



THE NEW FRONTIERS OF THE HUMAN BODY

LES NOUVELLES FRONTIÈRES DU CORPS HUMAIN

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ABSTRACT

The construction of the human body is not purely medical and biological, It is also a social, cultural and anthropological one to which the law is bringing its own stone.

In our modern society, the human body has the function of a limit which separates individuals and gives them a greater autonomy. With technoscience, we can reconstruct ourself.

Nevertheless, our new body is not totally our own and fully autonomous. It is part of a complex network of social relationship which explain the ambiguity of the human body. We want to be the author of our own identity but we look for social acknowledgement.

KEYWORDS

Human body, Autonomy, Identity, Social relationship, Anthropology, Culture, Law.

RÉSUMÉ

La construction du corps humain n'est pas purement médicale et biologique, elle est aussi sociale, culturelle et anthropologique et le droit y apporte sa pierre.

Dans notre société moderne, le corps humain a, en effet, la fonction d'une limite qui sépare les individus et leur donne une plus grande autonomie.

Si avec technoscience, nous pouvons repousser ces limites et nous « reconstruire », notre nouveau corps ne nous appartient pas cependant totalement et n'est pas entièrement autonome. Il fait partie d'un réseau complexe de relations sociales qui expliquent l'ambiguïté du corps humain car nous voulons être l'auteur de notre propre identité mais nous cherchons aussi une reconnaissance sociale.

* Court of appeal in Paris.

MOTS-CLÉS

Corps humain, Autonomie, Identité, Relations sociales, Anthropologie, Culture, Droit.

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In our modern society, the human body has the function of a limit which separates individuals and gives them a greater autonomy. With technoscience, we can reconstruct ourself (I).

Nevertheless, our new body is not totally our own and fully autonomous. It is part of a complex network of social relationship which explain the ambiguity of the human body. We want to be the author of our own identity but we look for social acknowledgement. Technoscience, consumerism and subjectivism accentuate this trend and we should ask the question: are we as *The Frog who Aspired to Become as Big as an Ox* (Jean de La Fontaine)?

I. A NEW SELF IS BORN

In its book "The Name of the Rose", Umberto Eco reminds us how dangerous the dissemination of knowledge was but that, due to the role of the Church, men could dominate their fear.

Modern medicine and the Enlightenment emancipated us from this fear and let us enter into a civilization of scientific progress while, in the field of morals and politics, we did not accept any more to have our destiny ruled by others. But, with the resurgence of democracy and the triumph of rationality, man became responsible for his own choices and this resulted in a new fear, the fear of uncertainty and risk.



There is however a major paradox in the way we behave towards the use of technoscience. On one hand, we are afraid of a possible “slippery slope” and we think that society should therefore impose strict limits to scientific activities. But, on the other hand, we support the idea that individuals may use new technologies to fulfill their own wishes.

A. Can the body serve to build a new human identity?

We know that today biology and genetics may be used to identify individuals. But can we deduce from this fact legal consequences regarding the determination of what an individual is and how he should be socially acknowledged.

1. The bio-identity

Although quite new, the concept of genetic identity has been accepted as a tool to characterize the identity of an individual while at the same time the recognition of gender identity extended the social dimension of human identity.

– Genetic identity

The discovery of DNA made possible to identify with a higher degree of certainty each individual and since the 1990's, human genetic identification broadly developed in different fields including judicial purposes; it is aimed at establishing family links or at identifying suspects or victims.

Moreover, genetic identification, which may be applied to prevent the falsification of official documents or to fight against terrorism, reinforces the social control on individuals. Of course, as asserted in the Universal Declaration on Human genome and Human Rights, it does not mean that the individual identity is reduced to its genetic components. But, this new genetics is replacing the old concept of race by the notion of individual with the idea that each individual has a genetic heritage that should be protected. We are all equal but all different.

– Gender identity

At the opposite border, the social frontier is also greatly moving as we can see with the case law of the European Court of Human Rights on transsexualism when in 2002 it put an end to concept of biological sex and recognize to transsexuals the right to marriage and to found a family.

• *Sex is no more defined solely on biological grounds*

In the Goodwin case (july 2002), the Court clearly stated that “it is not persuaded that... it can still be assumed that (the right of a man and woman to marry)... must refer to a determination of gender by purely biological criteria” and considered that there have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexual. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender.

