

The Right and the Principle of Autonomy

A Discussion of Autonomy as a Concept in Constitutional Law

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Oikeustiede
2017

Abstract

This master's thesis is a judicial review of the concept of autonomy within the jurisprudence of the European Court of Human Rights. During the review both the views of the proponents and the critics of the Court jurisprudence are discussed. The book endeavours to make sense of the complexity of autonomy as the questions asked expand also to the more broad questions of the history of autonomy, autonomy as a concept of constitutional law as well questions regarding to the status of autonomy as a concept of legal theory.

Rather than casting the reader adrift in a sea of theoretical detail, the author underlines the essential values in both the proponents' and critics' view of autonomy and forms a principle of reciprocity that could be used to counterbalance the use of the prevailing concept of individual autonomy within the jurisprudence of the European Court of Human Rights in certain situations.

Finding shortcomings in the current theory of autonomy, the author proposes and defends a layered model of autonomy, a tool to better understand the foundational layer of the subject of law, an autonomous person.

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 Case of Evans v the United Kingdom (App.6339/05), Judgment of 10 April 2007.
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Other Jurisdictions

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Israel

- Nachmani v. Nachmani* (50(4) P.D. 661)

The United States of America

- United Pacific Railway Co V. Botsford* (1891) 114 US 250.
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TREATIES

The Convention on the Rights of Persons with Disabilities
The Convention on the Rights of the Child
The European Convention on Human Rights
Vienna Convention on the Law of Treaties

LIST OF LEGISLATION

Finnish Law

Guardianship Services Act (442/1999)

Bibliography

- Aarnio, Aulis: *Tulkinnan taito – ajatuksia oikeudesta, oikeustieteestä ja yhteiskunnasta*. Helsinki. 2006.
- Arendt, Hannah: *The Human Condition*. The University of Chicago Press 1958.
- Berger, Peter L.; Luckmann, Thomas: *The Social Construction of Reality*. Doubleday 1967.
- Christman, J: *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*. 117 *Philosophical Studies* 143-164. 2004.
- Donnelly, Mary: *Healthcare Decision-Making and the Law*. Cambridge 2010.
- Dworkin, Gerald: *The Theory and Practice of Autonomy*. New York: Cambridge University Press 1988.
- Forell, Caroline A: *Gender Equality, Social Values and Provocation Law in the United States, Canada and Australia*. *American University Journal of Gender, Social Policy and the Law* 41(1) 27-69. 2006.
- Frankfurt, Harry: *Freedom of the Will and the Concept of a Person*. *The Journal of Philosophy*, 68 (1): 5-20. 1971.
- Hall, Mark A.: *Law, Medicine, and Trust*. *Stanford Law Review*. 55(2) 463-527, 2002.
- Harris, D.J.; O'boyle, M.; Bates, E.P.; Buckley, C.M.: *Law of the European Convention on Human Rights (third edition)*. Oxford. 2014.
- Lacey, Nicola: *In Search of the Responsible Subject: History, Philosophy, and Social Sciences in Criminal Law Theory*. *Modern Law Review* 64(3) 350-371, 2001.
- Löhmus, K.: *Caring Autonomy*. Cambridge University Press. 2015.
- Maclean, Alasdair: *Autonomy, Informed Consent and Medical Law*. New York 2009.
- Manson, Neil C.; O'Neill, Onora: *Rethinking Informed Consent in Bioethics*. Cambridge 2007.
- Kant, Immanuel: *Critique of Practical Reason (1785)* in M. Gregor (ed.) *Kant, Practical Philosophy* (Cambridge University Press, 1996)
- Lloyd, Genevieve: *Individuals, Responsibility, and the Philosophical Imagination in Relational Autonomy* ed. Catriona Mackenzie, Natalie Stoljar. Oxford University Press 2000.
- Mills, C. Wright: *The Sociological Imagination*. New York 1959.
- Mills, John Stuart: *On Liberty*. New York 2002.
- Mowbray, A.: *The Creativity of the European Court of Human Rights*. *Human Rights Law Review*. 5(1).
- Mullhall, S.; Swift, A.: *Liberals and Communitarians (2nd edn)*. Blackwell. 1999.
- Mundi, A.: *Explorations in the Faith and Thought of Hannah Arendt*, ed. James W. Bernauer. Dordrecht 1987.
- Möller, K.: *The Global Model of Constitutional Rights*. Oxford University Press. 2012.
- Nedelsky, Jennifer: *Law's Relations - A Relational Theory of Self, Autonomy, and Law*. New York 2011.
- O'Neill, O: *Autonomy and Trust in Bioethics*. Cambridge University Press 2002.
- Putnam, R.: *Bowling Alone*. New York. 2000.
- Raz, Joseph: *The Morality of Freedom*. Clarendon Press 1986.
- Redelmeier et al.: *Understanding Patients' Decisions: Cognitive and Emotional Perspectives*. 279 *Journal of the American Medical Association* 72 1993.
- Redelmeier, D; Shafir, E: *Medical Decision Making in Situations that Offer Multiple Alternatives*. 273 *Journal of the American Medical Association* 302 1995.

- Sandel, Michael: *Liberalism and the Limits of Justice* (2nd edn). Cambridge University Press. 1997.
- Schramme, Thomas: *New Perspectives on Paternalism and Health Care*. London 2015.
- Sherwin, Susan: *A Relational Approach to Autonomy in Healthcare* in S. Sherwin (ed.) *The Politics of Women's Health: Exploring Agency and Autonomy* (Philadelphia: Temple University Press, 1998), p. 27-28.
- Sneewind, J.B.: *The Invention of Autonomy: A History of Modern Moral Philosophy*. Cambridge University Press, 1998.
- Sjöstrand, Manne; Ericsson, Stefan; Juth, Niklas; Helgesson, Gert: *Paternalism in the Name of Autonomy*. *The Journal of Medicine and Philosophy* 2013.
- Smith, Huston: *The World's Religions*. HarperOne. New York 1991.
- Spaak, Torben: *The Concept of Legal Competence*. Dartmouth. 1994.
- Stoljar, Natalie: *Autonomy and the Feminist Intuition* in Mackenzie and Stoljar (eds.) *Relational Autonomy*. Oxford University Press 2000.
- Taylor, J. S. *Autonomy and informed consent: A much misunderstood relationship*. *The Journal of Value Inquiry* 38 383 2004.
- Wolpe, Paul: *The Triumph of Autonomy* in deVries and Subedi (eds.) *Bioethics and Society*, p. 54.

Introduction

The European Court of Human Rights¹ has a growing number of cases where the conception of autonomy has been invoked. The topics among them involve abortion, assisted birth, matters pertaining to one's identity, self-determination, sadomasochistic gay orgies² and assisted suicide³. It may be said that the scope of the autonomy-related rulings reaches everything from the cradle to the grave. On top of the vast scope of the autonomy in the Courts jurisprudence, one more evidence of the Court's affection with the concept of autonomy is, that to increase the use of autonomy in its litigation, the Court uses a publication on its website to educate potential applicants to use the principle of autonomy in their argumentation. The publication describes the conditions of admissibility: "Article 8 seeks to protect four areas of personal autonomy – private life, family life, the home and one's correspondence."⁴

Respect for personal autonomy is not written in any of the articles, yet the conception of autonomy and its use in the case law of the article 8⁵ of the European Convention on Human Rights⁶ has surprisingly been a non-issue in most of the recent legal discussions. The expanding scope of the concept of autonomy may be seen as an indicator of its diversity as it has helped the Court to formulate decisions with wide acceptance, or as Katri Lõhmus says, "as if

¹ Hereafter also " the ECtHR" and "The Court".

² Case of *Laskey, Jaggard and Brown v the United Kingdom* (Apps.21627/93;21826/93;21974/93), Judgment of 19 February 1997.

³ Case of *Pretty v the United Kingdom* (App.2346/02), Judgment of 26 April 2002.

⁴ The court website (<http://www.echr.coe.int/>) - Applicants - Admissibility Guide - The Practical Guide on Admissibility Criteria (pdf) p.66.

⁵ Article 8 states the following:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁶ After this also, "the ECHR" and "the Convention".

it was taken for granted".⁷⁸ The tendency of the Court to recognize more rights, and to give the existing rights broader interpretations has invited some scholars to argue that an autonomy-founded understanding of human rights is now, at least implicitly, underlying a big part of contemporary thinking in human rights law.⁹¹⁰¹¹

Notwithstanding all of the success, there is something worrisome in the mainly uncritical acceptance of autonomy as a concept of law. Even if the general meaning of autonomy was shared by all (which it is not) we would still have to agree on its status as a law concept: Is autonomy to be considered as a principle, a value, or possibly a right?¹² Unfortunately the Court is famously reluctant to give definitions, or to clarify its jurisprudence. So how to make sense of the meaning of the autonomy? If autonomy was a conception used in the Convention we would be better off, as the Vienna Convention on the Law of Treaties article Article 31 gives us the general rule of interpretation, according to which it is the ordinary meaning of the terms of the treaty in their context that we should lean on.¹³ The Court is not bound by the agreement since autonomy is not expressly articulated in any of the articles. The ordinary meaning of the term autonomy is still a valid starting point for a study of the concept of autonomy. The reasoning is this: what would the justification for the Court be, to use an intuitive

⁷ The claim to acceptance is obviously relative, there are also many widely disputed and controversial, both ethically and morally charged cases, where uniform acceptance is hardly possible.

⁸ Löhmus 2015, p.17.

⁹ Möller 2012.

¹⁰ Beyond diversity, the success of the conception of autonomy might be in that it is a familiar term, and because of that it has some degree of self-explanatory power. At least at first glance most people probably understand autonomy as self-governance of some sort and approve it as a value to be protected.

¹¹ In this study I use human rights law and constitutional law as synonyms, although I am aware of that constitutions include many provisions unrelated to human rights. My point is that national courts interpret human rights alongside with the ECtHR and there is a strong influence that goes both ways (See for example *Evans v the United Kingdom*, para 33-39). The European Court of Human Rights has no monopoly in interpretation of human rights and because of this I chose to use the term constitutional law in the heading of this study.

¹² Legal status in the meaning of legal bindingness. See more chapter 4.2.

¹³ Vienna Convention on the Law of Treaties

1969 http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (Cited 18.5.2014)

concept such as autonomy, and then give it a meaning totally different from the instinctual one? Hard to think of one.¹⁴

To be sure, there is a growing number of scholars who have been critical of the conception of autonomy in the Court's praxis as well. I will discuss with both the proponents and critics of the Court jurisprudence. The hypothesis of this study is that - even if the Court invoked autonomy as a new concept in its article 8 case law as late as 1996¹⁵ - the underlying ideas of autonomy must have been instilled in the jurisprudence of western societies in other shape, form or terms. In order to study the hypothesis, I will contemplate the concept of autonomy as found in philosophy and legal theory. After forming a basic understanding of the concept, I will evaluate how it is being used in practice, particularly in the legal praxis of the article 8 of the European Court of Human Rights. The study consists of two questions: 1) How has autonomy been understood in legal and philosophical literature? As subquestions to the first question a few more problems arise: What is the relation between autonomy and concepts like self-determinacy, agency and capacity that seem very similar to it? And how to understand the subject of law, a person or self behind what is prescribed as autonomous? 2) How does the meaning given by the Court relate to the scholarly discussion on autonomy? These questions will guide the inquiry undertaken in the first part of this study (Chapters 1 - 3).

In the first part of this study I will focus mostly on autonomy as it has been presented in the legal theory of human rights and in the legal practice of the European Court of Human Rights. Building on the gained knowledge, in the second part (Chapters 4 - 6) I will ask and discuss the scope and bindingness of autonomy more broadly, as a constitutional law concept (Chapter 4), and develop a model of layered autonomy to describe and better recognize the way au-

¹⁴ The ordinary meaning of a given term can arguably be traced by using dictionaries. Autonomy as a term has an old usage describing qualities of states, organizations, regions and churches and some similarity can be found when compared to the definitions given to persons. Cambridge dictionary gives two definitions: 1) The right of an organization, country, or region to be independent and govern itself; 2) The ability to make your own decisions without being controlled by anyone else. In this study the focus is on human autonomy so I will leave out the rest of the organizational-autonomy results. Merriam-Webster adds: Self-directing freedom and especially moral independence. And lastly dictionary.com gives us the following definition: Independence or freedom, as of the will or one's actions. Looking at the definitions, there seems to be a pattern where autonomy has something to do with freedom, independency and lack of outside control. These aspects of autonomy will be contemplated later on.

¹⁵ Case of Johansen v Norway (App. 17383/90), Judgment of 7 August 1996.

tonomy is inherent in law (Chapter 5). In the last chapter I will elaborate if it is possible or desirable to construct a counterbalance to autonomy.

From the many interesting topics available in law, this one came to me because of the unease I had after reading about a court case in the Guardian. In the case the court granted a 50-year-old woman, a mother of three children, a permission to die. She was entitled to refuse the life-saving kidney dialysis treatment she required. What made the case disturbing was the reason she gave to the court. She wanted to die because she had lost her "sparkle".¹⁶ The case was decided based on the principle of autonomy. It made me wonder what is the scope of autonomy, and that is the big question behind this study that still puzzles me.

¹⁶ <http://www.theguardian.com/uk-news/2015/dec/02/court-grants-impulsive-self-centred-mother-permission-to-die> (Cited 29.5.2016)

The Sources and Methods of the Study

The view in this study (and of this researcher) is that law heavily influences the world around it; law is not only a legal issue. Judges and courts might like the opposite, so that the judgments with their material consequences were only of importance to the parties involved. I believe that this is not the case, especially with the decisions of a court like the ETcHR, a court which has a great role in upholding and reforming the European value system. Conveniently to my point, the Court itself has identified the Convention as a "a constitutional instrument of European public order".¹⁷ The effect of the Court's decisions on wider social life is often held to be vast.¹⁸ The impact on the development of social values of courts rulings is a difficult topic in constitutional discussion in itself. Especially the creative ways the ETcHR interprets the Convention and develops concepts like autonomy is sometimes seen as a threat to democracy.¹⁹ But more to the point, what I want to say by stating that law is not only a legal issue is that - if we accept this point - it makes no sense to do legal research based only on legal sources either. I will live by that thesis and try to find inspiration from any source I can during the course of this study. This maybe an unorthodox approach is actually perfectly in line with the subject of the study: If the Court had held itself limited only to the Convention text and formal legal sources, it would never have come up with an innovation like the concept of autonomy in the first place.²⁰

As I find limiting sources of legal studies unnecessary and, well, limiting, the same can be said of the discussion on the applicable methods of legal studies, as I find structuring a strict method of legal studies useless and worse so, possibly harmful. To start with, C. Wright Mills gives a common sense definition of method: "Methods are procedures used by men trying to understand or explain something".²¹ Surely, Mills refers to social sciences, and namely, to sociology, but what is more fruitful than a little comparison between different leagues of

¹⁷ Case of Loizidou v Turkey (App. 153189/89), Judgment of 23 March 1995, para 75.

