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Protection of Human Life in Its Early Stage

Intellectual Foundations and Legal Means



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Introduction: Protection of Human Life Against a Background of Contemporary Legal Culture

If we consider the whole spectrum of different goods and values which are firmly protected by means of contemporary law, human life seems to be the least controversial of them and deserving the highest degree of protection. Indeed, there are several proofs that it is so. If we consider e.g. the issue of capital punishment for crimes, at least in Europe, denial of its legitimacy seems to be common and almost uncontroversial. If we consider all the procedural warranties limiting police or prosecution competence, as provided by law, respect for human life is still unchallengeable. Contemporary means of protecting human life are becoming more and more detailed – one could even say very sophisticated.

A deeper examination of this issue may provoke some doubts as to this *prima facie* impression, uncovering different approaches to the human being depending on the different stages of his or her development. Those different approaches are to a great extent uncontroversial and manifest in the legal protection for less autonomous human beings, be it in the earliest stages of human development or in its final stages. But a deeper examination of this issue again raises some doubts. There are numerous reasons put forward for the claim that – regardless of the declaration of special concern for the most vulnerable groups of people – in fact people are very often considered as deserving legal protection only as far as they are autonomous enough to look after themselves and do not need someone more autonomous to provide care for them. Once that happens, many people at a vulnerable stage of development face a risk of other people hardly resisting the temptation to waive legal protection for the less autonomous on the grounds of a discretionary assessment by those who are expected to take care of them. In fact this phenomenon raises the question of the very nature or essence of being human. What constitutes a human being as a person deserving the legally protected respect proper to humans? Is it a personal identity manifesting itself e.g. in genetic identity, or is it only an individual autonomy allowing for the performance of an individual will?

This collection of studies offers an insight into these problems, concentrating on the protection of human life during the earliest stages of development. It is the fruit of a deeper insight by several lawyers inspired by the International Law Conference held at the University of Warsaw on 25-26th September 2012 under the High Patronage of Her Royal Highness the Grand Duchess of Luxembourg and

organised by the *Ordo Iuris* Law Centre (Warsaw) and the Rule of Law Institute (Lublin).

The issue was examined in a multilevel way including from the philosophical and broad comparative perspectives. This complex approach is apparent from the very beginning. It is opened by Jane Adolphe's contribution analysing the very construction of human rights and starting with a systematic insight into the anthropology of the globally accepted international law of primary importance – the Universal Declaration on Human Rights, together with both the 1966 International Covenants, on Civil and Political Rights, as well as on Economic, Social and Cultural Rights. One of the striking features of contemporary reflection on human rights seems to be that the contemporary legal thought on human rights largely ignores these documents and the coherent anthropological approach they are founded upon. Nevertheless, this particular anthropology appears to be of special importance for the interpretation of the UN Convention on the Rights of the Child, which gives a firm base for the uniform protection of the child regardless of whether it is developing in or outside the uterus.

This context of international treaties brings us to the issue of the state's sovereignty as a background against which the legal protection of the early stages of human life should also be examined. This is a task undertaken by Piero Tozzi, a particularly experienced practitioner in the field of international law. He proposes a scrutiny of state sovereignty from a threefold perspective, including the traditional, Westphalian approach, which was later transformed into its 'Popular' form, and again confronted with 'Ultimate Sovereignty' involving the Natural Law perspective. Analysing the issue of human life protection from this complex perspective, he combines an examination of international and national regulations, asking about the legitimacy of legislation affecting the protection of human life.

The popular approach to sovereignty is an issue which appears in the contribution by Professor José Miguel Serrano Ruiz Calderon. He discusses the important problem of eugenics, which is unfortunately still far from relegation to the domain of past human mistakes. Not only is contemporary medicine developing several techniques facilitating eugenics, but they appear to be affirmed by recent judgements by the European Court of Human Rights, as in the case of *Costa et Pavan v. Italy*. This author demonstrates the analogy between this ECHR judgement and the famous American *Roe v Wade* case, and observes that both cases are based on a very similar approach to the concept of privacy and entail a denial on very arbitrary grounds of the legitimacy of the democratic legislative process.

This issue involving the question of sovereignty is then continued by Nikolas T. Nikas, who situates prenatal law protection in a context of two different approaches to the very nature of what is normative and where it comes from. This prominent attorney, with a profound expertise in philosophy, exceptional in prac-

tioners, discusses the very nature of sovereign power, asking whether it is lodged in Reason or in Will. He then offers an account on the consequences for human life protection if we proceed from the two positions in turn. His philosophical argument shows that the differentiation between the protection of human life in the prenatal and postnatal phases is hardly acceptable in rational terms and can only be explained in terms of a capricious discretionary will. It is clear that all the reasons which might be used in order to weaken the protection of human life in the prenatal phase could be readily applied to people already born, and it is hardly possible to understand why it should not be so. In this way it appears that due protection of human life must not consider the moment of birth as a relevant and legitimate justification for the weakening of the intensity of the legal protection that human life deserves. This particular issue is then examined in my contribution, closing the first part of the book and addressing the (in)famous concept of 'after-birth abortion,' as described recently in *The Journal of Medical Ethics*.

