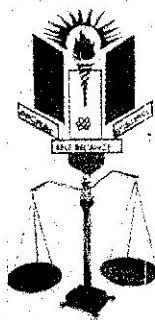


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DO THE UNBORN HAVE THE RIGHT TO LIFE? A REVIEW OF SOME MUNICIPAL CASE LAWS AND INTERNATIONAL HUMAN RIGHTS INSTRUMENTS*

Abstract

The decisions of courts in many countries have shown that generally, the unborn has no legal personality or any rights that are enforceable in law. This is particularly noted in the western world jurisdictions such as the United Kingdom, Canada, the U.S.A and France. These judicial pronouncements on non-legal personality of the foetus have exerted great influence on few African countries. For instance, the South African High Court handed down a similar decision de-recognizing the legal person of the unborn. This article takes a further look into the international human rights instruments to make a case for the unborn. Unfortunately, the international law too does not appear to grant the right to life to the unborn, therefore leading to an inevitable conclusion that each jurisdiction should work its own legal standpoint on the personhood and the right to life of the unborn.

Introduction

The Courts and the Legal Personality of the Unborn

The decision of courts in various jurisdictions have held to deny legal personhood to the unborn either at embryonic stage or at foetal stage. Most of these judicial decisions have arisen from cases involving abortion controversies or challenges to abortion laws. It is trite that the permissibility or otherwise of abortion depends heavily on whether the unborn which are inevitably and deliberately killed in the process of abortion are human beings or persons.

Decisions in some of these jurisdictions have repeatedly shown that the unborn have no right to life compared to a completely born human being and there is no equal legal protection of the unborn compared to the born.

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Canada, France, the United Kingdom, the United States and South Africa are veritable examples of such jurisdictions. Few of such cases are discussed below.

Canada

In Canada, the courts have consistently refused to give legal or judicial recognition to foetal personhood. In *R. v. Sullivan*,¹ the main contention arose from the death of a baby during a midwife-supervised home birth. Two individuals who were not members of the medical profession were hired as midwives. They supervised and took the delivery of a woman. In the process the woman's contraction stopped after the baby's head appeared. The midwives tried unsuccessfully to induce further contraction. They rushed the woman to the hospital where the baby was removed dead. The midwives were charged with negligence regarding both the child and the mother. The British Columbia Court² decided the case from the common law point of view and held that in order to be legally considered a person, one must be alive fully from the mother's womb. Since negligence occurs only with respect to a living person, the two midwives were held not guilty in negligence with respect to the dead child.

Another Canadian case was the case of *Medhurst v. Medhurst*³ which involved a biological father attempting to prevent the mother from obtaining an abortion. The appeal court judge held that the father could not act in the capacity of next friend to the unborn child. A next friend can act only for a person and the law did not recognise an unborn child as a person prior to birth.

The case of *Tremblay v. Daigle*⁴ was a very interesting one: here, the Quebec lower court held that the foetus was a person and was protected under the right to life clause provided in section 1 of the Quebec Charter of Human Rights and Freedoms. It therefore granted an injunction to restrain a woman from obtaining abortion. On appeal to the Supreme Court of

¹ *R. v. Sullivan*, [1991] 1 S.C.R., 502.

² Though this is not the Supreme Court but it is a superior Court equivalent to a High Court.

³ [1984] 9 D. L. R. (4th) 252.

⁴ [1989] 2 S. C. R. 530.



Quebec, the lower court's decision was overturned and the injunction was set aside. The Court held concerning foetal rights: "A foetus would appear to be a paradigmatic example of a being whose alleged rights would be inseparable from the rights of others, and in particular, from the rights of the woman carrying the foetus."⁵

France

In France, the same position was reached by the court in the case of *Vo v. France*.⁶ In that case, the applicant, Mrs Thi-Nho Vo, in 1991 had a medical check-up at the Lyons General Hospital in Lyons, France. She was about five months pregnant. The doctor, confusing the applicant with another patient with a similar name, Mrs Thi Thanh Van VO, performed the medical procedure intended for the other patient. During the erroneous procedure, (removal of a contraceptive coil) the doctor negligently pierced the applicant's amniotic sac, leading to the loss of the five months' pregnancy.

