

არამართლზომიერი ქმედების შედეგად სიცოცხლისა (wrongful life) და დაბადების (wrongful birth) საქმეები ადამიანის უფლებების ჭრილში

მარიამ გაიპარაშვილი

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აბსტრაქტი

სტატიაში განხილულია სიცოცხლე არამართლზომიერი ქმედების/შეცდომის შედეგად (wrongful life) და დაბადება არამართლზომიერი ქმედების/შეცდომის შედეგად (wrongful birth), საჩივრებთან დაკავშირებული ეთიკური და ფილოსოფიური საკითხები, ადამიანის უფლებების სამართლის ჭრილში. აქვე, განმარტებულია, თუ რას წარმოადგენს მსგავსი ტიპის სარჩელები და რა მოთხოვნები შესაძლოა ჰქონდეთ როგორც ბავშვებს, ასევე, მათ მშობლებს. მომდევნო თავები, კი აფასებს სარჩელის დასაშვებობის ეთიკურ და ფილოსოფიურ მხარეს. კერძოდ, მორალურად რამდენად დასაშვებია სარჩელების დაკმაყოფილება და ყოფნა-არ ყოფნის საკითხი სამართლებრივ ჭრილშია განხილული. ნაშრომში საკითხზე მსჯელობა განვითარებულია ადამიანის უფლებების პერსპექტივიდან და გაანალიზებულია ადამიანის უფლებათა ევროპული სასამართლოს გადაწყვეტილებები სიცოცხლის უფლებასა და პირადი ცხოვრების უფლებების თაობაზე.

ასევე, სტატიაში გაანალიზებულია დაბალანსების (პროპორციულობის) ტესტი, რადგან როგორც მეცნიერები, ისე სასამართლო გადაწყვეტილებები, მსგავსი ტიპის სარჩელებს ორ უფლებას შორის კონფლიქტად განიხილავენ. შესაბამისად, განხილულია როგორ დაბალანსდეს და გადაწყდეს დავა ორ დაპირისპირებულ უფლებას შორის.

საკვანძო სიტყვები: ფეტუსი, შეზღუდული შესაძლებლობა, პროპორციულობა

Wrongful Birth and Wrongful Life Cases from a Human Rights Perspective

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ABSTRACT

This article, from a human rights perspective, explores ethical and philosophical problems related to wrongful life and wrongful birth actions. It defines the nature of such actions and possible claims on behalf of children, as well as those of their parents. In the following chapters, the admissibility of those actions is assessed from the ethical and philosophical point of view. In particular, whether it is morally acceptable to rule in favor of the claimants and issue of “to be or not to be” is discussed from legal perspective. The topic is explored from human rights perspective and the decisions of European Court of Human Rights regarding the right to life and right to private life are analysed.

Moreover, the article analyses the “balance test” (test of proportionality) as both, scholars and case law, consider such actions as conflict between two rights. Thus, article examines the ways of balancing and resolving the conflict between those conflicting rights.

KEYWORDS: Fetus, Disability, Proportionality

1. INTRODUCTION

The paper encompasses two types of action for damages against medical practitioners – wrongful life and wrongful birth claims:

(1) When the child with disabilities is born and medical care providers did

not foresee this consequence, child becomes “a financial burden” to the parents.¹ Therefore, parents make a wrongful birth claim arguing that they were not aware of the child’s disabilities and could not make a decision whether to proceed pregnancy or not.² The wrongful birth claim involves a claim for damag-

1 Karosaitė, M., 2017. Wrongful birth and wrongful conception: is there a right to compensation? 1 (15) Law Review, pp. 4, 8.

2 Niekerk, C., 2012. Wrongful Life Claims: A Failure to Develop the Common Law. 23 Stellenbosch

es by the parents of a child for the pure economic loss, mainly the costs of bringing up the child, and non-pecuniary losses for emotional distress.

(2) In comparison, a wrongful life is a claim brought on behalf of a child who is born with a disability that could have been discovered before the child's birth by medical screening, but because of medical malpractice, it was not discovered. The legal ground behind the action is that as a result of a doctor's failure to inform the child's parents of disability, they were deprived of the opportunity to abort the fetus. Thus, the result of a lack of information was the birth of a child who has a permanent physical or mental disability. Therefore, the child argues that his/her birth is a damage and if parents had known about the impairment s/he would have never be born. Damages in those cases consist of the cost of living of the child, including the extra costs related to the disability, and also a non-pecuniary loss of the child because s/he was born with disabilities.

Those claims have been filed to courts for the past decades around the world. The immediate development of biotechnology (PGD– Preimplantation Genetic Diagnosis) during the last century have made it difficult for the law and ethics to keep up with the continuous changes. The key questions when dealing with those actions are legal and philosophical (ethical) in nature. This paper is necessarily limited in scope, since the legal issues of wrongful issues are broad. Therefore, it does not cover civil law issues and mainly concentrates on human rights and philosophical (ethical) perspective

as well as on conflict of rights that is challenged in those cases.

The aim of this paper is to show the impact of human rights on wrongful life and wrongful birth actions. The central research question revolves around this very issue: Is allowing wrongful actions in line with human rights? In order to find an answer and to have a more comprehensive picture, the paper will evaluate sub-questions. The paper primarily turns to philosophical and ethical questions in order to understand what philosophical implications wrongful actions might imply. The chapter will answer the question whether wrongful actions are ethically acceptable. In other words, are those actions encouraging stigmatisation and eugenics? Afterwards, the paper will answer the question whether allowing wrongful actions violates the European Convention on Human Rights. The last chapter sums up the legal and philosophical arguments on wrongful birth and wrongful life cases and makes suggestions regarding how those cases should be dealt with under human rights law.

The research methodology is chosen in a manner which will help most to understand the correlation between wrongful actions and human rights. The central question is tested through the comparative method to advance knowledge on the wrongful cases. Since the central legal issue of the paper is to evaluate the wrongful life and birth cases from the human rights perspective, it was decisive to show how ECtHR reflects and incorporates the paper's central issue. Therefore, the best way to measure the impact of human rights on the central question was to use comparative and philosophical analysis.

2. THE ROLE OF DIGNITY AND ETHICAL MATTERS OF WRONGFUL BIRTH AND LIFE CASES

The claims related to children with disabilities have the inherent tricky moral question intertwined with human rights. The ECtHR argued that wrongful life and birth actions involved the moral and ethical considerations as it is a very sensitive matter.³ In order to illustrate the overall picture of the fundamental issue, the paper hereafter scrutinizes the philosophical questions related to the core issue.

2.1. Philosophy of to be or not to be*

It is an old philosophical dilemma, whether it is better for a human being not to be born at all.⁴ As writers claim, never to have lived is the best and “never to have drawn the breath of life, never to have looked into the eye of day”.⁵ From an ethical point of view, wrongful life claims are less successful than

wrongful birth cases. The main argument in wrongful life cases is that the life of the child is an injury and life should have been terminated. Notwithstanding that the idea more or less is the same in wrongful birth cases, the courts limit the injury to future maintenance of the child and refrain from claiming that injury is the disabled life itself.⁶ Henceforth, the paper analyses scholars’ main arguments on wrongful claims from “to be or not to be” philosophical perspective.