¹⁸ Mowbray 2005.

¹⁹ More of the relation between democracy and constitutional courts Möller 2012 and Löhmus 2015. This is one of the topics I will only have little interest in this study.

²⁰ The concept of autonomy had been used by other courts before, so one can argue that it was already a part of constitutional law and so, contrary to my claim, could be found from legal sources.

²¹ Mills 1959, p. 57.

thought? Let's try to figure out what the term *procedure* in Mills' definition of method might embody. I would like to suggest that whenever there is a procedure to doing something, there is a rather firm belief in what the moving parts of the particular task are, and what the supposed outcome will roughly look like. A typical example of a method/procedure like this is a recipe of a particular food.²² To bring the general idea closer to the domain of legal study, we normally have somewhat known subject of the study in the form of legal sources and there is also some sort of expectancy of the results. But what might be the subject or the ingredients of a legal study, if we accept the idea and follow the lead of the Court in that using only legal sources will be too limiting to the study of law, as argued earlier?²³ The difficulty of defining the general ingredients of a study hints that maybe there is not much of a sure expectancy of the results of the legal study either - and, to stay with the food analogy, it probably is the *steps taken between* the ingredients on the table and the ready made cake that we actually are most interested in when referring to the term procedure or method. - What I am trying to say is that when we think of legal study in terms of procedure or recipe there is almost nothing in the analogy that actually works. The problem is that the thinking behind procedure- or a recipe analogy is based on the ideal of natural sciences. If the subject of the study is a human being, the main difference to natural sciences is that humans are reflective: they can change their minds, or at least become aware of the study situation, and in both cases the process and outcome of the study will vary in a way, that is first: hard to predict, and second: hard to systematically close out from the results. This is the main reason why studies of humans are not as easily *repeatable* as in natural sciences. And yet it is exactly the powerful scientific ideal of repeatability that we seem to insist on bringing from the world of natural sciences to the realm of social and human sciences - and finally, to legal studies. What Mills insists is that neither the adoption of the philosophy of natural sciences, even with modifications, nor strict commitment to method ever worked too well in the context of social studies. The problem he sees with what he calls "methodology" is that the problems that will be taken up and the way in which they are formulated are severely limited by the "The Scientific Method". In short, the problem to Mills is that strict commitment to a certain method may determine the questions asked in the study.²⁴ To me the warning given by Mills is not actual in the context of legal

²² Aarnio 2006, p. 186.

²³ It used to be that the inspiration of law was heavily drawn from nature as natural law philosophy holds that certain rights or values are inherent by virtue of human nature and universally identifiable through human reason.

²⁴ Mills 1959, p. 57.

studies as I have not witnessed anything close to a full grown scientific method of legal studies that might limit the questions asked. What I want to bring to the discussion is that maybe a strict method of legal studies is not even desirable.

Admittedly, there is some resemblance in the ideas of repeatability in science and legal certainty (predictability of the court rulings). Just as the goal of the repeatability is to make sure that the research results do not depend on who executes the test, the aim of legal certainty is that the judgments should be predictable, sometimes to a degree that there should not be any variation between judgments of two judges who are given the same set of facts to consider. Despite the similarities there are two points to be made of the differences of the two. First, in natural sciences there is almost no substitute for repeatability of tests where as legal certainty is not the only maxim for courts to follow. This is mainly because society is an ever-changing mixture of people and structures they produce, and if the courts were only to follow the maxim of legal certainty, law could not keep up with the pace of the change. Second, the ideal of predictability is not to be held as a virtue to the legal studies the same way it is a legitimate virtue of the courts. I do not see that the dual nature of the legal studies as part science, part legal source (of last resort, but still) would change that; it is not an ideal of a legal study that the results of the study should be predictable.

1 The History of the Concept of Autonomy

The ECtHR has become accustomed to using the term autonomy²⁵ when deciding cases under its Article 8 jurisprudence. It has been noted that also the commentators have been mostly welcoming to the new member in the human rights law tool box. There is a quite a wide array of literature on the concept of autonomy in legal, moral and political philosophy departments²⁶, but because of its late entry as a human rights concept, at this point, autonomy has not been subject of much research in the human rights law. So where exactly did the Court draw its inspiration of installing the new concept?

Today, the ECtHR values autonomy as an underlying principle of the whole Convention, but when and where did the incorporation of autonomy to law first happen?²⁷ It is no coincidence that the now prevailing notion of autonomy in the jurisprudence of the ECtHR was originated in a case concerning UK, as it is a country based on the legal system of common law, where autonomy has long roots.²⁸ The principle of autonomy was given legal effect in an often-cited

²⁵ What is the difference between "autonomy" and "self-determination"? Is there support to the claim that they indeed are different concepts? In the *Pretty* case the ECtHR stated that: "Although no previous case has established as such any right to self-determination as being contained in Article 8, the notion of personal autonomy is an important principle underlying the interpretation of its guarantees." The sentence opens for at least two interpretations. 1) The notion of self-determination is linked to term "right" while as personal autonomy is described as a "principle" as to say that there is a difference in the legal status of the terms. 2) If we were to believe that the Court means to make a distinction between self-determination and autonomy, the sentence as a whole would not make sense and - as we are better off in interpretation of the case law of the Court if we assume that the Court does not lose track in the middle of a sentence - the conclusion must be that the Court meant to use the terms as synonyms. Another example that points to the direction of the interpretation number two is the inconsistency of the legal status of autonomy in the case law of the ECtHR overall, as discussed in chapter 4.2. The discussion above summarizes well the problem of using synonyms in law texts. While they make reading the law more fluid (or bearable?) the use of synonyms has a tendency to cause a lot of grey hair. If only the judges and authors of law books were more outspoken when using synonyms.

²⁶ See for example: G.Dworkin, *The theory and Practice of Autonomy* (Cambridge University Press, 1988; J.B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge University Press, 1998)

²⁷ To answer this question we need to narrow the philosophical discussion only to the predominant ethical status of autonomy, and to its legal counterpart, the principle of individual autonomy.

²⁸ The Judgment of *Pretty* is heavily influenced, to a degree of copy-pasting large parts of the decision by the House of Lords, and especially the statement by Lord Bingham.

dictum of judge Cardozo J.: "every human being of adult years and sound mind has a right to determine what shall be done with his own body".²⁹ Even before that the respect for the right of autonomy could be identified in the common law tradition. In the decision of *United Pacific Railway Co V. Botsford* from 1891, the United States Supreme Court stated that: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint of interference of others, unless by clear and unquestionable authority of law."³⁰ While the principle of autonomy was effective for almost a century, the language of autonomy lagged behind as it was not until the case of *Planned Parenthood v. Casey* in 1992 before autonomy was explicitly mentioned.³¹

Before the idea of autonomy became present in law it had a long history in philosophy. In order to try to find the original source of the concept of autonomy, I will leave the law department for a while and head to the faculty of philosophy. Autonomy may be seen as a part of liberalism.³² What I will try to prove in the following chapters is that the ideas of modern concept of individual autonomy are ever present in liberal philosophical literature.³³

1.1. The Early Stages of Autonomy

One of the, or the, pioneer in liberal thinking is John Locke. In Two treatises he opposes absolute monarchy as he sets the stage for later discussion. For Locke, political power distinguished from that of father over his children, husband over his wife or a lord over his slave, consists of a right of making laws. In order to derive political power from its origin "we must consider what state all men are naturally in". To Locke that is "a state of perfect freedom" to order their actions, possessions and persons "as they think fit" bounded only by law of nature

²⁹ *Schloendorff v. Society of New York Hospital* (1914) 211 NY 125, 128.

³⁰ *United Pacific Railway Co V. Botsford* (1891) 114 US 250.

³¹ *Planned Parenthood v. Casey* (1992) 505 US 833.

³² The Latin *liber* means "free".

³³ Only the exact wording varies, for example concepts like self-ownership and sovereignty of the individual have their own branches of literature and are both worth a closer look. As the literature around them is more concerned about the property relations than the topic of this study I will leave those concepts mostly out.

”without asking leave, or depending upon the will of any other man”.³⁴ As I examine Locke’s view of the natural state, or more commonly, *the state of nature* of men and compare it to the current dictionary definitions of autonomy with aforementioned attributes like freedom, independency and lack of outside control, it is evident that the similarity reaches a point where practically all boxes are ticked.

The long roots of autonomy are apparent also in the work of english scholar John Stuart Mill. Mill was a later thinker than Locke and in 1859 in his famous book *On Liberty* he addressed the limits of the power that can be legitimately exercised by society over individual: ”The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will is to prevent harm to others. He's own good, either physical or moral, is not a sufficient warrant.” For Mill paternalism of the state is not an option, at least at this point of his thinking. After limiting the state power, the way he frames the counterpart, the individual, has a triumphant tone: ”Over himself, over his own body and mind, the individual is sovereign”.³⁵³⁶

Autonomy has been seen constrained by age as well as mental condition of an individual already in the thinking of Mill.³⁷ Mill saw coercion as incompatible with autonomy and, as a main rule, stated that interference with individual freedom could be justified in order ”to prevent harm to others”.³⁸ But it was not total non-interference that Mill went after either: ”there are good reasons for remonstrating with [an autonomous individual], or reasoning with him, or persuading him, or entreating him, but not for compelling him”.³⁹

³⁴ Two Treatises of Government, John Locke. Published 1821 London. Book II, Of Civil Government, chapters one and two p.188-189. From Archive.org.

³⁵ Mill 1859, p. 8.

³⁶ Immediately after framing of the sphere of individual sovereignty (autonomy), Mills takes precautionary measures and limits the scope of autonomy as he thinks it is not suitable for special cases like minors. This is important to note as it is central to the study as we will later see.

³⁷ Mill 1859 (Dover 2002 p. 8.)

³⁸ Ibid.

³⁹ Ibid.

1. 2. The Modern Concept of Autonomy

The liberal foundation of modern society seems to have its cornerstone in what we nowadays often call individual autonomy. The aim of this chapter is to show that autonomy is not only hiding behind the various concepts of the age of enlightenment but that it can be found concealing behind, or inside more recent terminology of liberalism. One of the most influential legal thinkers of the past few decades is arguably John Rawls. The reason for his vast influence is not because his ideas are so original⁴⁰, but mostly because both advocates and critics of his have formulated their positions in terms of explicit reference to his theory.⁴¹ This is the foremost reason for a short review of Rawls' opus magnum *A Theory of Justice*. A short assessment is necessary for the purposes of this study because it is his framing of liberalism that is the aim of many of the critics to be presented later. To be sure, *A Theory of Justice* has meant different things to different readers and Rawls himself has published another book - *Political Liberalism* - that has made some adjustments to his previous thinking. I will expose the very basics of only his earlier work because of its influence and hope not to present anything too controversial.

The heart of Rawls' ideas of justice as fairness is presented in two concepts that are the original position⁴² and the veil of ignorance. Rawls thinks that we would find out what would a just or fair assembling of society look like if we imagine what principles (of justice) would be agreed on by people who were left without knowledge of certain facts about themselves. The link between ignorance and fairness is in that if I have a cake to cut and do not know which of the five pieces I will end up with, it makes the most sense to cut them fairly. In same fashion, if people do not know who they are going to be, it makes sense to choose a set of fair principles to govern their society.⁴³

⁴⁰ Rawls was heavily influenced by Immanuel Kant and he has no problem in admitting it, for example in *A Theory of Justice* he claims that: "The principles of justice are also categorical imperatives in Kant's sense", p. 253; "The original position may be viewed, then, as a procedural interpretation of Kant's conception of autonomy and the categorical imperative." p. 256. What Kant and following him, also Rawls meant by autonomy differs vastly from Locke and Mill and I will shortly discuss Kant's in the section 3.2.

⁴¹ Mulhall, Swift 1992, p.10.

⁴² Rawls loans the idea of original position from Locke's "state of nature". (Rawls 1971, p. 12)

⁴³ Rawls 1971, p. 12.

Since the content of the principles of justice that materialize is clearly depending on how we portray the original position, it is necessary to focus on that portrayal first. As I try to identify the essence of the theory we need to address two issues at the point of the cake cutting moment. First, what is it exactly that people are ignorant of in the original position? Second, why should we consider it useful to regard them ignorant for the purpose of thinking about justice in the first place? The answer to this more elementary second question is that the original position aims to model the starting point so that people, when subjects of justice, should be considered free and equal. It is easier to understand if we give the answer a little more substance and tie it with the answer to the first question: There are two kinds of things that matter to freedom and equality that the people in the original position do not know about themselves. To bear in mind, the aim of this chapter is to show that there is autonomy here somewhere to be found and it is likely more related to freedom (just as the dictionary definitions suggested) than equality so I will keep the equality side of things short.

First off, people do not know what is their rank in the hierarchy of society, whether they will be at the top or the bottom. Neither do they know what talents they have or do not have, nor how their bodies are going to be like.⁴⁴ This in contrast to real life, where people are born in different countries, into particular families, with different abilities and the combination of all these social factors create inequalities. The aim of the original position is to show that when we think about justice these differences should be considered irrelevant and people should be regarded as equal. Rawls' view is initially appealing in that we do think that because people are not responsible for example for their talent nor family they are born into, these type of differences should be left outside of theory of justice. Say, if I do not deserve my talents, why should I deserve the advantage they bring me?

Denying the people in original position knowledge about their position in society as well as their natural attributes is necessary to Rawls as he wants to make sure that the principles they agree on are not influenced by the arbitrary inequalities that are likely to distort the distributive outcomes in the real world.⁴⁵ It is possible to think of what happens in the original posi-

⁴⁴ Ibid.

⁴⁵ Rawls 1971, p. 13.

tion so that there is a kind of bargaining going on, where people seek to find the best deal available for themselves. If people were allowed to know their position as well as their other attributes then the agreement reached would reflect the unequal bargaining power instead of justice and fairness.