The applicant and her husband filed a criminal complaint alleging unintentional injury to the applicant and unintentional homicide to her child. In 1996, the Lyons Criminal Court acquitted the doctor, finding that "a 20 to 21 week-old foetus is not viable and is not a 'human person' for purposes of the French Criminal Code."⁷ The Lyons Court of Appeal overturned the decision a year later, and found that based on "established scientific fact and elementary common sense, all dictate that a negligent act or omission causing the death of a 20- to 24 week-old foetus in perfect health should be classified as unintentional homicide."⁸

In 1999, the Court of Cassation, France's highest court, reversed the decision of the Lyons Court of Appeal and confirmed the judgment of the trial court and reinstated the doctor's acquittal. Construing the criminal

⁵ *Supra*.

⁶ *Vo v France*, No. 53924/00, 19 (Eur. Ct. H.R. July 8, 2004). See generally, "Vo v. France and Foetal Rights, The Decision not to Decide" (2005) 18 *Harvard Human Rights Journal* for facts and detailed criticism of this case.

⁷ *Ibid*.

⁸ *Ibid*. para 21.

statutes strictly, the Court of Cassation found that the charges against the doctor did not fall within the provisions of the Criminal Code because the foetus is not a person under the aforesaid Code and because protection of foetuses is governed under the embryos and foetuses clauses.⁹

United States

The case of *Roe v. Wade*¹⁰ represents the *locus classicus* in the history of abortion legal controversies in the United States. The abortion controversy in the United States is premised on the legal status of the foetus. And if it is a person, then, at what stage does it become a person that is capable of being legally recognised? The U.S. Supreme Court in *Roe v. Wade* ruled to the effect that the foetus is not a person under the United States Constitution. The Court listed all the places where the word "person" appears in the Constitution and concluded:

⁹ *Ibid.* para 22. This case continued with the appeal to the European Court of Human Rights. (ECHR) When the applicants realised that they found no remedy in the French Courts, they filed a claim in 1999 with the European Court of Human Rights (ECHR) alleging that France had violated Article 2(1) of the European Convention on Human Rights, which, states: "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." The applicant claimed that the Convention imposed on France a positive obligation to enact criminal legislation preventing and punishing the unintentional homicide of a foetus. The applicant further argued that because France lacked such criminal legislation, it was in breach of the Convention. The French government responded by arguing that Article 2 does not protect the foetus's right to life because the word "everyone" applies only to born persons, as illustrated by the exceptions listed in Article 2(2) of the ECHR which provides thus: "Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection." The French government also contended that even if article 2 is applicable, adequate administrative remedies were available in France to fulfil its article 2 obligations. In deciding this case, the ECHR declined to decide whether a foetus is protected under article 2. Instead, the Court relied on a former decision holding that "where the right to life has been infringed unintentionally" a criminal law remedy may be unnecessary as long as an adequate remedy is provided. The Court held, by a vote of 14-3, that even if Article 2 was applicable to this case, it was not violated because France had provided sufficient administrative remedies to the applicant.

¹⁰ 410 U.S. 113 [1973].



In nearly all these instances, the use of the word (person) is such that it has application only postnatally. None indicates, with any assurance, that it has any prenatal application. All these, together with our observation supra, that throughout the major part of the nineteenth century prevailing legal abortion practices were far freer than they are today, persuade us that the word "person" as used in the Fourteenth Amendment, does not include the unborn.¹¹

United Kingdom

Like Canada, France and the United States, the same position is held in the United Kingdom regarding the juristic personality of the foetus. According to the view of the President of the Family Division Court in the United Kingdom, George Baker:

The foetus cannot in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country...and is, indeed, the basis of the decisions in those countries where law is founded on the common law....¹²

South Africa

In the case of, *Christian Lawyers Association v. Minister of Health*, 1998,¹³ the plaintiffs¹⁴ challenged the constitutionality of Choice on Termination of Pregnancy Act 1996. (CTOP Act). The Act allowed abortion of foetus up to the twenty weeks of gestation on various grounds including socio-economic grounds. The plaintiffs prayed the court to set aside the Act on the basis that it infringed on the right to life. They contended that a foetus has a right to life and that irrespective of gestational age, foetus or unborn baby has a claim to protection by the Constitution for its right to life, because it is a person. They based their claim on Section 11 of South

¹¹ *Roe v. Wade*, supra, 158-159.