Supporters of wrongful claims argue that it is wrong to give birth to a child whose life will have a “poor quality”⁷ and that it “is a duty not to bring miserable children into existence because they have a right not to be brought into such an existence”.⁸ Joel Feinberg* argues that fetuses can be harmed in the womb, but only if they are born to suffer the harmful consequences of their prenatal injuries.⁹ In certain unusual circumstances, a person might be harmed by the act of being given birth when it was avoidable and if a person is born in a handicapped condition so severe that s/he would be “better off dead”.¹⁰ That point of view denies the “sanctity-of-life

3 ECtHR, *M.P. and others v. Romania* (dec.), App no 39974/10, 16 June 2014, § 45.

* Shakespeare, W., *Hamlet*. Act III, Scene I: “To be, or not to be: that is the question”.

4 Ruda, A., 2010. *I Didn’t Ask to Be Born: Wrongful Life from a Comparative Perspective*. 1 JETL – Journal of European Tort Law, pp. 204, 209. Sophocles, 2005. *Oedipus at Colonus*. Oxford University Press, p. 84: “Never to be born is the best story”; Camus, A., 1975. *The Myth of Sisyphus*. Penguin Books Ltd, p. 11: “Judging whether life is or is not worth living amounts to answering the fundamental question of philosophy”.

5 Yeats, W.B. *A Man Young and Old*. [Viewed 22 July 2020]. Available from: <https://www.poemhunter.com/poem/a-man-young-and-old/>

6 Pinkesz, M., 2017. *Gender – and Disability-Based Discrimination in the Techno-Scientific Age: A Legal and Ethical Pandora’s Box*. 3 *Edinburgh Student L. Rev.* pp. 62, 72-73.

7 Archard, D., Jul., 2004. *Wrongful Life*. Vol. 79, No. 309 *Philosophy*, pp. 403-404.

8 *Ibid*, p. 417.

* Joel Feinberg (1926-2004) was an American political and legal philosopher.

9 Feinberg, J., 1990. *The Moral Limits of the Criminal Law Volume 4: Harmless Wrongdoing*. New York: Oxford Univ. Press, XI.

10 *Ibid*.

concept”¹¹ and deems harmful to bring a child into existence because his/her existence is unbearable and it is preferable not to be born at all.¹² Some authors go even further and claim that the idea that life with a disability is worth living is just a psychological defence mechanism (denial) as well as children with disabilities and their parents do not believe that such life has any worth.¹³

The key argument against the wrongful birth and life cases is the fact that humans must not degrade the meaning of a child’s life and should treat the birth of a child as a gift.¹⁴ As it was mentioned, some scholars argue that for people who suffer from constant pain, life is worse than death as well as even mere disability constitutes a life not worth living.¹⁵ However, this statement is not accurate and in case of moderate intellectual disability people may live a happy and fulfilling life.¹⁶ In addition, children with disabilities are provided with as much care and support

as possible, many people are grateful for their birth and those affirming attitudes indicates that life with disabilities is worth living.¹⁷ Likewise, what is the best for a child, or if non-existence is preferable or when a life is worth living, seems very subjective judgment.¹⁸ Therefore, it is impossible for the law to define what “the best life” means because some people prioritize intelligence over physical well-being and vice versa.

Opponents of wrongful claims argue that acknowledgement of life as a damage is promoting the devaluation of life with a disability,¹⁹ and it is incompatible with the human rights to constitute a disability as a reason for degrading life and birth.²⁰ Consequently, the sanctity of human life excludes the assumption that life is an injury and not a blessing. As soon as the courts consider that the birth of a child is not a gift but a source of damage when a child is not “normal”, they denigrate the child and become

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- 11 Henderson, J., 2018. Things of Which We Dare Not Speak: An Essay on Wrongful Life. 86 *Geo. Wash. L. Rev.* pp. 689, 699.
 - 12 Benatar, D., 2000. The Wrong of Wrongful Life. *American Philosophical Quarterly*, 2(37), pp. 175, 180.
 - 13 Kim, H., 2013. The uncomfortable truth about wrongful life cases. *Philosophical Studies: An International Journal for Philosophy in the Analytic Tradition*, 3(164), pp. 623, 637.
 - 14 Steininger, B. C., 2010. Wrongful Birth and Wrongful Life: Basic Questions. 1 *JETL*, pp. 125, 130.
 - 15 Frati, P. & others, 2017. Preimplantation and prenatal diagnosis, wrongful birth and wrongful life: a global view of bioethical and legal controversies. Vol. 23 No.3 *Human Reproduction Update*, pp. 338, 351.
 - 16 *Ibid.*
 - 17 *Ibid*, pp. 624-625.
 - 18 Bennett, R., 2014. There Can Be No Moral Obligation to Eradicate All Disability. 23 *Cambridge Q. Healthcare Ethics*, pp. 30, 31.
 - 19 Bloom, A. & Miller, P.S., 2011. Blindsight: How We See Disabilities in Tort Litigation. 86 *Wash. L. Rev.* pp. 709, 735.
 - 20 Smrynaki, E., 2012. Wrongful Life and Birth. 31 *Med. & L.* pp. 97, 112; Sustek P. & Šolc, M., 2017. COURT DECISIONS IN WRONGFUL BIRTH CASES AS POSSIBLE DISCRIMINATION AGAINST THE CHILD. 1(18), *Joaçaba*, pp. 31, 41.

hostile policymakers²¹ based on “pity morality”²² towards people with disabilities.

According to Immanuel Kant* “act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means but always at the same time as an end”.²³ Kant’s Humanity Formula requires respect for a human being because they are persons and thus, have an absolute value. Therefore, the argument that parents become morally culpable of harming the child with a disability by bringing him into existence does not seem accurate. From the philosophical perspective, we are not obliged to respect people insofar as they are meeting our standards and person cannot lose its humanity by their misdeeds furthermore, even vicious persons deserve basic respect with dignity.²⁴ The cornerstone of human rights, philosophy and religion is absolute respect, acceptance and love of human being. Therefore, medical progress should not hinder the mainstay of human existence and human dignity.

2.2 Shadow of eugenics and ethical issues

While evaluating philosophical aspects of wrongful cases, scholars debate whether it encourages eugenics. Opponents of the claims state that evaluating life with a disability as the damage is related to eugenic practice. On the contrary, supporters argue that wrongful birth/life cases are not abuse related to sterilization and eugenics since “human selection” is not ordered and executed by the government. This paragraph further evaluates the arguments of both sides based on primary and secondary sources.

