

TALLINN UNIVERSITY OF TECHNOLOGY

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**PROTECTING FETUSES AGAINST SUBSTANCE ABUSER
MOTHERS IN FINLAND - METHODS OF CRIMINAL
SANCTIONING AND COERCIVE TREATMENT**

Bachelor's thesis

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ABSTRACT

The aim of this thesis is to examine if protecting the fetus against its substance abuser mother could be done through the Criminal Code of Finland. Since Finland does not legally recognize fetal rights but criminalizes the harm done to a premature baby at the same age, it will be discussed whether the harm done to the fetus could enjoy the same protection as premature babies do. This is to be examined with the Article 50 of the Finnish Criminal Code. In addition, the aim is to examine a coercive treatment for pregnant substance abusers in order to protect the unborn. If the Finnish Criminal Code cannot protect the fetus, could the other method be coercive treatment for these pregnant substance abusers? This will be examined together with the Article 10 of the Finnish law on substance abuse treatment. To get an answer to these research questions, the author will explore the concept of a fetus as well as the rights of women.

The hypothesis of this thesis is that Finland could, in order to protect the fetus, obligate pregnant substance abuser women to go through a coercive treatment period. Also, the Finnish Criminal Code could charge pregnant substance abusers for child abuse. Although, there could be still situations where the mothers' rights are seen more valuable than the fetuses'.

Methodology used on this thesis is qualitative and primary sources used are legislation from Finland, Norway, the United States from America. In addition, statistical data as primary source is used. Secondary sources are used as well, them being articles written by legal scholars giving their analyses of the topic or other commentary about it.

Key words: coercive treatment, substance abuse treatment law, criminalization, fetus

INTRODUCTION

More and more children are born with disabilities or dead as a fetus due to their mothers' substance abuse during the pregnancy. In Finland the discussion on the protection of an unborn child has developed to an extent where current law on substance abuse treatment is under a reform to bring out new ways of protecting the fetus against its substance abuser mother: the Norwegian model of coercive treatment and criminalizing the substance abuse during pregnancy. When trying to find the balance between protecting the fetus and the rights of the mother, the conflict of rights cannot be avoided. Since many delegates among the working group of the CRC saw that both the right to survival and the right life are complementary together¹, there should be actions made towards protecting the life of the children, whether born or unborn. The suggested methods could be solutions for it.

The topic of this thesis is finding a suitable method for the protection of fetuses against their substance abuser mothers. Methods introduced are the criminalization of women's substance-abuse while being pregnant to protect the fetus and the possibility of a coercive treatment in Finland for these women, where the law on substance abuse treatment is inadequate. Could the use of harmful substances while being pregnant be governed and prevented by a coercive treatment, even though the right to self-determination exists? Could the Finnish Criminal Code protect the fetus such as it protects born children, even though the fetal rights are not recognized in Finland and in order to do so, women's fundamental right to privacy would be limited.

Research method used is qualitative including legislation from Finland, Norway and from the European Union as primary sources together with statistical data. Previous Court decisions on the subject and case law are being used as well. The articles used as secondary sources are written by legal scholars who either analyze relevant issues relating to this thesis or argue one side with their comments. In addition, author will use published research reports and other relevant materials on the topic.

Chapter one will introduce the Finnish legislation and the reform of the law on substance abuse treatment, mainly from the side of a pregnant substance abusers in Finland and letting the reader

¹ Sutherland, E. E. (2015). The Child's Right to Life, Survival and Development: Evolution and Progress. *Stellenbosch Law Review*, 26(2), 272-294. p 277.

know about the drafted proposals over the years to change the law for taking drug user mothers into account as well and the suitable treatment for them. The chapter will also give a brief overview about the consequences of substance abuse during pregnancy and how it will affect the child.

Chapter two is focused on the coercive treatment for pregnant substance abusers and explaining the rationale behind it and debate over it. The conflicting rights of woman and the fetus are examined from the perspective of the coercive treatment as well as Finland's interest as a State to protect fetuses.

Chapter three brings out the option for criminalizing the substance abuse during pregnancy to protect the fetus. The discussion and analysis will be focused on the possibility for the Finnish Criminal Code to protect the fetus against its substance abuser mother, since there are no legally recognized fetal rights that could do so nor are there provisions on the Criminal Code that fetal rights could fall within. Criminal sanctions would focus on the harm caused to the fetuses because of the abuse of harmful substances.

Expected outcome from this thesis is that pregnant substance abusers could be criminally responsible for their actions against the fetus, even though there are yet no fetal rights recognized in Finland. Fetal rights have always been a discussed and controversial topic, so to determinate whether the protection of the fetus can be done through the Finnish Criminal Code or coercive treatment, is difficult. Could fetal rights be put above the women's right for self-determination and privacy, in order to achieve better protection of the fetuses than before. Also, another expected outcome from this thesis is that coercive treatment model, such as in Norway, will be taken into use in Finland.

1. CONCEPT OF SUBSTANCE ABUSE AND FINNISH LEGISLATION ON IT

1.1 Substance abuse and pregnancy

Drinking alcohol while being pregnant is one of the most significant threats for a development of an unborn child. Out of all harmful substances, alcohol causes the most damages to the fetus.² Alcohol reaches the fetus through the placenta disturbing the development of the fetus. These different types of fetal damages are called Fetal alcohol spectrum disorders (FASDs). The most serious form of fetal damage is Fetal alcohol syndrome (FAS)³ and the less dangerous disorder is called Fetal alcohol effects (FAE) which nowadays goes by the name Partial fetal alcohol syndrome (PFAS).⁴ In Finland, fetal disorders became a topic of discussion in the end of 1980, but the first damages cause to fetus were reported already in 1960. Nowadays there are estimated to be 600-3000 children born every year with development damages caused by mothers' alcohol use during pregnancy.⁵ Out of all these children, nearly 100 of them are FAS-children and nearly 150 are FAE-children⁶ but since the symptoms of the babies might occur later in life, these statistics are difficult to be kept up to date.

Drug usage during pregnancy affects the development of the fetus when reaching the fetus through placenta, such as in the case of consuming alcohol. Side effects that follow the use of drugs during pregnancy are for instance some among of the following: low birth weight and later in life occurring language and learning skills together with behavioral problems.⁷ In addition to those previously mentioned, there are more severe effects caused by drug usage during pregnancy; the risks of premature birth, placental abruption, fetal malformation and heart and brain abnormalities.

² Kehitysvammaliitto (2016) *FASD*. Accessible: <http://kehitysvammaliitto.fi/kehitysvammaisuus/fasd>

³ Verner (2017) *FASD*. Accessible: <http://verneri.net/yleis/fasd>, 8 December 2017

⁴ Clarke, M. E., & Gibbard, W. B. (2003). Overview of fetal alcohol spectrum disorders for mental health professionals. *The Canadian child and adolescent psychiatry review*, 12(3), 57.