¹² *Paton v. Trustees of the British Pregnancy Advisory Service* [1978] 2 All ER. 987, at 989.

¹³ (Otherwise known as *CLAW*) 1998 (4) SA 1113.

¹⁴ The Act was challenged by three different groups under the name of the United Christian Action Group, the Christian Lawyers' Association, and Christians for Truth.

Africa's Constitution, which provides that "everyone has the right to life," arguing that the phrase "everyone" applies to an unborn child.

The Transvaal Provisional Division of the High Court dismissed the suit. It held that there was no express provision in the Constitution, including section 11, affording the foetus or embryo legal personality or protection. And that to include foetus in the meaning of "everyone" in section 11 of the Constitution would ascribe to it a meaning different from that which it bore everywhere else in the Bill of Rights; something that was clearly untenable.¹⁵ Moreover, the Court concluded that to afford the foetus the status of a legal person might impinge on the rights of women that are expressly guaranteed in the Constitution.¹⁶

Right to Life under International Human Rights Instruments

All the above cases have significantly shown that many municipal jurisdictions have not recognised the legal personhood of the unborn. It logically follows that if the unborn are not persons in law, they would not be entitled to rights to life. This discussion therefore, takes a survey of international human rights instruments in order to see whether they could serve as avenue where rights to life of the unborn may be canvassed.¹⁷ One can only appraise the provisions guaranteeing the right to life in some prominent international human rights instruments to see whether such provisions extend or cover the unborn child. The first instrument that lends itself into such an enquiry is the Universal Declaration of Human Rights 1948.

¹⁵ *Supra* at 1122 F-I.

¹⁶ *Supra* 1123 E-G.

¹⁷ However, the first obstacle in considering whether a foetus could be regarded as a person who has a right to life under the international instruments concerns the fact that there is neither identified section on foetal personhood nor a categorical mentioning of foetus rights and status in various provisions of the international human rights instruments.



Universal Declaration of Human Rights (UDHR)¹⁸

The UDHR in Article 1, states that "all persons are born free and equal in dignity and rights." The provision here suggests that the rights guaranteed in the instrument accrue only to a human being who has been born. There is no inference to suggest otherwise, considering the language of the instrument. In accordance with the principle in the case of *Bank of England v. Vagliano Brothers*¹⁹ where Lord Herschel formulated what is generally accepted to be the proper canon (or rule) for the interpretation of a statute thus:

I think the proper course is in the first instance to examine the language of the statute and to ask what its natural meaning is, uninfluenced by any consideration derived from the previous state of the law and not to start with enquiring how the law previously stood... the purpose of such a statute surely was that on any point specifically dealt with by it, the language be ascertained by interpreting the language used....²⁰

What can be deduced therefore, from the language of Article 1 of UDHR, is that it cannot be interpreted to include a foetus/unborn child.

In addition, a look at the UDHR *travaux preparatoires* reveals that the word "born" in the statement "all persons are born free and equal in dignity and rights" was used deliberately to exclude the foetus or any ante-natal application of human rights. An amendment was proposed that would have deleted the word "born", in part, as it was argued, to protect the right to life from the moment of conception.²¹ The proposal was however rejected. Article 1 was eventually adopted after voting. 45 votes were in support of the language with nine abstentions.²² Thus, a foetus has no rights under the Universal Declaration of Human Rights. In addition, the deliberate use of gender-neutral term "everyone" thereafter in the body of the Declaration to

¹⁸ Universal Declaration of Human Rights was adopted on December 10, 1948 by the United Nations General Assembly Res/217.

¹⁹ [1891] A.C.107.

²⁰ Per Lord Herschel, *ibid.* pp. 144-145.

²¹ UN GAOR 3rd Comm., 99th mtg. at 110-124, UN Doc. A/PV/99, [1948].

²² UN GAOR 3rd Comm., 183rd mtg. at 119, UN Doc. A/PV/183, [1948].

define the holders of human rights, makes it clear that it refers to born persons only.²³

International Covenant on Civil and Political Rights (ICCPR)

Article 6(1) of the ICCPR provides: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

This article does not in any way protect the unborn/foetus. In other words, the right to life protected in the above article does not apply to 'before birth'. The history of the negotiations (*travaux préparatoires*) indicates that an amendment was proposed that stated: "the right to life is inherent in the human person from the moment of conception, this right shall be protected by law."²⁴ The said proposal was not accepted. The commission ultimately voted to adopt article 6, which has no bearing to conception, by a vote of 55 to nil, with 17 abstentions.²⁵ Thus, the article does not refer to the unborn/foetus.