• *Transsexuals have consequently the right to marry and found a family in their assigned gender*

If the Court agrees that “it is for the Contracting State to determine inter alia the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances”.

Therefore, we may say that the human body and its appearance contribute our social identity either to stigmatize or exclude an individual from the group or to facilitate its inclusion to the “social body”.

2. The body as a sign of social identity

Although the ambivalence of the genetic identity exists (our own genome contains elements common to some genetic groups of population), the role of the body in the ambivalence of the social identity is no less important.

We live a double reality show: we like to expose our body and, on other occasion, we prefer to hide it.



– Showing bodies

In the past, religions of the Book insisted on the Verb and rejected idols. Today, we belong to the civilization of Image and the word body does not refer to a community (religious, cultural, political...) but to what supports our individual personhood.

Although its goal is the individual self-fulfillment, this new narcissism implies that to worry about his body is also worrying about the perception of others on his body.

Progressively, the law has accepted this new sociology of the human body although till now the notion of body was not so far away from our law: marriage involves people of flesh and blood, and, if there is any alimony, it is that the body feed. But, the body then held his place, subject to binding social rules. Today, individual autonomy, which is expressed in the law, gives another meaning to the legal status of the human body. For example, isn't the distinction between sex and procreation an implicit recognition of a right to pleasure?

Admitted at the end of life, the concept of quality of life is also extended to safety and environmental protection. More precisely, this is the end of life that reveals the face-off between autonomy, that the individual wants also to control at that moment, and a dying body that we prefer to hide or retract permanently.

– Hiding bodies

To hide his own body is no more a sign of modesty but a sign of exclusion when a society conveys the idea that only well made bodies corresponding to the aesthetic canons must be exposed to the sight of all. It is a return to humility for our egos but a deep injustice for some of us.

The body veiled for cultural or religious reasons – it is essentially the woman's body – also expresses an idea of exclusion-hide the gaze of others – but this exclusion, unlike the lepers, does not stigmatize the ugliness but a double temptation: the one of others – “Thou shalt not covet thy neighbor's wife” – and the one of the woman, absolute temptress from original sin.

However, this excluding look is also an inclusion in the sphere of tradition.

And, insofar as many girls of North African origin appropriate these requirements to better circumvent them and to adopt outside the family environment the dress codes of modernity, there is in this double social life, albeit a bit “schizophrenic”, the beginning of a dialogue between self-assertion and the role that the body plays.

If the resurgence of the signs carried by the body and the strength of fashions might suggest a return to the practices of traditional societies, in fact, that is only the expression of self assertion taking into account the dominant trends of the consumer society and the show in which we live.

Are however legal prohibitions a better way to ensure individuals and society that they would keep control on the scientific transformation of the human body?

B. What role for legal prohibitions: symbol or pretence?

The notion of human identity, and in particular the safeguard of human species and the respect for human dignity, serves as a key issue to set up limits to the autonomy of individuals and the freedom of research. The prohibition of eugenic practices and reproductive cloning manifest denial letting a third party and a replicating genetic technology to interfere with human reproduction.

1. *Eugenics as a crime*

Since 2004, French law criminalize eugenic practices but the law does not clearly define what they are except to say that “they should aim at organizing the selection of persons”. So, it may cover both the aim to prevent someone to be born with undesirable traits and the aim to produce desirable ones.

Moreover, as the law does not refer explicitly to genetic technologies, it may cover other practices when they contribute to the same objective, such as forced sterilisation or euthanasia.

This crime is punished by 30 years of imprisonment which is less than the punishment of crimes against humanity (life imprisonment) but more than the punishment for torture (15 to 20 years).

Treating some iconic biomedical drift in the same way than organized crime practices, the legislator intended to stigmatize the potential errant doctors, who are supposed to commit such acts and consequently to prevent science fiction to become reality.

2. *The prohibition of reproductive cloning*

It is grounded on the same reasoning that it constitutes a major transgression because it disrupts the legal and anthropological definitions of the individual, the parenthood and filiation and excludes the hazard from the determination of our genetic heritage.

Universally proclaimed this prohibition has been transposed into the French criminal code with the

following definition: "the act of conducting an intervention aiming to raise a child genetically identical to another living or deceased". Still there, the definition is quite broad; it does not concern only a medical intervention and aims at punishing an intervention regarding its objective but without considering its result. The notion of genetical identity may also rise questions: how would an (intended?) limited change in the genome be considered? And regarding deceased persons, we may ironically observe that if the legislator had in mind the replication of a dictator, this regulation also leaves the idea of resurrection to the realm of faith.