Eugenics encourages to reproduce “the fit over the unfit and seeks to prevent the birth of the unfit”.²⁵ From the late 1880s to the early twentieth century, the eugenics movement in the United States implied that society could be improved by eliminating “bad genes” and almost over 60,000 persons with disabilities, drug users and homeless people were involuntarily sterilized.²⁶ The eugenics was widespread in the whole world during the 20th century. The U.S. Supreme Court

21 Steininger, B.C., 2010. Wrongful Birth and Wrongful Life: Basic Questions. 1 JETL, pp. 125, 130.
22 e.g. in *Procanik v. Cillo*, 478 A.2d 755 (NJ 1984), New Jersey court allowed wrongful life claim, para 353: “Our analysis begins with the unfortunate fact that the infant plaintiff never had a chance of being born as a normal, healthy child. Tragically, his only choice was a life burdened with his handicaps or no life at all. The congenital rubella syndrome that plagues him was not caused by the negligence of the defendant doctors; the only proximate result of their negligence was the child’s birth.”

* Immanuel Kant (1724 -1804) was an influential German philosopher.

23 Kant, I., 1997. *Groundwork of the Metaphysics of Morals*. Cambridge University Press, p. 38.

24 Stanford Encyclopedia of Philosophy, Kant’s Moral Philosophy. [Viewed 22 July 2020]. Available from: <https://plato.stanford.edu/entries/kant-moral/>

25 Bowman, J. E., 1996. *Genetics and the Law: The Ethical, Legal, and Social Implications of Genetic Technology and Biomedical Ethics: The Road to Eugenics*. 3 U. CHI. L. SCH. ROUNDTABLE, p. 491.

26 Roth, L. R., 2017. Reproductive Selection Bias. 27 *Health Matrix*, pp. 263, 282.

in *Buck v. Bell*²⁷ approved the states' right to sterilize people with intellectual disabilities to prevent them from passing disabilities to the next generation. In 1933 Nazi Germany enacted its law and sterilized more than 300,000 people, afterwards, between 1939 and 1945, euthanized more than 200,000 mentally and physically disabled people, Denmark sterilized more than 8000 people between 1930 and 1954, and Sweden sterilized more than 2000 people in 1948 alone.²⁸

The eugenics was undoubtedly one of the cruellest policies people come up with-in the world history. Due to the historical experience from 20th century, European and International Law has condemned eugenic ideology. Charter of Fundamental Rights of the European Union explicitly states in Article 3 that in the fields of medicine and biology, eugenic practices are prohibited, in particular, those aiming the selection of persons. Besides, Article 1 of the UN Convention on the Rights of Persons with Disabilities, states that "the purpose of the present Convention is to promote, protect and ensure the full and equal

enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity".

Supporters of wrongful claims argue that the compensation of damages is not eugenics because it is not a "collective phenomenon" and "an exercise of power by the authorities".²⁹ Even though, in those cases representatives of the judiciary system directly do not order "human selection", nevertheless they deem that to be born with disabilities is damage for parents and children. Therefore, while satisfying claims in wrongful birth/life actions, the state indirectly supports the aim and encourages the idea behind the eugenics:³⁰ to have an instrument for controlling the population in the name of improving the genetics of the human species.

In technologically advanced societies, people with genetic disabilities increasingly suffer from a new widespread prejudice: eugenic ideology which considers their very existence as a medical error.³¹ Indeed, they are perceived as well as treated differently and often considered inferior. In wrongful birth

27 274 U.S. 200 (1927), 207: "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes... Three generations of imbeciles are enough."

28 Braddock D. & Parish, S., 2001. An Institutional History of Disability in Gary L., Albrecht, Katherine D., Seelman and Michael Bury (eds), *Handbook of disability Studies*. London: SAGE Publications, p. 40.

29 Ruda, A., 2010. I Didn't Ask to Be Born: Wrongful Life from a Comparative Perspective. 1 JETL – *Journal of European Tort Law*, pp. 204, 233.

30 Stein, J. T., 2010. Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in Wrongful Birth and Wrongful Life Claims. 40 *Seton Hall L. Rev.* pp. 1117, 1140.

31 On 6 July 2012, a motion for a resolution on Combating eugenics and discrimination against people with disabilities (Doc. 12996) has been introduced before the Parliamentary Assembly of the Council of Europe (PACE).

cases, courts are acknowledging that the parents are “damaged” by the birth of a child with disabilities as well as in wrongful life cases the life with disabilities is deemed as a “damage”.³² Scholars argue that by the recognition of these torts, the courts are condoning the eugenic implications, considering children as a financial burden and devaluing the social worth of people with disabilities.³³ Some authors even argue that prenatal tests further aggravate their situation and encourage eugenic practice since screening might aim to prevent the birth of a child with specific characteristics.³⁴ Thus, those diagnoses increase the negative attitudes and indirectly forces parents on abortion.³⁵ Correspondingly, Wrongful actions give the impression that children are evaluated by their usefulness and precondition of the love of the parents is having “perfect qualities”, otherwise, they will be rejected.

3. WRONGFUL BIRTH AND WRONGFUL LIFE CASES THROUGH THE LENS OF ECHR

This chapter will firstly evaluate ECtHR case law on wrongful birth and life cases (3.1.); As the cornerstone of the wrongful birth claim is women’s arguments that she did not know about fetus disabilities, otherwise she would have

made an abortion, the paper assesses women’s right to self-determination and unborn child’s legal status under ECHR (3.2.); The research has shown that the courts deem that in wrongful life and birth actions there is a clash between the competing interests. The Courts in wrongful birth actions evaluate women’s right to self-determination vis-a-vis fetus rights and in wrongful life actions the right to “non-existence” vis-à-vis the right to life. Therefore, the last paragraph evaluates if there is a real conflict between the rights, which interests contradict each other and how to balance them in wrongful cases (3.3.).

3.1. European court of human rights on wrongful birth and wrongful life cases

The paragraph aims to evaluate the position of ECtHR on wrongful life and wrongful birth claims. Does the court consider that there was a violation of the Convention or deciding such cases are in a state’s margin of appreciation? The paper analyses all decisions regarding issues as mentioned earlier, also it presents the facts of the cases and reasoning of the Court.

For the first time the ECtHR dealt with wrongful case issues in *Reeve v. The United Kingdom*.³⁶ The Commission

32 Bloom, A. & Miller, P., 2011. *Blindsight: How We See Disabilities in Tort Litigation*. 86 Wash. L. Rev. pp. 709, 735.

33 Stein, J.T., 2010. *Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in Wrongful Birth and Wrongful Life Claims*. 40 Seton Hall L. Rev. p. 1117.

34 Joseph, R., 2009. *Human Rights and the Unborn Child*. Leiden: Brill, p. 154.

35 Falzon, C., 2014. *Wrongful Life and Wrongful Birth: Legal and Moral Issues*. Faculty of Theology University of Malta, pp. 108-112; Caulfield, T., Knowles, L. & Meslin E. M., 2004. *Law and policy in the era of reproductive genetics*. *Journal of Medical Ethics*, 30, p. 414.