American Convention on Human Rights²⁶

It is necessary to have a view of the Inter-American Human Rights Agreements generally so as to clear any ambiguity regarding the apparent contradictory provisions of the American Convention on Human Rights and the American Declaration on the Rights of Man and Duties.²⁷ The American Convention on Human Rights explicitly provides in its Article 4 as follows: "Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

²³ J. Morsink, "Women's rights in the Universal Declaration" (1991) 13 *Human Rights Quarterly* 236.

²⁴ UN GAOR Annex, 12th Session, Agenda Item 33, at 96, UN Doc. A/C.3/L.654, see also UN GAOR, 12th Session, Agenda Item 33, at 113 UN Doc. A/3764, 1957.

²⁵ UN GAOR, 12th Session, Agenda Item 33, at 119 (q), UN Doc. A/3764, [1957].

²⁶ American Convention on Human Rights "Pact of San Jose, Costa Rica" was adopted at San Jose, Costa Rica on 22 November 1969.

²⁷ American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948).



On the other hand, the preamble of the American Declaration on the Rights and Duties of Man, contains the same language as the Universal Declaration of Human Rights, premising rights on birth, by stating: "All men are born free and equal in dignity and rights."²⁸ This appears contradictory to Article 4 of the American Convention on Human Rights which protects the right to life "in general, from the moment of conception"²⁹

While one may tend to believe that the provision of Article 4 of the American Convention apparently granted the unborn child legal recognition and protection, the article has also been interpreted as not extending the protection to the unborn. The Inter-American Commission ruled that the Article did not confer right to life on the foetus nor required invalidation of permissive abortion laws.³⁰ This was interpreted by the commission in the case of *Baby Boy*.³¹

The case concerned the challenge of the refusal of a US State of Massachusetts Court to convict a doctor of murder for having performed a late-term abortion. The anti-abortion advocates in the US brought the case under the American Declaration on the Rights and Duties of Man, which protects the right to life with no reference to the "moment of conception".³² The Commission rejected the petitioners' claim under the

²⁸ (Preamble, para.1).

²⁹ American Convention on Human Rights, OAS Off. Rec. OEA/Ser.L/V/II.23, Doc.21, Rev.6 (1969) at Art. 4, in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4rev.7 at 23 (2000).

³⁰ The ruling was contained in "Baby Boy" which arose from the case of a Massachusetts doctor who was prosecuted for manslaughter after providing an abortion in 1973 to a teenage girl, at the request of the girl and her mother. The doctor was convicted at trial, but the highest court in Massachusetts reversed his conviction in 1976. The following year, members of an anti-abortion organisation submitted a petition to the Commission on behalf of the aborted foetus, referred to as "Baby Boy." Because the United States was not a party to the American Convention, the challenge was brought under the American Declaration of Rights and Duties of Man, which protects the right to life without reference to the "moment of conception."

³¹ *Baby Boy*, Case 2141. Inter-American Convention on Human Rights 25/OEA/ser. L/V/II.54, Doc.9 Rev.1 [1981].

³² American Declaration of Rights and Duties of Man, OAS Res. XXX, in Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/ Ser.L/V/I.4rev. 7 at 15 (2000).

Declaration.³³ The Commission also interpreted article 4 of the American Convention in the light of its drafting history, to preclude a right to life for the foetus. The Commission stated that:

The addition of the phrase, 'in general, from the moment of conception' does not mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed . . . when they approved the American Declaration. The legal implications of the clause 'in general, from the moment of conception' are substantially different from the shorter clause 'from the moment of conception', as appears repeatedly in the petitioner's briefs.³⁴

The Commission held further:

However, accepting *gratia argumentandi*, that the American Convention had established the absolute concept of the right to life from the moment of conception - it would be impossible to impose upon the United States Government or that of any other state member of the OAS, by means of "interpretation" an international obligation based upon a treaty that such state has not duly accepted or ratified.³⁵

The majority concluded that the declaration allowed each state to determine in accordance with its own domestic law the point at which the state believes it is necessary to provide protection to the unborn.