What else, other than knowledge of their circumstances, are people ignorant of in the original position? This is where, for the purposes of this study, it gets interesting. The original position is decorated so that people in it are also ignorant of their own conceptions of good. Just as ignorance of circumstances was aimed to secure equality, ignorance of the conceptions of good has a purpose. Rawls wants us to believe that when thinking about justice people are supposed to be free. This leads us to two questions: what does it mean people do not know their own conceptions of good and what does it have to do with understanding people as free?

We'll take the first question first. A given person's conception of good is a set of beliefs of what she finds valuable in life and how she should act on her beliefs. People with buddhist conviction have different conceptions of good than catholics and probably fans of NASCAR find different things worthwhile than those who spend a lot of time visiting art exhibitions. To say that people in Rawls's original position are ignorant of their conceptions of good means that they do not know what they believe makes life worthwhile. This will undoubtedly have an effect on what principles of justice get chosen. While ignorance of circumstances had some initial appeal because of the reasons related to equality, it is not as clear why it is important to ignore the beliefs about what ways of life are better than others when thinking about justice. Most probably agree on that society should be constructed so that it be fair to both the talented and the untalented, but the idea that it should be arranged so that it be fair between someone who spends her life pursuing truth and someone who dedicates her life to watching grass grow and collecting beer cans is far less appealing. And - we still have the question of what has this got to do with the idea that the original position's ignorance of the conceptions of good is intended to model a setting in which for thinking about justice it is appropriate to consider people as free.⁴⁶

⁴⁶ Mullhall, Swift 1999, p.12-14.

What brings freedom and ignorance of the conceptions of good together is essential for the purpose of this chapter. The people in the original position, rather than having particular conceptions of good and trying to reach as favorable agreement as they can to meet those conceptions are instead motivated primarily in keeping their options open, or protecting their capacity, as Rawls puts it, to "frame, revise, and rationally to pursue"⁴⁷ such conceptions. It is not the particular conceptions of good that people have that are of importance, but what lies behind such conceptions, their freedom to choose their own conceptions of good and do what they feel best suits those conceptions and their freedom to change those choices when they feel so.⁴⁸

What first sounded odd, was that when thinking about justice we should leave out the beliefs about which ways of life are more valuable than others, makes now much more sense. But when compared to leaving out the knowledge of the circumstances, ignorance of good is still not as convincing, as the critics of Rawls's theory will later show. But for the aim of this chapter of the study it definitely serves the purpose that Rawls holds that ignorance of good in the original position is needed so that people will have "highest-order of interest" to agree on such principles that will secure their capacity to freely make their own choices about what they want from life, and also to preserve an option to change their minds at will. Since what else is this but an elegant framing of autonomy?

Let us sum up the chapter: Locke wanted to derive political power from a state where all men were naturally in, and that was a state of perfect freedom, to order their actions possessions and persons as they think fit, bounded only by law of nature (without asking leave, or depending upon the will of any other man) while Mills thought that the sovereignty of individual ruled over his own body and mind. While neither of the authors use the term autonomy explicitly I want to compare their views to the Cambridge dictionary, which defined autonomy as the ability to make your own decisions without being controlled by anyone else. To conclude, autonomy has been a key concept of the liberal thinking for the last three hundred years. It looks like that any which way the scholars have tried to build a fair or just system,

⁴⁷ Rawls 1971, p. 14.

⁴⁸ Mullhall, Swift 1999, p.15-16.

they have had to make a cornerstone or a starting point, and more often than not it has been a version of what we nowadays call autonomy.

2. The Critical View on Liberalism

The critical view on liberalism has been named communitarianism (with a normal resistance from those the brand involves)⁴⁹. The communitarian stance has touched various themes of liberalism that we will discuss in this chapter. The critique is not always pointed towards Rawls's theory, but it often is. What unites these critical commentators, and justifies the use of an umbrella term, is their conviction that liberalism with its emphasis on individual, neglects the social or communal aspect of human life. For example, the Rawlsian version of understanding society as an outcome of negotiations between rational individuals whose primary concern is to protect their own interest seems to presuppose that those interests themselves are pre-social, given to a person prior to her membership of society⁵⁰⁵¹. In the critical, communitarian account the social matrix of a person is presented to be of much more importance to a person than liberals are willing to admit.

A person in Rawls's liberalism has formed a conception of good prior to the meeting with others in the original position. Communitarians, according to Mulhall and Swift, have named the Rawlsian position as asocial individualism and charged the view on two fronts: first, the sociological notion of a socialization process describes the way an individual becomes a member of society via the teachings of parents, friends and schools and so on, makes it impossible for an individual to form a language, a system of thought or a moral life outside a social setting⁵². This alone makes the Rawlsian view of a person in the original position implausible. Communitarian point is that the social origins construct a person's self-understanding as well as her conception of how she should lead her life.⁵³

⁴⁹ Just as there is not just one singular stream of thought within liberalism, the same can be said of communitarianism. Among the thinkers labeled - sometimes against their will - as communitarians are for example Michael J. Sandel and Alasdair MacIntyre.

⁵⁰ Mullhall, Swift 1999, p.16.

⁵¹ Michael Sandel has called the liberal subject (a person) "antecedently individuated" in a sense that, she is not necessarily selfish nor uncaring, but more fundamentally, standing at a distance from the interest she has. (Sandel, M: Liberalism and the Limits of Justice (2nd edn) Cambridge University Press. 1997. p. 62.)

⁵² See more Berger, Luckmann 1967.

⁵³ Mullhall, Swift 1999, p.13.

The second wave of communitarian criticism is tied to the first one. Where as the first sweep of critique has a more theoretical purpose, the second wave builds from it and points at the consequences it may lead to at the society level. The relation between an individual and her society is not only an outcome of negotiations between individuals. For a communitarian, the liberal understands society as a co-operation where every participant has a purpose of individual advantage, a firm like venture between individuals whose basic interests have been defined prior to the community they are members of. Communitarians remind us of the value of relationships in themselves, over and above of using them as means to some individual good. The liberals neglect the values that are more communal in nature. This is where Sandel sees it impossible to separate the question of asocial individualism as a possible problem at the society level and the liberalism's concept of a person.⁵⁴

The communitarian criticism of a person as well as asocial individualism seem to run together in understanding a society as an outcome of a contract or an ongoing process of negotiations between people mostly concerned to protect their own interest. Both appear to presuppose that those interests are themselves pre-social, formed by an individual prior to her membership with society. The model of society based on the idea and instrument of contract is an old one within liberalism and Rawls's theory is just one of its formulations. Hannah Arendt is one of the critiques of liberalism without the communitarian label and she sees a problem with the liberal view of a person as a "contracting individual". Her formulation of collective responsibility suggest that we do not acquire certain responsibilities through any negotiations, through individual decisions nor contracting to a group whose actions we accept. We acquire them by being born to a community.⁵⁵⁵⁶ Contrasted with a contractual model of liberals, where everyone may opt out or opt in at anytime, it is hard to see how we should come to have such responsibilities. For a legally minded reader, a notion of collective responsibility holds a strong possibility of placing the responsibility on innocent. That is why it is worth to note that what Arendt had in mind was a moral, rather than purely causal (legal) responsibility. Even if moral and causal responsibility seem distant from each other, and especially when they do so, there

⁵⁴ Mullhall, Swift 1999, p.15.

⁵⁵ Lloyd 2000, p.120. See also: Arendt, "Collective Responsibility" in *Amor Mundi: Explorations in the Faith and Thought of Hannah Arendt*, ed. James W. Bernauer. Dordrecht 1987. p. 43-49.

⁵⁶ The idea seems to be a kind of reflection or flip side of the human rights - to Arendt there should be something close to human responsibilities.

is a need to revamp the legal system to bring them closer, since no just legal system can justify itself if it is seen immoral.⁵⁷

What I believe unites the communitarian critique and Arendt's cry for collective responsibility is a worry that through the underlying model (or a view of a person) of "contracting individual" what is forming is a system of society where it is desirable or at least acceptable to hold people at arms-length, distant and alien, where the values of trust, caring and reciprocity are diminished - and that rights are one mean to express and create this norm.⁵⁸ As Nedelsky points out, rights have a distancing effect as they function in our current discourse in that they help us avoid recognizing some of the relationships of which we are in fact a part. For example when we see a homeless person on the sidewalk we do not think about the fact that it is in part our regime of property rights that renders her homeless. The prevailing concept of rights helps us to feel that we are not only not responsible but are in no way connected to these "others".⁵⁹

It is true that most of the critique of liberalism is not critique of autonomy per se, but as we have seen the concept of autonomy lays at the heart of liberalism and because of that I would like to suggest that the critique demands us to look closer at autonomy, and especially the prevailing concept of individual autonomy in action, as we next head to the autonomy related court praxis of the European court of human rights.

⁵⁷ Arendt was not being blind to the necessity of legal responsibility. When the postwar Germany adopted the slogan, "We are all guilty" Arendt said that while it first sounded noble, it served to exculpate those who actually were guilty: "Where all are guilty, no-body is". (Lloyd 2000, p.119.)

⁵⁸ Empirical studies have proven that at least in USA this development is already under its way. For example Robert Putnam has described the reduction in all the forms of social intercourse upon which Americans used to found, educate, and enrich their social lives. He argues that this undermines the active civil engagement which a strong democracy requires from its citizens. (Putnam, R.: Bowling Alone 2000) There are many things that may trigger a change in society. If we consider the described development unwanted, on the part of the legal studies, we need to look closer to the law and see if it may be one of the reasons behind the change and raise voice for the necessary adjustments.

⁵⁹ Nedelsky 2011, p. 251.

3. Three Sides to Autonomy by the European Court of Human Rights

Most if not all commentators hold the view that the specific right to autonomy was first formulated in the decision *Pretty v the United Kingdom*⁶⁰. It can be argued that the *Pretty* case should be seen as the the most authoritative precedent in the European Court of Human Rights autonomy-related case law⁶² as the phrase, or the definition of autonomy the Court gave as an "ability to conduct one's life in a manner of one's own choosing"⁶³ has yielded such a wide following.⁶⁴ In this chapter I will go through the case of *Pretty* in detail because of its widely held importance. But maybe even more interestingly I will present two parallel paths of autonomy interpretations that the Court already came up with, even before the *Pretty* case, that it now seems to have abandoned.

Löhmus argues rather convincingly that the Court had two other definitions (than the one adopted in *Pretty*) to choose from when adapting its now prevailing concept of *individual autonomy*. She calls the other two *caring autonomy* and *principled autonomy*.⁶⁵ Caring autonomy puts emphasis on the understanding that people are interdependent, and from that flows the duty of fulfilling any commitments that particular contexts of relationships require. This, according to ethics of care, will eventually lead to trusting relationships. Principled autonomy, on the other hand, requires people to act on principles that can be principles for all, based on an universal standard of values. Principled autonomy leans on Kantian philosophical understanding of autonomy as dignity.⁶⁶

⁶⁰ See Löhmus, Möller and their lists of commentators of the case.

⁶¹ Case of *Pretty v the United Kingdom* (App.2346/02), Judgment of 26 April 2002.

⁶² It is worth mentioning that the Court ruling follows the reasoning of Lord Bingham of the House of Lords to a degree where it is, if not similar, not very far from that either.

⁶³ *Pretty v the United Kingdom*, para 62.

⁶⁴ Among them, see: Case of *E.B. v France* (App.43546/02), Judgment of 22 January 2008, para 43; Case of *Schlumpf v Switzerland* (App.29002/06), Judgment of 8 January 2009, para 100; Case of *S.H. and others v Austria* (App.57813/00), Judgment of 1 April 2010, para 58.

⁶⁵ Löhmus borrows the concepts of principled autonomy and individual autonomy from Onora O'neill and particularly from her book *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge University Press, 1989).

⁶⁶ Löhmus 2015, p. 20 - 21.

The Court's different understandings of autonomy reflect different sets of values, different underlying perceptions about individuals and their relationship to others and in the end, give richer meaning to autonomy as a human rights concept.⁶⁷⁶⁸ From the point of view of this study, the differentiation of the varying concepts of autonomy is necessary in order to investigate not only what rights autonomy awards to us, but also to identify what duties autonomy may ground on us.⁶⁹ A detailed discussion helps us in finding and recognizing the possible sore spots that are caused by the interpersonal relationships and intimate decisions about life, death and sexual orientation. After the discussion we hopefully will have a deeper understanding of the concept of autonomy. And if we will be able to find or to frame a more responsive concept of autonomy that will be of service to the wider social community - well, we will take that too.

3.1. Caring Autonomy

In the beginning of the jurisprudence on the concept of autonomy within the ECtHR it was not actually the *Pretty* case, nor the conceptualization of individual autonomy. It was the case of *Johansen v Norway*⁷⁰ where the applicant disputed the decision of the authorities to take her daughter into care and deny her parental rights. Without linking the concept of autonomy to applicant's Article 8 rights, the Court saw the notion of personal autonomy to be an important part of a child's development. I will not go into details of the case, but try to concentrate on the way the Court framed the question involving the concept of autonomy. I also think it would be ill-advised to draw far reaching conclusions from the Court's use of the concept of autonomy in this case, because to me it seems like the concept was used in a rather incidental manner. Overall, while considering the case, much more weight was put on safe and stable

⁶⁷ Ibid, p. 21.

⁶⁸ As a critical notion I would add that the indecisiveness of the Court may be interpreted to be detrimental to the legal certainty of the human rights law.

⁶⁹ With the notion of "duties" I wanted to point to the direction of Raz and his famous account of rights, where it is not only the rights-side but equally the the duties-side of relation that is of importance. I think it is a useful way to think of autonomy as well: if autonomy is to become a right instead of a mere interest, we should also ask what duties does it ground on us? (Joseph Raz. *The Morality of Freedom* (Clarendon Press, 1986), 166. in Möller 2012)

⁷⁰ Case of *Johansen v Norway* (App. 17383/90), Judgment of 7 August 1996.

environment of the child. In the end, the meaning given to autonomy in the case never became an authority in terms of the Court's interpretation of the concept.