⁵ Verner (2017), *supra nota* 3

⁶ Rauhala, L. (2014) *Laki päihdehuoltolain muuttamisesta*, Accessible: http://www.eduskunta.fi/FI/vaski/Lakialoite/Documents/la_3+2014.pdf, 20 February 2014, p 1.

⁷ Foundations Recovery Network, Accessible: <https://www.foundationsrecoverynetwork.com/the-effects-of-drugs-on-pregnancy>

Different drugs cause different symptoms to the fetus.⁸ In some cases, the newborn child will be put straight to rehabilitation after the delivery because they are already severely addicted to drugs. The most common treatment given for the newborns in Finland is the morphine treatment cycle that can last altogether from four to six weeks. During the treatment the babies are put under a surveillance and they are being examined multiple times in a day, concentrating on the level of withdrawal symptoms such as sweating, crying and anxiety.⁹

Over the years, the substance abuse among pregnant Finnish women has increased and because of that, the discussion in Finland about the most suitable method for preventing it has been increased as well. The discussion has also turned to the most appropriate method to protect the potential life, i.e. the fetus. Having no fetal rights recognized legally, finding the methods has been difficult since the harm done to the fetus is not a crime either.

1.2 Overview of the current legislation

In Finland, the current law for substance abuse treatment (Päihdehuoltolaki 17.1.1986/41) is from the year 1986, and thus is lacking in certain parts such as the perspective of a “passive drinking”, the protection of children, whether born or unborn and the rights of them. The law regulates coercive measures in the Chapter 2, but only covers treatments for mothers who are consuming alcohol during pregnancy but leaving out the mothers who are using drugs. In addition, the same law offers coercive treatment for those mothers who are causing immediate danger for themselves, and their unborn children, for a period of five days and is again, excluding the drug user mothers.¹⁰ And even if the drug user mothers would be taken into consideration, the five-day period is not enough to treat a drug addiction.

The Finnish Child Welfare Act (Lastensuojelulaki 13.4.2007/417) states in its Chapter 1, that preventive child welfare aims at promoting the wellbeing of children even when the children are

⁸ Terveystieteiden tutkimuskeskus ja Hyvinvoinnin laitos (2018) Accessible: https://thl.fi/fi/web/lapset-nuoret-ja-perheet/peruspalvelut/aitiys_ja_lastenneuvola/paihdehuolto-neuvolassa/vanhempien-huumeiden-kaytto, 11 January 2018

⁹ Jyrävä, M. *Huumevauvoja vieroitetaan viikkoja* (2012) Accessible: <https://yle.fi/uutiset/3-6264160>, 21 August 2012

¹⁰ Rauhala, L. (2014), *supra nota* 6

not child welfare service clients yet.¹¹ Even before the birth of a child, the preventive child protection notification must be filed, if the mother uses drugs or other harmful substances during her pregnancy. The preventive notification must be done, if there is a doubt that the child will need child welfare support immediately after the birth.¹² Currently the Child Welfare Act does not mention any kind of coercive measure to be taken to protect the fetus against the substance abuser mothers.

Pregnant women have the right to get immediate treatment for themselves in Finland.¹³ This right has been granted in the Finnish Social Welfare Act (Sosiaalihoitolaki 30.12.2014/1301). Social and health services are organized together with the competent authorities from social and health services. The Finnish Health Care Act (Terveystieteidenhoitolaki 30.12.2010/1326) provides for maternity and child health clinic services in its Chapter 2. Maternity and child health care clinic services must be provided within their area of living by the local authorities. These services monitor the development of the fetus and the current health of the mother as well as monitoring the development of the born child every month after the birth for one year.¹⁴

Finland recognizes new born child as a human, no matter how far the pregnancy went before the birth but does not recognize the status of fetus nor the rights of it. The rights of an unborn child are complex and difficult to delimit. This is due the uncertainty of the time when fetus becomes a human. In Finland, the doctors are promoting the rights of the unborn as well as the safe and balanced development of it.¹⁵

1.3 The reform of the Finnish substance abuse treatment law

The Finnish substance abuse treatment law is inadequate due to its old age. The problem with the law is that even if it offers coercive treatment for substance abuser pregnant women, the offered treatment is only focusing on the harm done to the user herself and for the environment, not the

¹¹ Lastensuojelulaki 13.4.2007/417, §3a

¹² Terveystieteiden ja Hyvinvoinnin laitos (2018), *supra nota* 8

¹³ Sosiaalihoitolaki 30.12.2014/1301

¹⁴ Terveystieteidenhoitolaki 30.12.2010/1326, §15

¹⁵ Kattelus, M. (2016) *Syntymättömän oikeudet*, Accessible: <https://www.laakariliitto.fi/edunvalvonta-tyoelama/liiton-ohjeet/syntymaton/>, 23 February 2016

harm caused to the unborn child.¹⁶ Due to the other lacking parts, the law has been viewed overall outdated and hence there has been many drafted proposals to get the law amended.

First try changing the law and triggering the discussion about the treatment for these pregnant substance abusers, was introduced in a proposal in 2013.¹⁷ It was aiming to change the specific part of the law which concerns self-determination and the prerequisites for the use of restriction measures in social and health care.¹⁸ The group working on it were trying to figure out how to amend the law in a way that it could take measures concerning coercive treatment to these women into a consideration. They emphasized the primary of voluntariness but stated that coercive measure should be an option as the last resort.¹⁹ The proposal got turn down.

The second proposal on the topic was drafted in 2014, which has since been aborted, suggesting amendments to be made to the law on substance abuse treatment. In the proposal were suggestions to include the substance abuser mothers who specifically use drugs whilst pregnant. In addition, it suggested that the law would take into consideration a better protection of the fetuses, which proved to be difficult suggestion since it puts the rights of the fetus and the mother into a conflict and outbalances the rights of a fetus and the rights of a premature baby at the same age. Even though they are the same age, their legal status in Finland is rather different²⁰ since there are no fetal rights recognized. The premature baby in this case, would fall within the Finnish Child Welfare Act because he or she is out of the uterus.

There is also a third proposal, which is the latest one, drafted in 2016 by a member of the Finnish Parliament, to amend the current law on substance abuse treatment and especially its Article 10. The Article 10 of the law lays down the prerequisites for treatments offered. The same kind of approach has been taken as in the proposal from 2014, suggesting the coercive measures to be taken into use in order to protect the unborn child. It is reasoned that during pregnancy, the substance abuser mothers have more motivation to get treatment and protect their child themselves,

¹⁶ Rauhala, L. (2014), *supra nota* 6, p 1.

¹⁷ Kauma, P. (2013) *Päihdeäitien tahdonvastaiseen hoitoon ohjaaminen*. Accessible: <https://www.eduskunta.fi/FI/vaski/sivut/trip,aspx?triptype=ValtiopaivaAsiakirjat&docid=kk+816/2013>, 20 September 2013

¹⁸ Leppänen, V. K. (2014). Raskauden aikana päihteitä käyttävien naisten tahdonvastainen hoito: retorinen diskurssianalyysi Helsingin Sanomissa vuosina 2006-2014 käydyistä keskustelusta. (Pro gradu) Jyväskylän yliopisto, Yhteiskuntatieteiden ja filosofian laitos. Jyväskylä.