The Declaration of the Rights of the Child³⁶

The Declaration of the Rights of the Child was adopted by the General Assembly in 1959, and it states in its preamble amongst others as follows: "...the child, by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection, before as well as after birth."

³³ Para. 18 of the report.

³⁴ *Baby Boy*, note 29 above.

³⁵ Para. 31 of the Report.

³⁶ Declaration of the Rights of the Child was proclaimed by General Assembly Resolution 1386 (XIV) of 20 November, 1959.



The Declaration also states in Principle 4 as follows:

The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

A combined reading of the preamble and the Principle 4 of the Declaration suggest that a child is legally recognised from the period of his/her conception. The preamble offers a child *appropriate legal protection* while principle 4 offers him/her *pre-natal and post natal* care. But this has been subjected to various conflicting interpretations. While some jurists hold this as protecting the right to life of the unborn, others have viewed it differently. After giving the survey of the draft history³⁷ of the Declaration, Philip Alston submitted that there is no definitive conclusion to be drawn with respect to the status of the unborn child in the Declaration on the Right of the Child. He said:

... the 'special safeguards' which are referred to in the preambular paragraph, all relate to children in general and there are strong grounds for arguing that in light of the preparatory work, the wording itself, and the subsequent interpretation, the only explicit concern is with children after, rather than before, birth.³⁸

In addition, the statement "before and after birth" appears in the preamble. Thus it carries less weight than what is actually contained in the text. It has been said that preambular statement is just "a statement of purposes in the form of general declarations relating to the object and goal of the treaty and

³⁷ According to the Vienna Convention on the Law of Treaties, the *travaux preparatoires* constitutes a "supplementary means of interpretation" and that recourse to such materials would only be had, either, in order to confirm the ordinary meaning of the terms of the treaty, or where the meaning is ambiguous or obscure. See UN Doc. A/Conf.39/27 (1969) Art. 32.

³⁸ P. Alston, "The Unborn Child and Abortion under the Draft Convention on the Rights of the Child" (1990) 12 (1) *Human Rights Quarterly* 161.

sometimes expressing a veritable political program."³⁹ "It does not form part of the operative text and at the same time has no force of law."⁴⁰ All these facts put together, the conclusion therefore, is that the Declaration does not appear to protect the unborn.

Convention on the Right of the Child⁴¹

The Convention on the Right of the Child that was adopted in 1989 defines the child as every human being below the age of 18 years. The convention does not mention the unborn nor does it offer any inference to the unborn child in its definition and it's Article 6 which provides thus: "state parties recognise that every child has the inherent right to life and shall ensure to the maximum extent possible the survival and development of the child."

Both the *travaux preparatoires* and the interpretation by its expert treaty body make it clear that the Convention on the Rights of the Child (CRC) does not recognise the right to life until birth. The contention that the CRC recognises right to life before birth is found in Paragraph 9 of its Preamble, which provides:

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

This has been interpreted to be erroneous by many international jurists and human rights analysts. According to Ronda Copelon *et al.*⁴²:

³⁹ Nguyen *et al.*, *Droit International Public* 122 (3rd ed. 1987) quoted in P. Alston, *ibid.* at footnote 56.

⁴⁰ In the Southwest Africa Cases (2nd Phase) of 1966, the International Court of Justice stated that the Preamble of the United Nations Charter constitutes the moral and political basis of the legal provisions contained in the operative part. But, such considerations are not, in themselves, rules of law. See ICJ Rep. (1966), at 5.

⁴¹ Convention on the Rights of the Child, G.A. res. 44 U.N. GAOR Supp. (No.49) at 167, U.N. Doc. A/44/49 (1989) entered into force on September 2 1990.

⁴² See R Copelon *et al.*; "Human Rights Begin at Birth: International Law and the Claim of Foetal Rights" (2005) 13(26) *Reproductive Health Matters* 122.



This (paragraph 9 in the preamble) reflects, at most, recognition of a state's duty to promote, through nutrition, health and support directed to the pregnant woman, a child's capacity to survive and thrive after birth. The *travaux* make (sic) clear that this duty must not affect a woman's choice to terminate an unwanted pregnancy.

