not absolute. For example, the concept of brain death enables the legal person to end, while the entity is physically still alive. In addition, the beginning of the legal person does not necessarily collide with the biological birth. Law can feign an earlier beginning of the legal person with the help of the *nasciturus* fiction. This fiction entails that, if it is in the interest of the unborn child, the child of which the woman is pregnant is considered to be already born²². Since birth marks the beginning of the legal person, the fiction implies that the child is treated as a legal person if its interests require this. Importantly, this fiction is not meant to attribute legal personhood or legal rights to the embryo itself, but to enable the child, once it is born, to legally respond, in retrospect, to events that took place before its birth, e.g., to inherit from its father in case the latter died before the child's birth or to claim damages in case of prenatal harm. This fiction is codified in Dutch law in Article 1:2 of the Dutch Civil Code. The British Congenital Disabilities (Civil Liability) Act of 1976 provides for a similar fiction²³ to enable a child to bring an action if it is born disabled due to prenatal harm²⁴.

With the help of the *nasciturus* fiction, the beginning of the legal person does not necessarily have to collide with the biological birth. However, it does not provide a solution for the case of the future child for three reasons. Firstly, the fiction normally does not pertain to the future child, but the unborn child. Both the Dutch and the German codification require that the child is conceived²⁵. Moreover, in his discussion on the fiction in common law, Gray says that the child is considered to have been alive from the time it is begotten ([25], p. 38), thereby making a distinction between the unborn child and the future child. The second reason is that, even if the fiction was expanded in order to include the future child, the fiction could still not be applied to the case of the future child; since the fiction

²¹ ECHR 8 July 2004, application No. 53924/00 (*Vo v. France*).

²² In German law, a similar fiction is applied to enable the unborn child to inherit, Section 1923(2) of the German civil code. Feinberg suggest a similar principle that enables a person to, in his or her own name; sue for damages caused by prenatal harm. "Assuming that the child will be born, the law seemed to say, various interests that she will come to have after birth must be protected from damage they can incur before birth." Importantly, the child must be born in order to apply this fiction ([5], p. 12). Gray also mentions this fiction: "and in our law a child once born is considered for many purposes as having been a live from the time it was begotten" ([25], p. 38).

²³ According to Tur, the fiction pertains to the moment of causing harm, not the moment of birth and the beginning of legal personhood. The result, nonetheless, is the same as the application of the Dutch article ([26], p. 125).

²⁴ Mr. Ray Carter claimed in the second reading of the Bill that the liability to the child is derived from the liability to its parents. However, even though it concerns derivative liability, some form of personhood must be assumed.

²⁵ In the Dutch codification: "het kind waarvan de vrouw zwanger is", and in the German codification: "Wer zur Zeit des Erbfalls noch nicht lebte, aber bereits gezeugt war". The Congenital Disabilities act does not limit prenatal harm to harm caused during the pregnancy, which follows from Section s1(2)(a) and 1(4) of the act. In the second reading of the bill, Mr. Ray Carter stated that, although there was "some hesitation at imposing liability for an event occurring before conception, [i]t came to the conclusion that it was right to do so particularly because it is medically difficult to fix a point at which conception occurs, and also because, thanks to modern scientific and technological development, there are occasions when a child may need a remedy for a pre-conceptual event." HC Deb 06 February 1976 vol 904 cc1589-648 [Congenital Disabilities (Civil Liability) Bill]. Nevertheless, Tur has expressed his reluctance to grant the future child the same position as the unborn child under the Congenital Disabilities Act in order to protect it from pre-conceptual harm ([26], p. 126). Tur does not explain why he is opposed to the idea.

