



The right to life of the unborn child from a human rights perspective

El derecho a la vida del nasciturus desde el análisis de los derechos humanos

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ABSTRACT

All human beings have the right to life; however, when it comes to the unborn child or nasciturus, the controversy about whether it is the subject of this right is heightened, especially when the debate takes place in the preamble of the discussion of laws that approve or criminalize abortion. Consequently, the present study aims to analyze the positions of different authors in relation to the right to life of the unborn child from the analysis of human rights. In order to fulfill this purpose, a theoretical research was carried out, based on the review of scientific articles and documents related to the subject, and the use of inductive, analytical and synthetic methods. As a result, it was determined that the condition of the nasciturus as a person cannot be denied, therefore, its right to life must be guaranteed from conception according to the contents of the Universal Declaration of Human Rights.

RESUMEN

Todos los seres humanos tienen derecho a la vida, sin embargo, cuando se trata del concebido no nacido o nasciturus se aviva la controversia si el mismo es sujeto de este derecho, especialmente cuando el debate se da en el preámbulo de la discusión de leyes que aprueban o penalizan el aborto. En consecuencia, el presente estudio tiene por objetivo analizar las posturas de diferentes autores en relación al derecho a la vida del nasciturus desde el análisis de los derechos humanos. Para cumplir con esta finalidad, se realizó una investigación teórica, sustentada en la revisión de artículos científicos y documentos relacionados al tema, y el empleo de los métodos inductivo, analítico y sintético. Como resultado se determinó que no se puede negar la condición de persona del nasciturus, por lo tanto, debe garantizarse su derecho a la vida desde la concepción acorde a lo contenido en la Declaración Universal de los Derechos Humanos.

Keywords / Palabras claves

Abortion, Right to life, Human Rights, Nasciturus, Abortion

Derecho a la vida, Derechos Humanos, Nasciturus, Aborto

Introduction

At present, the debates that arise around the legalization of abortion have taken as their central axis the recognition of the conceived as a person, its ownership of rights, and, above all, which rights should prevail, those of the mother or those of the unborn child. It is not unusual then that the arguments against abortion focus on the defense of life from conception, placing the right to life of the unborn child above those of the pregnant woman.

On the other hand, those in favor of abortion base their arguments on the woman's right to self-determination and her freedom of choice. However, there is no consensus when it comes to recognizing whether the unborn child has the right to life, or whether, on the contrary, it is the woman who must decide about her body within the framework of her reproductive rights.

From the point of view of human rights instruments, the unborn child must be protected from conception, but women also have the right to decide on matters related to abortion. In this sense, women's

organizations have been fighting for decades for the legalization of abortion as a means of vindicating women's rights, while States seek the protection of life as a fundamental right, which is why they prohibit and criminalize abortion.

In this context, it is complex for legislators to decide on an issue that involves human life, since both the unborn child and the pregnant woman have the status of persons, and under this premise, they must be recognized and protected by the State, which makes it difficult to establish a priori differences that allow them to take a position on the legality of abortion.

The purpose of this study is to analyze the positions of different authors in relation to the right to life of the unborn child from the perspective of human rights. The aim is to objectively expose the arguments of the groups that defend life from conception, and those who consider abortion as the right of women to decide about their bodies, especially in cases of rape, medical complications, and unwanted pregnancies.

The conceived and its consideration as a person.

The human being has its genesis at conception, a milestone that marks the beginning of the embryonic and life process in the unborn child. With the fertilization of the ovum, a series of biological processes occur that will give rise to a new being with its own characteristics, although housed in the mother's womb, whose development will not stop until the death of the individual.