¹⁹ *Ibid.*, p 1.

²⁰ Rauhala, L. (2014), *supra nota* 6, p 2.

but their lack of ability to stay in the treatment program is in their way. Therefore, coercive measures are put in the table.²¹ The proposal is still under consideration, so the process is on-going, hence the outcomes are unknown.

The Mannerheim League for Child Welfare (MLL) has given its statement about the current stage of the law on substance abuse treatment as well as the Ombudsman for Children, who has emphasized the importance of protecting the rights of the children, especially in situations that involves substance abuse of the parents. MLL also reminded in its statement about the existence of the main principles, especially the Article 6 of the Convention on the Rights of the Child (CRC).²² Also, in Finland, the Ombudsman of Children has stated that especially unborn children's rights need legal protection that should be clearly and firmly done. The Ombudsman adds that preventive care for substance abusers is important, as it needs to be widely and uniformly practiced throughout Finland.²³

If the right to life has been stated to be one of the most fundamentals of rights overall²⁴, could the protection of the right be guaranteed to fetuses as well? The following chapters will introduce two ways in Finland of preventing substance abuser mothers from harming their fetuses. This means the protecting the right to life.

²¹ Räsänen, P. (2016) *Lakialoite laiksi päihdehuoltolain 10 §:n muuttamisesta*, Accessible: https://www.eduskunta.fi/FI/vaski/Lakialoite/Documents/LA_32+2016.pdf, 18 May 2016

²² Mannerheimin Lastensuojeluliitto, *Lausunto sosiaalihuoltolakiesityksestä*, Accessible: <https://www.mll.fi/kannanotot-ja-lausunnot/lausunto-sosiaalihuoltolakiesityksesta/>, 21 October 2014

²³ Lapsiasia, *Lapsiasiaavaltuutetun lausunto luonnoksesta hallituksen esitykseksi laiksi ehkäisevästä päihdetyöstä*, Accessible: https://lapsiasia.ssthosing.fi/?page_id=683, 13 October 2014

²⁴ Hodgson, D. (1994). The child's right to life, survival and development. *Int'l J. Child. Rts.*, 2, 369, p. 372.

2. COERCIVE TREATMENT TO PROTECT THE FETUS

2.1 The possibility of coercive treatment in Finland

Making women to attend coercive treatment is a question of fundamental rights, which are strictly regulated and under few limitations. Fundamental rights can set positive obligations such as ensuring the protection and promotion of certain rights within a country.²⁵ To put pregnant women under coercive treatment because of their substance abuse, means controlling the behavior of those women. If done so, the practical aspects must be thought with great consideration, taking also the applicable laws into consideration.²⁶ Using the method of coercive treatment in Finland includes issues relating to fundamental rights and there must be certainty of coercive measures having enough reasons to be used so that intervening to the right of privacy can be done.²⁷ Interpreting lightly, mother and the fetus could be seen as one “unit”, so when abusing substances the mother not only puts the fetus in danger but also herself. The method of coercive treatment could prevent further substance abuse happening and a healthy life for both the mother and the fetus.

Different disabilities and symptoms, such as previously mentioned FASDs caused by pregnant substance abusers, have been written down in medical journals already from the 1979. Also, the first treatment method, which was based on voluntariness was introduced in Finland already in 1983²⁸; three years before the current law on substance abuse treatment was entered into force. Nowadays the legislation in Finland does not see the health risk of the unborn as enough acceptable basis for putting pregnant substance abuser women into a coercive treatment, even in situations where the mother consciously continues to use these substances whilst being pregnant and therefore is unable to foster the development and healthy life of her unborn.²⁹

²⁵ Poikonen, H. (2011). Päihdeäidit pakkohoitoon. *Päihdeongelmaisen raskaana olevan naisen tahdonvastaiseen hoitoon määrääminen. Pro Gradu-tutkielma. Itä-Suomen yliopisto: Oikeustieteiden laitos.*

²⁶ Anderson, S., & Kellitz, I. (1991). Involuntary civil commitment of drug-dependent persons with special reference to pregnant women. *Mental & Physical Disability L. Rep.*, 15, 418.

²⁷ Poikonen, H. (2011). *supra nota* 25, p 7.

²⁸ Leppo, A. (2012). The emergence of the foetus: discourses on foetal alcohol syndrome prevention and compulsory treatment in Finland. *Critical Public Health*, 22(2), 179-191.

²⁹ Salmela, M. (2015). Sikiökö lainsuojaton? Raskaana olevan päihteitä käyttävän naisen tahdosta riippumattoman hoidon oikeudelliset edellytykset ja syntyvän lapsen oikeudellinen asema (Pro Gradu) Tampereen yliopisto, Johtamiskorkeakoulu. Tampere. p 4.

In Norway, the Norwegian Health and Care Services Act from 2011 regulates the municipal health and care services. Its Chapter 10 about coercive measures against substance abusers regulates also the pregnant women with its Section 10-3 that concerns the detention of pregnant substance abusers. That section states that a pregnant substance abuser can be put without her own consent to an institution. She then will be detained there for the selected period during her pregnancy. This action will be taken if there is a high probability that the unborn child will be born with some sort of injury or disability because of the substance abuse. The institution will be decided by the regional health authority.³⁰

The suggested treatment method in Finland would be same kind with the Norwegian model, but because it will infringe with the rights of the mother concerning self-determination, it is debated heavily. Parties against it have not suggested another method either for protecting the fetus nor how to help the pregnant substance abusers. The subject of coercive treatment and the overall need for some sort of treatment method for these women has always been a debated topic in Finland, but nowadays it is also being discussed widely within the field of social welfare and social sciences, not only within politics and the scholars of law and medicine.³¹

Currently in Finland, there is a coercive treatment possibility for substance abusers but only in cases where the danger caused to others is done violently and causes danger to the other person's health. These criteria, though, is not including harm done to fetuses, only born persons.³² The Norwegian model of coercive treatment is based on situations where the substance abuse is causing harm to the fetus. For instance, another Nordic country, Sweden, also uses coercive treatment for pregnant substance abusers but in the Swedish model, the basis is the harm caused to women themselves.³³ Finland's coercive treatment model would take the same approach as the Norwegian model has; focusing on the harm done to fetuses. This is another aspect that would be changed in the current law on substance abuse treatment in Finland, adding the harm caused to the fetus into the reasonings for coercive treatment method. A legal problem to this is the non-recognition of fetal rights in Finland: since fetus nor older unborn child have no rights, they cannot hold the right to be born over women's right to privacy and self-determination.

³⁰ Lov om kommunale helse- og omsorgstjenester m.m. (helse- og omsorgstjenesteloven) LOV-2011-06-24-30

³¹ Leppänen, V. K. (2014) *supra nota* 18, p 2.

³² Rauhala, L. (2014) *supra nota* 6, p 2.

³³ Leppo, A. (2012) *supra nota* 28, p 20.