works retrospectively, the application of the fiction in this specific case would not meet its own criteria. The Dutch codification stresses that, if the child is born dead, it is considered never to have existed at all. This implies that the fiction does not aim to attribute legal personhood to an embryo, but to enable a child, once born, to respond to matters that occurred during the pregnancy ([24], p. 232)²⁶. Therefore, in order to apply the fiction, the child has to be born alive. The same goes for the Congenital Disabilities (Civil Liability) Act of 1976, which speaks of the “child born disabled”²⁷, and born is defined in Section 4(2)(a) as “born alive”²⁸. In sum, attributing interests to the future child requires a proactive approach in which the child’s actual birth is not awaited, while the nasciturus fiction has a retrospective working²⁹ and is thus applied at a complete different moment. The third and final reason pertains to a more fundamental problem. The nasciturus fiction requires the child to be born, while the future child’s interests are protected by not letting it come into existence. In other words, the “being born” requirement of the fiction can never be met at all, since the legal measures that protect the future child’s interests aim to prevent its birth. For these reasons, even with the help of the nasciturus fiction, the beginning of legal personhood cannot be expanded to the moment before conception to include the future child and act on its assumed interests in non-existence.

3.2. Rational Features

Besides its biological nature, the rational nature of the human being is also reflected in the legal person. The rationalistic approach assumes that the ratio is the most distinguishing feature of human beings and therefore the key characteristic for the legal person³⁰. In this view, the legal person is capable of forming and expressing a free will, making autonomous decisions and therefore can be held accountable for its own actions. This legal person, capable of decision making and responsible for its actions, is present, for example, in criminal law ([22], p. 69). In order to be held accountable for a criminal act, *mens rea* is required. A crime must not only be committed, but also intended, albeit that there are different modes of culpability.

However, also from a rationalistic perspective, the future child cannot be understood as a legal person. Since it does not exist, the child cannot form or express a free will; therefore, it does not fit within this perspective of the rational legal person. What is supposed to be in its interests is fully determined by third parties. Nevertheless, there are more entities that (partially) lack rationality: newborns, the mentally ill, and coma patients, for example. From a purely rationalistic perspective on legal personhood, these groups would not have rights since they cannot exercise their rights ([27], p. 194), and for this reason they lack legal personhood ([22], p. 68). Although, as stated earlier, law is not consistent in its perception of the legal person, and rationality is not always a decisive feature for having legal personhood. In some cases, a distinction is made between rational people and people with reduced rationality, for example, in the case of minors who are not allowed to vote or who lack full rational capacities and are appointed a legal guardian. Still, such individuals remain legally relevant, since they are addressees of the law. In particular, human rights law refers to “everyone” (or “no one”)³¹, “all human beings”³² or “all members of the human family”³³, clearly addressing also

²⁶ Carter emphasises that one would be liable to the living child and that no legal rights are given to the fetus. HC Deb 06 February 1976 vol 904 cc1589-648 [Congenital Disabilities (Civil Liability) Bill]. Tur too claims that an action based on the Congenital Disabilities (Civil Liability) Act of 1976 is brought by the child, and not the fetus ([26], p. 125).

²⁷ See for example Section 1(1) and Section 2.

²⁸ Tur confirms that the child must be born alive in order to be covered by this Act ([26], p. 125).

²⁹ The versions of the fiction of Feinberg and Gray also require that the child has to be born alive in order to apply the fiction. See footnote 22.

³⁰ Gray for example sees the ratio as the most defining feature of the human being represented in the legal person ([25], p. 27). See also Naffine’s elaboration of this perspective on the legal person in ([22], p. 59).

³¹ For example, the fundamental rights of the European Convention of Human Rights and of the Universal Declaration of Human Rights.

³² Article 1 of the Universal Declaration of Human Rights.

³³ Preamble of the Universal Declaration of Human Rights.

those who lack the capability for autonomous decision making. The question that now arises is which feature is characteristic of the legal person in human rights law and which consequences this could have for attributing legal personhood to the future child.