Zambrana (2014) defines the nasciturus as the human being in the period of his life that goes from conception to the moment of birth, and develops in the different stages of the embryo of the fetus, while Jara (2013) explains that it is the being that is about to be born, whose development begins with the fertilization of the egg by the sperm, and the implantation of the embryo in the walls of the uterus.

it cannot be denied that the unborn child is a new being, a functional organism endowed with a complex structure made up of DNA. In fact, the human condition of the unborn child is evident in that it is the product of fertilization through the union of the sexual cells of the man and the woman, who provide the genetic material that will give life to a new being with unique and proper characteristics.

Despite this evidence, the beginning of life is a subject discussed by the medical community, and there is still debate as to whether or not the embryo in its early stages is a human being, but there is no doubt that the zygote possesses a genome that shows in its structure a factor different from that of its progenitors, which gives the unborn child the status of an individual being.

Regarding the conceived as a person, Váscenez and Mena (2017) argue that man does not change from one being to another, since, biologically during his development there are no qualitative leaps or changes of bodies, so that man is the same from his conception until his death. In fact, with the development of the zygote, the embryo and the fetus, the intrinsic capacities of the person are produced, so that the nasciturus cannot be considered as a potential person or human being, but as a person or human being in potential.

Human dignity and the right to life of the unborn child.

Human dignity should be understood as honor, excellence and distinction, which make man an independent individual, regardless of the conditions in which he develops, and personal or social circumstances. These aspects lead the human being to have a clear awareness of his moral and spiritual qualities that push him to the fulfillment of duties for himself and for others (González, 2016).

Human dignity gives rise to the so-called human rights, which can be defined as those that lead to the realization of the purposes of life, and impose in other concrete behaviors, aimed at ensuring respect, protection and protection of the human being.

Regarding the right to life, the Universal Declaration of Human Rights states in Art. 3 the following: "Everyone has the right to life, liberty and security of person", following this line, Art. 1 of the American Declaration of the Rights and Duties of Man (1948), states that "Every human being has the right to life, liberty and security of person".

It is evident that human rights are universal, and because of this, they must be applied to all persons, for the simple reason of being so, regardless of whether or not it is recognized by Positive Law, it is clear then that legal personality is a quality inherent to human beings, which grants them a series of rights, i.e., the legal quality must be granted to every member of the biological species homo sapiens, even to unborn conceived persons (Manjarrez & Yáñez, 2019).

In the opinion of Calvo (2004), the human nature of the unborn cannot be denied, and therefore, he/she is endowed with the dignity and rights that correspond to him/her by the fact of being a person. In view of the above, Vásconez and Mena (2017) consider that the legal existence of a person begins at the moment of birth, but life as such begins with conception, however, between conception and birth there is a natural existence, where the rule of Roman Law "Infans conceptus pro nato habetur, quoties de commodis ejus agitur" applies, which means that the conceived is considered born for whatever is favorable to him/her.

From this perspective, the unborn child, as a person, is subject to subjective rights derived from Natural Law. Consequently, given the condition of the unborn child, protection must be provided during all stages of gestation, since it is a holder of rights, which must be guaranteed at least until it is able to exercise them.

Materials and Methods

The present study was of a theoretical nature, in this sense, an exhaustive search of information was carried out in different academic and research databases, including Science, Proquets, EBSCO, Scopus, Latindex, among others, considering mainly articles and other documents in English and Spanish. In addition, legal and regulatory aspects related to the subject were consulted. The research was carried out by applying the inductive, analytical and synthetic methods, which allowed us to know and contrast the positions of different authors in relation to the right to life of the unborn child.

Results

The right to life of the unborn child is a controversial issue, which currently generates social, legal and legislative debates between those who defend the right to life of the conceived and those who approve and support the practice of abortion. For this reason, this document reviews the different positions adopted by various authors and the Cosmovation of Human Rights organizations.

The Inter-American Court of Human Rights, on several occasions in its rulings, has condemned the violation of the rights of the unborn, as

well as highlighted the actions taken by governments in pursuit of the protection of the unborn. Thus, in Advisory Opinion OC/17-2002, on the Juridical Condition and Human Rights of Children, this body states that rights are also applicable to the unborn, placing the principle of the best interest of the child first.

