

ZAMBRANO, Pilar - SAUNDERS, William L. (Coords.), *Unborn Human Life and Fundamental Rights: Leading Constitutional Cases Under Scrutiny*, Peter Lang GmbH, 2019, 264 pages.

Perhaps at no point since the height of the international push for abortion in the mid-1990's has the issue of abortion as a "Human Right" taken on such force as it is doing right now. Just this month, abortion has been imposed on Northern Ireland by the UK Parliament in one of the most flagrant abuses of democratic processes in Great Britain's History. In the Republic of Ireland, pro-life advocates rightly feel that abortion has also been imposed on them by the European Court of Human Rights. In Jamaica, Poland, Croatia and many other countries around the world, the issue of abortion is currently (or at least very recently been) at the centre of political discourse.

Philosophically and morally, there are few issues which approach the question of defining the substance of what is being argued in such polarising terms as with the abortion debate. The question of whether the unborn child is a human life worthy of protection should be a binary yes or no. Instead, the issue has taken on a life of its own, bringing with it questions of personal and physical autonomy, science, religion, and the worth we should afford to the most vulnerable of our fellow human beings, the unborn child.

Given the heightened relevance of the abortion debate in international discourse in recent years, a book analysing the constitutional traditions and history of the abortion debate internationally is a welcome sight. This is precisely what the reader gets from *Unborn Human Life and Fundamental Rights: Leading Constitutional Cases Under Scrutiny*, edited by Pilar Zambrano and William L. Saunders.

Using Constitutional law experts from 12 different countries, the book essentially divides the subject matter into three distinct categories: common law jurisdictions, Europe and the European Court of Human Rights, and Latin America and the Inter-American Court of Human Rights.

Life, Liberty, Autonomy and the North American Way

The book begins in the United States with William Saunders excellent treatment of the constitutional creativity behind constructing a right to abortion vis-à-vis the express liberty clause of the 14th Amendment. He then talks about the greater impact of judicially dehumanising the unborn child in areas like embryonic stem cell research. Also focused on

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the United States, Prof. Gerald Bradley offers a thoughtful reflection on Judith Thompson's 1971 essay, *A Defense of Abortion*, where she posits that the pro-life position has failed to substantiate that abortion is the *unjust* killing of a human person. Bradley, looking at the Supreme Court's 2016 ruling in *Whole Women's Health v. Hellerstedt*, where the rights of the fetus were wholly subordinated to the mother's freedom to choose abortion, argues that Thompson's question becomes *the* question in the contemporary American abortion debate. He argues that raw power has supplanted reason in justifying abortion.

Dwight Newman takes us to Canada, where he analysis the long-term impact of the Canadian Supreme Court's 1998 ruling in *R. v. Morgentaler*. Not unlike the situation in the United States, *Morgentaler* was decided on the life and liberty clause of its most fundamental source of legal rights, the Canadian Charter of Rights and Freedoms. Newman looks at how that decision has defined fundamental rights dialogue in Canada by grounding liberty in the principle of autonomy. In doing so, the reasoning used in *Morgentaler* has led to the permissive treatment of other moral ills like drug injection sites, prostitution and euthanasia. This procedural creep in Canada, Newman argues, opens Canada to the much larger implications caused by a personal autonomy based jurisprudence.

The European Melange

Unlike North America and many of the other common law jurisdictions, the legal position of the status of the unborn child in European jurisprudence is far more diverse and divisive. Nowhere is this conflict more evident than perhaps Italy, where Prof. Salvatore Amato examines the grab bag that is Italian jurisprudence about the unborn child. This conflict, he argues, stems from the Constitutional Court's 1975 ruling which found that while the fetus is a human individual, it is not a human person. This has resulted in inconsistent rulings where the unborn child has at times received greater legal protection while at others lesser treatment. As he so masterfully establishes, this contradiction in the law creates significant problems in striking a balance between protecting human life on the one hand and regulating emerging reproductive technologies on the other.

Prof. Angel Gómez Montoro provides a clear, concise and exemplary history of the gradualist reduction of the rights of the unborn child in Spain, largely through the continuing legislative and judicial dialectic often predicated by the legislative intervention of socialist governments. The degradation of protections for the unborn, Prof. Montoro argues, has essentially made *Prudentia Iuris*, N° 88, 2019, págs

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any such protections meaningless, as has been highlighted in the legislation and litigation surrounding reproductive technologies and research on the embryo.

Poland provides a wholly different picture, as demonstrated by Jerzy Ferencz and Prof. Aleksander Stępkowski. The authors follow the history of abortion in Poland where liberal abortion laws were imposed on the nation by the totalitarian Nazi and Soviet regimes. The chapter then looks at the emergence of Poland's robust right to life jurisprudence, highlighted by the Constitutional Court ruling in *K 26/96* which recognised the right of the unborn child prenatally and prohibited abortions for social reasons. It also reviewed the various Acts promulgated by the post-Communist Polish parliament and the 1997 Constitution. This chapter provides a positive contrast to the general trend followed by other nations highlighted in the book; whereby judicial intervention provided the basis for the protection of the unborn child.