36 *Reeve v. The United Kingdom*, App no 24844/94, Decision of inadmissibility of the former Commission of 30 November 1994.

found “reasonably proportionate” that British law does not allow an action for wrongful life, because it “pursues the aim of upholding the right to life”. The Court noticed that the British “law is based on the premise that a doctor cannot be considered as being under a duty to the fetus to terminate it and that any claim of such a kind would be contrary to public policy as violating the sanctity of human life”.³⁷ In this case, the legal reasoning is relatively short, however, the outcome shows that the Commission provided further protection and did not exclude prenatal life from its scope. Nevertheless, regarding the issue of wrongful birth/life, and the connection between abortion, eugenics and discrimination of people with disabilities, the Court, for the moment, took a cautious position. That restrictive stand was preconditioned by the sensitivity of the issue.

In *Draon v. France* and *Maurice v. France*³⁸ the applicants are parents of children with severe congenital disabilities which, due to medical errors, were not discovered during prenatal medical examinations. They brought proceedings against the hospitals concerned. A new law of 4 March 2002, introduced while their proceedings were pending, meant that it was no longer possible to claim compensation from the hospital/doctor responsible for life-long “special burdens” resulting from the child’s disability. The Government submitted

that amendments were prompted by general-interest considerations of three kinds: ethical concerns, and in particular the need to legislate on a fundamental choice of society; fairness; and the proper organisation of the health service. The Court considered that the grounds relating to ethical considerations, equitable treatment and the proper organisation of the health service could not legitimise retrospective action that deprived the applicants of a substantial portion of the damages and made them bear an individual and excessive burden.³⁹ The law with retrospective effect abolished the essential heads of damage, relating to vast sums of money, in respect of which the parents of children whose disabilities had not been detected before birth could have made wrongful birth claims.⁴⁰ The Court recalled that such a radical interference with the applicants’ rights upset the fair balance to be maintained between the demands of the general interest on the one hand and protection of the right to peaceful enjoyment of possessions on the other hand.⁴¹ The Court found that the law in question violated Article 1 (protection of property) of Protocol No. 1 to the Convention concerning proceedings which were pending when the law came into force.

In *A.K. v. Latvia*⁴² the Court found a violation of the procedural aspect of the right to private life (Art. 8) of Ms. A.K., who, on June 2002, gave birth to a daughter with Down’s syndrome. At

37 Ibid.

38 ECtHR, *Draon v. France* [GC], App no 1513/03 and *Maurice v. France* [GC], App no 11810/03, 6 October 2005.

39 ECtHR, *Draon v. France* [GC], App no 1513/03, § 85.

40 Ibid, § 82.

41 Ibid, § 85.

42 ECtHR, *A.K. v. Latvia*, App no 33011/08, 24 September 2014.

the national level the applicant claimed that had she known that the child had a congenital disease, she would have chosen to undergo an abortion on medical grounds. She claimed compensation for pecuniary and non-pecuniary damage, including compensation for lost wages and a lump-sum maintenance award for her daughter (wrongful birth) but her civil claims were dismissed. She alleged before the ECtHR that her doctor forgot and failed to carry out the necessary tests. Therefore, she had been denied adequate and timely medical care in the form of an antenatal screening test (AFP) which would have indicated the risk of her fetus having a genetic disorder and would have allowed her to choose whether to continue or to abort the pregnancy. Correspondingly, the case included three significant issues: the women were not allowed to get full and objective information regarding the health of the fetus; if she had known about the disability of a child she would have aborted it and the third, wrongful birth claims were denied at the national level.⁴³ Regarding the abortion, the Court recalled that “the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy and that, as a consequence, legislation regulating the interruption of pregnancy touches upon the sphere of private life”.⁴⁴ However, the Court considered that the case does not directly concern the applicant’s

decision whether or not to continue her pregnancy. Conversely, the case concerns questions whether she was provided with the necessary information and whether her medical care complied with domestic law while the applicant argued that she was denied the right to have an AFP test. The Court added in this respect that case law confirms that where a complaint concerns the exercise of the right to effective access to information concerning health, it is linked to private and family life under Article 8.⁴⁵ Even though, the case included three issues, the Court commented only on abortion and the right to access medical care. By contrast, the Court refrained from the discussion on arguments presented in the Amicus brief and wrongful birth issues. Consequently, the Court did not discuss the moral question of the case, i.e. the link between wrongful birth and eugenics, likewise limited itself to examining the procedural aspect of Article 8 and how the internal courts assess the applicant’s complaint. This once again highlights the Court’s position and unwillingness to discuss the moral and ethical issues that are sensitive in nature.

In *M.P. and others v. Romania* (dec.)⁴⁶ the Court in-depth analysed the issue of wrongful claims and evaluated it from human rights perspective. The application concerns three applicants, the parents and their son born without a tibia. They considered that his birth infringed their son’s right to life as a child with dis-

43 Ibid, § 79: Association des Paralysés de France as third party interveners invited the Court to consider that each human being has an equal right to life and equal dignity. Amicus also emphasised that those, living with disabilities, wished to be seen not merely from the medical perspective but as people enjoying the right to full participation in society.

44 Ibid, §63.

45 Ibid.

46 ECtHR, *M.P. and others v. Romania* (dec.), App no 39974/10, 16 June 2014.

abilities (Articles 2 and 8). They also considered that the birth of their child had infringed their right to the protection of their private and family life. Therefore, they claimed that they had the right to receive compensation for wrongful life and wrongful birth, as the birth of their child was due to the negligence of the doctors that did not discover the absence of a tibia of the child at the various ultrasound scans. The court assessed wrongful life claim of the child born without a tibia and decided that it is manifestly ill-founded and recalled that the right not to be born cannot be derived from Article 2 of the Convention.⁴⁷ Besides, “Article 2 cannot, without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life”.⁴⁸ However, the Court examined wrongful life claim under Article 8 of the Convention and considered that the internal courts’ decisions were reasonably proportionate, as they balanced the various interests involved. Among those rights, they

included the right to life of the unborn child: “Thus, and in view of the importance of the right to life, it could not be considered that it would have been better for the child not to have been born, having regard also to the fact that the malformation in question was not capable of substantially erecting the quality of the child’s life. It transpired that the malformation could be corrected in the future by surgery”.⁴⁹ Moreover, the Court pointed out that due to the lack of consensus⁵⁰ in Europe on this issue and to the moral and ethical considerations involved, the member states enjoy a wide margin of appreciation on the matter and Romania’s restrictive approach in this field is in conformity with the Convention.⁵¹ Therefore, the Court with this reasoning established that Article 2 does not apply to wrongful life case, since there is no right not to be born under the Convention. Furthermore, the Court states that Article 8 covers wrongful life actions, however, concluded that due to the lack of consensus, states have a wide margin of appreciation. As to the wrongful birth claim of the parents, the Court did not take a close look and as-

47 Ibid, § 40.

48 ECtHR, *Pretty v. the United Kingdom*, App no 2346/02, 29 April 2002, § 39.

49 ECtHR, *M.P. and others v. Romania (dec.)*, App no 39974/10, 16 June 2014, § 24.

50 ECtHR, *M.P. and others v. Romania (dec.)*, App no 39974/10, 16 June 2014, § 39: “In its *Kelly* case of 2005, the Supreme Court of the Netherlands granted compensation for pecuniary and non-pecuniary damage to the parents and to the child, who was born with a handicap due to a chromosomal deformity; the compensation for pecuniary damage included the costs of the care and education of the child and relating to her handicap. England and Wales did not recognise “wrongful life” claims but wrongful birth claims, however, were allowed in a few cases (*Rees v. Darlington Memorial Hospital NHS Trust* of 2003). Following the *Perruche* case of 2001, in which the Cour de Cassation accepted both types of claim, the French legislation was changed, expressly prohibiting wrongful life claims. Wrongful life claims were equally dismissed in Germany, while wrongful birth requests had been accepted, under certain conditions, in a few cases assessed by the Supreme Court. A similar approach was reported for Italy, where under contract law, claims for wrongful birth were allowed, the parents being entitled to recover their expenses for medical care, loss of income and also non-pecuniary damage however wrongful life claims were not accepted”.

