

A DISCOURSE ON RIGHT OF THE UNBORN

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Abstract

Are we born into the human rights or human rights are borne in us because we are simply humans? Is there a wake-up bell announcing our humanity at any point of our developmental stages. It is a simple logic from the causality principle that if we were not human, we are undoubtedly not human. If human rights are inherent, then it goes beyond our civic consciousness. The conscious civilians should therefore protect the unconscious at any point of their developmental journey to consciousness.

Introduction

Is there a right to life for the unborn and the weak? Where does it derive from: nature, principle or practice? Man has the instinct of survival and political philosophers like Hobbes would maintain that man is a wolf unto the other; hence the state serves to keep peace for greater development. Has the state any obligation to protect those who are not active participants of the civic responsibilities accruing to members? Common sense tells us that protecting the rights of the once active civilians guarantees trust and confidence in the state machinery and protecting the rights of the unborn also guarantees continuation of the race of humans.

However World War II helped man to move away from nationalistic consciousness to humanistic consciousness. The reason for the state is not just utilitarian but because there is inherent right in every person, which the machineries of the state help to develop. The world realizes that life is sacred and needs preservation with the available means. Hence the Universal Declaration of Human Rights (henceforth UDHR) in 10th December, 1948 formed the basis for future human history. Here the right of any person is not outside of him but inherent because he/she possesses life and is entitled to safeguard it according to his/her means with the help of the state. In the first paragraph of the preamble for the proclamation of the UDHR, it is stated

- **Whereas** recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Rights therefore proceed from the dignity of being a member of the human family which is not added to the person from the state or from his valour or wealth. Articles 2 and 7 capture this well as it says that

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

If there is no discrimination between the boy and the man, the man and woman, healthy and the sick; there should be no discrimination between the born and the unborn. Article 3 says that everyone has the right to life, liberty and security of person. Interestingly, article 1, which seems to be a term of reference for the whole document, refers to all human beings as those who are born free and equal in dignity and rights. Does the dignity begin when one is born? The principle of causality and common sense tells us that if the fetus is no human, it can never become that at birth. To buttress this, in 1959 Declaration of the rights of the child, the UN declared “That the child by his physical or mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth”.

However, there is a move to include a right to abortion in the list of Human rights. This is decried by so many as sully the whole UDHR document.

Crack On The Wall

Encarta (2006) describes the genesis of the problem that opened the door to the savages of the state to the unborn. In the United States, jurisdiction over abortion historically rested with the states rather than with the federal government. By the end of the 19th century, the majority of states had adopted statutes that made it a crime to either perform or obtain an abortion, except to save the life of a pregnant woman. Most of these 19th century statutes were still in effect in 1970, when Norma McCorvey, a pregnant woman from Dallas, Texas, first challenged the constitutionality of a Texas abortion law. Using the pseudonym “Jane Roe,” McCorvey sued Dallas County district attorney Henry Wade to be allowed to have an abortion.

After a prolonged legal battle, the case was won in favour of Roe. Justice Harry A. Blackmun wrote the Court’s majority *opinion*, the written

document that announces the Court's decision and explains its reasoning. Blackmun noted that legislatures in England and the United States had made important distinctions between abortions performed early in a pregnancy and those performed later. For example, U.S. statutes from the early 19th century either allowed abortion or had few penalties for abortions performed before *quickening*—a term then used to describe a foetus that could be detected through its movement. *Quickening* normally occurred after the third month of pregnancy. Blackmun also pointed out that the abortion statutes adopted later in the 19th century were partly designed to protect the life of a pregnant woman because abortion itself was then considered a hazardous medical procedure. In overturning these statutes, Blackmun noted that by the 1970s the medical dangers posed by pregnancy and childbirth might be greater to women than the dangers from an abortion.

Blackmun wrote that since at least 1891 the Supreme Court had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." He then mentioned many cases in which the Court had upheld the right of personal privacy in marriage, family relationships, contraception, childbirth, child rearing, and education. He also noted the constitutional protections guaranteeing that the government not intrude into the privacy of the home without a legal cause and a warrant.

Despite these examples of constitutional guarantees of personal privacy, Blackmun pointed out that privacy is not absolute. He rejected the idea that the Constitution protects "an unlimited right to do with one's body as one pleases." All of these considerations led Blackmun to develop compromise guidelines that allowed states to interfere with the privacy rights of a woman only during the later stages of pregnancy.