3.3. *Metaphysical Features*

According to a dignitarian perspective, the reason why all humans are entitled to fundamental rights is because, as human beings, they are endowed with human dignity, an inherent value that resides in the condition of being human ([22], p. 102). Or, in the words of Calo, dignity entails a symbolic claim, namely, “an anthropological claim about the nature of human identity and personhood” ([28], p. 474). This inherent dignity is a source of legal respect and protection; for this reason, human dignity would be an inherent characteristic of the legal person. Although the concept of human dignity is highly debated and its meaning is not clearly and unequivocally defined, this concept has gained importance in several areas of the law. Van Beers speaks of a juridical renaissance of human dignity as a legal value since World War II ([24], pp. 35–45). For example, the concept of human dignity can be found in Article 1 of the Universal Declaration of Human Rights. This article states that all human beings are born free and equal in dignity and rights. The preamble of the International Covenant on Civil and Political Rights also stresses that all members of the human family have inherent dignity. This juridical renaissance has become even more visible due to the rise (and the regulation) of human biotechnology ([24], p. 36; [28], p. 475). The European Convention on Human Rights and Biomedicine emphasizes that human dignity must be safeguarded and that abuse of biomedicine can violate this dignity. For this reason, some forms of biotechnology are still banned because they violate human dignity. Illustrative examples are human cloning³⁴, gender selection³⁵, and germ line cell therapy³⁶.

The human dignity perspective does raise new questions. If dignity is inherent to the human being, does an individual have human dignity only when born, or does it also have human dignity in previous stages? In other words, can legal personhood be constructed on the basis of the dignity the entity (once born) will possess? From a biological perspective, there is not much difference between the fetus a few moments before birth and the child a few moments after. A fetus is a form of human life, and all of us have once been an unborn child. As a result of this basic fact, it does appear odd that human dignity cannot be ascribed to an unborn child; as a result, the unborn child cannot be the subject of the same fundamental rights. However, the concept of “fetal rights” remains sensitive. The European Court of Human Rights did not want to deal with the question of whether an unborn child has a right to life³⁷. The preamble of the Convention on the Rights of the Child (CRC), though, states that the child needs legal protection “before as well as after birth.” Although the convention does not explicitly state that the unborn child is an addressee of the rights of the convention, it has given rise to the discussion on the prenatal application of these rights³⁸. Nevertheless, there is an important difference between the unborn child and the future child. The former has already been conceived and therefore physically exists, while the latter does not exist at all. The discussion preceding the creation and ratification of the CRC focused on the question of whether the child should be protected from conception onwards³⁹. In other words, a distinction was made between the unconceived, future child and the conceived, unborn child, and the prenatal application of the Rights of the Child does not necessarily include the future child. If prenatal application of rights is based upon the concept of

³⁴ Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings.

³⁵ Article 14 of the European Convention on Human Rights and Biomedicine.

³⁶ Article 13 of the European Convention on Human Rights and Biomedicine.

³⁷ ECHR 8 July 2004, application No. 53924/00 (*Vo v. France*).

³⁸ See for an extended discussion on this topic: ([29], pp. 53–57, 133–36).

³⁹ See for an extended discussion on this topic: ([29], p. 53).

human dignity, then the question is whether something that does not physically exist at all can have inherent dignity. Since the future child does not exist, it cannot be part of the human family. Therefore, it seems unlikely to me that the future child itself has dignity.

In addition to the prenatal attribution of rights, another way of prenatal protection is the anticipation of the unborn child's future human dignity. Of particular interest in this regard is the explanatory note of the Dutch embryo law⁴⁰. This note states that human dignity must also be respected before the moment of birth⁴¹. Some forms of biotechnology, such as human cloning and germ line cell therapy, are prohibited because they would be a violation of human dignity⁴². However, the explanatory note does not indicate whose human dignity is at stake; it could be the dignity of the human race in general, or the human dignity of the person that would come into existence as a result of these techniques. The note does state that the use of artificial reproduction technologies requires that the interests of the future child need to be taken into consideration⁴³. Taking this into account, the ban on cloning and germ line cell therapy could be understood as anticipation on the resulting child's human dignity. Interference before its conception is required to prevent a violation of its dignity. However, due to the ban on these techniques, that specific child will not come into existence; for that reason, the anticipation of dignity results in a non-existing entity. This case is similar to the anticipation of interests; in fact, it is based on the assumption that preventing the violation of the child's human dignity is in the child's best interest. Therefore, this case raises the same questions rather than providing a solution. Whether it is possible to anticipate not only human dignity, but also interests of an entity that (due to the anticipation) will not come into existence, will be further discussed in Section 5.