51 Ibid, § 45.

sessed it in one paragraph. The Court applied the *Costa and Pavan v. Italy*⁵² and considered that Article 8 is applicable in so far as it refers to the parents' desire to conceive a child unaffected by a genetic disease, this choice is a form of expression of their private and family life.⁵³ In other words, with the above reasoning, the Court recognised a right to have a healthy child without disabilities under Article 8 of the Convention. Looking to the merits of this complaint, the Court noted that the national authorities acknowledged the wrongful birth claim of the parents and since national courts afforded them redress they are no longer victims in the sense of the Convention. Consequently, the Court acknowledges the wrongful birth claim under Article 8 with respect to the parents' desire to conceive a child unaffected by a genetic disease. *Costa Pavan* judgment underlined that the applicants' desire to conceive a child unaffected by the genetic disease attracts the protection of Article 8 since this choice is a form of expression of their private and family

life.⁵⁴ Consequently, the Court denied the risk of eugenic selection in cases of abortions on medical grounds and admitted parents' choice of having a healthy child. Even though this case is closely linked to the embryos, and not wrongful actions, it still had a significant influence on wrongful birth actions. *M.P. and others v. Romania*, taken together with *Costa Pavan*, developed the logical consistency that since the parents' desire to have a healthy child is protected under Article 8, the wrongful birth claims should be admitted as well.

As it was mentioned, the paragraph aimed to evaluate the position of ECtHR on wrongful life and wrongful birth claims. Henceforth is an answer to the question of whether the Court considers that there was a violation of the Convention. To conclude, on the above-discussed issue, there are only a few types of claims before the ECtHR:

(1) Wrongful life is a lawsuit where a child is asking for damages because the doctor failed to diagnose fetus' injury and claiming that she/he should

52 ECtHR, *Costa and Pavan v. Italy*, App no 54270/10, 11 February 2013, the case concerned an Italian couple who are healthy carriers of cystic fibrosis and wanted, with the help of medically-assisted procreation and genetic screening, to avoid transmitting the disease to their offspring. The Court held that there had been a violation of Article 8 of the Convention. It noted the inconsistency in Italian law that denied the couple access to embryo screening but authorised medically-assisted termination of pregnancy if the fetus showed symptoms of the same disease. In order to justify this interference, the Government refer to the concern to protect the health of "the child" and the woman, the dignity and freedom of conscience of the medical professions and the interest in precluding a risk of eugenic selection. The Court was not persuaded by those arguments considering that the concept of "child" cannot be put in the same category as "embryo", it fails to see how the protection of the interests referred to by the Government can be reconciled with the possibility available to the applicants of having an abortion on medical grounds if the fetus turns out to be affected by the disease, having regard in particular to the consequences of this both for the fetus, which is clearly far further developed than an embryo, and for the parents, in particular, the woman. Furthermore, the Court concluded that the Government have failed to explain how the risk of eugenic selection and affecting the dignity and freedom of conscience of the medical professions would be averted in the event of an abortion being carried out on medical grounds.

53 Ibid, § 50.

54 Ibid, § 57.

not have been born. The Court does not consider such cases under Art. 2 and deems that the right not to be born cannot be derived from the Convention. Although, such claims are admissible under Art. 8 however the Court has never found violation of Art. 8 in wrongful life cases since the lack of consensus grants the states a wide margin of appreciation.

(2) The second type of lawsuit is when the parents lost claim of damages in wrongful birth cases due to the legislative amendments. This type of applications is considered admissible as the Court deems that it violates the right to property.

(3) The last and the most widespread suits are wrongful birth actions when parents argue a violation of Art. 8. They deem that their doctor failed to adequately warn about the risk of giving birth to a child with “genetic abnormalities”, thus, they claim that they were prevented from making a truly informed decision as to whether or not to have the child. The research outcome has shown that regarding parents’ legal arguments the Court has two types of reasoning with the same outcome – the violation of Art. 8. The first chain of reasoning settles that the parents’ desire to have a healthy child is protected under Article 8 hence the wrongful birth claims should be indeed admitted. The second type of reasoning consists of a multi-layer and confusing arguments. The Court tries not to connect this issue with an abortion/fetus rights and touches upon only prenatal tests. The Court, in wrongful birth cases, established that it is a women’s right to have full information about

her health, do prenatal tests and denial in this violates Art. 8.

As the Court avoids to openly discuss abortion, eugenic selection and fetus’ rights, the paper will further evaluate women’s right to self-determination and the rights of the unborn child. Since the Court established that wrongful birth actions concern the women’s right to get information on embryos health status and to decide on abortion, to have a more comprehensive picture, the paper will hereafter assess women’s right to self-determination and unborn child’s legal status.

3.2. Women’s right to self-determination and the legal status of the unborn child

The cornerstone of the wrongful claim is parents’ arguments that they did not know about fetus disabilities, otherwise they would have made an abortion. Therefore, women in wrongful birth cases claim damages because their right to get full information on the health of a fetus was violated as well as they lost the chance to execute their right to abortion. This paragraph assesses what are the bases of women’s claims under ECtHR and how it relates to fetus rights.

The notion of private life according to art. 8 encompasses, inter alia, decisions to have and not to have a child.⁵⁵ ECtHR maintains its presumption according to which due to the close physical link during pregnancy the fetus’ condition and health constitute elements of the pregnant woman’s health.⁵⁶ Therefore, women are entitled to carry out prenatal

55 ECtHR, *Evans v. The United Kingdom* [GC], App no 6339/05, 10 April 2007, § 71.

56 ECtHR, *Tysiac v. Poland*, App no 5410/03, 20 May 2007, § 106; ECtHR, *R.R. v. Poland*, App

genetic tests, on account of her right to health-related information and in order to allow her to exert her right to “personal autonomy”.⁵⁷ However, some scholars argue that the PGD increases the risk of disability oppression and discrimination and, since it does have a profound influence on society, it should be regulated by public policy.⁵⁸ Scholars deem that it is quite expected that parent will want only “normal baby” and also in case of fetus’ disability it will be aborted. Abortion, in such cases, sends the message that people with disabilities are not tolerated.⁵⁹ Hence, the fact that prenatal and pre-implantation diagnosis provide information that can lead to termination of pregnancy⁶⁰ makes the whole issue highly controversial. However, PGD tests serve various purposes⁶¹ and the paper is not in favour of strictly controlling PGD since a right to get information on fetus’ health condition is an integral part of women’s private life.