Blackmun then cited medical evidence suggesting that in the second trimester, an abortion posed a greater threat to a woman's health than one performed in the first trimester. Based on this evidence, Blackmun wrote that during the second trimester the state could regulate abortion only to protect the health of a pregnant woman.

Blackmun maintained that in the third trimester the foetus is usually considered *viable*—that is, capable of meaningful life outside the womb. Blackmun argued that only at this final stage of pregnancy does the state have a strong enough responsibility to protect the life of the foetus to override the privacy concerns of the woman and to forbid an abortion. Even at this stage, however, a woman has a right to an abortion if the pregnancy threatens her life.

Although the trimester guidelines offer some protection for the foetus, Blackmun flatly rejected the idea—put forth by the state of Texas—that a foetus was a person protected by the 14th Amendment to the Constitution. (The 14th Amendment says that no state can "deprive any person of life, liberty, or property, without due process of law.") Blackmun pointed out that all references to a person in the Constitution assume that the person is already born, rather than a foetus. Indeed, the 14th Amendment defines citizens as "persons born or naturalized in the United States." Since then abortion has been legalised in the States and a wave of this corruption is sweeping on many other nations.

Reactions

Many reactions have been registered by different people after so many researches made into the case especially in the medical and legal areas.

Legal Contention:

Dr John Fleming & Dr Michael Hains (2011) said that denial of personhood is just a way to justify abuse of human Rights. They observed correctly that man often use utilitarian moral philosophy to deny personhood. They noticed that it is always born of selfish interest that is driven by eugenic, economic, social and political factors such that those that the society wishes to exclude are deemed to be non persons. They maintain that the attempts to disenfranchise some members of the human family from moral consideration has led to justifications of intolerable abuses of human rights like slavery, genocide, abortion, infanticide, non-voluntary sterilisation, non-voluntary and voluntary euthanasia of other human beings. Many examples abound like *Dred Scott* (a negro slave) who was denied personhood by the *Chief Justice Taney* of the United State in 1850s. In the same vein could the Egyptian Pharaohs exclude the Israelites, Hitler the Jews, Gypsies the degenerate and the asocial from personhood. The British could tolerate slave trade and could do anything with a slave without qualms of conscience and the Australians liquidate and repress the Aborigines. Proctor, (1988) writes that the Canadian Indian Act of 1880 stated that "the term person means an individual other than an Indian."

Human rights committee (1982) avers that the phrase of the preamble of the declaration "inherent dignity" and article 6.1 of the International covenant of civil and political Rights of 1966, which expressly stated that the Right to life is the only Right that is inherent in everyone and cannot be understood properly in a restrictive manner and the protection of this Right requires that states adopt positive measures.

In order to buttress their points that the International Covenant on Civil and Political rights (1966) included the unborn in all the above statements, Fleming & Hains (2011) said that death sentence imposed for crimes committed on

persons below 18 years shall not be carried out on pregnant women. This was so because the innocent is not supposed to die along with the guilty. This fundamentally humane principle was also in place in the common law of England and Australia when the countries had the death penalty.

Thus with the documents at our disposal inter-elucidating each other, one can conveniently say that the provision of International law is that human beings without distinction are born free and equal in dignity and rights because as members of the human family, they have had that status from the beginning of life. Can a baby be born human if he was not human before birth? Michael Tooley, Peter Singer and Helga Kuhse (1983) maintain that a foetus is “quasi-human being” (p.424) at the first three months of conception. This is the **gradualist position** that foetus increase in its rights as it develops. There is also the **decisive moment** view that although human life may begin at conception, it is at some later stage of the foetal development that it becomes worthy of our protection. What a savage position to take!

Medical Contention:

There had been many varied theories of personhood beginning with Aristotle who assumed that a process was needed to turn the matter from a woman's womb into a being that could receive a specifically human form or soul. It is good to note that this informed St Augustine and Thomas thinking. St Augustine knew of the theories that the soul was not present until some weeks into the pregnancy but he conceded of the limitedness of human knowledge of biology and warned of misusing such theories to commit homicide. St Thomas accepted the non-presence of the soul in the first few weeks of conception but rejected abortion as a grave evil at any stage observing that it is a sin “against nature” to reject God's gift of new life. However, these theories of personhood had not agreed but then since the discovery of the human ovum in 1827, scientists have agreed that from fertilization, we all share a common humanity.