The reform of the current law on substance abuse treatment could indeed bring the Norwegian model of coercive treatment into Finland. The pregnant substance abusers would be given the possibility to get into a treatment program which would include in advance asked permission to continue the treatment against their will. This treatment would be based on voluntariness, which would also be the primary approach, the coercive part would only follow if the pregnant substance abuser did give her permission for it. This would increase the possibility that the mothers would quit using the harmful substances in order to protect their unborn children as well as the healthy future of them. The drafted proposal in 2016 also suggested that the coercive treatment could be used mainly for the protection of the unborn child against the mother, but in extreme cases only. From the perspective of national health, coercive measures during pregnancy are seen to be more valued than sacrificing a healthy future of the unborn child.³⁴

Such as every controversial topic, also the method of coercive treatment has two sides to consider.

2.2 Conflict between women's rights and fetal rights

When discussing about the topic of coercive treatment, the freedoms of the mothers are conflicting with the rights of the children to have a healthy life. The issue has gathered views from different fields, all of them stating their own opinion. If the right of woman to self-determination is respected and she refuses from the treatment, the fetal rights are left unvalued. If done the other way around, the women's right for their own bodies would be neglected.³⁵ The main issue between those conflicting rights is how far can the limitation of women's right for privacy and their personal autonomy go³⁶ as well as to what extent could fetal rights be recognized. Some advocates are against separation of mothers and fetuses and want rather to focus on both of them. For instance, in the United States of America, the parties against coercive treatment suggests only voluntary treatments to be used, such as parenting guidance, because it would promote the health of both the

³⁴ Rauhala, L. (2014) *supra nota* 6, p 2.

³⁵ Harris, P. (2001). Compelled medical treatment of pregnant women: the balancing of maternal and fetal rights. *Clev. St. L. Rev.*, 49, 133, p 135.

³⁶ Reitman, D. R. (2002). The Collision Between the Rights of Women, the Rights of the Fetus and the Rights of the State: A Critical Analysis of the Criminal Prosecution of Drug Addicted Pregnant Women. *John's J. Legal Comment.*, 16, 267.

fetus and the mother. The advocates believe that with focusing more on voluntariness, the treatments would be more humane and the costs lower.³⁷

Furthermore, the parties against coercive treatment are stating that there should be respect for the women's right to decide on their own body as well as their dignity as individuals.³⁸ For instance, the Charter of Fundamental Rights of the European Union (CFREU) grants in the Article 3 the respecting of one's integrity. The Charter also contains the rights of the child in the Article 24 but does not define the word "child".³⁹ In addition, advocates against the coercive treatment has stated that the same rights should remain and be respect whether a woman is pregnant or not.⁴⁰ In Finland there has been statements that one of the most important issues, is the patients' right to self-determination in treatments⁴¹ which in this case relates to the substance abuser mothers and their treatments, whether voluntary or not. Some advocates who do not support the idea of fetal rights state that if fetal rights would be recognized, it would weaken several rights guaranteed to women, such as abortion.⁴²

How the fetuses are seen varies; it can be seen as part of the woman, since fetus grows inside of her, and it can be seen as an independent being.⁴³ There are also other views how fetuses are seen, such as genetically described: fetus is a human being because it is part of human species.⁴⁴ When it comes to the fetal rights, the discussion is focused mainly on the topic of when does a fetus become a human, hence there are disagreements between the views of lawyers, philosophers and doctors to name a few.⁴⁵ One way into looking at the possible fetal rights is to view the CRC which includes a part from the Declaration of the Rights of the Child, stating that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate

³⁷ Pollock-Byrne, J. M., & Merlo, A. V. (1991). Against Compulsory Treatment: No "Quick Fix" For Pregnant Substance Abusers. *Criminal Justice Policy Review*, 5(2), 79-99.

³⁸ Moss, K. L. (1991). Forced drug or alcohol treatment for pregnant and postpartum women: Part of the solution or part of the problem. *New Eng. J. on Crim. & Civ. Confinement*, 17, p 16.

³⁹ Schütze, R. (Ed.). (2015). *EU Treaties and Legislation*. Cambridge University Press. p 213.

⁴⁰ Harris, P. (2001), *supra nota* 35, p 136.

⁴¹ Hupli, A. M. M. (2013). *Pakon politiikka: Raskaana olevat päihdeongelmaiset naiset yhteiskunnallisen hallinnan kohteena* (Doctoral Dissertation), Helsingin Yliopisto, Sosiaalitieteiden laitos, Helsinki. p 4.

⁴² Mans, L. K. (2003). Liability for the Death of a Fetus: Fetal Rights or Women's Rights. *U. Fla. JL & Pub. Pol'y*, 15, 295. p 310.

⁴³ Johnsen, D. E. (1986). The creation of fetal rights: conflicts with women's constitutional rights to liberty, privacy, and equal protection. *The Yale Law Journal*, 95(3), 599-625. p 599.

⁴⁴ Scott, R. (2002). *Rights, duties and the body: law and ethics of the maternal-fetal conflict*. Hart Publishing. p 31.

⁴⁵ Reitman, D.R. (2002) *supra nota* 36, p 268.

legal protection before as well as after birth”.⁴⁶ Interpreting this from the perspective of fetus, it could be considered that it would indeed recognize fetal rights, even though it stays silent on the question of what age does being a child begins.⁴⁷ The wording of “before as well as after birth” indicates to a situation where fetus is seen as a child. In addition, the Article 6 of the CRC is about the child’s rights for life, survival and development, stating that “States Parties recognize that every child has the inherent right to life. States Parties shall ensure to the maximum extent possible the survival and development of the child.”⁴⁸ Here also, the fetal rights have room to exist and the wording “child’s right to development” could indicate that fetus falls within the definition of a child. When drafting the Convention and its articles the working group left the question of when life begins unanswered.⁴⁹ The CRC only answers the question of when childhood ends, that being when the child is 18 years old.⁵⁰

The Finnish Constitution guarantees in the Article 1 of the inviolability of human dignity, which can be seen important also from the perspective of the fetus and the protection of its health. The Article 1 is what the advocates in favor of the coercive treatment are using, when explaining their views. It is seen as wanting to protect also the unborn, since there are set limits on abortion as well as prohibitions relating to medical tests which are regulated by the Finnish Constitution.⁵¹

Looking this from the perspective of the substance abuser mothers and mothers overall, the Finnish Constitution guarantees the inviolability of human dignity also to them. Women enjoy other rights as well that are guaranteed to them by Finnish legislation. The Article 7 of the Finnish Constitution provides women their personal freedom and the Article 10 the protection of their private life.⁵² There can be no interventions to one’s private life without a basis regulated by law, and when discussing about coercive treatment, intervention will happen.

⁴⁶ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577

⁴⁷ Janoff, A. F. (2004). Rights of the Pregnant Child vs. Rights of the Unborn under the Convention on the Rights of the Child. *BU Int’l LJ*, 22, 163.

⁴⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, art 6.

