



Is there a “right” to have children? An Optimum Population Trust Briefing

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Most of us consider the decision of whether to have children an entirely personal matter. The thought of others being affected or having a say in the decision strikes us as an interference with our privacy. In reality, it is the most public action - in the sense of influencing the lives of others - most citizens will ever take.

Having children, and the circumstances under which we have them, determines the life of the child we have, influences others with whom the child will interact and unavoidably changes the environment. The decision has ripple effects far into the future, influencing the lives of generations to come. If having and raising children were truly a private matter, there would in all likelihood be no standards for parents to adopt or foster children, no prohibitions on incest, no standards to access certain reproductive technologies - indeed there would be no compulsory parental fitness and child education requirements. Far from being a personal or private matter, the decision to have children - to *create people* - is thoroughly “public” (in its original meaning of *concerning the people*). And since procreation is a highly public act, it involves a series of ethical and legal duties, both to the prospective child and to society, which limit the right to procreate.

For many people these duties are intuitive. They are the concerns that lead responsible individuals to prepare for their future child and their parental commitments. We also have an interest in the number and nature of the persons we share society - and its limited resources - with. This notion of the *social contract* is masked somewhat by stable governance; but since competition for scarce resources in a finite space is part of what defines political reality, the introduction of new competitors results in a narrowing of the range - and for some a reduction in the value - of the average claim to resources. This is one of the few areas where Thomas Hobbes and John Locke, fathers of modern political theory, agreed: as population grows, so does conflict, or what Locke referred to as “quarrels and contentions”.

The rights everyone is guaranteed by the social contract often compete with one another. The creation of new persons in a finite space eventually results in either unequal rights (and thus a growing sense of unfairness or injustice) or equal but increasingly limited rights, as spheres of rights overlap. In both cases social tensions and conflict, for example over access to land for housing, result. It also thrusts us into competition with our descendants. Because the world and its resources are finite, to believe that we can enjoy an unfettered procreative right means future generations cannot enjoy the same. This fact alone makes the notion of a limitless procreative right, a privacy right free of limiting duties, self-contradictory and illogical.

But even if we wanted to convert all the world’s resources to the end of a larger, happier, and healthier human population, moral and legal obligations prevent it. Domestic laws, as well as instruments such as the Convention on Biological Diversity or the Convention for the Protection and Preservation of the World Cultural and Natural Heritage, create a duty on others not to interfere with nature and wilderness, and thus create for us a right to it. Access to wilderness is comparable to what Locke termed “natural liberty” - a freedom outside the sphere of humanity, a right not to be trapped in a world of others’ making. Our moral and legal rights to access wilderness and natural biological diversity (including other species), enjoy its benefits, and perhaps even see it *restored*, are at odds with - and arguably outweigh - the “private” right to have an unlimited number of children.

The belief that having children is an entirely personal matter may be promoted by a tendency to view them more in terms of property than personhood. Professor Barbara Bennett Woodhouse, a US authority on family law, has argued that "paternal property rights grew naturally from a patriarchal account of procreation". In this view - one echoed currently in the calls in many developed countries to boost the birth rate for economic reasons - future generations are means to our ends (labour-inputs, for example) rather than ends in themselves.

If the right to have children is not based on privacy, and furthermore is subject to a series of limiting duties, what *is* it based on? One attempt at objectively defining the procreative right - the *replacement* approach - recognises that people ought to be able to replace themselves on the Earth: to create lineage and have a family. This would protect the right to *genetic* or, some would argue, *numerical* replacement (in practice, 1-2 children) but thereafter weigh the right to have more children against competing interests. It would base the procreative right on the distinct and intrinsic value of self-replacement, thereby limit it, and allow competing rights - which the procreative right now dominates under the guise of privacy - to flourish. The process is comparable to how the courts in democratic states have defined freedom of speech to protect particular values, such as political speech, but not others, such as the incitement to violence. The procreative right would thus protect "core" values such as child care, and family and genetic lineage, but beyond these would be balanced against other, wider interests and the public good. Simply wanting a "large family", for example, might fail this wider test.

The idea of basing the value of procreation on replacement is already reflected in the law. While non-binding sources of international law often speak in terms of one's right "to choose the number and spacing of one's children", the Universal Declaration of Human Rights, and sources such the International Covenant on Civil and Political Rights, only protect the narrower right "to found a family". The United Nations Human Rights Committee has interpreted that to mean "in principle, the possibility to procreate and live together". That right in turn is balanced against competing international human rights, such as the right to liberty of movement, choice of residence, continuous improvement of living conditions, environmental hygiene and prevention of disease, all of which limit family size. A national population policy would ideally reflect this more nuanced right.

Foremost for many when thinking about population policy and the law is the spectre of enforcement. In reality the law, as the ultimate expression of social consensus, is capable of guiding our behaviour through a process of agreement and internalisation: we follow the law not merely, and perhaps not even mainly, for fear of punishment but also because it is perceived as *right*. This normalisation process, described by one authority as consisting of "gentle nudges" rather than "hard shoves", can be seen at work in smoking bans or seat-belt laws. In essence, a voluntary population policy - in which the law imbues the act of procreating with legal significance, reflects a consensus that what we value in procreation is replacement, and emphasises the crucial role of family planning - may suffice. Certainly, without a properly defined right, and without "resetting" the social norm to something just, objective and sustainable, the dilemma of self versus society is simply shifted forward. Future generations will not thank us for leaving them an overpopulation problem we were afraid to face up to.

For most of us having children is the most public action - in the sense of influencing the lives of others - we will ever take. Given that law guides our behaviour, a policy that treats procreation as private is regressive, environmentally damaging and peculiarly anti-social: it teaches us to *disregard* others and their interests. Until we have policies that reflect the truly public nature of having children, we will encourage irresponsible procreation, and all the harm it causes.

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