As originally drafted, the preamble did not contain the reference to protection "before as well as after birth." But the Holy See led a proposal to add the phrase, at the same time stating "that the purpose of the amendment was not to preclude the possibility of an abortion."⁴³ Although the words "before or after birth" were accepted, their limited purpose was reinforced by the statement that "the Working Group does not intend to prejudice the interpretation of article 1 or any other provision of the Convention by States Parties."⁴⁴

The language of the definition of "a child" in Article 1 is also unequivocal. It states: "For the purposes of the present Convention a child means every human being below the age of 18 years..."

Thus, it is clear that the definition of "a child" for purposes of the Convention does not include a foetus. In addition, the Committee on the Rights of the Child, the expert treaty body that interprets and applies the Child Rights Convention, likewise denies a right to life to the foetus. The Committee has expressed repeated concern over adolescent girls' access to safe abortion services and the need for states "to provide access to sexual and reproductive health services, including safe abortion services."⁴⁵

⁴³ UN Commission on Human Rights, Question of a Convention on the Rights of a Child: Report of the Working Group, 36th Session, UN Doc. E/CN.4/L/1542 (1980).

⁴⁴ UN Commission on Human Rights, Report of the Working Group on a Draft Convention on the Rights of the Child, 45th Session, E/CN.4/1989/48 at p.10 (1989), quoted in Jude Ibegbu, *Rights of the Unborn in International Law* (2000) 145. See also, LeBlanc LJ. *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights*, London, University of Nebraska Press, 1995, p. 69.

⁴⁵ Committee on the Rights of the Child, General Comment No.4: Adolescent health and development in the context of the Convention on the Rights of the Child (33rd Session 2003) at Para. 31, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 12/05/2004, UN Doc. HRI/GEN/Rev.7.

In any case, our argument above relating to the status of the preambular section of a convention or treaty may hold to suggest that the convention has no intention of protecting the unborn.⁴⁶ It is therefore clear that neither the text of the Convention itself, nor any of the relevant circumstances surrounding its adoption, lends support, either of a legal or other nature, to the suggestion that the Convention requires legislation to recognise and protect the right to life of the foetus.⁴⁷

African Charter on Human and People's Rights⁴⁸

The African Charter on Human and People's Right which was adopted in 1981 also declares in its Article 4 thus: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be deprived of this right."

Since this Charter in other Articles referred to individuals, there is no convincing reason to regard this isolated Article 4 as applying to unborn child.

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa⁴⁹

The position of African Charter on the possible extension of the right to life to the unborn can be seen clearly in the wordings of the Protocol to the

⁴⁶ The preamble "does not possess any obligatory force" of its own. Thus, for example, the fact that the preamble of the UN Charter begins with the words "we, the peoples of the United Nations..." is of strictly political significance and could not be used as the basis for a legal argument seeking to equate, for example, peoples and states parties to the treaty. See P. Alston, note 36 above.

⁴⁷ Philip Alston concluded his analysis of international protection of the unborn thus: "While recognising that the foetus is deserving of appropriate protection, its right to life *per se* is not recognized. Moreover, the rights of the mother (including those to life, mental and physical health, and privacy) recognised by a wide range of other international human rights treaties, are fully preserved by the savings clause contained in Article 41 of the Convention." The matter of abortion is therefore left to each state to deal with in light of its own perceptions of the most effective means of balancing the conflicting rights and interests involved. P Alston, note 79 above, 176.

⁴⁸ African Charter on Human and People's Rights, also known as Banjul Charter was adopted on June 27, 1981. OAU Doc.CAB/LEG/67/3 rev.5, 21 LLM. 58 (1982). It entered into force on Oct. 21 1986.

⁴⁹ AHG/Res. 240 (XXXI) 31st Sess. (11 July 2003).

Charter. The Protocol is set to protect the rights of African women in all ramifications. It recognises in Article 14, the duty of the state to take "all appropriate measures . . . to protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus",⁵⁰

This Article 14 clearly shows that the protocol allows abortion, (therefore does not recognise the right to life of the unborn). Therefore, if the protocol is read together with the Charter, the two instruments make clear that the right to life referred to in the African Charter is not meant to apply prenatally or to protect a foetus where that would contradict the right of women to abortion. As a result, one may safely assume that the right to life does not extend to unborn in both African Charter and the Protocol to the African Charter on the Rights of Women.