The highly respected pro-life barrister and professor William Binchy provides an impressive and engaging breakdown of the situation in Ireland and how domestic court decisions coupled with outside campaigning forces, including international agencies and the Grand Chamber of the European Court of Human Rights, held great sway over public opinion leading up to the May 2018 referendum on abortion. Intriguingly, Prof. Binchy names names, specifically calling out Amnesty International and the Open Society Foundation for their tampering in Irish domestic affairs. He nonetheless offers hope, noting that the Eighth Amendment has saved thousands of lives and that pro-lifers have already committed themselves to the challenge of righting this wrong and restoring full protection for the lives of our unborn brothers and sisters.

Latin America, International Law and Textual Hermeneutics

Prof. Juan Cianciardo opens the book's examination of Latin America. He looks at the Inter-American Court of Human Rights judgment in *Artavia Murillo et al. v. Costa Rica*, where the Court found Costa Rica to be in breach of its treaty obligations by prohibiting *in vitro* fertilization. Prof. Cianciardo argues that the Court has exceeded its jurisdiction, pointing to the paradox in its reasoning that scientific disagreements in relation the value of unborn human life should impose upon states subject to the American Convention on Human Rights the obligation to authorise *in vitro* fertilization procedures. One of Prof. Cianciardo's central thesis' in the chapter, one which applies equally to the often skewed and anaemic *Prudentia Iuris*, N° 88, 2019, págs

proportionality test applied by the European Court of Human Rights, is that the Court's ruling was not the only way of reaching its final decision, but it was nonetheless the path that restricted the political choices of the State the greatest. Such an analysis breaches the international legal norms of respecting subsidiarity and finding the least restrictive means of limiting a fundamental right.

Prof. Pilar Zambrano looks at the seismic shift in legal reasoning among the four leading Argentinian Constitutional Court cases dealing with the issue of abortion, and analyses the legal hermeneutic the Court used in coming to such different conclusions using the same international legal sources. She summarises the question of textual interpretation well by arguing that there are only two choices: either fundamental rights are social constructions that precede and determine their own reference, or else their reference -some basic human good- precedes and determines their meaning.

Staying in South America, Professors Alejandro Miranda and Sebastián Contreras provide an excellent commentary on Chile's Constitutional Court's decision which declared the "morning after pill" unconstitutional. The Court based its findings on two principles. The first is that life begins at the moment of conception and therefore, from that point forward, the unborn child is a rights holder enjoying the protections afforded other human individuals or persons. Second, using the *pro homine* principle, the Court is bound, where there is doubt between two positions (in this case whether the "morning after pill" is an abortifacient or not), to choose the position which most favours life. While Miranda and Contreras agree that the Court's reasoning was generally correct, they lament the lack of more solid intellectual underpinning which could survive scrutiny under circumstances such as when a woman who has been raped seeks to use the pill.

Professors Hugo S. Ramírez García and José María Soberanes Diez examine Mexican abortion jurisprudence, positing the thesis that the protection of unborn life in Mexico has not been exclusively the result of general statutory rules, especially constitutional norms, but it has ultimately been shaped by what the authors call creative judges, who interpret and apply these norms. The authors use the term constitutional norms, arguing that the constitutional regime itself does not recognise any justification for the deprivation of any human life, but that an underlying interpretive problem exists which has related to the question of when human life begins. The authors do a superb job navigating and making accessible the complex procedural aspects of Mexican constitutional deliberations, and the interplay

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between Mexico's 31 states, their local constitutions, and how state matters are dealt with at the federal level.

Prof. Luis Castillo Córdova gives an inspired lesson in Constitutional law interpretation from Peru, where he analyses the Constitutional Court's ruling in case *STC N° 02005-2009-PA/TC*, where the Court determined that the distribution of the so-called "morning after pill" was violative of the Peruvian Constitution's protection of unborn life at Article 2.1: "*Every person has the right to life [...] The unborn child is a holder of rights, in any event which is beneficial for him*". Prof. Córdova notes that it is uncontroversial to argue that constitutional court judges within a constitutional system of law play an active role in the creation of law by creating constitutional norms. Using the concept of derivative norms (which are defined as indirectly established constitutional norms which are valid where it is possible to provide a correct constitutional justification for them under a directly established norm) he analyses the Court's reasoning in *STC N° 02005-2009-PA/TC*. He artfully defends the position of the Court by unpacking its two most fundamental points of constitutional interpretation within the aforementioned framework: (1) human life commences with fertilization; and (2) the principle of caution requires that life be protected where there is any uncertainty as to the abortifacient qualities of the "morning after pill".

The book is closed by John Finnis, who in his typical brilliance, provides substantial insight into what the other authors have developed, and provides an impassioned defense of the unborn child. Finnis laments that: "[...] *the entrusting of human rights to the judicial branch of constitutional order has –over the past 50 years– turned out to be at best a thoroughly inadequate means of protecting those rights against popular or legislative abuse or neglect, and at worst has eased the way for strong persons to exercise an abusive dominance over the weakest*".

The book is an excellent resource for anyone interested in the abortion debate, pro-life campaigners, constitutional scholars and those fascinated with comparative jurisprudence. It is a book equally valuable to the university student as it is to the recreational reader. Rarely has an issue polarised societies, courts, and the political class the way abortion has. Too much is at stake not to be informed. In that sense, the book provides an excellent roadmap to perhaps the greatest moral question facing our generation today. It is well worth the read.

ROGER KISKA