In other words, the development and exercise of the rights of the nasciturus must be considered as guiding criteria to elaborate norms that contain orders related to the life of minors. The best interest of the child will always be to live, therefore, for the States to decide on the right to life from conception becomes a sensitive issue, which may violate supranational agreements on Human Rights. From this angle, the Latin American Center for Human Rights (2011) proposes that, when making a decision on the right to life from conception, States should "recommend both punitive measures for any act aimed at destroying the life of the unborn and preventive measures".

As stated in art. 1.2 of the American Convention on Human Rights, every human being is a person, consequently, the nature of the unborn must be recognized as a person or human being, which makes him/her a subject of rights in the Inter-American System. There is no doubt then, that the States parties to the Human Rights agreements must recognize the right to life of every person from the moment of conception, according to a good faith interpretation of the terms contained in the signed and ratified treaties.

Indeed, Sanchez, and Taype (2018), argues that the nasciturus is not a subject of law at least until birth, then it must be understood that the rights for the conceived are not null, but are subject to the resolutive condition of birth, in other words, these rights are in a passive state, until they can be activated once the individual is born. Therefore, following this premise, it can be affirmed that every human being is a person, therefore, he/she is a holder of human rights in any of the stages of his/her integral life.

With regard to Ecuador, the right to life is constitutionally protected from conception. Article 45 of the Constitution states that "the State shall recognize and guarantee life, including care and protection from conception". Therefore, the constitutional mandate considers that the unborn is a human life, regardless of its stage of development.

It so happens that the Ecuadorian Constitution determines the protection of the unborn child from conception, without giving rise to any interpretation, unlike other Constitutions, which simply state that

the right to life is inviolable. In this sense, countries such as Canada, India, the United States and Uruguay, do not recognize the unborn child as a subject of the right to life, which has allowed the creation of public policies that allow the undue manipulation of the conceived, for example, the legalization of abortion.

For Cornejo (2013), this happens because international human rights conventions do not expressly defend the human life of the unborn, but this is deduced from some of the texts enunciated by human rights organizations, which gives rise to an erroneous interpretation that ends up violating the right to life.

In this sense, the Inter-American Court of Human Rights (2011), points out that "the lack of recognition of juridical personality harms human dignity, since it absolutely denies their status as subjects of rights and makes the individual vulnerable to the non-observance of their rights by the State or by private individuals". Similarly, he argues that denying the legal existence of the nasciturus is a clear violation of the right to life, "although children and other legally incapable persons lack the capacity to fully exercise their rights (for example, the right to vote or property rights), they are fully entitled to inalienable rights inherent to the human person" (Muñoz, 2020). (Muñoz, 2020).

And precisely, the Ecuadorian Civil Code (CCE) exposes a similar premise, stating in Art. 63 that "The rights that would correspond to the creature that is in the mother's womb, if it had been born and lived, will be suspended until the birth takes place. And if the birth constitutes a principle of existence, the newborn shall enter into the enjoyment of said rights, as if it had existed at the time they corresponded to it."

On the other hand, art. 61 of the CCE declares the protection of the life of the unborn, stating that "the law protects the life of the unborn. Consequently, the judge will take, at the request of any person or ex officio, all the measures that seem appropriate to protect the existence of the unborn". Then, the unborn is a subject of law by its legal nature, which emanates from the protection of life, from the moment of conception until birth. (Galvis, 2019)

Therefore, even if the unborn child does not have civil capacity, this should not be an impediment for it to enjoy its human rights, or to be recognized as a person from the embryonic and fetal stages. So, while fundamental rights are qualified as general principles to achieve legal effectiveness, on the other hand, the human being is being denied the

first moments of his life, this incongruence ends up denying the nasciturus his status as a person. This dichotomy results in the difficulty of determining whether the unborn child really has the same rights as the mother, whether these are superior to the will of the mother, or on the contrary, whether its rights are subordinated to the mother's decision.