Löhmus argues that it should have become; she insists that the Court found something when it considered that autonomy is something that develops and something that needs to be protected. The case took a turn from initial right to family life to the question of the protection of the development of the child's autonomy. The development of the child's autonomy was again linked to 1) her circumstances and 2) depending on the lifestyles of the people she lived with.⁷¹ Doing so the Court acknowledged that the development of a person's autonomy is not only a matter of one's own doing and rationality, but also subject to social context and influence. Leaning heavily on the expert's opinion the Court held that social surroundings (of a little child) were important in constructing cooperative, trusting behavior in future, and that was in connection to her ability to live a fulfilling life.⁷² Löhmus interprets the Court's message so that "autonomy begins with an assumption of human connectedness and interdependence."⁷³ People become who they are in terms of their identity, life plans, capacities, desires and wishes through their relationships in which they live their daily lives. These relationships constitute the surroundings or social context that is seen crucial for the development of a person's autonomy.⁷⁴ For the purposes of this study it is important to notice also that in this case dependence is not seen as an opposite of the notion of autonomy but rather a precondition of it.

It is interesting to notice that during the Case of *Johansen v Norway* the Court did not contemplate, in fact it did not consider at all, the autonomy of the applicant. This treatment seems to indicate that the Court ponders autonomy as something belonging only to the early development of a person, instead of seeing it as a lifelong process. Once we become adults we all of a sudden turn out independent, self-sufficient individuals who "exercise our autonomy by

⁷¹ Why did the Court contemplate the case using the concept of autonomy in the first place is beyond me. To me it is clear they should have referred to the concept of the "best interest of the child" as it is enshrined in Art. 3 of the Convention on the Rights of the Child.

⁷² *Johansen v Norway*, para 27 and 72.

⁷³ Löhmus 2015, p. 25.

⁷⁴ *Ibid.*

making free and rational choices in pursuit of our own life plans without interference by others".⁷⁵

Löhmus argues that the Court recognized some elements of *caring autonomy* in *Johansen v Norway* decision that it should have kept developing more. She believes the Court acknowledged that an individual is to a large part shaped by social conditions and influence she receives and for an individual to become autonomous she needs trusting relationships, responsibilities and care. Without those elements, a person cannot gain the capacity to exercise her autonomy.⁷⁶⁷⁷⁷⁸

3.2. Principled Autonomy

Only a year after *Johansen* the Court had to face up to the question of whether prosecution and conviction for physically injurious sadomasochistic acts conducted privately among consenting adults was in breach of Article 8. The concept of autonomy was resorted again, in a different meaning though, in the case of *Laskey, Jaggard and Brown v the United Kingdom*.⁷⁹ The applicants of the case were members of a group of men that, over a period of ten years, had been engaging in activities involving violent acts against each other for the purpose of getting sexual gratification from giving and receiving pain. The activities involved maltreatment of the genitalia as well as ritualistic beatings with equipment like sand paper, fish hooks, spiked belts and so on. The activities were consensual and private, with no other apparent purpose than sexual pleasure. Accidentally, while investigating other matters, police came into possession of videotapes that were made during these sadomasochistic gatherings. As a result the applicants were charged with a series of offenses, for example wounding and assault, and

⁷⁵ Löhmus 2015, p. 27.

⁷⁶ Löhmus 2015, p. 28.

⁷⁷ Löhmuses "caring autonomy" resembles "relational autonomy", a concept used by communitarians and feminists, see for example Nedelsky; Stoljar and Mackenzie.

⁷⁸ It can easily be criticized that Löhmus reads a whole lot into the *Johansen* case after she first admits herself that the use of autonomy in the case was "rather incidental". Still, for understanding the development - or maybe more like Löhmus seems to think - the decline of the concept of autonomy in the Court case law, her imaginative reading of the case is useful.

⁷⁹ Case of *Laskey, Jaggard and Brown v the United Kingdom* (Apps.21627/93;21826/93;21974/93), Judgment of 19 February 1997.

were convicted and sentenced to imprisonment. The applicants appealed. They relied on Article 8 arguing that they had the right to express their sexuality as a part of their personality and that the conviction was an unjustifiable interference to their right to respect for their private life.

The Court decided to lean on a version of autonomy originally from Kant who connects autonomy "inseparably with the idea of freedom and with the former there is inseparably bound the universal principle of morality, which ideally is the group of all actions of rational beings."⁸⁰ I will try to put this mouthful into something more workable: What Kant may have meant by this is, while we all are capable of being autonomous, it is only those who follow the universal principle of acting morally who actually do so. In other words principled autonomy requires people to live according to rationality and morals that have reached a certain universal status. In *Laskey, Jaggard and Brown* the Court ultimately decided that it, as an institution, is needed in guiding an individual and society towards dignified choices, and to this end, it needed to form a new concept of autonomy (within its own jurisprudence).

The Court was not alone in adopting the Kantian version of autonomy in *Laskey, Jaggard and Brown* as also when Rawls uses explicitly the term "autonomy" he gives it a Kantian, principled meaning. According to Rawls, autonomy in this principled sense congregates with a notion of *objectivity* as well. As Rawls frames it, "acting autonomously is acting from principles that we would consent to as free and equal rational beings."⁸¹ He insists that these principles are the principles that "we would want everyone (including ourselves) to follow".⁸² It looks like Rawls's thinking of the original position - where the veil of ignorance prevents us from shaping our *subjective* moral view - defines what the Kantian version of autonomy already encompasses.⁸³ It is this high, overseeing point of view (of the original position) where we are not tied to our own subjective situation but are able to look at the social order of society and judge it *objectively*.

⁸⁰ Kant, *Groundwork of the Metaphysics of Morals* p.71 in Donnelly 2010, p. 18.

⁸¹ Rawls, 1971. p. 516.

⁸² Ibid.

⁸³ Compare to the O'Neill's and Löhmsus's "principled autonomy". To me they are identical.

Did the Court find an objective, universal moral code, envisaged by all these classics, it went after in the case of *Laskey, Jaggard and Brown*? Is "torture" in all forms something that one simply can not do, nor allow for herself as an autonomous choice?⁸⁴⁸⁵ The Court would not be comfortable to accept that a sensible individual would autonomously choose to participate in activity in question even if there was no doubt of the consent of the participants. Neither of the parties disputed the interference of the right to express their sexual personality, so the Court could not by their own decision examine this question (and possibly sidestep the case completely). Maybe it was because of a fear of creating a zone of protection for immorality, the Court held that "not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8"⁸⁶⁸⁷ Whatever the fear might have been, it is very hard to think of a case that would not be applicable if the case is involving both sexuality and privacy.

The Court may be criticized for the incoherent treatment of the concept of autonomy in the case. When giving the introduction to the case the Court held that "personal autonomy of the individual" was to be considered when drawing appropriate limits of state interference in situations "where the victim consents."⁸⁸⁸⁹ Yet, in no part of the judgment this consideration actually happened. The Court did not connect the protection of autonomy to the informed wishes and desires of the participants. It instead turned the question to evaluating potential and actual injuries the participants "suffered", completely ignoring the obviously important fact that all the participants had given their consent. As a result, based on protecting the public health, the Court unanimously found that there was no breach of the Convention. A Kantian interpretation of the judgment Löhms asserts is, that the Court held that homosexual sadomasochistic behavior was clearly incompatible with objective, universal ideals and therefore 1) the people involved were not acting autonomously and 2) the Court could not accept the behavior as a maxim for all to follow⁹⁰.

⁸⁴ The question has some similarity to the old moral question: can one choose to become a slave.

⁸⁵ I put torture in quotation marks because it clearly is not a word applicants of the case would use.

⁸⁶ *Laskey, Jaggard and Brown v the United Kingdom*, para 36.

⁸⁷ Also Judge Pettiti's separate concurring opinion stated that "fact that the behavior concerned takes place on private premises does not suffice to ensure complete immunity and impunity" and that "not everything that happens behind closed doors is acceptable."

⁸⁸ *Laskey, Jaggard and Brown v the United Kingdom*, para 44.

⁸⁹ This framing of autonomy is actually in line with the concept of autonomy to come, labeled in this study as individual autonomy.

⁹⁰ Löhms 2015, p. 31 - 33.

When the European Court of the Human Rights used the Kantian, or principled version of autonomy it tied autonomy with morality without needing to say so, presumably in order to avoid the issue of moralism.⁹¹ But when Kantian version was adopted the Court arguably *de facto* presupposed a borderline moralistic view, that there is a set of objective ideals, or principles that everyone should follow.⁹² However, the problem with principled autonomy is, that in increasingly plural societies it is very difficult to single out even one comprehensive, all-embracing conception of morally and ethically right behavior - let alone a coherent principle we all could agree on.⁹³ What should be evident by this short review is that what may seem, especially to supporters of principled autonomy, like a universal moral code is always only an opinion situated in time, place and culture, i.e. shaped by community. The danger of principled autonomy is that the Court could uphold paternalistic values that might interfere with people's wishes of leading a life of their own choosing; ultimately, it could give the Court the power to measure people by its own standards rather than standards set by the law.⁹⁴

3.3. Individual Autonomy

The ECtHR linked the notion of personal autonomy for the first time *explicitly* to the protection of Article 8 rights in now famous case of *Pretty v the United Kingdom*. Mrs pretty was diagnosed with motor neurons disease, and her condition got worse rapidly, leaving her paralyzed from the neck down. The disease is known for its cruel final stages, so she wanted to avoid that, and instead to control how and when she died. She had only months to live and wanted her husband, who was willing to proceed with the plan, to assist her in committing a suicide. It was the law that stood in the way, as it was a crime to assist a person to commit suicide.

⁹¹ Möller 2012, p. 192.

⁹² I will not speculate how a deviation from traditional sexual expression might have had impact on the ruling (even if it is the most obvious reason).

⁹³ Löhmus 2015, p. 33.

⁹⁴ John Stuart Mill foresaw a case like this and contemplated "...there are many acts which, being directly injurious only to the agent themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offenses against others, may rightfully be prohibited." (On Liberty 1859, Dover 2002 p. 83)

The Court recognized that Mrs Pretty indeed had an autonomy interest involved and that it was contained by Article 8. The Court also held that the reasons behind a choice of an individual are irrelevant as long she acts autonomously: "a mentally competent adult who knows her own mind, who is free from pressure and who has made a fully informed and voluntary decision"⁹⁵ Christman has called this view a "value-neutral" account of autonomy in that it is an attempt to define autonomy in a way that does not hold a value system that would define and motivate agents.⁹⁶ In other words, the Court would not review the choice of the applicant for example from a moral point of view. With the decision in *Pretty* the Court moved the test whether a decision is autonomous from ethical to procedural evaluation. The change of direction is evident when compared to the case of *Laskey, Jaggard and Brown*. With that case, the Court was primarily interested in *what* the men decided to do as an indicator of the autonomy of the men. In *Pretty*, the Court was only interested in *how* the decision was made. As Löhmus has noted, this view would not assess the moral character of the particular act, but instead would guarantee an individual a right to live according to her own version of the "good".⁹⁷ With the *Pretty* decision, the strongly criticized aspect of morality in the Kantian version of principled autonomy apparent in the ruling of *Laskey, Jaggard and Brown* was now set aside. The new direction adopted in the *Pretty* decision reflected clearly the Millian understanding of autonomy, as it set a restraint on the state power to interfere with an individuals way of life.

The restraint was not absolute however, as the Court did not grant Mrs Pretty a definite right on the ground that making assisted suicide legal could lead to abuse by others.⁹⁸ What the the Court supposedly had in mind was the fear of making it tempting to some to kill old or ill relatives and claim afterwards that they were assisting them with their suicide.

The decision may be criticized for dodging a serious issue. The picture the Court paints of the assisted suicide does not now, and did not at the time of the ruling, reflect the understanding of the practice of euthanasia. There are ways to grant the permission to assisted suicide and close out the possibility of abuse by relatives. An example available to the Court was the well

⁹⁵ *Pretty v. United Kingdom*, para 62.

⁹⁶ Christman, J: Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves. 2004.

⁹⁷ Löhmus 2014, p.82.

⁹⁸ *Pretty v. United Kingdom*, para 74.

known fact of physician assisted practice of euthanasia in Switzerland. The fact is so notorious that it is impossible that the Court did not know of the practice.⁹⁹ So what made the Court to weigh the autonomy of Mrs Pretty against a threat that is not plausible in any way? What really was at stake was that by not respecting the autonomy of the applicant and granting Mrs Pretty the dignified death she asked for by using the means available to the Court, the Court weighed - in effect - the state's right to passively torture its citizens to death stronger. It should have been an easy decision. To sum up, to me the true issue was not whether the ruling of assisted suicide could lead to the claimed abuse, but how far can the Court go in forcing the contracting states to make regulatory changes to provide a right to dignified death. The discussion regarding what is required from the state to make sure that the enjoyment of a right is effective is known as "positive obligation". The doctrine is developed by the Court and was readily available at the time of the *Pretty* decision. The necessary regulatory framework for assisted suicide would have of course required additional resources from the states¹⁰⁰. Coupled with the predictable state resistance, these were possibly the reasons that made the Court dodge the issue.¹⁰¹ It is a shame though, that the first time the Court applied the (prima facie) right to individual autonomy, autonomy was weighed against a pseudo issue, and it still lost. Nevertheless, according to Löhmus, the decision in *Pretty* became a cornerstone of the autonomy related jurisprudence of the Court for years to come¹⁰².

⁹⁹ Of course the facts of the case were, that it was the husband of Mrs Pretty that was not given the permission to assist. I do not think that the fact is of much importance. The regulatory framework could easily be built in a way that the assist can be given by a close relative under the supervision of a physician.

¹⁰⁰ See more about positive obligations, for example Harris, O'boyle and Warbrick 2014, p. 505.

¹⁰¹ See also Möller 2012, p. 194-195.

¹⁰² Löhmus 2014, p.81.

4. The Scope and the Legal Status of Autonomy

4.1. Inflation of Rights?

In order to identify a legal concept it is necessary to try to encompass the scope of the notion in question, and what concept would be more central to legal theory than "right". Kai Möller suggests that the whole distinction between "rights" and "interests" is misplaced. His argument is that the idea that rights cover only a limited domain by protecting solely certain especially important interests of individual is, due to the late development in constitutional rights law, no longer valid. The development Möller is pointing at is sometimes called "rights inflation" referring to the growing number of cases where constitutional courts have given protection to relatively trivial interests as (prima facie) rights.¹⁰³ Also the European Court of Human Rights has read such interests routinely into the right to private life (Article 8). For example, The *Hatton* case concerned a policy scheme that permitted night flights at Heathrow airport, leading to noise pollution that disturbed the sleep of some area residents, the Court discovered as part of Article 8 the right not to be "directly and seriously affected by noise or other pollution".¹⁰⁴ The broad understanding the Court takes in issues of private life has lead George Letsas to dismissively dub the case as "the human right to sleep well".¹⁰⁵¹⁰⁶

Neither the Convention nor the ECtHR has provided a comprehensive definition of the meaning of "private life" but private life, whatever it means, is the requirement that every interest in question must meet to become a right in the Article 8 application.¹⁰⁷ Meanwhile in Ger-

¹⁰³ Möller 2012, p. 2-4.

