

Written Contribution on General Comment for the Right to Life

to

United Nations Committee for Human Rights

Common violations of the Right of Life

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INTRODUCTION

The Right to Life is the first basic Human Right that is an elementary precondition for all other rights, but following concretely from two other abstract fundamental principles of Human Rights: The dignity of each and the equality of all human beings. Therefore these principles of Human Rights need to be understood and applied accordingly in order to decide controversial discussions. In particular topics like abortion, genetic engineering, euthanasia and organ transplantation (brain death) require an explanation in order to maintain the Right to Life as a clear Human Right. Exceptions that were introduced due to some actual social opinions mostly served as model for other exceptions and grew up to a widespread abuse and extensive breach of Human Rights. In case of abortion this was first allowed as an exception to prevent unreasonable hardships, although no mother was ever allowed to kill her born child due to these reasons, and although one may not solve any social problem by killing human beings. Today some people want abortion to be introduced as a new Human Right, and utilitarians¹ require to allow a mother to kill her child up to some weeks after the birth. They try to establish this with the fact that there is no essential difference between a child newly born compared to some weeks before birth, when an abortion still was allowed. Also it was discussed to distinguish the beginning of valuable human life with features as self-confidence¹, with accordingly consequences also on temporarily sick peoples or such with some 'severe handicaps'. All such unthinkingly criteria lead to requests to 'allow somebody to die' if these conditions seem to be satisfied for some sick people - with a needed certainty of the diagnosis that might be discussed.

By this the Right to Life itself becomes a matter of probability.

Laws for exceptional situations were misused and become common violations of Human Rights.

In presence or history of the humanity exists a commonly pattern to justify serious violations of Human Rights. Mostly this was accomplished with the same argument:

“In the eyes of the law .. the slave is not a person.” (Virginia Supreme Court decision, 1858),
“An Indian is not a person within the meaning of the constitution.” (American Law Review, 1881),
“The statutory word 'person' did not in these circumstances include woman.” (British Voting Rights case 1909), “The Reichsgericht itself refused to recognize Jews .. as 'persons' in the legal sense.” (German Supreme Court decision, 1936), “The law of Canada does not recognize the unborn child as a legal person possessing rights.” (Canadian Supreme Court, 1997) and many others more.

Therefore we have to find answers on these questions:

1. Who is a human being, since when, how long and why?
2. When arises or disappears comprehensive human dignity?
3. With which arguments indivisible human dignity must be defended?

¹ Peter Singer, 'Individuals, Humans, Persons', 1994 ; 'Practical ethics', 3. edition 2013, p. 289

RECOGNIZABLE CHARACTERISTICS OF HUMAN BEINGS

The first question for who is a human being is too essential to let it be decided by politics, philosophy, ideologies or even democracy. Also it seems that religions and worldviews are so much different, that it is impossible to derive from them commonly accepted answers. On the other hand it is not sufficient simply to declare, that human dignity is something that will appear progressively after conception up to the birth of a child. With this it is not defined what there is growing, and, if there are different degrees, how to measure it. The suggested essential difference between a born child and a fertilized egg stays unclear. With this argumentation the human dignity seems to be something supernatural that will be subject to endless and undecidable discussions. Therefore concretely characteristics are needed.

First some unsuitable characteristics shall be discussed. Birth was proposed as to be the beginning of the validity of human rights and dignity. Indeed the Universal Declaration of Human Rights declares in Article 1 '*All human beings are born free and equal in dignity and rights*'. Nevertheless the purpose of this expression is not to define the birth as the beginning of human dignity but instead to show the inheritance of dignity and rights for all human beings. In the same way as no one can change the circumstances of his own birth afterwards there should not exist any legal influence on these claims. This is valid although the birth can be introduced by other persons at any time during pregnancy. Also the CCPR declare in Article 26 I that every person is equal before law without any discrimination to the equal protection of the law. The law shall prohibit any discrimination on any ground such as .. property, birth or other status. Commonly here 'birth' is understood as a kind of social status or legality of birth, but the word itself is not limited on that. Discrimination is prohibited independently of whether one has property or not, of whether one is born or not. So with this literally interpretation of Human Rights unborn children have to be protected from discrimination.