On this point, I must conclude that the future child does not seem to fit in any of the naturalistic approaches of the legal person. Due to its non-existence, the future child lacks all the qualities that are represented in the legal person. Even though the future child is an anticipation of a human being and this anticipation serves to protect this human being from being harmed, the strong link between the legal person and the human being of real life in the naturalistic approach prevents the future child from fitting into the naturalistic approach. However, not all perspectives on legal personhood attribute such explicit qualities to the legal person. In constructivist approaches, the legal person is often seen as an "empty" slot that could be applied to anything. The following section discusses this perspective and explores the extent to which the future child can be understood as a legal person according to a constructivist approach.

4. Legal Personality as a Construct

In constructivist approaches, the legal person is not defined as a reflection of the human being of daily life, but as a legal construct, which, according to some, can be anything.⁴⁴ It denies any connection between the legal person and the human being of flesh and blood. Kelsen, one of the most important proponents of this approach, stresses that a human being is a biological-psychological entity and not a legal concept. The human being in its entirety, with all its physical-biological and mental aspects, is not relevant for the law; only those actions that are addressed by law are important ([30], pp. 52–53). In other words, biological, rational or metaphysical characteristics, as long as they are not addressed by law, are not relevant for the legal person in this perspective and thus do not provide themselves a ground for legal respect or legal protection. Instead of reflecting daily life, law "translates" events of this reality into its own language; therefore, it has its own perception of the physical reality or it "constructs" its own, legal reality.

⁴⁰ *Kamerstukken II 2000-2001*, 27 423, nr. 3.

⁴¹ *Kamerstukken II 2000-2001*, 27 423, nr. 3, 5. This does not imply that the embryo has human dignity.

⁴² *Kamerstukken II 2000-2001*, 27 423, nr. 3, 41.

⁴³ *Kamerstukken II 2000-2001*, 27 423, nr. 3, 14.

⁴⁴ See for a discussion of this perspective ([22], chap. 3; [24], pp. 53–66 and chap. 6).

This constructivist perspective, in which law is not merely a reflection of the physical reality, is also visible with regard to some aspects of legal personhood. One example is the temporal boundaries of the legal person. As mentioned earlier, the beginning and end of legal personhood are based on the biological birth and death of the human being. Notably, these boundaries are not always absolute. Law can “pretend” that the legal person begins or ends at an earlier moment by employing the *nasciturus* fiction or the concept of brain death. These constructs expose (at least partly) the constructivist nature of the legal person: Law is not strictly tied to the real human being in its representation, but it makes its own construction what this entity is in law.

What is important is that, in this approach, legal personhood is not attributed because the entity of the physical reality possesses inherent features, such as rationality or human dignity. According to Kelsen, a legal person is the allocation point of rights and duties or even “is” the bundle of rights and duties ([30], p. 52). It is an artefact created by law. Instead of inherent features, the attribution of legal personhood depends on a legal construction, *i.e.*, it is a consequence of a legislative decision. In the words of Lawson: “All that is necessary for the existence of the person is that the lawmaker [. . .] should decide to treat it as a subject of rights or other legal relations” ([31], p. 915). The most common examples of this are the corporation and the State. These entities have legal personhood not because they meet certain metaphysical requirements, but because the law attributes it to them.⁴⁵ Since the attribution of legal personhood does not depend on inherent traits, it implies that the legal person has no specific characteristics ([22], pp. 35–36; [24], p. 374; [32], p. 351). Tur points out that this conception of legal personhood is “wholly formal”; the legal person is “an empty slot that can be filled by anything that can have rights or duties” ([26], p. 121). It all depends on what the law defines as a legal person: “If legal personhood is the legal capacity to bear rights and duties, then it is itself an artificial creation of the law, and anything or anyone can be a legal person. It all depends on the particular, concrete rules of particular legal systems” ([26], p. 121).