Beckwith (1994) did a detailed work on the processes of development of the foetus in the womb in order to prove that life begins at conception.

During the first month, the uniting of the male sperm and the female ovum result into a one-celled biological entity called the zygote. It is one of the stages of development like infancy, childhood and adolescence. This entity is not a “fertilized ovum” but a genetically different entity from the father and mother and no new genetic information is needed. The zygote fulfils the four criteria necessary to establish a biological life viz: (1) Metabolism (2) growth (3) reaction to stimuli (4) reproduction. Implantation occurs within a week of conception. Then toward the end of the first month, the arms and legs begin to

appear as tiny buds. Krason (1984) maintains that “a whole embryo with part of the central nervous system” (p 341) is formed at the end of the month.

At the second month, brain waves can be detected in the unborn (about 40-43 days after conception). Here, the eyes, ears, nose, toes and fingers begin to make appearances; the skeleton develops; the heart beats and its own blood begins to flow. By the 8th week, the unique fingerprints and lines on the hand begin to form. Since the brain waves can be detected at this point, Noonan (1984) argues that it is reasonable to infer that toward the end of second month, the unborn has the ability to feel pain. It is good to note that this is 7-8 weeks of pregnancy and of course falls into the first trimester. Thus this is when most of the abortions are performed. However inarticulate their cognitive powers, however rudimentary their sensations, they are “sentient creatures undergoing the disintegration of their vital capabilities.” (p. 152). It is a painful experience.

The third month is characterized by movement. The zygote is now as big as the size of a goose egg, one ounce weight. The Unborn begins to swallow, swim, grasp with her hands. The salivary glands, taste buds and stomach digestive glands develop. She begins to urinate as well. Primitive sperm and eggs begin to form too depending on the sex.

The fourth and fifth months are characterized by rapid growth. The foetus increases six times, half her birth weight. It becomes **viable** at the fifth month. It now has the ability to live outside the womb under our contemporary technology. Now the mother begins to feel the foetus movements. This is traditionally called **quickenings**. Some medieval scholars refer to this time as the time of **ensoulement**. During this time, the Unborn responds to sounds, her mother’s voice, pain and the taste of substances placed in the amniotic fluid. Some studies like Rosen (1978) maintain that the child can actually learn before it is born.

The Right to Health

Article 25.1 of the Universal Declaration of Human Rights includes the right to health of the sick. Asbjom (2000) says that “everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family.” (p. 151-2). It is to be noted that there is no particular standard given but one that is affordable by the means of the person. Article 12 of the International Covenant on Economic, Social and Cultural Rights recognizes the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps that the member states would take are listed:

- The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child;
- The improvement of all aspects of environmental and industrial hygiene;
- The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

In article 24.1 of the Convention on the Rights of the Child, it enjoins the child to enjoy the highest attainable standard of health and facilities for the treatment of illness. Nation States are thus asked to make sure that the child is not deprived of her right of access to such health services. The steps to achieve this are enumerated as follows:

- To diminish infant and child mortality;
- To ensure the provision of necessary medical assistance and health care to all children, with the emphasis on the development of primary health care;
- To combat disease and malnutrition, including within the framework of primary health care, through, *inter alia*, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;
- To ensure appropriate pre-natal and post-natal health care for mothers
- To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breast-feeding, hygiene and environmental sanitation and the prevention of accidents;
- To develop preventive health care, guidance for parents and family planning education and services.

Evaluation

Given that life begins from conception, every foetus is a gift to humanity and attracts respect. The inherency of the rights to life should indubitably be applied here and even more. If the **gradualists** maintain that foetus increase in right, it also follows that as we develop from childhood through adulthood, we increase in right. Thus all are not equal as stated in the Universal Declaration. Also, if we grow into full human rights, we also will grow out of the full

human right after reaching the zenith. Therefore the aged and the sick possess lesser rights than others. If **decisive moment** philosophers maintain that the foetus only attract our care after some time, the society is painted outrageously insensitive. The initial reason for the society is to safeguard the weak from the fittest and as such its administrative apparatus should protect the privacy of the weaker ones in order to establish the equality due to all.