⁴⁹ Alston, P. (1990). The unborn child and abortion under the draft convention on the rights of the child. *Hum. Rts. Q.*, 12, 156. p 161.

⁵⁰ Sutherland, E. E. (2015). *supra nota* 1, p 276.

⁵¹ Salmela, M. (2015) *supra nota* 29, p 2.

⁵² Suomen perustuslaki 11.6.1999/731, §7 and §10

2.3 Finland's interest as a State to protect fetuses

Although some parties might state that Finland should guarantee the survival and the development of the unborn child as every State should, such as stated in the CRC⁵³, it is not an issue which can be done without taking women's rights into consideration. Currently women's self-determination has its basis on the law, but the debate over the rights of women and fetal rights still exists. In addition, the debate has many sides and the balance between the two is difficult to find when advocates of both sides are reasoning their views. Looking at this from the perspective of protecting both the mother's and the fetus' health as a common interest, it would require a justification of limiting the rights of women's self-determination in a constitutionally sustainable matter, with the requirements of the general limitation of fundamental rights.⁵⁴

In Finland, legislators can intervene one's privacy rights only through qualified rights, that will give public authority the powers to limit person's fundamental rights. At the same time, there are certain additional criteria for the limitation of the legislator's discretion. Public authority's interfering is meant to help and to guide how to limit those rights within strict and necessary scope.⁵⁵ The European Convention on Human Rights (ECHR) sets the criteria for limiting one's fundamental rights in its Article 5 and lists cases when it can be done if it follows the set procedure by law. When deciding on the method of coercive treatment in Finland, it is necessary to first consider why voluntary treatments are not good enough and whether the benefits of the coercive treatment method are large enough to justify the limitation of women's fundamental right for privacy. Also, it is important to consider if the problem of substance abuse whilst pregnant decreases or comes to an end with the coercive method.⁵⁶ It can be justified to intervene to women's fundamental rights when it is needed for the protection of the health of herself or others. This is regulated in the Finnish Constitution.⁵⁷ Coercive treatment in Finland could be justified with the same principle, since the intervention would aim at protecting the woman and the fetus from the harm.

⁵³ Kauma, P. (2013), *supra nota* 17

⁵⁴ Salmela, M. (2015) *supra nota* 29, p 2.

⁵⁵ Poikonen, H. (2011) *supra nota* 25, p 36.

⁵⁶ *Ibid.*, p 39.

⁵⁷ Suomen perustuslaki 11.6.1999/731, §7

An example from the United States is the case *Roe v. Wade*, where State's interest of protecting potential life was conflicting mother's right to have an abortion.⁵⁸ The State of Texas tried to invalidate a law where right to abortion was stated, if the pregnancy did not threaten the woman's life. This was done to protect the potential life.⁵⁹ The Court ruled in favor of the woman, but the case remains one of the most discussed cases and is used as basis for the discussion of fetal rights. Even though the main issue in the case was women's right to have an abortion, which does not include any substance abuse, there are couple aspects that can be taken from the case to justify and further explain the idea of criminalizing the substance abusers' actions in Finland. In the case *Roe v Wade*, a certain limited protection of fetus was recognized as well as State's interest to intervene when the life of an unborn is at stake. Could women's right to privacy be seen limited and not absolute in certain cases such as those concerning harming the fetus by substance abuse?⁶⁰ If yes, Finland as a state could intervene women's right using the method of coercive treatment or the Criminal Code, which is explained in the following chapter. This would mean that Finland's interest to protect the health of the fetus and overall potential life is seen having a higher stand than the rights of the mother but only to the measures that are seen necessary and proportionate. Another case from the United States is the case *Planned Parenthood v. Casey*, where the issue was also concerning State's interest to protect potential life from the beginning of a pregnancy, until the end of it. The case *Casey* showed that it is not only abortion that the State can protect fetuses from.⁶¹

Furthermore, Finland's interest for protecting fetuses could arise from the fundamental rights of children. Those rights include rights concerning identity, health as well as right to protected from violence as stated in the Articles of the CRC.⁶² Substance abuser mothers could be seen as neglecting their children even before the birth of them and this would give Finland the room to intervene as *parens patriae* and control the mother for the protection of the fetus and its healthy development and life.⁶³ Finland could act as *parens patriae* in two ways; first being the

⁵⁸ Noonan Jr, J. T. (1984). The Root and Branch of *Roe v. Wade*. *Neb. L. Rev.*, 63, 668. p 672.

⁵⁹ Blackmun, J. H. A. (1973). *Roe v. Wade*, p 217.

⁶⁰ Pollock-Byrne, J. M., & Merlo, A. V. (1991) *supra nota* 37, p 9.

⁶¹ Boatright, A. K. (2000). State control over the bodies of pregnant women. *J. Contemp. Legal Issues*, 11, 903. p 903. p 910.

⁶² UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577. § 7, 8, 19, 23, 24, 34

⁶³ Boatright, A. K. (2000). *supra nota* 61, p 907.

intervention already at an early stage, where the prevention could be done more efficiently through visiting a family's house where a substance abuser mother lives. The second is the intervention later on, when the child is already born and would be taken away from the substance abuser mother.⁶⁴ Fundamental rights of the children are not the only base for Finland's intervention. Same interest could arise also from the sole use of drugs and the pressure of society where the use is seen as not falling within the ideal image of a society.⁶⁵ Also, sometimes mothers are advised not to work near toxic substances because it might affect the fetus, which shows some kind of fetal protection or at least the interest towards it.⁶⁶ Although if protecting fetus through not letting women work in those circumstances, it must be done with certainty that there is no discrimination.⁶⁷

Although Finland does not need intervene as a State according to law, it must still obey the international laws which include protecting of human rights, and human rights in their side protect dignity of every human being and the potential life of them.⁶⁸ Guaranteeing this to everyone means equal treatment but it does not mean that substance abuser and non-substance abuser women should be treated the same; it can be done, if there is enough justifications and proportionate measures.⁶⁹

Upcoming chapter will give case law from United States and France to demonstrate more how the interest of a State could protect fetuses and prevent mothers from abusing substances. Those cases will also introduce a second method which could protect fetuses; criminal sanctions for substance abuse during pregnancy.

⁶⁴ Barthloet, E. (2003). The challenge of children's rights advocacy: problems and progress in the area of child abuse and neglect. *Whittier J. Child. & Fam. Advoc.*, 3, 215. p 217-218.

⁶⁵ Kimbel, A. S. (2002). Pregnant Drug Abusers Are Treated Like Criminals Or Not Treated At All: A Third Option Proposed. *J. Contemp. Health L. & Pol'y*, 19, 521. p 550.

⁶⁶ Williams, W. W. (1980). Firing the woman to protect the fetus: The reconciliation of fetal protection with employment opportunity goals under Title VII. *Geo. Lj*, 69, 641. p 643.

⁶⁷ Duncan, A. K. (1989). Fetal protection and the exclusion of women from the toxic workplace. *North Carolina Central Law Journal*, 18, 67. p 86.