Birth is a change of feeding and oxygenation of the child, nothing more. The same applies to the implantation in the womb (nidation). Also a unborn child is developed in its sensitivity of touch, pain, acoustic, light, temperature and so on. As an general conviction there is no essential difference between the nature of a child after birth compared to shortly before. Therefore the event of birth is unsuitable to establish human dignity. This is confirmed by the preamble of the International Covenant on Civil and Political Rights, by the expression: 'Recognizing that these rights derive from the inherent dignity of the human person', as well as in the Declaration of the Rights of the Child by the expression in the preamble: 'Whereas the child .. needs special safeguards and care, including appropriate legal protection, before as well as after birth'.

Another opinion declares a indivisible unity between the pregnant woman and its unborn child. Therefore the child couldn't claim any rights for itself in opposition to its mother. Instead she is admitted to decide anything regarding her own body, including the child. This opinion ignores all biological facts that show up the individual identity of the unborn child. It has its own bloodstream, sensitivity independent of its mothers sensitivity, and all its organs had been created before the 5th week. In the 11th week it starts with thumb sucking, showing that it is able to perform directed movements and obviously has feelings by this. It is drinking amniotic fluid and urinating. As the main fact each of its cells owns its individual heredity in DNA, different to every other human being, and different to its mother as well. This leads to the consequence that the right of a woman on her stomach ends there, where the stomach of her child begins, no matter where this child is staying. Furthermore Human Rights condemn all serfdom and slavery according to Article 8 CCPR. This also needs to be observed in case of pregnancies.

As already shown would the requirement of self-confidence, intelligence or vitality also touch adult persons. Comatose patients possess neither self-confidence nor the ability to think or an independent viability, although many of them end up in a healthy state without any doubt on their human dignity. Viability of a person is dependent on the particular circumstances, which are sometimes maintained only with great effort. A fertilized egg can live during the preimplantation period up to 12 days outside the womb as can be observed on any in vitro fertilization. An infant is

unlikely to survive such a period when it would be exposed in the jungle alone. Obviously, therefore, the viability can not be seen as a criterion for humanity.

But it appears, that some basic knowledge on biology, logic and some honesty is enough to find a clear answer, that allows viable conclusions, if personal or commercial reasons for a different answer are removed. All these facts validate the begin of human dignity with the moment of conception. At first we have to confirm that any human can only descended from humans, and is at no time anything of another kind or species. Then I want to cite the so-called SCIP-criteria (in German: SKIP): Belonging to the *species* as a human being, *continuity* of development as a human being without any turning points, the *identity* argument, after which the fertilized egg is the same individual as later the adult man and the *potentiality* of further Development as a typical human being². Thus, humanity begins at conception, and then develops in a typical human way with no further cuts until to the death. But as a logical closed subset of them I propose a compilation of 3 characteristics similar to the SCIP-criteria. The following characteristics apply only to humans, and to all human beings. So each of them is necessary and together they are sufficient to identify human beings (not to define humanness as this is undefinable):

a) Vitality: Everyone lives. Biological life is recognized by the ability to metabolism, an energy balance, reproduction, cell division and inheritance. Life is obviously present since conception, and distinguishes from dead or objects.

b) Conformity: Everyone comes from humans and will evolve typically human, according to its hereditary and DNA, provable in each cell since its conception, and different to all other species of live.

c) Individuality: Everyone is characteristically different from all other people, in particular in the genetic information, so that its individuality is recognizable in each cell since conception, and different to all other humans, even to his mother.

The fact that twins are recognized as separate individuals later after conception does not affect the initial individuality of any newly conceived human being, which is the ancestor of these two people. Finally gametes are just the ancestors for all their human descendants, without questioning their own individuality. The timing and manner in which an individual propagates to several individual descendants therefore is irrelevant for uniqueness.