¹⁰⁴ *Case of Hatton and others v United Kingdom (App. 36022/97), Judgment of 8 July 2003.* para. 96.

¹⁰⁵ Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007) p. 126 in Möller 2012, p. 3.

¹⁰⁶ See also Löhmus 2015 p. 10 who also recognizes the development but directs the discussion to the discourse of rights overall with an emphasis more on the linguistic side of the matter.

¹⁰⁷ According to the Court: "'The concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees.'" (*Pretty v the United Kingdom*, para 61)

many the German Federal Constitutional Court has explicitly given up any threshold to distinguish a mere interest from a constitutional right. Already in 1957 it decided that Article 2(I) of the Basic Law, which protects everyone's right to freely develop his personality, is meant to be interpreted as a right to freedom of action.¹⁰⁸ The court gave various reasons for its decision, while the primary argument was that an earlier draft of Article 2(1) had read "Everyone can do as he pleases" (*Jeder kan tun und lassen was er will*) and it was left out only for linguistic reasons.¹⁰⁹ The court has affirmed this ruling in various later judgments, most famously it has declared that Article 2(1) included the right to feed pigeons in a park¹¹⁰ and to go riding in the woods¹¹¹.

What Möller successfully shows is that the language used by courts gives a very different meaning to term "right" than the one philosophers and probably public might give. The courts version will put no extra weight on an issue simply because something is named as a "right", instead courts will label any interest as a "right" and proceed with it. The rights of the courts differ from the rights of philosophers also in the sense that a court's right is only a prima facie right, instead of a definite right, and may be outweighed by a competing right or public interest.¹¹² More than providing us with a linguistic notion, the German Federal Constitutional Court's interpretation of Article 2(I) of the Basic Law may reveal something of the future scope of the Article 8 of the Convention as well. As noted before, the Basic law protects everyone's right to freely develop his personality, and that the Article has been given a very wide interpretation. According to the ECtHR the Article 8 also covers, among others, "a right to personal development"¹¹³. It remains to be seen if also the interpretation of the right follows along the path shown in the German court. There is a good argument by Möller to believe it will, and the conceptual vehicle by which the Court is going to do it is the concept of autonomy they are developing. What I believe is a view held by vast majority even among

¹⁰⁸ BVerfGE 6, 32 (Elfes).

¹⁰⁹ Ibid, 36-7.

¹¹⁰ BVerfGE 54, 143 (Pigeon-Feeding).

¹¹¹ BVerfGE 80, 137 (Riding in the Woods).

¹¹² An interesting aspect of the current dilution of the term "right" along with the inflation of rights is the public acceptance. Probably the way people understand the term right is closer to the meaning given by philosophers and if the disparity grows too much it might effect the acceptance of the court decisions. Of course a more positive turn of events is possible as well, a chance that people might change their understanding of rights over time along with the development in the courts.

¹¹³ *Pretty v the United Kingdom*, para 61.

lawyers that there is indeed a threshold between an interest and a right. If the Court would adopt this view, it looks like the choice would lead into difficulties with coherency if looked closer. Möller develops an interesting theory on autonomy to battle the problem of incoherence that we will now turn to.

According to Möller, in order to identify the scope of the conception of autonomy and to further cast light on the phenomenon of rights inflation we must ask if there is a threshold to be met in terms of autonomy interest to qualify for protection as a human right, or is any autonomy interest adequate? Let's examine the hobbies like telemark-skiing, brewing beer, photographing and growing chilis. These hobbies do not represent crucial choices in life such as whether to procreate, which profession to choose and whom to choose as a partner. They are still meaningful activities for people engaging in them; it can be argued that their relevance is above, say, eating red ice cream and somewhere below a decision whether to marry or not. Möller gives two paths to follow: In the *threshold model*, autonomy interest will be protected by human rights if they cross a certain threshold of importance. According to the *comprehensive model*, any autonomy interest, no matter how trivial, will be adequate. If we were to accept the initially appealing threshold conception we would have to agree on the line where anything below will not be protected. But how do you draw the line that will not be arbitrary? Would the interest have to be average, reasonable, high, or maybe something A. A. Milne would call of Great Importance to the Person in Question? What standard/criteria should be used? Just any standard would not do, since it would have to be a principled distinction that separates interests from rights in order to secure the value of legal certainty. - Until a believable standard appears, Möller argues, it seems like there is no choice but to protect the law from incoherence brought by arbitrariness of the threshold model and extend the scope of rights to everything that is in the interest of a person's autonomy.¹¹⁴¹¹⁵

¹¹⁴ Möller 2012, p. 73 - 75.

¹¹⁵ The threshold model has an advocate in James Griffin. In *On Human Rights* he tries to derive a threshold from the idea of personhood, but to me does not find a concrete principle.

The conclusion Möller comes to is in line with the recent development in the constitutional rights law¹¹⁶ and the trend towards rights inflation. The argumentation gives us reason to believe that the cases that now present themselves as outliers in the body of human rights law - the cases like pigeon feeding and riding in the woods as well as the right to sleep well case - are actually a hint of what to expect in the future. If we agree on that the human rights are to give freedom to people to follow their projects, the inclusion of hobbies loses its instinctive flavor of absurdity.¹¹⁷ Overall, I think it is important to note that the comprehensive model of autonomy suggested by Möller is not trying to build a right in a philosophical sense, as a binding trump - instead he is investigating the *prima facie* scope of autonomy that can be outweighed by other rights as well as public interest.¹¹⁸

4.2. Autonomy: a Value, a Right or a Principle?

At the first glance the question of the legal status, or a level of bindingness, of the concept of autonomy seems highly theoretical. In the evaluation of autonomy in health care context at the end of this chapter I will try to show that the initial reaction is far from accurate. Before that I will shortly note that even the European Court of Human Rights seems to be in disarray with the status of autonomy as a legal concept. In some cases the Court has described autonomy as an important *principle* underlying the interpretation of Article 8 guarantees¹¹⁹ and sometimes as a *right* of its own under Article 8 jurisprudence¹²⁰. For example in the *case of Evans* The Grand Chamber concludes that “private life” is a broad term encompassing, *inter alia*, aspects of an individual’s physical and social identity including the right to personal autonomy.¹²¹

¹¹⁶ I use the terms constitutional rights law and human rights law interchangeably. By bringing the term “constitutional” in I want to subtly remind the reader that it is not only the ETCHR that is interpreting human rights and also of the fact that it is an ongoing discussion between constitutional courts that is heavily influencing the Court.

¹¹⁷ Somewhere John Rawls is nodding in approval.

¹¹⁸ The constitutional courts need to assess the justifiability of a state interference with a constitutional right (or as suggested here: an autonomy interest). The assessment consists of what are regularly called doctrines of balancing and proportionality. This stage of the judicial review of autonomy interest is left out of this study. More on the subject, for example Möller 2012.

¹¹⁹ For example: Case of Van Kück v Germany (App.25968/97), Judgment of 12 June 2003; Case of Gillan and Quinton v the United Kingdom (App.4158/05), Judgment of 12 January 2010.

¹²⁰ For example: Case of Kalacheva v Russia (App.3451/05), Judgment of 7 May 2009; Case of R.R. v Poland (App.27617/04), Judgment of 26 May 2011.

¹²¹ *Evans v the United Kingdom*, para 71.

while in the *case of Pretty* the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of guarantees of the Convention.¹²² The mixed results suggest that the Court is not too worried about the exact legal status of the concept of autonomy.¹²³

Now let us take a look at the issue of the legal status of autonomy with the focus in the health care context. Probably the most virile discussion on autonomy to date has been going on in the field of health care. Even if we do not think about it in the difficult and possibly traumatic circumstances of healthcare, the law is inherent in the decision-making processes in the hospital corridors. Law provides the framework within which we consider our choices: The choices we have and do not have and what happens when we are removed from our right to make our own decisions. Mary Donnelly points the rise of the principle of individual autonomy to the latter part of the twentieth century.¹²⁴ Today, in 2016 autonomy has a firm place both in theory and practice of medical law. The leading vehicle in operationalizing autonomy in health care as an action-guiding principle has been the conception of "consent", although some recent challenges to the straightforward association between autonomy and consent in medical law have risen.

If autonomy is seen as a value rather than a right of a patient, it can be argued that in some circumstances patient's wishes can be overruled to protect their own good.¹²⁵ According to this view the healthcare professional's duty to respect the patient autonomy should not be seen as isolated from the other duties of the professional. It has been insisted that in order to protect the future autonomy of the patient it is sometimes necessary to limit the current one.¹²⁶

¹²² *Pretty v the United Kingdom*, para 61.

¹²³ Why is it so? My guess is that the Court has wanted to keep its options open for future cases. If autonomy had been slotted too tightly by strict definition from the start it would not have stayed flexible enough for the cases to come. So my guess is the commentators criticism of the confusing legal status of the concept is something the court has foreseen and been willing to live with.

¹²⁴ Donnelly 2010 p. 4-5.

¹²⁵ Autonomy seen as a subjective right leaves no ground for health care professionals to overrule the wishes of a patient as it inserts the ultimate power on patient.

¹²⁶ This view may yield some more proponents because of the recent events: "A sexual abuse victim in her 20s was allowed to go ahead with assisted suicide as she was suffering from "incurable" post-traumatic-stress disorder (PTSD), according to the Dutch Euthanasia Commission." <http://www.news.com.au/lifestyle/real-life/sex-abuse-victim-in-her-20s-allowed-by-doctors-to-choose-euthanasia-due-to-incurable-ptsd/news-story/33d67a4ee6e5980d0c8f6c38147f1576> (Cited 17.5. 2016)

Schramme finds especially worrying the state of the young psychiatric patients who warrant a very complex account of the capacity¹²⁷ to consent.¹²⁸ Also Maclean makes an important point that the provisions of choice (as in consent) to ensure patient autonomy have danger of being used simply as a way of transferring responsibility to the patient.¹²⁹ The more paternalistic view to health care does not see the patient autonomy as a be all end all, has it's proponents.¹³⁰ Overall the issue of autonomy vs. paternalism is one of the oldest in health care ethics.¹³¹

I think it is useful to summarize the chapter to this point and draw a couple of conclusions. What this short discussion on the topic of the legal status of the concept of autonomy has revealed is that even the most basic concepts of the law - concepts like "right" - may have a different meaning in different contexts. The opening question of this chapter takes us to at least two different discussion on rights. When we discuss whether autonomy should be considered as a value, principle, or a right, our main concern is the level of the bindingness of autonomy. And when the discussion turns to the rights inflation, and whether there is a general right to autonomy, the focus is aimed more on the scope of rights. This, what can be called interrelatedness of different topics of law, is I believe the main reason behind conceptual confusion in legal studies.

To end this chapter, I want to bring up a little side note from the health care context. While "informed consent" remains the leading conception and a practical guideline of the day in healthcare some researchers have seen room for improvement as Manson and O'neill have proposed a shift with their concept of "genuine consent".¹³² Manson and O'Neill have company in Maclean and his formulation of "relational consent". For the purposes of this study it is not necessary to look deeper into the consent-discussion. A brief look already reveals that

¹²⁷ Capacity is a central concept to this study, the study of autonomy and the study of law in all her beauty. The concept has such a variety of meanings that a thorough treatment is not possible here. Within this study the concept refers most often to the preconditions of autonomy, to conditions like age, mental health, disability and such. So capacity is seen as something that is prior to autonomy. A good, but technical account of competence that touches many issues of capacity as well is Torben Spaaks's *The Concept of Legal Competence*, 1994.

¹²⁸ Schramme 2015, p. 10.

¹²⁹ Maclean 2009, p. 9.

¹³⁰ Schramme 2015, p. 8.

¹³¹ Sjöstrand, Ericsson, Jute, Helgesson 2013.

¹³² Manson, O'neill 2007, p. 10.

there is a branch of researchers who believe that medical law and ultimately health care practice need some revamping.¹³³ So the question, what is required of a true consent, is still very much on the table. I think the discussion and ultimately the way we construct the concept of autonomy may be of great help in contemplating the concept of consent in the future.

¹³³ Maclean 2009, p. 4.

5 The Three Layers of Autonomy

The last chapter showed that the concept of autonomy has been applied in a number of circumstances and probably has even more use in the future of the constitutional law. The *prima facie* scope of the autonomy is very wide.¹³⁴ The last chapter also showed that the level of bindingness of autonomy has been somewhat a question mark for a reason related to the confusion regarding its legal status, as well as because of the variety of situations it has been invoked. The aim of this chapter is to develop a layered model of autonomy that can be used as a tool to examine both of these problems. The claim argued here is that the current fuzziness in the treatment of autonomy is a result of the inadequacy in the analysis of the subject of law: the person. The prevailing concept used to prescribe the subject of law in the context of autonomy seems to be "agent".¹³⁵ The development of the theory of agency to satisfy the needs of the discussion regarding autonomy has been neglected though, or maybe the need has not been noticed. The layered model introduced here will give a more systematic way to address the questions related to autonomy than the use of the prevailing concept of "agency". The layered model helps to better understand the questions of scope and bindingness of autonomy and also to investigate the seriousness of the breach of autonomy in a particular question.

5.1. The Presumptions of a Natural Person

The theory of a person in the original position had a limited purpose - person per se was not of interest¹³⁶, nor values like beauty or harmony - it had a purpose of just society as Rawls made the focus of his theory clear by a narrowing statement "when thinking about justice". I support the idea of limited purpose. It is true that we may be able to gather a more accurate description of a person if all the psychological and biological information concerning a human being is involved. We know that psychology and biology of a person are in many ways interconnected. We know phenomena like psychosomatic illnesses and placebo effect that reveal

¹³⁴ Again, I need to remind that within this study, the balancing stage the constitutional courts use to ponder the questions related to autonomy is not discussed in this study. That is why I use the term "prima facie". To have a fuller picture, see Möller 2012.

¹³⁵ See Möller 2012, Nedelsky 2011.