⁶⁸ Wicks, E. (2012). The Meaning of 'Life': Dignity and the Right to Life in International Human Rights Treaties. *Human Rights Law Review*, 12(2), 199-219. p 199.

⁶⁹ Reich, C. A. (1964). Individual rights and social welfare: the emerging legal issues. *Yale Law Journal*, 74, 1245. p 1254.

3. CRIMINAL SANCTIONS TO PROTECT THE FETUS

3.1 Case law

Harming the fetus while being pregnant is either done by active conduct or a failure to behave in a way that is suitable for an expecting woman. These actions are considered as equivalent to prenatal abuse.⁷⁰ Substance abuse falls within this definition, since besides harming the expecting mother herself, the substance abuse harms the fetus.

Right to life is safeguarded in the ECHR. Article 2 of the Convention regulates as follows: “Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”⁷¹ Since there is no straight forward legislation on the rights of a fetus but for instance, the women’s right of privacy exists, it has been difficult to come up with a suitable method that would govern the behavior of the pregnant substance abuser mothers if the coercive measures are excluded.⁷² In addition, one of the principles of the Charter of The United Nations is the self-determination of people, as discussed in the previous chapter, which makes the finding of the right method for protecting the fetus against its substance abuser mother more difficult. Since Finland focuses mainly on preventive methods, such as voluntary treatment periods for pregnant substance abuser women in order to protect the fetus and prevent the mother from abusing substances, some cases from the United States of the America and France are presented, to introduce and further explain a method of criminally sanctioning those women to prevent the fetus being born with disabilities or dead in the worst case. The possible sanctions under Finnish Criminal law (Rikoslaki 19.12.1889/39) would be given due to the actions of the mother towards the fetuses, not only for their alcohol or drugs abuse. Cases will also show how the criminal sanctioning is done elsewhere and on what grounds. These can then guide how the Finnish Criminal Code could be used for protecting fetuses.

⁷⁰ Weyrauch, S. (2001). The Fetus and the Drug Addicted Mother: Whose Rights Should Prevail? *Journal of Medicine and law*, 5(2), 95-120. p 96.

⁷¹ Council of Europe, *European Convention on Human Rights*, as amended by Protocols Nos. 11 and 14, 4 November 1950, art 2.

⁷² Weyrauch, S. (2001) *supra nota* 70, p 96.

In the United States, there has been discussions whether the government should punish the substance abuser mothers using the criminal law together with the Child abuse statutes, such as the Equal Protection Clause that is part of the Fourteenth Amendment to the Constitution of United States.⁷³ The discussion in the United States is mostly about finding the balance between fetal rights and the State's responsibility to punish those women because it causes harm to the unborn child. This would be the case in Finland as well, if the Finnish Criminal Code was to be taken into use for both prevention of prenatal abuse and for sanctioning from harm done to fetuses. In the United States it has been demanding task to appoint how the fetal rights would fall within the Statute of Child Abuse. It must be taken into account, that the criminal laws vary from State to State within the United States, thus for instance, what is permitted in Ohio, might be prohibited in California. Some States in the United States have amended their laws on civil child abuse into a form which sets obligations to report any pregnant drug user, who then get reported to child welfare authorities and other States have not.⁷⁴

A case from the United States, *Sheriff, Washoe County, Nev. v. Encoe*, is an example of a case where the State of Nevada criminally charged a mother because of her marijuana usage during pregnancy. By using marijuana, the mother endangered her unborn child.⁷⁵ This case showed how the prenatal abuse can be the reasoning behind the criminal sanctions. Changing the Finnish Criminal Code to include fetal abuse as well, would not only probably be the most radical change but also most effective method of preventing abuse or other harm done to fetuses. Such as discussed in the United States, criminal law could be used within certain limitations: A State can hold mothers criminally liable when the substance abuse will lead to either killing the fetus or causing severe disability.⁷⁶

Finland does not recognize fetal rights as does not the European Union either. The European Court of Human Rights (ECHR) gave its statement in the ruling for the case of *Vo v. France* that the Article 2 of the ECHR does not extend to fetuses.⁷⁷ The Article 2 of the Convention is headed as

⁷³ *Ibid.*

⁷⁴ Paltrow, L. M. (1998). Pregnant drug users, fetal persons, and the threat to *Roe v. Wade*. *Alb. L. Rev.*, 62, 999. p 1006-1007

⁷⁵ Reitman, D.R. (2002). *supra nota* 36, p 298.

⁷⁶ Parness, J. A. (1985). Crimes against the unborn: Protecting and respecting the potentiality of human life. *Harv. J. on Legis.*, 22, 97. p 115

⁷⁷ Pichon, J. (2006) Does the Unborn Child Have a Right to Life – The Insufficient Answer of the European Court of Human Rights in the Judgement *Vo v. France*. *German LJ*, 7, 433. p 433.

“Right to life” and it states that everyone has the right to life and that right is protected by law. In the case *Vo v. France*, the fetus was not considered to be a person yet, who would have enjoyed the rights guaranteed in the Convention. The Criminal Court of France concluded that “it had been scientifically established the fetus becomes viable at six months.”⁷⁸ The case went firstly to the Lyon Court of Appeal and after to the *Cour de Cassation*, which ended up reversing the judgement of the Appeal Court stating that the French Criminal Code also extends to children who are not born yet. The unborn child and its legal status is protected by special provisions of the Criminal Code which applies to the fetuses as well.⁷⁹ The Commission has previously made clear that if the fetus and its life would be protected it would demote the value of the pregnant woman and her life.⁸⁰ In addition, the Commission has stated that Contracting States of the Convention, could have some room for their own discretion about the matter on when life will begin but the Commission itself did not answer this fully.⁸¹ The Convention and its Articles, though, must be read with the Vienna Convention on the Law of Treaties, focusing on the Article 31 headed as “General rule of interpretation”. It states the way of interpretation which must be done in conformity 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.”⁸²

3.2 The Finnish Criminal Code to protect the fetus

If the Norwegian model of coercive treatment will not be taken into use in Finland, the other option for protecting the unborn child could possibly be the usage of the Finnish Criminal Code, in a way described with the example cases from the United States and France. Although, there has been no wider discussion about the possibility in Finland, it has been taken into consideration elsewhere as mentioned. Both the coercive treatment for pregnant substance abusers as well as criminalizing their actions so the protection of fetus would be achieved, is a controversial topic. It is not only matter of law and ethic, but also a matter of the society, medical field and politics. In addition, not

⁷⁸ *Ibid.*, p 434.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Douwe, K. (2006) A guide to the implementation of Article 2 of the European Convention on Human Rights, *Human rights handbooks*, (2).