The punishment is the same as for eugenism.

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The collapse of large transcendence requires individuals to make sense of a precarious existence and, in some way, the attention paid to the body is as a palliative to a decline in spirituality. Our body has become a familiar racing car that carries our life. It is also the flagship of our projected image in society. As such, it concentrates much of what we are or what we intend to appear. This may be the reason why, at every accident of life, the person takes the risk of being ejected from his own body. We have therefore no choice than to leave between narcissism and schizophrenia.

II. DRIVING OUR LIFE BETWEEN NARCISSISM AND SCHIZOPHRENIA

If some transformations of the human body are prohibited, others such as body tattoo or cosmetic surgery are not because today, body put on show is a mean to socialize individuals and to enhance the body as a beautiful object. This discrepancy between the self-regard and the eyes of others takes the body in a swirling vertigo between narcissism and schizophrenia. How to please oneself while attracting others?

A. Narcissism: between being and seem

The notion of autonomy is a dynamic concept which serves to found claims and new rights with the idea that to control his body is to ensure his identity and destiny.

1. *The triumphant body has two aspects: the cult of the body and the fight for new rights*

– The cult of the body

New individual practices (fitness, jogging, bodybuilding, body therapies...) in vogue since the 1970s underline how far the individual grabbed his body to reshape it and to make it the place of his personal development as if it was enough changing the body to change life. Narcissism takes the place left vacant by the end of the common expectancies and the agony of politics. However, the new narcissism is ambiguous because the exaltation of singularity is combined with the desire to be like others. Therefore, although the individual thinks that he freely and fully expresses himself through his body, he largely remains constrained by social codes. And that is what makes difficult the recognition of new rights.

– Fighting for new rights

• *Sexuality and reproduction*

Already the progress of medicine allows the individual to control his own sexuality and capacity of reproduction. It is now possible to distinguish those two functions. At the same time, medically assisted procreation, which affects nearly 2% of births in France, has established itself as a reliable mean, both medically and socially, to overcome the sterility of the couple or the risk of transmission of serious illness to the unborn child. It avoids the use of schemes of the past, still used in other cultures, especially those promoting ancillary relations. But in doing so, medically assisted reproduction replaces the fusion of two human bodies by the extracorporeal fusion of gametes.

The hedonist approach also encourages the individual to claim benefiting a quality of life as long as possible until death.

• *The end of death*

The wish to move the frontiers of death may explain that we do not care so much about future generations and that we forget our duty to pass them our experience and heritage. If, on one hand, the old generation is solely living to enjoy the durability and quality of life and, if on the other hand, the new generation may find know-how and knowledge in data banks, what is left to transmit from one generation to the other except an increased debt and a ravaged world?



Do we then need to maintain “useless” corporeal functions, in particular those which keep the individual in relation with others? Is ‘nt better to promote the reshaping of the body as a replica of ourself, as an introverted body?

2. *The body as a self replica for an introverted self*

If a physical replica would constitute an infringement to international and domestic legislation, a virtual replica is already a reality.

– The physical replica: cloning

Reproductive cloning has been designated as a fundamental prohibition for humankind, a new taboo. However, the idea to create embryos by cloning that might be the source of compatible and available organs to graft has been mentioned as a possibility by well-known scientists, including the nobel prize Robert Edwards. It is also the role of the lawyer to raise the following question which is nearly the same with surrogacy: what would be the consequence of such prohibition on the status of children born using the technique of cloning?

In theory, the principle of non-discrimination would impose that those children should have a status as much as possible similar to the common status of all children. The use and abuse of reproductive technologies should not serve as an alibi to recreate unfair legal distinctions between children. But is this possible without denying the fact that human reproductive cloning constitutes an absolute prohibition assimilated by French Law to a crime against the human species?

For the French National Bioethics Committee “cloning would lead to predetermine the genetic characteristics of a future human being, making him the “thing” of its “creators” and not the result of the “great lottery of heredity””. Therefore, today, the strength of the prohibition of reproductive cloning makes the child who would be born, although fully a human person, a social and legal pariah like children born of incestuous relation or surrogacy.

In some way, it is easiest for an individual to create a virtual identity.