European Convention on Human Rights⁵¹

The argument on whether Article 2 of the European Convention on Human Rights which provides that "everyone's right to life shall be protected by law" extends to an unborn child came up before the European Commission on Human Rights in the case of *Paton v. United Kingdom*.⁵² The Commission held that the word "everyone" means persons actually born. That the word "everyone" in article 2, and elsewhere in the Convention, did not include foetuses.⁵³ Further, recognising the inseparability of the foetus and the pregnant woman, it gave precedence to the woman's rights under Article 2 by declaring as follows:

⁵⁰ (Art.14(2) (c).

⁵¹ The Convention for the protection of Human Rights and Fundamental Freedoms also called the European Convention on Human Rights was adopted under the auspices of the Council of Europe in 1950 to protect human rights and fundamental freedoms in Europe. This regional treaty is referred to here to illustrate the similarity in the interpretation of provision of similar treaties in Europe. Though the application of this treaty may not be directly applicable to the selected jurisdictions, the discussion may nevertheless give an insight into what obtains in other jurisdictions which may be relied upon as persuasive authority when necessary.

⁵² (1980) 3 EHRR 408.

⁵³ *Paton v UK*, App. No. 8317/78, European Commission on Human Rights, 13 May 1980, 3 European Human Rights Rep.408 (1981), (Commission report) para. 7-9.

The life of the foetus is intimately connected with, and it cannot be regarded in isolation of, the life of the pregnant woman. If Article 2 were to cover the foetus and its protection under this Article were, in the absence of any express limitation, seen as absolute, an abortion would have to be considered as prohibited even where the continuance of the pregnancy would involve a serious risk to the life of the pregnant woman. This would mean that the "unborn life" of the foetus would be regarded as being of a higher value than the life of the pregnant woman.⁵⁴

Paton's case was followed in the case of *R.H. v. Norway*⁵⁵ and *Boso v. Italy*.⁵⁶ All these cases point to the same fact that at present, there is no recognition of the right to life for the unborn. Against this background, various international law analysts and commentators have made submissions and suggestions regarding the status of foetus or unborn in international law. For instance, Gillian Douglas has submitted that there is yet little international consensus on any need to protect the unborn child and therefore suggested that the onus lies on individual States to work out their own positions.⁵⁷ Similarly, Philip Alston agrees that, while there is no basis for asserting that the notion that human rights inherent in the unborn child has been authoritatively rejected by international human rights law, there has been a consistent pattern of avoiding any explicit recognition of such rights, thereby leaving the matter to be dealt with outside the international legal framework.⁵⁸

In their own analysis on the status of the foetus in international law, Ronda Copelon *et al.* observed that the arguments against recognising rights before birth (i.e. foetus right to life) has many practical and theoretical foundations. These include the scientific or medical uncertainty of stating when human life begins, and the philosophical and religious diversity of

⁵⁴ *Paton v UK*, App. No. 8317/78, *ibid.* (Commission report) para 19.

⁵⁵ *RH v Norway*, Decision on Admissibility, App. No. 17004/90, 73 European Commissions on Human Rights Dec. & Rep. 155 [19 May, 1992].

⁵⁶ *Boso v Italy*, App. No. 50490/99, European Commission on Human Rights September 2002, American Declaration, OAS Off. Rec. OEA/Ser.L/V/ II.82, Doc.6, Rev.1 [1948].

⁵⁷ G Douglas, *Law, Fertility and Reproduction* (London: Sweet and Maxwell, 1991), p.39.

⁵⁸ P. Alston, "The Unborn Child and Abortion under the Draft Convention on the Rights of the Child" (1990) 12(1) *Human Rights Quarterly* 161.

opinion worldwide as well as within countries. These have been the basis for rejecting the claim for foetal rights in the past. Yet, these factors continue to exist. Copelon *et al.* however submitted that, in recent decades, the rejection of claims for "foetal rights" has been increasingly grounded, and most significantly so, on their (claims) incompatibility with women's human rights. They suggested that, recognising foetus right to life would reduce women to a human vessel deprived of bodily integrity.⁵⁹

According to Cole and Frankowski, the survey of international human rights instruments and jurisprudence has revealed a considerable lack of agreement among States on inclusion of the foetus as a person or human being for purposes of human rights protection. They contended that even if foetal rights do exist, these are outweighed by the mother's rights to privacy and family life.⁶⁰

It may be reasonable to conclude therefore, that since the international jurisprudence has not given a categorical answer to the question of whether the foetus is included in the universal guarantees of the right to life, and there are also disparities among various municipal jurisdiction regarding the legal status of the foetus; it is appropriate to allow each jurisdiction to determine on its own, the legal status and right to life of the unborn.