Every right to life is inalienable but what happens when two rights to life conflict? When the right to life of a pregnant mother is in danger over against the right to life of the foetus, what happens? This is not just right to privacy of the woman versus the right to life of the foetus. The right to privacy, which the US Chief Justice used to allow for abortion, only holds water when the growth in the uterus is only a “blob” or something from the woman alone. The right of another man is involved and also the right of the unborn. VanderPoel (2000) asks that if the right to privacy holds water, why the same court should bring a mother whose use of drugs during pregnancy causes a defect in the child, yet the drugs were administered at the early days of the pregnancy. However, when the life of the mother is in danger because of the foetus, the mother is saved by aborting the child when it is the only means of saving the mother. Most religions see this as acceptable reason but the official Catholic teaching opposes it. Pope Paul VI (1968) states in *Humanae Vitae* says in par.

In conformity with these landmarks in the human and Christian vision of marriage, we must once again declare that the direct interruption of the generative process already begun, and, above all, directly willed and procured abortion, even if for therapeutic reasons, are to be absolutely excluded as licit means of regulating birth.

Knauer (1979) suggests that the Principle of double effect could be used here. This principle is used ethically when an action has desirable and undesirable consequences and the both effects flow equally immediately from the one and same activity. Here it means that abortion is not willed, rather the healing of the pregnant woman which is good and desirable is willed.

The inherent dignity of human persons is a secular way of saying that man is made in the image of God. Christians and Jews maintain that the life we have is the *nephesh Yahweh*, breath of God that was given to us at our creation. Most Vedic religions call it the spark of God in creatures and even extend it to other animals. Arazu (2003) maintains that this spark is developed as the level of consciousness in the *Atma* increases (p. 93). Therefore, all life is sacred and should not be tampered with but should be protected with every facility that we

have as humans. The unborn as well as the sick possess this right and as they are weaker should receive more attentive care and protection.



Plate 1: photo of a developing foetus. Source; Encarta Premium Suite, 2009

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References

- Arazu, R. (2003), *Man, know thyself*, Enugu: SNAAP Press Ltd
- Asbjorn, E., "Economic and Social Rights" in Janusz Symonides, ed., (2000), *Human Rights: Concept and Standards*, Paris: UNESCO Publishing, place de Fontenoy
- Beckwith F., (1994), "Answering the arguments for Abortion Rights? Part III: "Is the Unborn Human less than Human?", Rancho Santa Margarita: Christian Research Institute, CA 92688-7000
- Fleming J. & Hains, M., <http://www.priestsforlife.org>
- Human Rights Committee, General Comment 6, Article 6 (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.1 at 6 (1994) §1
- International Covenant on Civil and Political Rights 1966, Article 6(5)G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171.

- Knauer, P., "The Hermeneutic Function of the Principle of Double Effect", in Reading in Moral Theology, Curran, C., & McCormick, R., (1979), New York: Paulist Press
- Krason, S., (1984), *Abortion: Politics, Morality, and the Constitution*, Lanham, MD: University Press of America.
- Kuhse, H. and Singer, P., (1985), *Should the Baby Live?*, Oxford: Oxford University Press,
- Lifton, R.J (1986), *The Nazi Doctors: Medical killing and the psychology of genocide*, New York: Basic Books
- Microsoft Encarta (2006). Microsoft Corporation.
- Noonan, J., "The Experience of pain by the Unborn," in, Hensely, J., ed (1983), *The Zero People* Ann Arbor, MI: Servant.
- Pope Paul VI, (1968), *Humanae Vitae*, <http://www.papalencyclicals.net/Paul06/p6humana.htm>.
- Proctor, R. N (1988), *Racial Hygiene: medicine under the Nazis*, Cambridge, MA: Harvard University Press.
- Rosen, M., (1978), "The Secret Brain: Learning before birth" Harper's
- Tooley, M. (1983). *Abortion and Infanticide*, Oxford: Clarendon Press.
- United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty 1984, Article 3
- USCCB Committee*, "Respect for Unborn Human Life: The Church's Constant Teaching", Retrieved Oct 2010 from <http://www.usccb.org/prolife/constantchurchteaching.shtml>
- Van der Poel, C.J. C.S.Sp, (2000) "Bioethics", Spiritan International School of Theology, Attakwu, Enugu
- Williams, B., (1985), *Ethics and the Limits of Philosophy*, London: Fontana Press