Until now, there is still no clear-cut definition on the nature and legal sta-

tus of the fetus in Council of Europe. Even though fetuses get more legal protection against medical tests, still it is vague where it stands while conflicting with other rights. Therefore, this legislative lacuna complicates wrongful action issues. In Parrillo case, ECtHR acknowledged that the “protection of the embryo’s potential for life” may be linked to the aim of protecting moral and the rights and freedoms of others.⁶² Moreover, human embryos cannot be reduced to “possessions” within the meaning of that provision.⁶³ The Court in Vo found that it was neither desirable nor possible to answer the question of whether the unborn child was a person for the purposes of Article 2 of the Convention,⁶⁴ so the question of when the right to life begins is under the States’ margin of appreciation. Since the rights of the fetus and the mother are “inextricably interconnected” the margin of appreciation in the field of “protection of the unborn necessarily translates into a margin of appreciation for that State as

no 27617/04, 28 November 2011, § 197; Brems, E., 2017. *Evans v UK*, three grounds for ruling differently in Smet, S. & Brems, E. (eds), *When human rights clash at the European Court of Human Rights*. New York: Oxford University Press, p. 86.

57 ECtHR, *R.R. v. Poland*, App no 27617/04, 28 November 2011, § 188.

58 Caulfield, T., Knowles, L. & Meslin E., M., 2004. *Law and policy in the era of reproductive genetics*. 30 no. 4 *Journal of Medical Ethics*, p. 414.

59 Falzon, C., 2014. *Wrongful Life and Wrongful Birth: Legal and Moral Issues*. Faculty of Theology University of Malta, p. 112.

60 Council of Europe, Committee of Ministers, Recommendation No. R(90)13 on Prenatal Genetic Screening, Prenatal Genetic Diagnosis and Associated Genetic Counselling, 21 June of 1990, principal 2, prenatal genetic screening and prenatal genetic diagnosis tests were undertaken to identify a risk to the health of the unborn child should be aimed only at detecting a severe risk to the health of the child; Oviedo Convention: protecting human rights in the biomedical field, article 12, tests which are predictive of genetic diseases and genetic predispositions or susceptibility to a disease may be performed only for health purposes or for scientific research linked to health purposes and subject to appropriate genetic counselling.

61 ECtHR, *R.R. v. Poland*, App no 27617/04, 28 November 2011, § 205.

62 ECtHR, *Parrillo v. Italy [GC]*, App no 46470/11, 27 August 2015, § 167.

63 ECtHR, *Parrillo v. Italy [GC]*, App no 46470/11, 27 August 2015, § 215.

64 ECtHR, *Vo v France*, App no 54924/00, 8 July 2004, § 85.

to how it balances the conflicting rights of the mother".⁶⁵

Meanwhile, the topic of abortion undoubtedly is a very sensitive moral and ethical issue.⁶⁶ Therefore, a wide margin of appreciation is accorded to state in balancing the protection the right to life of the unborn child, and the conflicting right of the mother.⁶⁷ However, the prohibition of abortion is not automatically justified "on the basis of unqualified deference to the protection of prenatal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature".⁶⁸ The court established that in the context of access to abortion, procedures should guarantee that a woman's voice is heard and their views are considered.⁶⁹ Consequently, according to case law, the primate is not always given to one right, yet the main challenge is to balance unborn child's and mother's interests.

Furthermore, the paper highlights the importance of a woman's independence to decide on reproductive issues. Even though the paper is not in favour of wrongful birth/life claims, it argues that abortion is inseparable right of women. It argues that wrongful birth action is connected with abortion. However, by contrast, an opponent of wrongful claims can be a supporter of women's self-determination rights. Moreover, the paper argues that a woman has a right

to get full information on fetus and make an abortion. If those rights are violated, she can get compensation that is appropriate under civil law, however, not wrongful birth damages. In order to support this opinion and show that this argument is not contradictory, the paper will henceforth use the "balance test".

3.3. Proportionality or imbalance of the rights?

As it was shown, ECtHR evaluated wrongful life action under Article 2 and Article 8 and denied those actions, arguing that claim contradicts the aim of right to life. Meanwhile, its reasoning shows the clash between various rights and values. The Court closely linked wrongful birth actions to women's right to self-determination, although, as was shown in the second chapter, those actions might imply eugenic policies and incitement to discrimination. In order to evaluate which rights are on a scale, the paper evaluates wrongful birth and life actions according to the balance test.

The universality of human rights system means that there is no hierarchy between the different rights and if the society wants to solve the puzzle of human rights galaxy, it should read all rights together.⁷⁰ Cases involving multiple human rights are examined through the

65 ECtHR, *A, B, and C v. Ireland* [GC], App no 25579/05, 16 December 2010, § 237.

66 Beauvoir, S., D., 2010. *The Second Sex*. New York: Vintage Books, p. 605: "Men tend to take abortion lightly; they consider it one of the many accidents to which the malignity of nature has destined women: they do not grasp the values involved in it."

67 ECtHR, *A, B, and C v. Ireland* [GC], App no 25579/05, 16 December 2010, § 233.

68 ECtHR, *A, B, and C v. Ireland* [GC], App no 25579/05, 16 December 2010, § 238.

69 ECtHR, *P. and S. v. Poland*, App no 57375/08, 30 October 2012, § 99.

70 Eremadze, K., 2013. *Balancing of Interests in Democratic Society*. Tbilisi: German Cooperation for International Cooperation, GIZ, p. 15.(in Georgian)

only one human right,⁷¹ however, “our interest in the trees should not make us forget to study the forest” and should remember that human rights law is an integrated system.⁷² The paper does not aim to challenge the right to abortion, yet to illustrate conflicting rights in wrongful actions and to show the possible ways to balance them. It assesses conflicting rights in wrongful actions according to the “balance test” that is inspired by scholar’s works. The test includes further relevant criterias:

(1) The first step is an evaluation of whether there is a real conflict between the two existing fundamental rights; (2) If there is a real conflict and it is impossible to protect both rights fully, decision-makers should avoid sacrificing one right for the sake of the other and find a compromise for the harmonisation.⁷³

However, if on this stage the conflict is not eliminated by the compromise, the test continues with further criteria for prioritizing competing interests:

(3) Decision-makers should check if International Law and treaties provide the order of the priority;⁷⁴ (4) If there is no established order between the rights under International Law, then, the dis-

inction between “the core and the periphery” within each right must be assessed and the primate should be given to the right that infringes only “a peripheral zone” of another right;⁷⁵ (5) The next criterion is to compare how severe is the interference in exercising right and privilege is given to the right when the exercise of it is deemed utterly impossible;⁷⁶ (6) The infringement should be avoided if it indirectly involves other rights;⁷⁷ (7) When there are fundamental individual rights on a scale, but one of them additionally involves a substantial general interest, balance is tilted in favour of that right.⁷⁸

3.3.1. “Balance test” in wrongful life actions

In wrongful life actions, a child with disabilities asks for the compensation because s/he was born. This claim should be evaluated from different perspectives under the “balance test”:

First and foremost, in wrongful life actions child’s “right not to be born” allegedly conflicts with the right to life and dignity. Though, compensating the life with disabilities is not in line with

71 Brems, E., 2017. Legal pluralism as a human right and/or as a human rights violation in Brems, E., Corradi G. & Goodale M. (eds), Human Rights encounter legal pluralism: normative and empirical approaches. Oxford-Portland: Hart Publishing, p. 27.