These above 3 characteristics are present since conception. Starting with that date everyone is a complete and wholesome human being, because nothing else lacks. From conception to death the evolution of man is continuous, without significant ruptures and without any change in its value. With this understanding, a pregnancy is temporarily symbiosis of two people. Although these are special life circumstances, but without affects on the nature of the parties. The two humans are recognizable and distinguishable in every cell of their bodies based on their vitality and based their typical human and yet unique individual genes, with their own sex, own bloodstream, its own brain and perception. There are two people with their own rights, which have to be balanced. Both may claim their rights on protection of their human dignity and equal treatment, what justifies at first their requirement on protection of their life and protection against discrimination.

Further consequences of these characteristics on humanity will be obvious. A fertilized egg, frozen or not, is a human being as well as a clone of any human. If a not negligible amount of the genetic material is derived from humans to create living hybrids then they also may claim all human rights. If the health of of these humans is in any way harmed by the genetic manipulations then the responsible persons must be held accountable. Living embryonic stem cells are able to develop as a human being usually does, and descended of a human being. Also the European Court (EuGH)³ recognized them as human beings. Although the therapeutic value of their usage was discussed for a long time it was not possible to use them for such purposes due to the fact, that it was impossible to prevent them from creating cancer. Instead it had much more effort to use adult stem cells, which can easily extracted

² Müller-Terpitz, 'Der Schutz des pränatalen Lebens', 2007, S.49 ff; Friauf/Höfling/Höfling GG Art. 2 Rn 33

³ EUGH Rechtssache C-34/10 2011-10-18

from cord blood. These don't create cancer and can't evolve as a new individual. Therefore adult stem cells can't be identified as human beings and their usage or extraction doesn't touch any human right.

Also death must not be defined in another way as the complete absence of life in a biological sense (see Vitality). It is inadequate to define death in a special way just to enable organ transplantations in cases that would violate any Human Rights if the person would still be alive. Also there are more and more indications that the common criteria used to define a kind of 'brain death' are whether definitive nor is the brain damaged in an amount that prevents any further life. The American Academy of Neurology (AAN) has not been satisfied by the mere assertion, that with the diagnosis of neurological processes of the brain death the irreversible destruction of the brain can be established. Therefore they let autopsy the corpus of 41 patients after the organ removal who were diagnosed in advance as brain dead. To the surprise of the doctors here they found only slight brain damage and not a single case of irreversible destruction of the brain. The judgment of the AAN is devastating: "Neuropathologic examination is not diagnostic of brain death."⁴ As one further example Prof. Cicero Galli Coimbra has clearly demonstrated for the apnea test, the core study of brain death diagnosis, the limits of its diagnostic value⁵.

As a second example Dr Alan Shewmon wrote regarding his patient Jahi McMath⁶: „Clearly Jahi is not currently brain dead. Yet I have no doubt that at the time of her original diagnosis, she fulfilled the AAN diagnostic criteria, correctly and rigorously applied by the several doctors who independently made the diagnosis then. That diagnosis was even backed up by two ancillary tests: an EEG that was reportedly isoelectric and a radionuclide scan that reportedly showed no intracranial blood flow. A likely explanation for the discrepancy (in fact the only explanation I can think of) is that (1) the standard clinical diagnostic criteria are not as absolutely 100% reliable as commonly believed, and (2) radionuclide blood flow studies are not sensitive enough to distinguish no flow from low flow“. Indeed it seems to be unsure whether 'brain-dead' patients really do no longer feel any pain. In any case the pain therapy will be interrupted to perform the diagnostic tests. By it was reported that while the tests and the extraction of organs the body is sweating and under tension, also an enhanced amount of adrenalin was found in the blood. All this are clear symptoms of pain.