¹³⁶ Although it is worth mentioning that people who were in the original position were modeled free (and equal).

that the old notion of separateness of of body and soul is not accurate, and we know much more. Even so, when doing psychological study on, say learning, most of the other branches of psychology and almost all of the biological knowledge can be set aside as irrelevant to the study in hand. In the same way a lot of the knowledge of a human being is irrelevant when thinking about justice.¹³⁷

If biological and psychological nature of person are to be considered of only minor interest when considering the essence of a person as legal phenomenon, where else are we supposed to turn to? Last chapters showed that for a person to be autonomous in the eyes of the law, she must have capacity. But there must be a some kind of bearer of that capacity, since we do not think that a person can be reduced to a notion of capacity. As we are operating in the realm of law, the obvious suspect for a bearer of capacity is the concept of legal subject. A legal subject (or an individual) is a legal subject with or without capacity. But what do we that which is behind a legal subject and what qualities do we think it possesses? Or is it necessary to go beyond legal subject to find the essence of a person at all? I believe it is. The reason is that there already are two types of legal subjects, a natural person and a juridical person and there is no need to bring more confusion to these concepts. In this study, to discuss the essence of a natural person and the qualities that are important in the context of law, I will use term "self".¹³⁸ Now we have a concept for the fundamental nature of a person as a legal subject, but what qualities do I think it possesses?

What made a human being separate from nature for Immanuel Kant was the freedom of a person in comparison to the determinism of nature.¹³⁹ Nature could not choose to do otherwise, it was in a prison of its own laws. In contrast, a person was free to choose as it had will. This to me contains the essence, or the quality of self, when we think of law; the ability to will, and to

¹³⁷ Nedelsky points out that, If all the differences in strength, health, intelligence, temperament and abilities were to be counted in all of the legal considerations, it would make it very hard for law professors to use examples like the liability "A" incurs to "B". For the purposes of legal rights it must make sense, that people are portrayed as interchangeable and equal units of "A" and "B".

¹³⁸ The idea of "self" was inspired by Hannah Arendt's concept of "natality", a kind of second birth, or a principle of beginning through which we become members of a community. To understand the claim that we can be born into responsibilities, she argues, we must think of the beginning of a self in terms of entry into a community instead of the physical facts of birth. (Arendt, 1958)

¹³⁹ See I. Kant, *Critique of Practical Reason* (1785) in M. Gregor (ed.) *Kant, Practical Philosophy* (Cambridge University Press, 1996)

be able to will freely. When we think of contract, tort or especially criminal law, it is the will of a person that we are most interested in. For a good reason, as most consequences of law depend on it; in western jurisprudence responsibility is attached tightly to free will.

It is interesting to notice that there seems to be some overlapping of concepts when we think of the qualities of self: the free willing subject of law seems to have its counterpart in theological thinking also, as free will is an ancient theme for the scholars of divine as well.¹⁴⁰ And, as in law, serious consequences are tied to free will in religious context as well. The intersection of law and theological ethics in their treatment of individual responsibility is I believe a neglected domain.¹⁴¹ The ancient wisdom traditions¹⁴² have considered questions of right and wrong all over the world, for example the concept of final judgment is very meaningful to the structure of the dogma of christianity, while the law of karma is in the heart of justice in hinduism.¹⁴³¹⁴⁴

The question of law as well as religion is, what does it mean to will freely? Say, does an addict who uses heroin daily, really want to use heroin? She uses it and no-one makes her do so, so she clearly wants to use it, right? Or do we think her will is diminished by the addiction, even if her capacity otherwise is in no doubt? Can we neglect the question of addiction if we frame the question of will slightly differently, by bringing a reflective meta-level: do we think that a person's will is solid only if she is able to reflect herself and by so, she not only wants

¹⁴⁰ The problem of free will is an ancient theological puzzle, that can be formulated for example like this: how should we understand free will and human responsibility for sin if God is omnipotent (all powerful). It is tempting to think that God determines all our actions. Versions of determinism can be found also in social sciences: If we could understand all the variables we could know and also predict why one becomes drug lord and another a concert pianist. On the side of the physical science the same thinking goes like: If we ever will understand the chemistry and biology of the brain, we will be able to control our reactions and actions.

¹⁴¹ One exception to the rule is a book by Cathleen Kaveny: *Law's Virtues: Fostering Autonomy and Solidarity in American Society* (2012 Georgetown University Press)

¹⁴² A respectful term for religions originally by Huston Smith.

¹⁴³ Smith, 1991.

¹⁴⁴ A good question for further examination is, is theological ethics as immaterial, i.e. having as little interest in questions of psychology and biology when considering what is just, as secular law? J. Nedelsky 2011 p. 278 - 293 has a good account on how law should take seriously the material, i.e. biological, psychological and bodily aspect of a person.

to use heroin, but she also wants to want to use heroin?¹⁴⁵¹⁴⁶. The answers we give to these questions materialize for example when we decide how to treat the people with addiction in healthcare.

The example of addiction shows an instance of incoherence in the theory of capacity and autonomy as it shows that there are situations in life when you can be autonomous and in full capacity - when you are not. The fact that modern societies are so reluctant to take coercive methods in a case like addiction can be interpreted to indicate that there is growing a shared belief in existence of a free willing self that is beneath the surface levels of autonomy and capacity. It can be argued that this self is the foundation of natural person (legal subject) and a starting point of a legal analysis of autonomy.¹⁴⁷

The way autonomy is built in the legal system seems to have at least two layers in autonomy and capacity, although I would like to assert that the self founds an even more fundamental one. As Nedelsky points, the presumption of autonomy in law has a function: we only think it is just to hold people responsible for an action if we think the action was genuinely theirs, a product of their autonomous self.¹⁴⁸ Conversely, if we thought that people were not autonomous to start with, we would grant a *prima facie* free pass from responsibility. Donnelly sees the layers of autonomy a bit differently as she thinks that there is "a presumption of agency that underlies the liberal conception of autonomy".¹⁴⁹ To me it seems like there is a lot of similarity between Donnelly's "agent" that forms the foundation of law in her theory and the notion of self that I have proposed. The difference may be that Donnelly's idea of agency

¹⁴⁵ This again, is a version of a question of can an autonomous person agree to become a slave. Gerald Dworkin argues: "There is nothing in the idea of autonomy which precludes a person from saying: " I want to be the kind of person who acts at the commands of others. I define myself as a slave and endorse those attitudes and preferences. My autonomy consists in being a slave". Dworkin is not satisfied with this outcome. Instead he sees this as a limitation of the ethical value of autonomy and acknowledges a need to find other reasons, outside of respect for autonomy, for why a person's agreement to become a slave does not make slavery ethically acceptable. (Dworkin 1988, p. 129.)

¹⁴⁶ The question illustrates the procedural model of autonomy by Frankfurt. The reflective stage of autonomy, or *second-order-desire*, is a higher form of autonomy than the *first-order-desire* that lacks the thorough consideration. (Frankfurt, 1971).

¹⁴⁷ One can also think that it is just a matter of defining capacity differently for cases like addiction. It is also possible to hold that the threshold to capacity is lower than it used to be because of the emerging view of the (free willing) self as a foundation of a person. See more Frankfurt 1971.

¹⁴⁸ Nedelsky 2011, p. 279.

¹⁴⁹ Donnelly 2010, p. 24.

seems to pertain the notion of rationality, which I think is a bit hasty. The problem of rationality deserves a thorough consideration, and as such, is an excellent subject for further study.¹⁵⁰ After a short take on the similarities between the framing of a person in law and in theology it should be helpful to investigate the presumptions about self and how free and rational a will (or how autonomous a self) can be via modern behavioralist studies. Under what conditions and in what sense do we consider a person's actions as her's? There is reason to believe that autonomy may be more compromised on every layer than most would like to admit. In the next chapter the focus is on the theory and empirical study on decision-making.

5.2. Autonomy and Decision-making

The way the language of choice implicates responsibility may lead to inappropriate conclusions. The familiar question indicating the problem is whether it is suitable to say that a child from extremely poor family *chooses* to steal. And - if autonomy is reduced to a choice, or doing what one wants to do, it still leaves open the question is the choice or desire itself *really* autonomous. The autonomy of an individual in the decision-making process has been challenged from psychological and sociological standpoints. On the theory of layered autonomy, the psychological and sociological studies seem to work mostly on the level of autonomy.

5.2.1. Behavioral Studies

The theory of decision-making has been a subject of theoretical and empirical study by psychologists. According to the studies the decisions people make are heavily influenced by heuristics, i.e. problem-solving rules of thumb.¹⁵¹ The decisions in the context of health care, where all the layers of patient autonomy are visible, include the heuristics of *anchoring*, *availability* and *alternatives*. What anchoring refers to is the tendency to focus (or anchor) on a particular piece of information and to adjust the decision against this. The way decisions are

¹⁵⁰ The next chapter *Autonomy and Decision-making* can be read as a critique to what I call a naive presumption of human rationality. Of course what is meant by "rationality" in the context of law may differ a lot from how its meaning is understood in, say, philosophy. Then again should not the law be able to change its view of a person if the view held is inaccurate by modern standards?

¹⁵¹ A. Tversky and D. Kahneman: Availability: a Heuristic for Judging Frequency and Probability (1973) 5 *Cognitive Psychology* 207 in Donnelly 2010, p. 25.

framed has an impact on the choices made. This is shown by a study of patient responses to a treatment decision in which identical facts were presented in two different ways. The group of patients that were told "of those who undertake this procedure, 90% are still alive after five years" were found to be more likely to agree to the procedure than patients who were told that, after five years, 10 per cent of people who undertake the procedure will have died.¹⁵² The heuristic of availability gives a name to people's tendency to rate the events they can imagine more probable than the events they are less aware of. Decisions dealing with probability and risk may be blurred by media exposure: people are more likely to fear terrorist attacks or plane crashes than car accidents. Or, a person's ease in imagining an event may be influenced by personal experiences. A person may over-rate the risk involved in a treatment decision if a similar risk has materialized to someone she knows. The "alternatives" heuristic has been linked to the amount and different types of alternatives available to a person in a decision-making situation. While increase in alternatives can make a choice easier, it can also lead to the postponement of decisions, to choosing a default option in order to maintain the status quo.¹⁵³ Thus, more alternatives does not necessarily improve the quality of the decisions made.

The behavioral studies help us understand how the decision-making process works and, also, reveal the limits of human capabilities. The studies show that the law's basic element, *rational agent*, is not so rational if looked closer.¹⁵⁴ The examples presented were picked from the context of health care, and they reveal some of the problems of the legal threshold of "informed consent" as well. Donnelly names the role of effective communication, the boundaries of manipulation and the appropriateness of surrogate decision-making as a group of questions the behavioral studies demonstrate.¹⁵⁵ However, the most important question to the study in hand is, do these studies undermine the decision-making freedom of the self? Even if the heuristics cause bias in the decisions people make, I would say, if a person is not coerced, or intentionally manipulated, and if the physician communicates - preferably including the pit-

¹⁵² Redelmeier et al.: *Understanding Patients' Decisions: Cognitive and Emotional Perspectives* (1993) 279 *Journal of the American Medical Association* 72 in Donnelly 2010, p. 26.

¹⁵³ D. Redelmeier and E. Shafir: "Medical Decision Making in Situations that Offer Multiple Alternatives" (1995) 273 *Journal of the American Medical Association* 302 in Donnelly 2010, p. 26.

¹⁵⁴ The rationality of the agent in law is to be understood as *prima facie* rationality, an attribute of a person until there is evidence to the contrary.

¹⁵⁵ Donnelly 2010, p. 26.

falls of heuristics - orderly, the decisions people reach under these circumstances, are in the fundamental sense free. The studies of heuristics do not touch the question of (autonomy on the level of) capacity either, since these are studies that were executed with people in "sound mind". Instead, the studies exposed problems related to the surface level of autonomy. As such, heuristics along with the layered model of autonomy can be helpful, for example, when the threshold of informed consent is being evaluated.

5.2.2. Sociological Studies

The constitutional rights law has been constructed on the liberal political thought in which rights are associated with the individualistic conception of humanity; the rights-bearing individual is the basic subject of the law. From the sociological (and communitarian) standpoint the view is only half right. What the individualistic stance fails to recognize is the way our essential humanity is neither possible nor comprehensible without the network of relations it is a part of. Nedelsky puts the sociological stand aptly: "Human beings are *both* uniquely individual and essentially social creatures."¹⁵⁶

Leaning on the work of Peter Berger and Thomas Luckmann and their classic, *The Social Construction of Reality*¹⁵⁷, Paul Wolpe argues that, to an extent, the idea of "free choice" is socially constructed and situated. Wolfe notes several structural factors that may prevent a person from making free decisions in health care: the power and prestige of medical profession and the coercive influence of families and communities. Also class, race, education, as well as religious and cultural factors all have impact on the way people make decisions. Furthermore, life circumstances, like the need to get back to a job that has low tolerance on medical absence may coerce patients to make ill-advised decisions.¹⁵⁸

A sociological thinking starts with recognizing that all social systems generate norms that shape and constrain human behavior.¹⁵⁹ We may hold that consumption choices represent the fundamental exercise of freedom in contemporary liberal capitalism. But for example norms

¹⁵⁶ Nedelsky 2011, p. 249.

¹⁵⁷ Berger, Luckmann 1967.

¹⁵⁸ Wolpe: The Triumph of Autonomy in deVries and Subedi (eds.) *Bioethics and Society*, p. 54.

¹⁵⁹ Sociological meaning of term *norm* differs from its legal meaning.

pertaining consumption may have compulsive quality to them in a way that people feel they need to have certain clothes, or cars, to satisfy their self-respect or for other's recognition of their success. One may want to ask if norms like this amount to significant decrease in freedom and autonomy. Applying feminist theory, Susan Sherwin questions the autonomy of women's choices in respect of cosmetic surgery, abortion, reproductive technology and hormonal replacement therapy¹⁶⁰ while Natalie Stoljar argues that the view that an active sex life is inappropriate for women or to plan and initiate sex or that pregnancy and childbearing promote one's worthiness are informed by "oppressive and misguided norms". According to her those norms may influence women's decisions on contraception in a way that limits their agency.¹⁶¹

Some of the sociological/feminist studies are not adequately argued with little or no empirical evidence supporting the claims. Nevertheless the issues they touch are important and the way autonomy has been incorporated to the feminist theory gives somewhat a common ground with the studies of law. The combining of sociological and legal point of views makes this particular field of study very intriguing for the future. For this study, a brief look helped to reveal the amount of influence social norms can have on an individual. The decision's a person may hold as rational, and her own, may be seen differently if all the social factors are counted in. The way social norms influence the decision-making of a person are not coercive in the strict meaning of the word, nor do the possibly oppressive norms or peer pressure undermine the capacity of a person. Thus, on the layered model, the social influence should be interpreted to impact a person's autonomy.