72 Ibid, 26.

73 Eremadze, K., 2013. Balancing of Interests in Democratic Society. Tbilisi: German Cooperation for International Cooperation, p. 15. (in Georgian)

74 Brems, E., 2017. Evans v UK, three grounds for ruling differently in Smet, S. and Brems, E. (eds), When human rights clash at the European Court of Human Rights. New York: Oxford University Press, pp. 79-80.

75 Ibid.

76 Ibid, see also, Neuman, G. L., 2003. Human Rights and Constitutional Rights: Harmony and Dissonance. 55 Stan. L. Rev. pp. 1863, 1886.

77 Ibid.

78 Eremadze, K., 2013. Balancing of Interests in Democratic Society. Tbilisi: German Cooperation for International Cooperation, pp. 17-21.

the idea of the right to life that ranks as one of the most fundamental provisions in the ECtHR and enshrines one of the basic values of democratic societies.⁷⁹ Therefore, allowing compensation contradicts the principle that there is no right to non-existence and would devalue the importance of the right to life. Consequently, the “right not to be born” does not exist and, therefore, according to the first criteria of “balance test”, there is no conflict between two equally important rights.

Secondly, allowing the argument that life with disabilities is not worth living spreads negative stereotypes and, thus, contradicts human dignity. Any negative stereotyping of a group impacts the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group.⁸⁰ While society engages in stigmatic stereotypes, robs persons with disabilities of their dignity and humiliates them, it is crucial that decision-makers always remember that they should reflect dignity values.⁸¹ It is essential since people with disabilities are all the time struggling to think positively about themselves despite all these negative messages and stigma in society.⁸² Allowing damages in wrongful life cases do not affirm the value of life with disabilities, but on the contrary, nullifies weighty general interest as the court “legalise the logic” that non-existence is better off than life with impairments.

To summarise, in wrongful life actions there is not any real conflict between the child’s “right not to be born” and the right to life and dignity, since “right not to be born” does not exist. Even if opponents continue to claim the existence of the “right not to be born”, wrongful life claim “involves other weighty general interest” and by allowing the damages, it furthermore stigmatises vulnerable members of socium. Therefore, the involvement of the general interest tips the scale in favour of rejecting such claims.

3.3.2. “Balance test” in wrongful birth actions

Every woman has a right to have full information about her health, including the health of the fetus as it is an integral part of her body. Bosso⁸³ case is a clear indication that reproductive rights, including pregnancy continuation or termination, is primarily a woman’s concern and nobody can influence her decision. The woman’s body and sexuality belong only to the woman and any other definition will bring us back to patriarchy when males continuously strive to control the sexuality of woman and dominate their decisions. Hence, the paper suggests that the vital principle of women’s self-determination and emancipation is to make independently all the decisions regarding her reproductive rights.

79 ECtHR, *Lambert and others v. France* [GC], App no 46043/14, 5 June 2015, § 117.

80 ECtHR, *Aksu v. Turkey* [GC], App nos 4149/04, 41029/04, 15 March 2012, § 58.

81 Perlin, M., 2016. My Sense of Humanity Has Gone Down the Drain. Stereotypes, Stigma and Sanism in Brems, E. & Timmer, A., (eds), *Stereotypes and human rights law*. Cambridge – Antwerp – Portland: Intersentia, p. 102.

82 Hensel, W. F., 2005. The Disabling Impact of Wrongful Birth and Wrongful Life Actions. 40 *Harv. C.R. – C.L.L. Rev.*, pp. 141, 176.

83 ECtHR, *Bosso v. Italy* (dec.), App no 50490/99, 5 September 2002.

Even though the paper supports the right on abortion as an essential part of women's rights, simultaneously it argues that wrongful birth actions should be rejected. Denying wrongful actions cannot be defined as a rejection of the right to abortion in view of the fact that, there is post factum situation when a woman, due to the lack of information, missed the opportunity to abort the fetus and she has a child with disabilities. Indeed, hypothetical case scenario, when a woman wanted to, but was not allowed to, abort the fetus with disabilities, includes the conflict between women's and fetus's rights. However, the paper suggests that in wrongful birth cases, there is not conflict between women's right to abortion and fetus rights. In wrongful birth cases law has to balance which is more important – full information on health and missed chance on abortion or rights of a child with disabilities. In order to determine equilibrium, the paper will weight up interests on the grounds of “balance test”.

According to above-stated criteria, decision-making body should check if International Law and treaties provide some hierarchy. The ECtHR relied on Article 31 § 3 (c) of the Vienna Convention and stated that “the Court has never considered the provisions of the Convention as the sole framework of reference for the interpreta-

tion of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties”.⁸⁴ Accordingly, in its judgment about the child with disabilities, the Court took into consideration International law and read ECtHR in the light of CRPD as well as deemed children with disabilities “particularly vulnerable”.⁸⁵ Since “an integrated approach is needed for full human rights justice”⁸⁶ and the Court usually takes into consideration relevant sources, in this case, CRC might be deemed relevant as wrongful birth cases involve children's rights. Therefore, the paper will evaluate the cases in the light of CRC.

Firstly, the paper argues that advantage has already been given to children's rights under International Law treaties. According to Article 3 (1) of the Convention on the Rights of the Child “children's interest should be the primary consideration” and it is an obligation for a state and not a discretion.⁸⁷ “The best interests of the child” as primary importance should be taken into consideration at all levels, but it becomes highly important when an action has a direct, as well as indirect impact, on the children. The principle of “The child's best interest” concerns all matters that involve children and should

84 ECtHR, *Demir and Baykara v. Turkey* [GC], App no 345003/97, 12 November 2008, § 67.

85 ECtHR, *Cam v. Turkey*, App no 51500/08, 23 February 2016, §§ 53, 65, 67.

86 Brems, E., 2017. *Evans v UK*, three grounds for ruling differently in *Smet, S. and Brems, E.* (eds), *When human rights clash at the European Court of Human Rights*. New York: Oxford University Press, p. 81.