Independent of all these circumstances it is no violation of human rights if a person confirms to a transplantation of his own organs to save someones life, no matter of whether the donor is alive or not or whether he will survive the organ transplantation or not. This applies according to Art.1 CCPR, also here I want to quote Jesus with: 'Greater love has no man than this, that a man lay down his life for his friends' (John 15,13).

But as an inevitable consequence people have to be enlightened about all these uncertainty before they agree to any organ transplantation. Secondly nobody may allow this in representation of any other person. This decision is too close connected with the Right to Life and personal freedom. Thirdly one may allow a transplantation under the condition that first his death is clearly recognized, not only but also because he wants to be sure not to experience any pain. Here we have to admit that the definition of diagnostic methods were too much driven by the goal and need to be corrected.

Finally we have to admit that a human being is dead when the dying process has finished, not earlier. Nobody has a right on the organs of someone else, no matter on how urgent this request is.

4 Wijndicks, E.F.M. et al (2008): Neuropathology of brain death in the modern transplant era. *Neurology* 70, 1234-1237

5 Mattei, R. (2006): *Finis Vitae*, 113-145. Coimbra, The Apnea Test – a Bedside lethal Disaster

6 Shewmon, D.A., (1998): Brainstem Death, Brain Death and Death, *Law & Medicine* 14, 137ff.

HUMAN DIGNITY AS FOUNDATION OF INHERENT RIGHTS

One may well concede that unborn children and also fertilized ova already may raise a certain claim on humanity. But are these therefore already equal human beings with fully qualified dignity? Aren't here drawn unrealistic conclusions that don't meet real human needs? The fertilized egg still doesn't feel anything. Is it not just a kind of 'pregnancy tissue', or even some kind of 'vegetables' (as some physicians call 'brain dead' patients..)?

In fact, it needs to be well-founded if all humans starting with their conception up to their dead may claim their dignity to be inviolable, and may claim a protection of their life in an equal way without any discrimination, meaning by the same laws, due to the same reasons and with equal consequences on any violation. But this foundation exists really.

Obviously, the face of a baby with his big eyes and his clumsy moves wakes up naturally emotions and protective instincts. A fertilized egg is unable to do that, therefore our natural motivation suffers to recognize them as full-fledged human beings. But lack of emotions are not an appropriate criterion to judge on human dignity. We have strongly to be aware of this. Disfigured adults or disabled people often fight against similar social exclusion, but all this may not have any legal relevance.

In the origin the human dignity is derived from the Christian understanding that man was created in the image of God, and refers appreciation and dignity from God's love that remains independent of all individual characteristics. In a secularized society, which is both doubted the existence of God and of His appreciation of the people that reasoning was criticized as inadequate, especially where the recognition of human dignity would cause some efforts. Utilitarians already argue that all intuitive respect for human dignity is just following from education or religious beliefs.

But there is another, substantial justification, which should be comprehensible even for atheists. The experiences with the Nazi dictatorship or other totalitarian systems made obvious that unpopular people could be deprived of all human rights if these just were declared as 'subhuman'. To this purpose Hitler also used animal metaphors and comparisons of pest control. In this way an attempt was made to justify the murder of Jews, disabled people and political opponents. In order to prevent such misanthropy in future and thus legalized deprivation of fundamental human rights, the inviolability of human dignity was enshrined in the German Constitution after the second world war. If anyone is allowed to define who is 'person in the meaning of human rights' and who is not, then he could arbitrary decree on all human rights. Each human being could be excluded from human rights and fundamental freedoms. Even democratic majorities against such misjudgments are not immune.

By relativization of human dignity all human rights will be relative with respect to every human being.

The indivisible human dignity with the widest possible scope is a necessary prerequisite to defend all other human rights.

The indivisible human dignity, therefore, must be respected and protected even for unborn human beings. And if this shall be more than a set phrase then this must establish the claim on all other Human Rights as well.