In view of the above, Calvo (2004) considers that the right to life is "among human rights, the one that has been subject to the most restrictive interpretation, giving way to other rights of lower rank and even to certain legitimate desires that do not deserve the qualification of rights, such as those of the woman to her own body (which is placed before the right to life of the child and thus justifies abortion). In this way, an inversion of values is produced, in which secondary rights are placed before the principal and fundamental right to life".

This conception is a relevant social derivation that responds to the vindication of reproductive freedom and the controversial concept of a woman's freedom to decide over her own body, which is used to justify induced abortion. According to Vial and Rodriguez (2009), this notion of reproductive freedom has been widely accepted by important jurists, who consider that it is a woman's right to choose whether to continue or terminate the pregnancy, putting her needs and desires first.

In this notion of reproductive freedom, one aspect of interest is to consider the mental health of the woman who, not being able to choose and decide whether or not to terminate the pregnancy, would trigger psychic-emotional imbalances or imbalances, making the unwanted pregnancy a hopeless environment and a risk factor for psychological disorders.

Consequently, abortion is a prevailing factor in the psychic affectation of women. Aznar and Cerdá (2014) propose to give their criteria based on the evaluations of the reviews of different articles on this subject, where they conclude that women with induced abortions have between 1.80 and 7.07 higher probability of presenting mental problems, including mentioning that mental health disorders attributable to abortion represent between 1.5% and 5.5% of the total mental disorders of women.

In relation to abortion, the deviation of the Law is remarkable, because when this freedom is granted to the woman, the unborn child, who is a person, ceases to be a subject of the Law, loses its transcendence, and

becomes an object of the rights of others and of the legal business. To avoid this transgression, the State has the duty to refrain from interrupting the process of natural gestation, establishing a legal system that allows to effectively defend life from conception. (Galvis, 2019).

In other words, by considering the life of the unborn child as a legal good, it is subject to the will of the parents, as legitimate holders of that legal good, therefore they have the right to freely dispose of the life of the unborn child, which opens the possibility of performing an abortion, as a right of parents not to have an unwanted child. (Chávez, 2015).

From this point of view, in countries where abortion has been legalized, the norm, the protection of human rights and their guarantees, are only valid for human beings when they are recognized as subjects of rights, that is, after birth, but are not applicable to the unborn, which results in a paradox, since it is precisely human beings in their embryonic and fetal stage that are weaker, and therefore require greater protection and legal protection of all kinds.

Therefore, it is logical that the recognition and protection of human rights cannot be subordinated to the period in which man is born, since the right to life is the main and most fundamental of rights, without which the others would have no reason to exist, which is why it is important to demand respect for life, from its beginnings until its natural extinction.

For man, life is a right that must be protected, without distinction between the being who has already been born and the one who is about to be born, and precisely from this precept derives the illegitimacy of abortion. It cannot be ignored that the right to life is the most essential of all human rights, since it is the basis of humanity, nor can it be denied that the human being begins to be such from conception, therefore, the unborn child is invested with human dignity, which gives him/her rights that are enforceable against third parties. (Iglesias, 2016).

States cannot deny the personhood of the unborn, therefore, their right to life must be constitutionally protected from conception. In this sense, Positive law must recognize the unborn as a subject of rights, leaving aside controversial criteria contrary to what is stated in the Universal Declaration of Human Rights (Garzón, 2017).

As Paulson (2017) argues, intentional abortion constitutes a form of execution more serious than the death penalty, since to terminate a pregnancy in order to get rid of the product is to deny the unborn child its legal personality, to deprive it of its right to life and to go against the mandates contained in the declarations of human rights.