The constructivist approach towards legal personhood seems to offer opportunities to conceive the future child as a legal person. In this interpretation, the legal person is not connected to an entity of the physical world and has no inherent features; for this reason, anything can be a legal person ([26], p. 121; [33])—even a non-existent entity. What makes the legal person is the allocation of legal rights and duties; from a purely legal-technical view, the future child could be the subject of rights. Gray points out that, from a legal perspective, *technically*, there is no difficulty in attributing rights to an unborn child. A newborn is equally incapable of exercising its rights; it can only exercise its rights through, for example, a legal guardian. Since there is not much difference between the child just before birth and just after birth, “[i]t is just as easy to attribute the will of a guardian, tutor or curator to the one as to the other” ([25], p. 38). In a similar way, this construction could be applied to the future child; technically, the future child could be the allocation point of rights (instead of interests), such as a “right not to be born”; by doing so, it would be a legal person. Of course, the attribution of rights to an unborn or future child causes other problems, like conflicts with the rights of the mother in the case of abortion or the impossibility of conducting stem cell research involving the destruction of embryos. However, the question of whether the future child *should* have legal personhood is of a political nature; from a legal perspective (according to the constructivist approach), even a non-existent entity could fill the empty slot.

The emptiness of the constructivist legal person is sometimes considered an important benefit of the constructivist approach. Gear, for example, considers this plasticity a necessary benefit, since, in her opinion, it is most responsive towards the complexity of society and the creation of hybrid subjects and therefore indispensable ([33], pp. 2, 23). New entities, such as trees, animals, future generations, artificial intelligence, unborn and future children, that do not fit in the naturalistic

⁴⁵ In several legal systems, the law explicitly attributes legal personhood to these corporations. See for example the Dutch civil code, Section 2:3, the German civil code title 2, subtitle 1, Section 19, and the Belgian Company code, Section 2, para. 2.

perspective of the legal person can be understood as a legal person in a constructivist perspective; that way, they could gain more legal protection and their interests could be protected better⁴⁶. A constructivist approach could be adopted in order to evade the birth requirement: Following this line of argumentation, it would not be necessary for the future child to actually be born in order to become a legal person, but it would be a legal person because law attributes legal personhood to it. The reason why legal personhood would be attributed is to offer the future child legal protection; that way, the interests of the future child would be better protected. Instead of interests, it would have rights, such as “the right not to be born”.

However, applying the constructivist approach is misleading; speaking of attributing legal personhood to the future child in the same way as attributing legal personhood to animals, trees, or entities with artificial intelligence suggests that the future child has interests of its own that require legal protection, just like, for example, animals have their own set of interests. This approach splits the future child from the actual child, as if both entities have their own set of interests. The future child, to the contrary, is not an independent entity that needs protection; instead, it is the allocation point of interests that transgress the temporal boundaries of the actual child’s existence; as an allocation point, it becomes the subject of interests. The future child is a construct, a tool, to be able to anticipate those interests in the present. The aim of this construct is to protect the actual child, once it is born, from the risk of harm. In other words, it is the actual child that needs protection, not the future child. This point is illustrated by the chosen formulation of written regulation. For instance, Section 13(5) of the HFEA, which speaks of the “child who may be born as a result of the treatment”. Moreover, the Dutch medical professional guidelines state that the “wellbeing of the future child” is determined by the “psychosocial circumstances the child is born into”, implying it is concerned with harm that the actual, born child might suffer. Therefore, it is the risk of harm the actual child runs that constitutes the interests of the future child, as these interests are an anticipation of the risk. The interests of the future child are derived from the actual child, and this creates an inextricable link between the future child and the actual child; as a result, they cannot be seen as separate entities. The future child can still be understood as a subject of interests, but these interests are based on the interests the actual child could have.