PROTECTION BY LAW

Protection by law can be accomplished either directly by penalty or indirectly by preventing preconditional circumstances that would enable inappropriate behavior or by offering benefits on appropriate behavior. Only offering benefits or applying public relation measurements means to accept any violation of a protected person. If there is a stringent human right to protect this can never be sufficient in any way, instead it is only acceptable as accompaniment to a clear penalty.

Any Human Right that can be violated without any penalty is none.

The penalty on any violation of the Rights to Life shall be independent of the person of the victim.

Any dependence between the degree of protection and the victims person is a serious discrimination.

In Germany it was tried to reduce abortions by an offer of consulting services as precondition for a abortion without penalty. Reason was the hope to convince women in consulting sessions not to abort them if they would get information regarding the human dignity of the child, as well as offers for further support in pregnancy and education. The result was sobering. Most consulting organizations were not willing to convince any woman to keep her child. Instead they only explained how easy to perform an abortion and helped them on the preparations for it. Partly due to their conviction that an abortion in quite all cases would be the best solution for a woman, partly due to own commercial interests, as the same organizations maintained own abortion facilities. Overall there was no essential reduction of abortions observable since this law was introduced about 20 years ago. Instead the society was used to think about abortion as a usual medical service, supported by the state.

Penalty in case of abortion will be effective, despite of the repeated opposite statements. Nearly no woman is interested in an abortion itself. Mostly they try to prevent difficulties from themselves or their children, trying to save a wanted lifestyle. But if they'd have to expect a prison penalty in case of an abortion then their targeted lifestyle would be destroyed as well. It is obvious that the abortion therefore will no longer appear as a solution to them. Also I want to emphasis that it was a widespread error to think that many women would suffer and die due to unsafe abortion methods if abortion is not allowed. In countries such as Chile and Ireland abortion is prohibited. Nevertheless these states are global and regional pioneers in the fight against maternal mortality, because they have implemented the measures mentioned.⁷

Of course this needs to be supplemented by additional measurements. Real support should be offered, also with appropriate consulting. The motivation to seek such counselors can be easily enhanced if the penalty on abortion will be reduced by law in case the woman had a meeting with the counselor. Furthermore it seems to be advisable to introduce a compulsory registration not only for the birth but also for detection of pregnancy. Means for detection of pregnancy may be applied only by doctors.

Classical as well as genetic prenatal diagnosis became a main reason for late abortions due to any supposed diseases. Estimated 90% of all children with trisomy 21 are aborted today in Germany. The conditions of genocide are fulfilled. These children obviously feel pain while their abortion, without any anesthesia, what definitely violates the prohibition of torture in Art 7 CCPR. Their mothers didn't want an abortion, but many are convinced by the physicians to do so. Therefore in order to prevent late abortions due to prenatal diagnosis it seems to be a solution to require the medical confidentiality also to the mother and relatives of the unborn child regarding all diagnoses without any available therapy before birth. Also genetic diagnosis on unborn children must be prohibited as there is no benefit for the children itself.

Roughly calculated the German birth deficit would not exist if there were no abortions. According to UN statistics⁸ no longer overpopulation is seen as a problem of future, but instead subpopulation. Latest in 2100 the growth of the world population will begin to decline in worldwide mean values. Already in 2050 Russia and China have to expect only about 50% of the population compared to 2010. This will be a serious problem, finally world wide. As the WHO gives numbers of estimated 40 mio abortions p.a. this seems to be a main reason on this development. Each year more children are aborted than people were killed in both world wars together. This might be recognized as a new kind of Genocide. It needs to be declared as an violation of Human Rights comparable to torture or slavery (Art 7, Art 8 CCPR).

7 WHO: Trends in Maternal Mortality: 1990-2010 p.32 f.
http://www.unfpa.org/sites/default/files/pub-pdf/Trends_in_maternal_mortality_A4-1.pdf

8 UNO World Population Prospect Demographic Components of Future Population Growth 2013
<http://www.un.org/en/development/desa/population/publications/technical/2013-3.shtml>