All the problems discussed in the first part reappear subsequently in the specific context of particular national legal systems. In the consideration of the issue of weakening, not to say denying, of prenatal protection, the American experience seems to be of particular importance, and thus it opens the second part of the book. William L. Saunders presents this issue, stressing that constitutional protection of abortion in the USA challenges not only the legal protection of human life but also the very essence of the democratic process. He demonstrates the way in which the widely criticised and rationally hardly defensible decision taken by a few judges has been able to prevent the democratic lawmaker from guaranteeing the due protection of human life at the most vulnerable stage of its development. This involves the broader problem of the position of judges in contemporary democratic systems, which is also relevant on the international level, as José Miguel Serrano has already demonstrated.

The legal system which seems to be most important on the Old Continent is that of Germany. The systematic presentation of the legal protection of human life in the prenatal phase according to the German Constitution, as provided by Professor Christian Hillgruber from Bonn, raises another important question. The German Constitution in itself affirms protection for human life, also in the prenatal phase, as the Federal Constitutional Tribunal has several times declared, but in practice this principle has become a meaningless platitude. The introduction of new provisions, construed by the Federal Constitutional Court as a different way of protecting an unborn life in a way refraining from punishment, has turned out to be a procedure legalising and financially supporting a massive attack against children at the earliest stage of their development. This crucial inconsistency between constitutional axiology protecting human life in its early stage and the practical legal solutions operating on a day-to-day basis is also apparent in the contribu-

tion by Thomas Piskernigg focusing on the Austrian Supreme Court decisions upholding wrongful life and wrongful conception damages. His observations clearly demonstrate that such claims do not have sufficient grounds in Austrian law if it is to be considered as a reasonable and coherent unity.

The second part of the book concludes with two contributions on Polish law, which is widely considered as providing relatively strong protection for human life in the prenatal stage of its development. A systematic and detailed analysis by Małgorzata Gałazka provides the reader with a complex and profound exposition of Polish law in this respect. Regardless of its general affirmation of the value of unborn human life, the existing provisions, which waive the doctor's liability for the performance of an abortion in certain situations, raises serious doubts as to their legitimacy. The reasons for such doubts are shown in an essay by Olgierd Pankiewicz, styled on a courtroom speech which provides the reader with an argument questioning the constitutionality of the most frequent premise for statutorily authorised abortion in Poland.

The third part of the book focuses on the perspective which transcends the national legal systems but is influencing them more and more powerfully. This part opens with a contribution by Dobrochna Bach-Golecka on the issue of the child's prenatal protection within the EU perspective. Apart from a systematic presentation of the different ways in which the European legal order is dealing with prenatal human life, she also underlines the legislative sovereignty of individual states in granting it proper protection. The disturbing idea of empowering the EU or other international institutions to legislate on the status of an unborn child, appears in her contribution when she stresses 'full responsibility through the legislative choice of the European Member States.'

The reason for such reservations might be the distance between society (ordinary people) and the decision-making body on the degree of protection that is granted to the child in the prenatal phase. It is by no means unfounded to say that the greater that distance and the less accountable decision-makers are to society, the more likely they will be to weaken the protection of prenatal human life. Perhaps this is why the impressive account of ECHR case law relating to abortion presented in this collection is not at all reassuring for those who want and expect this international tribunal to champion the defence of unborn children. But every reader of the paper by Grégor Puppinc, regardless his/her attitude on protection of human life in its prenatal phase, should be satisfied with his coherent and objective presentation of the Strasbourg Court's case-law, and his legal account of abortion under the European Convention on Human Rights.

The contribution which concludes the book describes the attitude on the protection of unborn human life in the broadest possible perspective, that of the United Nations. Stefano Gennarini, a lawyer profoundly involved in the UN process,

demonstrates the way in which the UN human rights framework has become an important promoter of legal concepts undermining protection of early-stage human life. Again it turns out that the less accountable political structures are to ordinary people, the more contentious their attitude to the unborn. But on the other hand it seems that the purely political accountability of decision-making entities does not provide a sufficient answer to the issue of proper protection for human life in its early stage. Time and again the very nature of law recurs as a discomfiting question. Lawyers are still being called on to answer the question whether it is possible to continue dealing with law as an expression of Will, or whether the time has come to rediscover its reasonable nature.

All the contributions come together to provide a complex, by no means superficial account of an issue which is occupying the minds of contemporary people, and the outlook is that nothing is going to change in this respect.

In this introduction an acknowledgment is also due to the people whose support allowed me to make this book a reality. I would like to give my thanks to Professor Andrzej Zoll and Professor Hubert Izdebski, the careful reviewers of the studies in this collection. But I owe my gratitude also to the learned women, Dr Teresa Bałuk-Ulewiczowa, Dr Joanna Banasiuk, Dr Izabela Poniatowska and my beloved wife Dr Agnieszka Stepkowska, for their precious assistance in editing this volume. Thank you!

Aleksander Stepkowski

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The book consists of thirteen studies examining different aspects of human life protection in the early stage of its development. The contributions are arranged in three parts. Part I focuses on theoretical problems and examines the main issues of contemporary jurisprudence. The foundation of human rights, different approaches to sovereignty, the relation between law and science, the legitimacy of judicial power, and the nature of legal authority are discussed. Part II presents the issues within the national contexts of the USA, Germany, Austria and Poland. In a wider perspective, Part III examines the issue of the protection of human life in the prenatal phase on three different levels: within the EU, within the European Court of Human Rights case law and the UN system.

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