– The virtual replical and the temptation to multiply identities

From social security number to the other different personal codes, we already use in many occasions a virtual identity. In most cases, this virtual identity is a tool to

trace back to our real social and physical identity. But, either for fun or for fraud, we may create virtual identity which are different. By doing so, we often believe that we could escape from our physical aspect and personal history. Indeed, without an efficient protection of those data which will prohibit interconnexion and fight against hacking, we give more opportunities to “Big Brother” to look at our global identity.

Should the legitimate search of identity by individuals led to more isolation among individuals in society? And how the community may acknowledge the claim for greater personal autonomy without asking the question: what’s about solidarity? Blood transfusion, organ transplantation, medically assisted procreation with donors depend on solidarity and raise the question to know how far our body may be a vital link between humans. Eve, who was created by the side of Adam, is the symbol of otherness which is necessary to found a common history while human cloning locks us into a face to face with ourselves. With the abolition of the body, we would have lost the Paradise again. Failing to exist for ourselves, we still believe that our bodies are by and for others.

B. Schizophrenia

Individualism does not allow to escape our social condition. It only transforms the relationship we have with the community. We live in a world of image which requires individuals to highlight their body if they want to work their way.

Being ourselves and appearing as ourselves for others is the dual face of the body and leads to a kind of schizophrenia.

1. *Masks fall away: the body, its image and the humanity of the individual*

By its capacity of transformation, the body facilitates flexible identities but it helps to reassure on what we are only when our image is corresponding with the idea that we have of ourself. In its first legal sense, the person is a mask. The words proclaimed on the social scene define our being and illuminate our actions. Stripped of its mask, the body comes to light but we must now consider the meaning of body language.

For some, the new social function of the body reflects the omnipotence of individual autonomy. To extend our rights, we not only use our body but we use the body of others. This body can then legally disappear as surrogate arrangements show. The consequence of this logic is the destruction of social models: gender

identity, kinship, filiation, family. Due to its anthropological role, the law has the duty to stop this destructive effects and maintain the individual within his "natural" frontiers.

For others, the body and the person are only concepts used to give life and meaning to legal personhood. Control of the individual over his fate now carries the entire life time to distend this time, decide its rhythms (the knowledge of our health risks, the timing of the birth of our children or that of our death) or improve the quality of life (repairing bodily functions, separating sexuality from procreation). But there is a limit. This new freedom should not be at the origin of a global social phenomenon because what is legitimate for some individuals is often unbearable for the whole society. The growth of individual liberty can then be the counterpart of new prohibitions and new forms of social control.

2. A socio-normative schizizophrenia

The post-modern State combines its development with the existence of two social phenomena: the politicization of the biological field and the individual claim to control the body. Today the State does not "monitor and punish" those who are on the margin of society but it delegates new forms of social control by encouraging in the health field doctors and patients to comply with socially accepted practices. Those individuals or groups who yesterday were considered as marginals are today fighting to get equal rights in society on the ground that all differences should be respected. In 1992, the reversal of its jurisprudence on transsexualism by the French Supreme Court following the condemnation of France by the European Court of Human Rights is a good example. More recently, we may also quote the 2013 Act authorizing marriage for same sex couples.

But this legitimacy assumes that individuals, who claim the benefit of new medical practices, should

accept to comply with a "consensual" definition of core legal rules. And these rules aim at keeping the human freedom in accepted limits. Their goal is to create a sort of "humanism of diversity" gathering all men under a universal law without imposing them a new moral order. In reality, the emancipation of the individual from the old social constraints performs only to encourage them to comply with new standards of behavior.

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Thus, the body is a place where confrontations occur at the same time as emancipation. Far from eliminating all frontiers, the dynamics of the body creates new and supposed best suited ones to our times. In addition, by virtue of science, it turns for the benefit of social use the human body into a mixed half-human, half artifact object. Then, do we have a future with or without our body?

To be, or not

to be: that is the question:

Whether 'tis nobler in the mind to suffer

The slings and arrows of outrageous fortune,

Or to take arms against a sea of troubles,

And by opposing end them? To die: to sleep;

No more; and by a sleep to say we end

The heart-ache and the thousand natural shocks

That flesh is heir to, 'tis a consummation

Devoutly to be wish'd. To die, to sleep;

To sleep: perchance to dream: ay, there's the rub;

W. Shakespeare, Hamlet, Act 3, scene 1