The constructivist approach is capable of attributing legal personhood to a non-existent entity such as the future child. However, adopting this approach to “protect the interests of the future child” wrongfully suggests that the future child has interests of its own, which therefore does not address the essential connection between the future child and the actual child. These two entities are inextricably linked, for the future child is only constructed to protect the interests of the actual child, or at least those interests of the actual child that transgress the temporal boundaries of the child’s existence, *i.e.*, the interest in preventing preconceptual harm to the actual child. In other words, the future child as a concept is created to anticipate the actual child. Perhaps there might be a legal construction that is able to address this link properly, but it needs further investigation to understand *how* this construction is constructed and whether this construction requires the attribution of *legal personhood* in order to articulate the characteristics and nature of this entity. For now, the current constructive approach is not able to properly address the future child because it is not an independent entity. For this reason, it would be more logical to, instead of constructing legal personhood, explore the possible expansion of the legal protection of interests that corresponds with legal personhood. The question then is not which approach to legal personhood can include the future child as a legal person, but whether the legal personhood of the actual child can be extended to the moment before its conception and affect the future child. The following section therefore explores whether the future child can be seen as a legal person if legal personhood is constructed upon the idea of anticipation.

⁴⁶ Attributing legal personhood in order to protect the interests of an entity is a pivotal point in different discussions, including on the legal status of embryos and stem cell research and the great ape project. See also ([23], pp. 369–70).

5. Legal Personality as Anticipation

Several areas of the law show an anticipatory form of protection of entities that may exist in the future with respect to the legal personhood it one day will have. One example already given is the Dutch regulation on techniques such as human cloning and germ line cell therapy. These techniques are banned because of the possible violation of human dignity (although it was not explicated whose human dignity was at stake). Another example is the case *Vo v. France*, in which the European Court of Human Rights was confronted with the question of whether an embryo falls within the scope of Article 2 of the Convention (and should therefore get legal protection in case of involuntary abortion). The Court did not answer that question, but did claim that “the potentiality of that being and its capacity to become a person [. . .] require protection in the name of human dignity, without making it a ‘person’ with the ‘right to life’ for the purposes of Article 2”⁴⁷. Karnein proposes a theory on the representation of future persons in law based a similar idea: Potential, future persons must be treated “in anticipation of the respect that is due to the actual persons” ([34], p. 33)⁴⁸. Karnein points out that stages previous to the attribution of legal personhood, in this case, the stages before birth, matter ([34], p. 28). After all, events that occur during these stages can affect the actual person. Therefore, once a person exists or is born, obligations to the entity of a previous stage (such as the embryo) arise retrospectively, e.g., not to cause prenatal harm. Since these obligations towards the embryo will exist in the future, we should anticipate them now:

“Our obligations to embryos arise retrospectively (once they have become persons). They are applied in a forward-looking manner only via speculation (as to an embryo’s future) and as a matter of caution so that we avoid violating our (retrospective) obligations” ([34], p. 29).

The anticipation of these future obligations does not imply that the “not yet” person is to be treated equally as the person it will become; such an approach would, for example, imply that it is unacceptable to destroy embryos or abort a pregnancy⁴⁹. However, this theory does explain how interests can transgress the temporal boundaries of the entity’s existence and therefore provides a reason to anticipate the interests the actual child has once it is born.