Therefore, legalizing abortion is tantamount to denying the right to life of a particular group of persons, in this case unborn children, which constitutes discrimination on the basis of age or birth prohibited by the American Convention in Article 1.1, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Article 3), the Convention on the Rights of the Child in its Preamble and Article 2(1), and the Declaration of the Rights of the Child.

Thus, in several countries, the legislation that sustains laws prohibiting abortion bases its criteria on the right to life of the unborn child, without considering the complementary interpretation that should be made of the rights of other women.

For example, the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights establish that life is an inherent right of the human person, including the unborn child, while international treaties on women's human rights, such as the Convention on the Elimination of All Forms of Discrimination against Women, determine that all discrimination in areas such as health, family relations and family planning must be eradicated.

In this sense, the arguments that defend prenatal life under the premise that it is protected by international human rights treaties generate an even greater controversy, since they consider the rights of the unborn child, but leave aside the rights of women, which goes against the principle of equality and non-discrimination.

Therefore, it is not by chance that anti-abortionists defend the theory that the embryo or fetus is a human life, therefore, they prioritize the right to be born of the conceived, before the woman's right to decide freely about her body and maternity. In this context, the different pro-life groups demand the tightening of laws and oppose the legalization of abortion, regardless of the reason for which the woman decides to terminate the pregnancy.

Under this scheme, Ugarte (2006) argues that abortion is equivalent to homicide, since it violates the right to life of the fetus. According to

Pérez (2019), this position is based on the position of the Catholic Church, for which, interrupting pregnancy is an attempt against human life, therefore, it cannot be admitted under any circumstances and must be punished by law.

The Catholic Church bases its fundamental criterion on the anthropological nature of man, in the opinion of Jara (2013) "the natural moral law evidences and prescribes the purposes, rights and duties based on the bodily and spiritual nature of human persons. The Creator is the only one who can direct and regulate their life and acts and, more specifically, to use and dispose of one's own body". Consequently, for Catholicism, life is sacred and only God determines the beginning and end of it, therefore, under no circumstances, no human being can claim the right to end the life of an innocent human being.

From this perspective, Cornejo (2018) argues that the legal criminalization of abortion, incorporates ideological or moral reasons to prohibit the termination of pregnancy, for example, there is the conviction that the nasciturus is a person with equal dignity to the mother, and to attempt against his life, not only violates a superior right, but, it is done in a conscious and voluntary way.

Morality is an intrinsic process of the subject constructed in such a way that different subjective, environmental and cultural elements are incorporated, so that the choice of abortion involves a confrontation of the being himself between what he wishes and what he should do. Luigi Ferrajoli quoted by García (2006) in his article Questions of life and death mentions "the principle of utility and the principle of separation between law and morality that does not end in an integration of these complex systems but rather in an opposition between moral values and the protective function of criminal law" (p.184). And in the morality play, the clandestinity of abortion is absorbed in the morality of the professional who practices it and we leave the gap open in concomitance of the participants.

Another argument sustained by abortion's detractors is the consideration of the fetus and embryo as a human being. This thesis seems logical, so much so that several legislations accept it as a basis for the criminalization of abortion. As García (2017) mentions, "the personality of the fetus nullifies any justification of abortion" (p.189), in other words, from this position, abortion could not be justified

under any circumstances, even if the woman's life is in danger or she has been sexually violated.

From the perspective of the Declaration of Human Rights, the unborn child is considered a person from conception, therefore, it is a subject of rights, interests and claims, so it is not only a matter of exalting a life, but also of protecting its legitimate rights. Therefore, when it comes to affirming or denying the legal existence of the unborn child, the discussion becomes very complex.

Consequently, by giving the unborn child the same value as the mother, interrupting a pregnancy is a decision that attempts against a life, therefore, abortion would be on the same level as homicide, which is why it is penalized by several legislations. But, from a theoretical point of view, affirming that the embryo and the fetus are a person, shakes the arguments of those who are in favor of abortion, so they are forced to use medical knowledge in order to counteract this statement, often used as an argument difficult to refute.