87 UN Committee on the Rights of the Child (CRC), General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1), 29 May 2013, CRC /C/GC/14, § 36: “The best interests of a child is a primary consideration in the adoption of all measures of implementation. The words “must be” place a strong legal obligation on States and mean that States may not exercise discretion as to whether the child's best interests are to be evaluated and ascribed the proper weight as a primary consideration in any action undertaken.”

be applied while resolving the conflicts among the rights enshrined in human rights treaties, as well as due care should be given to children in a vulnerable situation.⁸⁸ According to the General comment of CRC, Potential conflicts between the best interests of a child and other people must be resolved by carefully balancing the interests of all parties and finding a suitable compromise.⁸⁹ If the harmonisation is not possible while analysing and weighing the rights, states must remember “that the right of the child to have his or her best interests taken as a primary consideration means that the child’s interests have high priority and not just one of many considerations. Therefore, a larger weight must be attached to what serves the child best”.⁹⁰

Consequently, CRC and International Law established that child’s best interest has the crucial importance in deciding human rights conflict and therefore, wrongful birth cases should not be allowed. However, opponents might disagree with those arguments and claim that International Law does not automatically give primacy to the denial of the claim, because the notion of “child’s best interest” is vague or even more, it might contradict “child’s best interest” to exclude financial support for children with disabilities. Hence, the paper will further evaluate those arguments.

CRC established that while assessing the “child’s best interest”, state

must respect effective enjoyment of the rights recognised under the Convention, including the right to life, survival, development and dignity.⁹¹ Consequently, the elements that contradict the rights enshrined in the Convention cannot be considered as valid in assessing what is best for a child or children,⁹² also a child’s vulnerability is a crucial element to consider, in particular, disability.⁹³ To conclude, much weight is given to holistic development, self-worth and dignity of a child that definitely will be violated in case of compensating life with disabilities. Nevertheless, all needs of a child should be provided, but this must not be compensation for life. The primary responsibilities of parents are to take care of their children, support them emotionally, financially and provide with unconditional love. Therefore, those responsibilities, including financial burden, cannot be shifted onto the doctor and they must fulfil all needs of a child.

As for the argument regarding financial support, the paper will further clarify. As paper suggested, the recognition of wrongful birth claims implies the risk of eugenics, stigmatisation and contradicts child’s best interest to develop in a holistic environment. The moral acceptability of wrongful actions depends on the values and principles of the political ideology,⁹⁴ for instance, the neoliberal emphasis on individual choice is reinforced into the idea that the parents’ choice must

88 Ibid, § 33.

89 Ibid, § 39.

90 Ibid.

91 Ibid, § 42.

92 Ibid, § 51.

93 Ibid, § 75.

94 Camp, N.V., 2014. How Liberal is (the Liberal Critique of) a Liberal Eugenics? 26 *Humana. Mente Journal of Philosophical Studies*, pp. 223, 225.

not “burden” the rest of society that does not want to provide social services for a person with disabilities.⁹⁵ On the other hand, people with different political views claim that the lack of economic security and social support encourage parents to prevent the birth of children with disabilities, but financial concerns, however, could be allayed by the proper public health insurance system.⁹⁶ The idea that debates on wrongful life and birth cases include the tension between different political ideologies seems accurate. The main concern is the will of the government and how far they are going to fulfil their social responsibility and protect the vulnerable group.

4. CONCLUSION

The paper evaluated the issue from an ethical perspective in order to understand what philosophical implications wrongful actions might imply. It can be concluded that the primary dilemma that jurisprudence have to decide in wrongful life and birth cases is “to be or not to be”. In particular, two main arguments oppose each other: one group of scholars argue “poor quality” view as they claim that life with a disability is not worth to live. This logic is contradicted by the second and more crucial argument that is called “sanctity-of-life concept”, as well as the fact that the courts do not have jurisdiction over assessing the worth of human being and it does not matter whether he/she is with disabilities or not. After the evaluation of the arguments from

both sides, the paper concludes that, the right to non-existence does not exist and therefore, the primate is given to “sanctity-of-life concept”.

Furthermore, in wrongful birth cases, courts are acknowledging that the parents are “damaged” by the birth of a child with disabilities as well as in wrongful life cases the life with disabilities is deemed as “damage”. Therefore, the paper suggests that by recognition of these torts, the state indirectly supports the idea of the eugenics, since they consider children as a financial burden because of their disabilities. As a consequence, such policies imply that nonexistence is preferred to life with a disability and it furthermore stigmatises them. Subsequently, allowing damages in wrongful birth cases, harms a child’s self-worth and the fact that parents claim compensation for harms resulted by the birth of a child, stigmatises her/him.

The paper evaluated the position of ECtHR on wrongful life and wrongful birth claims. According to case law, it can be concluded that the Court does not consider wrongful life cases under Art. 2 and deems that the right not to be born cannot be derived from the Convention. Although, such claims are admissible under Art. 8, however the Court has never found violation of Art. 8 in wrongful life cases since the lack of consensus grants the states a wide margin of appreciation. On the other hand, wrongful birth actions are widespread. The research outcome has shown that regarding parents’ legal arguments, the

95 Silva, V. T., March 2011. Lost Choices and Eugenic Dreams: Wrongful Birth Lawsuits in Popular News Narratives. 1(18), *Communication and Critical/Cultural Studies*, pp. 22, 35.

96 Stein, J. T., 2010. Backdoor Eugenics: The Troubling Implications of Certain Damages Awards in Wrongful Birth and Wrongful Life Claims. 40 *Seton Hall L. Rev.* pp. 1117, 1125.

Court has two types of reasoning with the same outcome – the violation of Art. 8. The first chain of reasoning settles that the parents' desire to have a healthy child is protected under Article 8, hence, the wrongful birth claims should be indeed admitted. The second type of reasoning establishes that it is a women's right to have full information about her health, do prenatal tests and denial of this violates Art. 8.

The paper conducted a test that was evaluated based on scholars' works. Consequently, the "balance test" showed that in wrongful life actions child's "right not to be born" conflicts with the right to life and dignity. However, according to ECtHR's case law, "right not to be born" does not exist and, therefore, according to the first criteria of "balance test" there is no conflict between two equally important rights. To conclude, by allowing the damages in wrongful life, states furthermore stigmatise vulnerable members of the socium. Therefore, the answer on the central question will be the following – allowing damages in wrongful life cases violates the dignity of the person with a disability and contradicts the meaning of the right to life.

Even though the paper supports the

right to abortion as an essential part of women's rights, simultaneously it argues that wrongful birth actions should be rejected. Indeed, the paper suggests that in wrongful birth cases there is not a conflict between women's right to abortion and fetus rights. In wrongful birth cases, the law has to balance what is more important – full information on health and missed chance to abortion or rights of a child with disabilities. While evaluating the conflict on the grounds of "balance test", the paper concluded that the child's best interest has the key importance and, therefore, wrongful birth cases should not be allowed.

To conclude, healthy self-esteem has a vital role while humans deal with different hardships in life. It is the main instrument that helps humans to develop favourable self-concept and clear identity that they are full members of society. The fact that state acknowledges that parents of the child with disabilities are victims and they need compensation for damages resulting from the child's birth, excludes a person from socium and marks them with a negative stigma. Therefore, neither claims should be allowed.

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