Karnein limits her research to the status of the embryo and does not include the unconceived, future child. Still, the claim that “previous stages matter” is not necessarily limited to the embryo. After all, harmful events not only occur between conception and birth, but they can also happen prior to conception, which is the stage of the future child. For example, conceiving a new person by creating a human clone or a human-animal hybrid could also be understood as a violation of respect for the person it will become. Similarly, once the child is conceived, certain facts become unchangeable: for instance, mutations in the genetic blueprint or the biological parents. These facts can also constitute physical or psychosocial harm to the later person. This harm can only be prevented by anticipating the person that one day may exist when it is still a non-existent, future child. In sum, anticipating the future person (in order to prevent all sorts of harm) may also be required in the stage of the future child. Consequently, legal protection based upon anticipating later obligations (arisen in retrospect) is not necessary limited to the embryo, but may also apply to the future child. Therefore, Karnein’s theory is not only helpful for understanding not only the attribution of interests to unborn children, but also the non-existent future children.

⁴⁷ ECHR 8 July 2004, application No. 53924/00 (*Vo v. France*), para. 84.

⁴⁸ “This respect should express itself chiefly by treating embryos with care and by regarding them for ‘who’ they are genetically encoded to be, that is, without other people interfering with their endowment and certainly without other people taking anything away from them.”

⁴⁹ Preventing these potential persons from coming into existence is acceptable in Karnein’s view. “Our obligations to embryos arise retrospectively (once they have become persons).” ([34], p. 29).

Buchanan *et al.* wondered whether the acknowledgement of prenatal and preconceptual harm (like in a wrongful life law suit) to an existing child implies that we have duties to a non-existent entity or whether this non-existent entity has interests or rights ([2], p. 236). In their opinion, the wrongful life claim (and the corresponding assumption that the child is better off if it does not exist at all) is based on the violation of the right not to be born into a life not worth living. The assumption of this right and its violation constitute the core of a wrongful life law suit. However, according to Buchanan *et al.* this right comes into existence when the child is born (and thus the legal subject exists). The creation of the right and its violation happen at the same time, namely, the moment the child is born; for this reason, there is no need to attribute interests to the child before it is born: “[I]t is not necessary to attribute to beings that do not yet exist rights not to be brought into existence at some future time with a life not worth living. If the child never is brought into existence, there never is a being with the right that would have been violated had it been brought into existence with a life not worth living” ([2], p. 236). In this line of reasoning, it is indeed not necessary to attribute rights or interests to the future child in order to be able to justify a wrongful life claim. Importantly though, the wrongful life claim works retrospectively; once the child is born and harmed by being born, the claim in the law suit serves to compensate for its harms. The legal measures that are discussed in this article are proactive: Before the child is born, harm is prevented by preventing the child’s existence. If there are no interests because there is no existing subject, then there is no justification for the legal measures⁵⁰. In other words, if the justification for the prevention of existence is based on the interests of the future child, then that implies that interests are attributed to a non-existent, preconceptual entity. Therefore, the question remains how law can represent an non-existing entity as the subject of interests.

Karnein’s theory offers an explanation and justification for anticipating the interests of future entities and therefore explains how these future entities can be represented in law. This is not only important for the way in which law deals with future and unborn children, but also future generations. Nevertheless, the future child differs from the other two entities in a fundamental way. Karnein distinguishes between the embryo that is aborted, destroyed or used for research and the embryo that is carried to term, that is the unborn child ([34], p. 34). Only the latter will grow into a person (or, more specifically, there is a clear intention of the parents to let this entity grow into a person. Medical complications could of course still alter the actual result). Since the latter embryo will become a person with certain rights and interests, society has an obligation to anticipate its interests. The same goes for future generations: Although we do not know *which individuals* will be part of future generations, the future generation *as an entity itself* will come into existence, unless the whole human race becomes extinct ([35], p. 730). Unlike the unborn child and the future generations that come into existence, the future child’s existence is prevented. Since the future child in this case will not come into existence, there will never be a person to anticipate. No individual will ever exist in order to induce the application of retrospective respect for its unborn predecessors, including the future child. Accordingly, Karnein’s approach, in which legal protection of interests is based on anticipation of an actual person, does not offer a solution to the case of the future child.