5.3 The Multi-layered Model: A Case Study

In the last chapter I argued that the conventional liberal understanding of autonomy and rational agent can, and have been, criticized being limited in a sense that they do not reflect an accurate image of a person by modern standards of science.¹⁶² So is the notion of a person in law outdated? In order to examine the question of the justification of the prevailing concepts

¹⁶⁰ Sherwin (1998)

¹⁶¹ Stoljar (2000)

¹⁶² See Löhms 2015.

of individual autonomy and agent we have to first ask what is the logic behind treating autonomy as a presumption, something that can be, as a general rule, assumed as a characteristic of human actors. After that we can take a closer look on various fields of law and see what we can find. I will apply the multi-layered notion of autonomy to the analysis, hopefully to make things clearer.

As already briefly noted, according to Nedelsky a (a common law) legal system is "based on a conception of a person as a rational agent who can be held responsible for his actions". If so, then justice seems to require a link that connects autonomy and responsibility.¹⁶³ This is because there is no just system of law that would hold people accountable for actions that were not "their own". Another thing is, that for process economical reasons law does not require judges to inquire into all the specifics of what it might mean for an action to be "one's own".¹⁶⁴ Autonomy is to be presumed "unless quite limited exceptions are met".¹⁶⁵

There seems to be a consensus in legal studies that it is suitable to use the term "agency" to mark all of the suggested three levels of autonomy in relation to assigning responsibility.¹⁶⁶ The treatment is not specified enough approach for the needs of systematic study of law. I think the need for distinction between the different layers of autonomy is a fundamental one: It allows a multistage inquiry into rights debates. For example, when somebody moves the actors finger in order to pull the trigger, applying the layered model, it is clear that it is a case where there is not even the free will of the self to put the blame on. On the other hand a defense based on the reason of insanity should be seen (on the layered model) as a matter of capacity. - The capacity for self-governance is so weakened that there can not be responsibility. Then there are cases that raise the issue of duress and provocation, that are best dealt with at the autonomy level. A person (a free willing self) has made choices, with no questions whether she is in full capacity, yet the choices she has made are seen so constrained that they can not be seen as fully autonomous. In the case of provocation the test applied is the words or actions of the provocateur that would cause an ordinary person to lose control to a degree

¹⁶³ Nedelsky 2011, p. 173 - 174.

¹⁶⁴ For example the impact on autonomy by norms revealed by sociological studies are by and large left without consideration.

¹⁶⁵ Nedelsky 2011, p. 174.

¹⁶⁶ See for example Möller 2012, Donnelly 2010, Nedelsky 2011.

that she can not be seen as acting fully autonomously.¹⁶⁷ Instead, she is understood to be acting under the control of the anger, or heat of the passion and, thus, not fully responsible for her actions.¹⁶⁸¹⁶⁹

Nedelsky gives us an interesting example of autonomy interest from contract law that turns the conventional dichotomy of paternalism vs. autonomy upside down. According to Nedelsky, if there was not employment regulation, like minimum wage and maximum hours, the unequal bargaining power of employers would often yield contracts "in which the employees exercise agency but not genuine autonomy."¹⁷⁰ In other words, the law should not let people to use the legally backed freedom to contract to extract agreements that are not given autonomously. In the described situation the effective coercive power of the employers is being limited by what is traditionally understood as "paternalistic" legislation. One may say though, that the legislation actually promotes the *de facto* autonomy of the employees as it enables them to take control of their lives better. Applied to the multi-layered model, initially this looks like a surface level question: the workers have a genuine choice, they can leave the employers offer on the table if they so wish. The lack of employee autonomy is created by the fact that this is a case of a choice between bad options. If the circumstances were especially difficult, like when there were high unemployment numbers across the society, that could cause a reason for the more careful consideration of the level of coercion because of the vulnerability of the employees at the moment.¹⁷¹ Overall, the example of employment regulation indicates that there are autonomy interests to be protected in various fields of law. Also the other recent developments in contract law with concepts like duress, as well as unjustifiable enrichment open up more opportunities for autonomy based research for the future.

¹⁶⁷ Forell 2006, p. 45.

¹⁶⁸ Ibid.

¹⁶⁹ According to Forell, different jurisdictions handle the issue of provocation differently: some see it as a partial defense, some as a mitigating circumstance in sentencing. Partial defence is more commonly available, meaning for example that a charge of murder may be reduced to manslaughter. Applying the layered model, it seems like the principle of provocation is available in situations when there is a loose of control over oneself; the capacity for self-governance is, similarly as in reason of insanity although temporarily, limited to a degree that a person cannot be seen as "acting on her own". If the autonomy is seen to be limited on the capacity level, consistently, also the level of responsibility should be decreased. This means that provocation should be seen as a partial defense, instead of a mitigating circumstance, which operates at the surface-level of autonomy.

¹⁷⁰ Nedelsky, 2011, p. 174.

¹⁷¹ The rightful autonomy interests of the employer must be given consideration as well.

The example of employee autonomy sheds some light on one point the supporters of the relational autonomy (communitarian/feminist scholars) have been addressing. In the relational view of autonomy, autonomy is understood as something that develops and diminishes in people's relations with other people. The autonomy of a person is dependent on other people and because of that, is in constant flux: sometimes a person has more autonomy and sometimes less, depending on the relationships she is in. To contrast their stand, the communitarian / relational approach to autonomy has presented the view of the individual autonomy as an on/off thing, lacking the nuances and denying the relevance of context.

The health care context of autonomy presented itself as a domain of autonomy as mostly a question of capacity. The capacity of a patient is presupposed, and when in doubt, the capacity is ordinarily decided by a physician¹⁷². The scope of the patient autonomy is limited to the matter of consent. As such, autonomy in health care can be described as an on/off thing with very little in between like the communitarians claim. The way patient autonomy is treated reflects the image of how a person is understood in law, but - we have to be careful here - it only reflects the image of a person in law in healthcare context. Even if autonomy has an on/off nature in healthcare, it does not follow that the same could be said about it in the other fields of law. And, there is another important thing to be noticed. The way a person and her autonomy is treated in law may in some situations and contexts be of on/off quality, but this does not mean that the treatment itself was fixed, unable to take influence from the surrounding world.

The issue of legal responsibility revealed the logic to the presumption of autonomy, while the health care context disclosed that the law may treat capacity in overly simplistic fashion. What I will argue in the following is, that even if law may seem "clumsy" in assessing autonomy with limited amount of categories, in reality it is not lacking in nuances of modern understanding of a person and the context she lives in. The question of what kind of responsibility should be assigned to "battered women" who kill their batterers is an intriguing example

¹⁷² In case there are two differing medical opinion, the decision has to be made by court. And - ultimately - there is no such thing as "capacity as a medical decision", as Nedelsky points out, the law of legal sanity can have a very rabid legislative change. After John Hinckley Jr.'s successful insanity defense in the trial for attempted assassination of President Ronald Reagan the laws defining the test of legal sanity had a sudden change towards more punitive approach. (Nedelsky 2011, p. 424)

that touches the critiques of the prevailing view of individual autonomy. According to Nedelsky the defendants of these cases are women who have sustained long relationships "characterized by physical and psychological abuse by their male partners".¹⁷³ The usual pattern is that the partner threatens to kill the woman and she realizes she has to kill the man before he kills her. In many of the cases, she is able to kill her partner because he is sleeping or otherwise unaware of the attack. What makes these cases difficult to fit in the ordinary self-defense claims, is that she does not kill her partner at the exact moment he is threatening her, but shortly after when she has the opportunity to do so relatively safely. The described pattern does not fit the legal definition of insanity and provocation, as noted earlier, is not a full defense but a partial defense or sometimes a mitigating factor.¹⁷⁴

Nedelsky argues that there are conceptual barriers to understanding these cases that exist in both the common understanding and in the minds of legal professionals as well. One of them is the presumption of rational agent and an on/off conception of autonomy. The other is the victim/agent dichotomy that the courts must overcome in order to assess fairly the situations these women are in. These women, according to Nedelsky are not simply agents nor victims; they are both.¹⁷⁵

The way flexibility, nuances and the modern understanding of a person is crouching into law is via backdoor. By backdoor I mean the development is not an accomplishment of legal professionals; it is not happening by the legal theorist's efforts nor majority decisions by the elected branches but by the expert testimonies addressed to courts in difficult cases, cases like the "battered women". The experts have contemplated about the abuse the accused have suffered and about the damage such long term abuse may cause. The recognized patterns of damage have often been called the battered women's syndrome with characteristics of learned helplessness, a feeling of being trapped in the relationship, low self-esteem, and great dependence on the battering partner. This syndrome has been said to help to explain for why women who are in abusive relationships do not leave them. This has been important so that judges

¹⁷³ Nedelsky 2011, p. 175.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid.

and juries "do not discount the stories of abuse as unbelievable - on the assumption that if the abuse had been as bad as she claimed, she would have left".¹⁷⁶

The courts have been receptive to the experts testimonies, but there is a trap in seeing the accused women simply as victims as well. The passive, helpless victim - *a damsel in distress* - is a stereotype readily available for courts casting women as not responsible for their situation or for their actions. There is a danger that the agency of the woman disappears even if the facts are that she had made efforts to leave the man and had employed different strategies to protect herself and her children. Nedelsky argues that what is needed is a nuanced conception of autonomy that can make sense of a picture of a woman whose capacity for autonomy has been seriously damaged by an abusive relationship but who, at the same time, is capable of reasonable judgments about the nature of the threat she faces and of the options she has to protect herself.¹⁷⁷

To sum up the discussion, I suggest that the question of the criticized on/off character of the prevailing concept of individual autonomy in some instances may be more a result of the nature of the law, as an instrument of policy decisions, rather than inherent incapability to understand the modern conception of a person. The incorporation of modern psychiatric knowledge in law (in the form of diagnosis of battered women's syndrome) show that there are instances of receptiveness in law, as it is not a fixed system. In the particular fields of law the changes may be slow, but it is important to note as an answer to the criticism of individual autonomy, that there seems to be no systemic failure in law in the sense there would be no way of introducing new knowledge to the system. Law is open to new influences. And the prevailing conception of individual autonomy is not making a more nuanced approach impossible. Indeed, there are examples like the Finnish law on the restriction of competency where the need for more nuanced approach to autonomy has been met in a way that does not divide people into two groups expecting that the given slots are fitting for every individual, but instead give respect to a more nuanced view of a person. The law yields a step-by-step model that provides courts room to maneuver a decision that gives a person as wide a space for com-

¹⁷⁶ Ibid.

¹⁷⁷ While it would be interesting go deeper into these cases, the most famous probably *R. v. Lavallee* (1990) 1 S.C.R. 852., a Canadian case, it would also be unnecessary for the purposes of the chapter.

petency as is fit to her condition, thus limiting the autonomy of the person as little as possible.¹⁷⁸¹⁷⁹

An important group of people viewed until lately as objects of charity, medical treatment and social protection are persons with disabilities. One big step towards treating "them" finally as "us", as full and equal members of society with human rights, has been The Convention on the Rights of Persons with Disabilities. The preamble of the treaty guarantees persons with disabilities the same presumption of autonomy as the rest of us as it demands the contracting states to recognize "the importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices", and to reinforce the matter, the article 3 lists autonomy as one of the general principles of the convention.¹⁸⁰¹⁸¹ Being a relatively new treaty (it came into force on 3 May 2008¹⁸²) with not too many instances of application to date as well as the multitude of possible uses because of the scope of the autonomy within the convention suggest that the layered model of autonomy might be helpful when the treaty is interpreted in the future instances.

While it should be the purpose of the study of law to define the concepts used as universal as possible and as coherent as possible, the complexity of modern societies and the differences between fields of law make it probably impossible to develop concepts that would fit in all situations. For example, Lacey notes that multiple and philosophically inconsistent conceptions of responsibility may operate within legal practices without any necessary incoherence

¹⁷⁸ Guardianship Services Act (442/1999), Chapter 3, Section 18.

¹⁷⁹ Lack of competency seems to limit a person's autonomy to a degree that it should be considered on a layered model as a matter of capacity. The importance of competency to a person suggests that maybe even the level of self should be considered. But as long as there is no coercion and the protection of the person is well thought out and the supervision of the guardian is up to the task, to me, it is a matter of capacity.

¹⁸⁰ The Convention on the Rights of Persons with Disabilities. Preamble, Section n. <http://www.un.org/disabilities/convention/conventionfull.shtml> (cited 9.9. 2016)

¹⁸¹ As Möller has suggested, autonomy may be seen as an underlying principle of all human rights law. I agree with this view, but at the same time think that the explicit recognition of autonomy in the treaty text is very important from the educational point of view of the law. Beyond the preamble and article 3 of the treaty, autonomy is given a written presentation also in article 16 concerning freedom from exploitation, violence and abuse, and in article 25 on the subject of health.

¹⁸² https://www.eduskunta.fi/FI/tietoeduskunnasta/kirjasto/aineistot/kotimainen_oikeus/LATI/Sivut/vammaisten-oikeuksien-yleissopimuksen-ratifiointi.aspx (cited 24.9.2016)

in these distinctive practices.¹⁸³ The notion makes a good hypothesis for the further study of the concept of autonomy in many ways. The layered model may and very likely will find different meanings and uses of autonomy in different fields of law while also the concepts of self, capacity and autonomy may have different definitions in different contexts. It is also possible that less or more layers of autonomy will be found in different fields of law. Regardless of how tempting it may be, an a priori universal approach to theorizing autonomy does not seem appropriate. Instead of searching for the universals of the philosophers, I believe the law studies should put the emphasis on defining principles that reach a level that can be described as local coherency, principles that in a given field of law, can guide the jurists to making well thought out decisions.

¹⁸³ Lacey 2001, p. 353.