Conclusion

The question as to whether the unborn has a right to life is clearly not favourably answered in the international law and the courts of various jurisdictions of developed democracy have refused to recognise foetal personhood. There are little or no efforts both at the international and municipal level to advocate the right to life for the unborn. This fact is underscored by the fact that such recognition of foetal right to life would stand in contradistinction to the right of women to abort their unborn, as the

⁵⁹ R. Copellon *et al* "Human Rights Begins at Birth: International Law and Foetal Protection" (2005) 13 (26) *Reproductive Health Matters* 129.

⁶⁰ G. Cole and S. Frankowski, *Abortion and Protection of the Human Foetus: Legal Problems in a Cross Cultural Perspective* Martinus Nijhoff, Netherlands (1985), 1.

latter would amount to intentional homicide or murder. This would be contrary to morality, religion and the law.

It is our contention however, that the unborn should not be regarded as mere clot of blood or disposable organism whose life is determined by the pregnant women at will. There is need for law to recognise the unborn and to afford them legal protection against unwarranted interference and intrusion. It is submitted that the only justifiable or excusable circumstance under which the right of the unborn may be subjected to the wishes of the pregnant women is for the purpose of protecting the right to life of such women. The Unborn is no doubt a potential human being which in the least is entitled to legal protection. It is unfortunate that the laws of various countries, including the international human rights instruments, have refused to accord them legal personality.

The non-recognition of the legal personality of the unborn/foetus leads to an inevitable illogicality inherent in the concept of a legal person in law. The *Black's Law Dictionary* defines a person simply as a human being.⁶¹ The question is whether the unborn/foetus are human beings. It may be argued that biologically speaking, embryo/foetus lives and therefore qualifies as a potential human being. However, being biologically human does not *ipso facto* qualify the unborn as a person under the law.

John Salmond was right when he said regarding personhood in law:

So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. Any being that is so capable is a person, whether a human being or not, and no being that is not so capable is a person, even though he be a man. Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance and this is the exclusive point of view from which personality receives legal recognition.⁶²

⁶¹ B.A. Garner, *Black's law Dictionary*, 8TH edition, (USA: Thompson West, 2004).

⁶² J. Salmond, *Jurisprudence* 318 G. Williams (ed) 10th ed. 1947.

Therefore the issue is not whether the unborn/ foetus is a human being or not, but that the law does not confer on it legal personhood. The criterion for conferment of personhood by law is obviously arbitrary. Such criteria change with the tide of legal development, advancement in civilisation and other variables. It is on record that women and slaves were once not considered as persons in law. In *Dred v. Scot* the US Supreme Court ruled that a black man was not a person and could therefore not have a right of audience in court.⁶³ Similarly, in 1876, a British Court ruled that women were persons in matters of pains and penalties, but were not persons in matters of rights and privileges. This decision was based on the British North American Act (BNA Act) of 1867 which did not recognise women as persons under the law. In 1928 the Supreme Court of Canada, following the same BNA Act, ruled in a unanimous decision, that women were not "persons" and therefore were not eligible to be appointed to the Senate.⁶⁴

All these decisions became "judicial fallacies" with time. Nowadays, women are not only legal persons but are being treated equally with their male counterparts. History has even recorded a woman as a prime minister in Britain where the discriminatory law originated. In addition, women have held and are still holding many special political and judicial positions in the present world. It is hopeful that one day, and soonest we pray, the present legal theory regarding the personhood of the embryo would change to recognise the unborn as a legal person with a protectable right to life. Until then, the unborn has neither legal personality nor the right to life under the law.

⁶³ *Dred v Scot* [1856] 60 US.393.

⁶⁴ This decision was appealed against to the Privy Council which later granted women the legal personhood and the right to be appointed to Senate. See the Library and Archives Canada, RG 125, vol. 563, file 5426.