⁸² United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, art 31.

only are the values discussed but also the decisions based on practical methods and professional opinions are under constant debate.⁸³ A child is taken away from his or her parents when there is a substance abuse in the family and could lead to a situation where the parents lose their rights for the child. Could the rights of the parents be taken away as well, when the substance abuse is done during pregnancy and its harm focuses on fetus and is there enough reasons to justify it?⁸⁴

The Criminal Code of Finland mentions fetus only in few parts, mainly in its Chapter 22 that focuses on violating fetus, embryo and genome. The same chapter includes the regulations for illegal intervening to embryo as well as to genome and the prohibition of violation the identity of a child.⁸⁵ In the Finnish Criminal Code, there is no separate provision for crimes against fetal rights since Finland does not recognize them and thus, the substance abuse during pregnancy is not a crime itself nor is the actual harming of the fetus a criminal act. On the other hand, Finland does criminalize, in the Chapter 50 of the Criminal Code, any form of drug usage and possession of any drugs.⁸⁶ Article 2 of the same chapter sets the criteria for a vicious drug offence while stating that the offence is vicious if the drug is distributed to a minor. These Articles could be used for the protection of the unborn if amended in a way that extends to the unborn as well, since they already include illegal intervening to embryo. Only difference that an embryo and a fetus has is the weeks of development, neither of them has been granted a definition of a child, so why does not the Finnish Criminal Code prohibit illegal intervening to fetus as well? Mother's substance abuse intervenes the healthy development of the fetus and thus could be seen illegal. In addition, the substance abuse is already deemed illegal in Finland.

Compared to Finland, where no women have yet been sanctioned for their substance abuse during pregnancy, there have been cases in the United States, where women have been convicted through other channels, since also there, the substance abuse during pregnancy is not an act of crime itself. Women have been charged of harming the fetus under provisions concerning child abuse as well as for embolden criminality of the minor.⁸⁷ The case, *re Ruiz*, was the first case in the United States, where a mother was criminally convicted because she was substance abuser during her

⁸³ Leppänen V.K. (2014), *supra nota* 18, p 12.

⁸⁴ Fentiman, L. C. (2006). The New Fetal Protection: The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children. *Denv. UL Rev.*, 84, 537. p 581.

⁸⁵ Rikoslaki 19.12.1889/39

⁸⁶ *Ibid.*, § 1-2

⁸⁷ Weyrauch, S. (2001), *supra nota* 70, p 108.

pregnancy. It was stated by the Ohio Court of Common Pleas' Juvenile Division, that viable fetus is considered as a child under the child abuse statute.⁸⁸ Although the Court of Appeals of Ohio later reversed the ruling, the first given charge by the Ohio Court of Common Pleas' Juvenile Division was child abuse. Here, some recognition of fetal rights was given to the fetus against its mother. As well, in case *Whitner v. State*, fetal rights were somewhat recognized since the Court in the case brought up an approach where a State could intervene in order to protect the fetus, in other words, future life.⁸⁹

In Finland, the legal status of the fetus and the same aged premature baby is rather different, which leads to differences concerning the criminal sanctions. Substance abuser mother could cause a disability or poisoning of the fetus in the placenta without any legal consequences, but if the same would be done to the premature baby that is the same ages as the fetus, it would be considered as a punishable crime according to the Chapter 50 Article 2 of the Finnish Criminal Code. The Article 2 sets the prerequisites for actions to be considered as aggravated narcotics offence and lists cases where the sanction will be imprisonment for minimum of one year. The same Article states that the sanction will be imprisonment if narcotic substances cause serious danger to a life of another. There is no specific definition of to whom the word "another" refers to nor is there a specific age set, which could lead to a discussion over the possible protection of the unborn, no matter the age of the fetus. Also, if any injury caused to a fetus by someone else than the mother is considered to be an actionable tort⁹⁰, why cannot the same apply to the mother of the fetus as well? To add, there have been situations in the United States, where an abortion is done too late, and without a competent doctor, where the mother is then found criminally liable for the action, since she caused the death of her fetus.⁹¹

In order to have criminal sanctions for pregnant substance abusers, the Finnish Criminal Code must be amended on the Articles that refer to fetuses and provisions relating to prenatal abuse should be added. The same approach could be taken as in the French Criminal Code, by adding special provisions only for fetuses that could be used to protect fetuses against substance abuser mothers. Furthermore, laws protecting fetuses could be used also for third party crimes against

⁸⁸ *Ibid.*, p 112.

⁸⁹ *Ibid.*, p 116.

⁹⁰ Fulton, L. (2001). Protective Custody of the Unborn: Involuntary Commitment of Pregnant, Substance-Abusing Mothers for the Protection of Their Unborn Children. *Child. Legal Rts. J.*, 21, 8.

⁹¹ Parness, J. A. (1985). *supra nota* 76, p 126.

both the mother and the fetus, not only cases against substance abuser mothers.⁹² Most importantly, fundamental rights such as privacy and women's bodily integrity must be valued together with the right for liberty towards personal life and decision towards it, when new laws are being made or old ones amended.⁹³

3.3 Arguments against the criminalization

Advocates arguing against the criminalization, especially in the United States, are stating that criminal prosecution of the pregnant substance abuser would be violating the right of equal protection, infringing the women's privacy rights.⁹⁴ They are also arguing that if women anyway have the right to abortion, should not they have the right to decide on their own body as well in the case with substance abuse during pregnancy.⁹⁵ Furthermore, advocates have stated that the criminalization of substance abuse during pregnancy means that, when criminally charging women, it is because of she is pregnant, not because she is a substance abuser. When charging these women, it could lead to an abortion of the unborn since it would be the only way of escaping the punishment for a crime.⁹⁶ In addition to these, prosecuting substance abuser women might also work as a deterrent for these women and push them more further away from treatments also.⁹⁷ Criminally sanctioning pregnant substance abusers would also violate their fundamental right of privacy which allows them to carry out the pregnancy until the end. At the same time, criminal sanctions could also violate their choice of reproduction, freedom and women's autonomy.⁹⁸ State's intervening to those rights and freedoms could be criticized, since those are seen having high value and not to be interfered, but for instance in the United States, in the State of Texas, protecting the potential life has gone as far as keeping a braindead mother in life support until her unborn child has born. This was done against the family's will, decided by the local hospital

⁹² Mans, L. K. (2003). *supra nota* 42, p 311.

⁹³ Boatright, A. K. (2000). *supra nota* 63, p 903.

⁹⁴ Reitman, D.R. (2002). *supra nota* 36, p 268.

⁹⁵ *Ibid.*, p 276.

⁹⁶ *Ibid.*, p 300.

⁹⁷ Fentiman, L. C. (2008). In the Name of Fetal Protection: Why American Prosecutors Pursue Pregnant Drug Users (And Other Countries Don't). *Colum. J. Gender & L.*, 18, 647. p 651.