6. Counterbalance for Autonomy?

The layered model of autonomy showed that the vehicle of individual autonomy, to a large degree, carries the view of a person in law. The view has been argued to be lacking in accuracy. Also the notion of human responsibilities has been brought up. The examples of the critics, like the impossibility of language for an isolated individual propose that the values that foster trust and solidarity of people should be better recognized by law. We are "socially embedded"¹⁸⁴ depending on each other, yet the law seems to a large extent see us as self-sufficient islands. The law does not appear to have found a way to articulate values intrinsic to human existence: values like co-operation, solidarity and reciprocity should be available to law to a much greater degree than what they are today. In this chapter I will discuss the possible ways these values could be incorporated to law and their relation to individual autonomy. For example, is it possible to find a better balance between the prevailing concept of individual autonomy and communitarian values via interpretation of the Convention?

It is not the purpose of this chapter to display the interpretation of the Convention in all its nuances. Instead I will try to find out if there is a way to instill communitarian values to human rights law through the vehicle of interpretation of the Treaty. In the interpretation of the ECHR, the Court is bound by the Vienna Convention on the Law of Treaties (the VCLT), which expresses the generally accepted principles of international law. The first time the connection was articulated was the case of *Golder v the United Kingdom*¹⁸⁵ in which The Court stated that as an international treaty the interpretation of the Convention is guided by Articles 31-33 of the Vienna Convention¹⁸⁶. According to the Article 31¹⁸⁷, when giving meaning to a treaty, a court has to take into consideration the object and purpose of the convention. The Court has let known that it finds autonomy an underlying principle of the Article 8 interpretation and Möller goes even further suggesting that autonomy-founded understanding of human

¹⁸⁴ Mackenzie and Stoljar (eds.) *Relational Autonomy*, p.4.

¹⁸⁵ Case of Golden v the United Kingdom (App.4451/70), Judgment of 21 February 1975.

¹⁸⁶ Golden v the United Kingdom, para 29.

¹⁸⁷ The relevant sections of Article 31 of the Vienna Convention read as follows: "1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes."

rights is underlying a big part of contemporary thinking in human rights law¹⁸⁸. The examples propose that preserving autonomy has a strong footing as a number one object and purpose of the Convention¹⁸⁹. But is there room for communitarian values alongside with autonomy? The ECHR in itself does not seem to carry any of the communitarian values nor human responsibilities in its Articles. For the purposes of this chapter, help comes from the Preamble of the ECHR. A preamble of a treaty is according to the Vienna Convention useful for the determination of the "object" and "purpose" of the instrument to be construed¹⁹⁰. The Preamble of the ECHR refers to the Universal Declaration of Human Rights as one of the sources of its inspiration. The first sentence of Article 1 of the Universal Declaration of Human Rights confirms that all human beings are born free and equal in dignity and rights. The second sentence, although not as well known, records the principle of solidarity in human rights law. Human beings "are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"¹⁹¹. The concept of "spirit of brotherhood" arguably carries communitarian values, values like solidarity and loyalty to the human rights law.¹⁹² The duty of the courts then, is to apply those values.¹⁹³

The way Löhmus and Nedelsky, respectively, want to reinforce the communitarian values in law is via redefining autonomy. Löhmus names her proposition as *caring autonomy* while Nedelsky's term is *relational autonomy*. Calling their views simply "communitarian" does not do justice to neither of the scholars, but I will cut a few corners here as I reject the idea of re-

¹⁸⁸ Möller 2012.

¹⁸⁹ Dignity has been noted as a strong candidate as well. See Löhmus 2014, p. 72.

¹⁹⁰ See the Vienna Convention Article 31 para. 2.

¹⁹¹ The Universal Declaration of Human Rights. (<http://www.un.org/en/universal-declaration-human-rights/>) (cited 24.9.2016)

¹⁹² The Cambridge Dictionary's British version connects "brotherhood" with notions of friendship and loyalty, while as the English Oxford Living Dictionaries defines brotherhood as the feeling of kinship with and closeness to a group of people or all people. 'a gesture of solidarity and brotherhood'. (<http://dictionary.cambridge.org/dictionary/english/brotherhood>); (<https://en.oxforddictionaries.com/definition/brotherhood>) (cited 25.9.2016)

¹⁹³ If we accept that brotherhood is connected to solidarity and loyalty, we only have advanced one step. In order to apply solidarity and loyalty we need to understand what patterns of behavior foster these values in practice. I would like to suggest that loyalty and solidarity are related to notion of trust. Trust is often seen consisting of an optimistic attitude towards one's vulnerability (Hall 2002, p. 474-475). And conversely, trust is redundant when actions or outcomes are guaranteed (Oneill 2002, p. 17). I want to suggest that we can expect to build a trusting relationship only over time. Step by step, gradually growing trust is fueled by reciprocity. These are, I think the behavioral patterns that need to be upheld by law to foster solidarity or "brotherhood" in society: Trustworthy behavior and behavior of reciprocity.

defining autonomy and present my proposal for bringing the essential values of communitarianism more available to law.

What Löhmus convincingly argued was that there already are three different types of concepts of autonomy in the jurisprudence of the ECtHR, so the Court has a track record to show that it has been able to reroute before, when it has seen it necessary. So is reframing of the concept of autonomy necessary once again? I would hesitate to do so. For one, the Court seems to have finally found the type of autonomy with individual autonomy that it feels confident to work with. If it were to change the framing once again, for the sake of legal certainty, it would be necessary to be outspoken about it, because a fourth concept would undoubtedly lead to confusion. Second, the concept the Court has come up with lately represents the middle of the road in the ever widening pool of autonomy interpretations and resonates well with the common law interpretations as well as with the dictionary definitions.

Justice is not only about *what* the court decides, it is almost equally important *how* it decides it. What the communitarians have been successful in, is in showing where the potholes of the prevailing concept of individual autonomy are. To me the Court has been able to avoid making autonomy a be all end all of principles;¹⁹⁴ the problem is, as I see it, more on the side of the argumentation. The ECtHR has not been able to articulate a general counterbalance(s)¹⁹⁵ of some sort, let alone a convincing legal principle, that would be necessary to count in when autonomy considerations are invoked. I think the counterbalance(s) should cluster together the values inherent in the communitarian view, such as interpersonal trust, caring, solidarity and so on. But unlike Löhmus and Nedelsky, I see it as a mistake to package those values in a new, reformed concept of autonomy; it would only add to the confusion. So my take is, that rather than reframing autonomy the Court needs to, once again, use its legal imagination and adopt a new concept to balance the concept of autonomy it has finally been able to resolve. By counterbalance I do not mean the limiting factors of autonomy, factors like age or mental illness. Nor do I mean the doctrine of balancing, the often final stage of proportionality test

¹⁹⁴ See cases like *Petty and Evans*: while autonomy interests were recognized, other values held weight as well.

¹⁹⁵ Due to the vast scope of autonomy, one counterbalance will not very likely be adequate. It is more likely that what is needed are many counterbalancing principles for different contexts. This is an example of what I mean by local coherence.

that constitutional courts employ when they are faced with conflicting autonomy interests.¹⁹⁶ Conflicts of autonomy interests appear when two or more people join. It becomes a necessity to specify the spheres of autonomy of equals. This is where the law is today, it is modeled to solve conflicting autonomy interests. By counterbalance I mean argumentation that brings other values, values like trust and solidarity on the table. The conflict could be then of type, say, autonomy interest vs reciprocity, or remain as a traditional clash of autonomies, but gain values related to the communitarian stance.

My claim is that the law does not recognize and differentiate clearly enough special relations like family relations, where trust and intimacy are involved. Individual autonomy concentrates on the individual and her life project and leaves out the ones indispensable to her as if they were meaningless. When individual autonomy is applied, family members are being treated as if they were strangers to each other. It is telling that even contracting parties, via loyalty principle¹⁹⁷, may have more duties towards each other than family members. In the case of *Evans*¹⁹⁸ the European Court of Human Rights ruled that a woman left infertile after cancer treatment can not use her frozen embryos to have a baby without the consent of her former partner. The Court held that the case involved two adults with an interest of pursuing a life of their own choosing. Ms Evans was asking to be allowed to use the embryos without Mr Johnston's permission as it was her last chance of getting pregnant. She argued that Mr Johnston had already consented to their creation, storage and use, and should not be allowed to change his mind. The Court upheld Mr Johnston's autonomy rights, namely his right to decide not to become a parent. The Court noted that Ms Evans knew from the start that Mr Johnston had a right to withdraw his consent to implantation at any moment.¹⁹⁹ For the Court, the case had typical characteristics of a clash of two autonomous decision makers, it was about "two individuals, each of whom is entitled to respect for private life".²⁰⁰ But to me, the case has some aspects that call for elaboration of the special relationship between the two and the message the decision sends. O'neill nails the problem that the Court would not address in its judgment:

¹⁹⁶ More on the proportionality test, balancing stage, see Möller 2012 and especially Harris, O'boyle & Warbrick 2014, p.505-521.

¹⁹⁷ Hemmo 2009, 43.

¹⁹⁸ *Evans v the United Kingdom*

¹⁹⁹ *Evans v the United Kingdom*, para 88.

²⁰⁰ *Evans v the United Kingdom*, para 69.

”reproduction is intrinsically not an individual project”.²⁰¹ The Court was stuck with only one tool, individual autonomy, a concept that could not reach the nuances of a relationship. I agree with Löhmus that by giving the man the possibility to opt out any time the Court left the woman dependent on the ongoing consent of the man. The man was left with all the power, with a chance to calculate and no need to commit. The woman had no other choice than to trust.²⁰² Had this been just a regular contract²⁰³, the woman would have been better secured: The Court would have asked the man if he had given any warnings of not possibly being able to make the delivery. The Court would have asked what efforts were being made at the time of the agreement to better balance the distribution of risks. What kind of effort the parties had had in search for a compensation in case of a breach of contract, and so on. Contracting parties are to be loyal to each other, yet the ECtHR implicitly, through the interpretation of individual autonomy, held that the people in intimate relationship had no such duty. If the law holds that there is no need for values like solidarity and reciprocity between family members such as Ms Evans and Mr Johnston, it looks like these values as earlier discussed, intrinsic to human existence, are severely undermined by the law.²⁰⁴

Drawing from the notion of ”spirit of brotherhood” in the Article 1 of the Universal Declaration of Human Rights and to fill the void of communitarian values within the individual autonomy based jurisprudence of the ECtHR, I suggest that a counterbalance is needed. The *reciprocity principle* I propose, would give a voice to the value of ”spirit of brotherhood” in law. To implement this value, along with the communitarian values, reciprocity principle would borrow the idea of loyalty as an analogy from the contract law. The basic idea of loyal-

²⁰¹ O’neill 2002, p. 65.

²⁰² Löhmus 2015, 83-87.

²⁰³ There is a difference between a contract and a long term contract. The loyalty principle gets stronger in long term contracts, encompassing a duty to take into consideration and inform the opposing party of the things that may be beneficial or detrimental to the end of the agreement. The idea of growing duty of loyalty fits perfectly with family relations as well. See more (Hemmo 2009, 43.)

²⁰⁴ The decision was highly controversial as the member countries had, at the time of the judgment, regulated the consent issue differently. The Court considered other jurisdictions as well. There is a series of judgments by State Supreme Courts in the United States as the field of medically assisted reproduction is not regulated at federal level. The Court cited also an Israeli case *Nachmani v. Nachmani* (50(4) P.D. 661) that had very similar facts to the *Evans* case. The Israeli Supreme Court decided in favour of the wife. The judges in the majority found that the woman’s interests and in particular her lack of alternatives to achieve genetic parenthood outweighed those of the man. (See *Evans* para. 33-39.) The cases from the other jurisdictions (as well as the dissenting judges opinions in the *Evans* case) the Court considered were unfortunately not very helpful as there appear to be no principled argumentation given.

ty principle is that contracting parties are to be loyal to each other. The reciprocity principle would then be invoked in cases 1) where using only individual autonomy without counterbalance would lead to a situation where relations that are formed on trust, such as family relations, would not differ from any other relation, and, 2) the relations in question would not receive the protection of the loyalty principle of the contract law either. Reciprocity principle would send a message that people in intimate relations have duties toward each other especially in situations that are delicate and where trust needs special protection. After contemplating a particular case, the Court might still hold that individual autonomy gains more weight against the reciprocity principle, but what autonomy is weighted against would get a clear, articulated presentation.

7. Conclusion

What started off as a judicial review of the concept of autonomy within the jurisprudence of the European Court of Human Rights expanded to the questions of constitutional law and legal theory in a speed it seemed like it had a will of its own. The main influence of the expansion was the work of Kai Möller and his theory of the global model of constitutional rights. The book encouraged me to propose and defend some abstract concepts and values of my own. Obviously the ideas presented in this study, the layered model of autonomy and the reciprocity principle are more sketches than full grown theories. Yet I believe they are capable of stimulating a more profound study at some point.

The early discussion of autonomy revealed two layers of autonomy in capacity and autonomy. As capacity is seen as a precondition of autonomy it is in a sense a more fundamental concept. Most of the rights and responsibilities are attached to the notion of capacity, yet it is not the basic layer of autonomy. The subject of law, a person, is not reduced to a mere question of capacity. There are rights, and possibly responsibilities, that are independent of the question of capacity. As a tool to better understand the foundational layer of an autonomous person, I introduced the concept of "self". The way we frame the autonomous self may have a profound effect on where the threshold of capacity is set, with possible consequences on how we treat for example questions pertaining to mental health, disability and the question of responsibly in crime cases.

From the theoretical standpoint, the reciprocity principle has many influences: First, there is the idea that there should not only be human rights, but as a counterbalance, there should be human responsibilities as well. The idea has its origins in moral philosophy and particularly in Hannah Arendt's concept of "collective responsibility". Human responsibility has been discussed in philosophy but as a subject of law, at least quick google searches suggest that this field of study has been to a large part neglected²⁰⁵. The second source for the principle of reciprocity can be tracked to the critique of liberalism, the view that upholds the social nature of a person as well as communal values within society: namely, communitarianism. After

²⁰⁵ Joseph Raz's analysis of "duty" in *The Morality of Freedom* shares some similarities with the notion of responsibility.

studying the concept of autonomy as a concept of constitutional law I was able to combine the ideas of human responsibility and communitarian values and - with a little help from contract law - form a principle that could be used to counterbalance the use of the prevailing concept of individual autonomy within the jurisprudence of the European Court of Human Rights in certain situations. On the other hand, the reciprocity principle can also be seen as an attempt to define a lost value in the current practice of human rights law as the notion of "spirit of brotherhood" in the paragraph 2. of the Article 1. of The Universal Declaration of Human Rights is arguably one of the more overlooked pieces of the convention.