6. Conclusion: The Problems of Representation

As the previous sections have shown, the future child does not fit in any of the three current perspectives on legal personhood. This is caused by the unique qualities of the future child. Since it does not exist, it does not fit in the naturalistic perspectives on legal personhood. The constructivist approach seems promising, but it overlooks the fact that the future child has no interests of its own, but is created to anticipate the interests of the actual child. Nevertheless, the future child can also not

⁵⁰ Another justification may be a non-person affecting principle, as proposed by Parfit [6]. However, this is a completely different approach. In the discussed regulation, the justification is clearly based on the interests and the wellbeing of an individual entity that may or may not exist in the future.

be understood as an anticipation of the interests of a person that will exist in the future, since that person will never come into existence. In short, this entity that does not and never will exist creates a whole new and unique situation in law, whose representation in law cannot be formulated within the current legal vocabulary. Consequently, law is confronted with a problem of representation; law lacks the concept to properly represent the future child.

This first representation problem is caused by the fact that the future child does not exist and will never come into existence. The fact that the future child's existence is prevented because of its *own* interests causes a second representation problem, *i.e.*, the *paradox of representation*. The representation of the future child in law is paradoxical. On the one hand, because the interests of the future child are taken into consideration, the actual child retrospectively gains a stronger legal position. By taking its interests into account, the future child is given a "voice" in the decision-making process, where it otherwise would have none. As the subject of interests, it gains legal protection against the risk of harm. On the other hand, the importance or value of the future child's status is denied by the fact that its existence can be prevented. Preventing or ending one's existence because he or she assumingly has an interest in his or her own non-existence is not as easy if it concerns an unborn child or a living human; it would only be possible with consent of the mother or the person him or herself. For example, euthanasia can only be realized if the patient requests this himself and not because a third party believes the patient's life is of such poor quality that he would be better off dead. It is essential that the patient has a mechanism of expressing autonomy. The "voice" that is given to the future child, however, is simultaneously silenced by the prevention of its own existence. Appealing to the future child's interests in its own non-existence makes this entity's status not just ambiguous, it is paradoxical: The future child is treated as a subject of interests, which result in its becoming a non-subject.

The complexity of the future child, which results in two distinct representation problems, is at the moment unaddressed in regulation and policy guidelines invoking the interests of the future child. The fact that this complexity is underexposed becomes even more problematic when the moral impact is taken into account. The regulation of access to fertility treatments, embryo selection and forced contraception determines who should come into existence and who should not. They are tools used to select offspring and future members of our society. While claiming that it is in the future child's interests not to come into existence, the regulation actually determines which life is worth living. Instead of explicitly addressing this aspect of the regulation, it seems to be obscured by the appeal to the interests of the future child.

The strong focus on the interests (or rights) of the future child is understandable. The rhetoric of individual rights and interests fits into the vocabulary of the liberal society, and attempts to distance the regulation from eugenic programmes of the past, which are the reason for our aversion towards selection in the first place. Nevertheless, the rhetoric of interests cannot undo the fact that regulation regarding PGD, access to fertility treatments, and forced contraception entails possibilities for the selection of offspring. At best, it might offer justification for this selection. However, this justification is challenged by representation problems raised by the vocabulary of interests. Sandel has pointed out that, with regard to the difficult issues raised by the developments in biotechnology, the liberal vocabulary of rights, interests and autonomy fails to provide proper vocabulary for articulating and discussing these issues ([36], pp. 9–10). This seems not only to be the case for genetic enhancement, but also with the prevention of the future child's existence, as the appeal to interests turns out to be rather paradoxical in this case. Nevertheless, since law's attention for the future child and its interests increases, despite the fact that this entity does not fit in the legal vocabulary, it is important that the concept of the future child is further elaborated. Further research is needed in order to understand what this entity actually is, what its characteristics are and how it functions in the law. A first step could be looking beyond the traditional legal vocabulary of rights and persons, and accepting that the legal vocabulary needs to adapt or respond to the changing environment and develop new concepts and constructs for entities such as the future child.

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