Other arguments used in defense of abortion are measured by the freedom of the woman, her state of necessity, the preservation of the life or health of the mother, in spite of this, these affirmations lose force when the rights of the mother are contrasted with those of the unborn child.

In the opinion of Finnis (2016), the nasciturus is a weak being that must be protected by the State against the aggressions of others, since, just as it cannot be admitted that the life of an innocent person is sacrificed to save another, neither should it be permissible to deliberately end the life of the fetus to save the life of the mother or at the mother's wish.

Those who are against abortion state that because of its status as a person, the unborn child deserves legal protection and protection even before birth; however, this is not a sufficient premise for it to be considered as a unique person. In fact, those who are in favor, defend that the fetus is not yet a human person in the full sense, therefore, it cannot be considered as a subject of law or superimpose this on the rights of the mother.(Bellieni, 2019)

It should be noted that the defenders of abortion consider that it is a woman's right, therefore, its recognition guarantees compliance with human rights treaties and agreements. In this way, abortion is justified with arguments that defend women's freedom, which range from "the

supposed property of women over the fruit of their sexual relations, to the atavistic condition of subjugation, which alone would legitimize any demand related to the demands of a minority and exploited group". In any case, recognizing the woman's right to self-determination is a questionable matter, since it implies the denial of the right to life of the unborn child.

As indicated by Bergallo et al. (2018), "the autonomy of the woman would be limited by not being able to exercise a right to have an abortion, but this limitation does not eliminate or affect her essential freedom or autonomy", but abortion does deprive the unborn child of the right to life, which is certainly an affectation to the essence of this right. For this reason, many legislations that have legalized abortion do not consider the unborn child as a person until birth, since, not considering the fetus and the mother as equals, there is no difficulty in discerning who to save and who to let die so that the other survives.

A literature review article from the Department of Business Organization, Marketing and Sociology, Sociology Area, University of Jaén, Jaén, Spain, (2019) on the exploration of the emotional experiences of women around the voluntary interruption of pregnancy shows the presence of anti-abortion protesters in the woman's environment as a factor that affects the appearance of negative emotions generating in traumas before the stigmatization of this social myth, leading the woman to feel the lack of autonomy and personal decision which would make her doubt the support of her partner, family and close people showing the gender inequality as a consequence of this critical fact during stages of the life cycle fracturing the relationships with the environment.

For example, in society there is a clear inequality in terms of the way in which the product to be aborted is conceived, one part of which points out or judges the woman who decides to terminate an unwanted pregnancy because she does not feel ready to be a mother, while it is intended to legalize abortion when the pregnancy is the result of rape. In this scenario, society does not seek to protect the right to life of the unborn child, nor the woman's freedom of choice, but rather to indulge its moral and selfish prejudices.

To conclude, it is clear that there is a conflict of rights between the autonomy of the woman and the life of the unborn child, which makes it difficult for legislators to adopt a position in favor or against abortion. However, this must be resolved under a criterion of

proportionality, in order to determine the limits that legislators must impose when passing laws on abortion, without affecting the essence of the fundamental rights of the unborn child and the mother.

Conclusions

The Declaration of Human Rights grants the unborn child the status of a person from conception, therefore, it is a subject of rights, interests and claims, so it is not only a matter of exalting a life, but also of protecting its legitimate rights. Then, when it comes to affirming or denying the legal existence of the unborn child, the discussion becomes very complex. It cannot be denied that the legal personality and rights of the nasciturus provoke endless debates that do not allow a global consensus on the limits and scope of the rights of the unborn child. This makes it difficult for legislators to decide objectively on those sensitive and controversial issues that could imply a violation of the right to life. For this reason, it is interesting to analyze the different positions regarding the moment in which the conceived child acquires the status of a person, and from when the right to life must be guaranteed, in order to prevent legislative and judicial decisions from being influenced by religious, subjective or unscientific positions.

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