⁹⁸ Roberts, D. E. (1991). Punishing drug addicts who have babies: Women of color, equality, and the right of privacy. *Harvard Law Review*, 1419-1482. p 1419.

officials because Texas law does not permit pregnant women to be taken off from life support.⁹⁹ Other parties argue that criminal sanctions make women seem as persons who need State's supervision and control, which is found to be unconstitutional.¹⁰⁰

So far though, in Finland, the idea of criminalizing the actions of substance abusers since they are harming the fetuses, has not gotten many advocates nor has it gotten much attention among legal scholars, politics or within medical field. One of the reasons for this could be the drafted proposal that aims at getting coercive treatment for pregnant substance abusers legalized in Finland. In addition, using the Finnish Criminal Code for protecting fetuses need tremendous changes to Finnish legislation, already starting from the changes that must be made to the Finnish Constitution. The Finnish Criminal Code would have to include provisions on illegal prenatal abuse and specific sections for substance abuse being illegal during pregnancy with reference to the health risks and other complications causing to fetuses. Furthermore, if pregnant substance abusers would be criminally liable of their substance abuse, and got sanctioned to imprisonment for instance, it would lead to them being excluded further away from the society, which could then lead to more serious consequences for the fetus, if the mother would end up in a bad place in her life because she does not adopt to the society again.¹⁰¹ Considering the same from the perspective of the fetus, if their the mother is for instance facing imprisonment, the later born child would be taken into social welfare system if there are no other relatives left. This could be seen inhuman, since the only care taker would be put into prison. Furthermore, if the baby is taken away after being born, it could affect the mothers' motives to get better. There are also possible affects for the born child as well, since the placement could be even worse of more harmful.¹⁰²

Canada uses a rule of "born-alive", which does not let neither a mother nor a third party to be criminally sanctioned for their actions towards a fetus nor the death of it.¹⁰³ This could be used against the idea of criminally sanctioning pregnant substance abusers. Some authorities have been

⁹⁹ Goodwin, M. (2014). Fetal protection laws: Moral panic and the new constitutional battlefield. *Cal. L. Rev.*, 102, 781. p 814.

¹⁰⁰ Boatright, A. K. (2000). *supra nota* 63, p 908.

¹⁰¹ Torronen, J. (2004). Finnish newspapers' positions on drug policy between 1993 and 2000. *Contemp. Drug Probs.*, 31, 59. p 79.

¹⁰² Lester, B. M., Affleck, P., Boukydis, Z., & Freier, K. (1996). Keeping mothers and their infants together: Barriers and solutions. *NYU Rev. L. & Soc. Change*, 22, 425. p 434.

¹⁰³ Fentiman, L. C. (2008). Pursuing the Perfect Mother: Why America's Criminalization of Maternal Substance Abuse Is Not the Answer – A Comparative Analysis. *Mich. J. Gender & L.*, 15, 389. p 428-429.

leaning towards drug treatments rather than criminal punishment, so that the prevention is achieved at earlier stage.¹⁰⁴ Debates over criminal sanctioning of pregnant substance abusers and whether fetal rights exist or not, could all be avoided if laws would be strictly worded and there would be no room for misinterpretations,¹⁰⁵ but until it is done, the debate continues.

¹⁰⁴ Torronen, J. (2004) *supra nota* 101, p 61.

¹⁰⁵ Kader, D. (1980). The Law of Tortious Prenatal Death Since *Roe v. Wade*. *Mo. L. Rev.*, 45, 639. p 648.

CONCLUSION

Going back to the beginning of this thesis, the aim was to examine and analyze if either method of coercive treatment for pregnant substance abuser or criminally sanctioning those women could be done in Finland to protect fetuses. Currently in Finland, neither of these two methods are in use. Both methods are seen limiting women's fundamental rights and difficult to have in the law, since Finland does not recognize fetal rights at any stage or form, and women's fundamental rights enjoy great amount of protection. Because substance abuse has increased and there are criminal sanctions for injuring or causing disabilities to premature babies in Finland, the discussion on suitable method for preventing of this to happen to fetuses as well has started. Many drafted proposals have been made in Finland, to get the current law on substance abuse treatment amended, so it would take fetuses into consideration and allow coercive treatments, such as in Norway.

The hypothesis considered one of the methods to have the possibility of existing in Finland, coercive method having more advantages since it has already being discussed. After analyzing and doing research, the results are complex. For the Finnish Criminal Code to sanction pregnant women for their substance abuse is not an issue which can be added to the current legislation that simply. Fundamental rights come above other rights in Finland and elsewhere, and since fetuses have no rights, women's right to privacy comes before. What could also affect Finland not having criminal sanctions for substance abuser mothers, is that using the Criminal Code might be seen as measure and method of "last resort".

To decide which method suits better for the protection of fetus from disabilities or death caused by mother's substance abuse is a complex topic as well. Whether the method being coercive treatment that limits women's right of privacy or criminally sanctioning the mother, there are both good and bad aspects to them. If the main goal is to prevent fetuses from being exposed to disabilities and to protect the potential life, then coercive treatment could be seen more human and effective. Criminally sanctioning substance abusers will not prevent any harm done to the fetus, since the mother has already probably caused disabilities to the fetus that will occur later in life. Compared to the coercive treatment, criminalizing the actions of the mother does not focus on the potential life, rather to the woman herself. Coercive treatment as a method can be seen better for couple of reasons; firstly, the treatment period only lasts for certain amount of time and benefits

both the mother and the fetus. Secondly, there might be less damage caused to the fetus, since the treatment would start at the beginning of the pregnancy. And lastly, coercive measures would protect potential human life better than criminal sanctions.

Whether the coercive method would be possible in Finland or not, it has some downsides as well. Coercive method either way needs the fetal rights to be somewhat recognized. Without them, it is nearly impossible to justify any limitation to women's privacy rights. Furthermore, if fetuses would be seen as human beings, their right to life would be fundamental as well, which would abolish *inter alia* women's right to have an abortion.

Rather than changing the Criminal Code, Finland has taken steps closer to preventive methods as well as treatments during pregnancy. The Federation of Mother and Child Homes and Shelters has developed a care system called "*Pidä Kiinni*". This care system helps not only the new families but also the pregnant substance abusers via setting up facilities that are specialized in rehabilitations. These facilities include open service units and different development centers.¹⁰⁶ Within next years, the newest drafted law proposal on the coercive treatment for pregnant substance abusers will be dealt with, and whether those treatments will be regulated by Finnish laws will be determined.

Both suggested methods for fetal protection need laws to be amended in a way that would put women's privacy rights under limitations, which is complicated to justify since fundamental rights are seldom restricted and are respected worldwide. Overall, protecting fetus means also protecting potential life as well as respecting human dignity.

To further examine whether one of the suggested methods could be adopted in Finland, there should be more analysis done regarding how far the limitation of women's rights could go, and more detailed examination on the Finnish legislation and specific Articles. After having fuller and more concrete overview of what are the different aspects and necessary amendments, it might be easier to solve the problem of fetuses getting hurt by their substance abuser mothers. Firstly, the decision on the newest proposal for amend the current Finnish law on substance abuse treatment

¹⁰⁶ Ensi- ja Turvakotien liitto. *Pidä Kiinni -Hoitojärjestelmä*. Accessible: <https://ensijaturvakotienliitto.fi/tietoa-liitosta/nain-me-autamme/pida-kiinni-hoitojarjestelma/>

must be waited, since it might take the first important steps to partially recognizing fetal rights in Finland and the protection of them.

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