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Managing Editor
Georgina Spencer
Will Foster

Administrator
Samantha Mottram

Telephone
+44 (0)1782 734436

Email
jade@keele.ac.uk

Web
<https://www.keele.ac.uk/kiite/publications/jade/>

Address
KIITE, Claus Moser Building, Keele, ST5 5BG

Article Title: Does Abortion Violate the Right to Life of Unborn Babies?

Author: Ahsan Nisar, Keele University

Institution: Keele University, School of Law

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Abstract

The question of when life begins is a deeply divisive issue, which has been debated to the moon and back without ever truly being answered, or so it seems. This article will critically analyse the reasoning behind the 'Prolife' argument and highlight its arbitrary nature. It will endeavour to examine the relevant legal instruments in order to discern whether the law recognises the right to life of unborn babies. Finally, this article will engage in a theoretical discussion about abortion, i.e. that if unborn babies were to have a right to life, would it be violated by abortion. Through its analysis this article seeks to raise awareness amongst the readers about the fickle nature of the arguments against abortion and advocates for policy

measures which ensure easy access to abortion for women, safeguarding them from the dangers of clandestine abortions.

Introduction

The argument this article will put forward is twofold: firstly, upon critical analysis of the 'Prolife' argument and careful inspection of international instruments and regional treaties, this article will illustrate that unborn babies do not have a right to life. It will show that, although the foetus is not legally invisible, it cannot be afforded the same rights as the mother, for it represents a potential for human life, it is not a human life in itself. Secondly, it will adopt the view that even if the unborn child were entitled to such a right, it is not necessarily violated by abortion. Finally, it will highlight the harms of states adopting laws prohibiting abortion and in doing so impress upon the readers the need for easy access to abortion.

The 'Prolife' Argument

The question of when life begins remains largely unanswered, both in the philosophical and scientific realms and as a result, it is a polarising subject. A premise supporting the right to life of unborn babies is the idea that from the moment of its conception, a foetus enjoys the 'right to life' (European Convention on Human Rights, 1953, article 2). This belief stems from the fact that the ovum and the sperm fuse together to produce a zygote, which is a discrete unicellular, live creature with a complete set of human genes (Williams, 1994, p. 74). This fusion of the two germ-cells (fertilisation) is deemed to be the moment of conception, and the zygote produced is considered to be a human being for all moral reasons.

The aforementioned view is largely subscribed by advocates of the foetus' right to life but as Glanville William points out, the beginning of human life is a complex process and no one-stage can be enshrined as the beginning (Williams, 1994, p. 76). The fusion of the two gametes itself is a multi-stage process, which may take up to 24 hours or more, with no-stage capable of being clearly pointed to as the moment of conception (Williams, 1994, p. 76). Moreover, it can be argued that other stages, such as implantation, when the pre-embryo embeds itself to the womb lining, or the 'primitive streak' (Williams, 1994, p, 77), the beginning of cell differentiation (without which there will be no embryo and the cluster of cells will be reabsorbed and vanish) should be deemed to be the moment of conception (Williams, 1994, pp. 76-77). All of this indicates the arbitrary nature of adhering to such a view. This can lead to the argument that since the beginning of life is an evolving process and pointing to any stage as the beginning is to make an arbitrary choice, the foetus should be considered a 'person' from the moment of conception to preserve the sanctity of human life (Thomson, 1971, p. 47).

However, Judith Thomson categorises such an argument as 'slippery slope arguments' (Thomson, 1971, p. 47) and states, that holding a zygote to be a human being is akin to holding

an acorn to be an oak tree (Thomson, 1971, p. 49), a proposition which would be considered ridiculous by all. Additionally, subscribing to such a view could stop the use of certain contraceptives that prevent the fertilised egg from implanting in the uterus, as it would constitute the taking of life (if life began at fertilisation) (Hicks, 1992, p. 809). The fusion of the two gametes does not produce a person but rather, an organism which, through a process of development, turns into a human being.

International Legal Instruments

Article 1 of the Universal Declaration of Human Rights ('UDHR'), 1948, states that 'all human beings are born free and equal in dignity and rights' (UDHR, 1948, article 1). The use of the terminology 'born' is significant, as it establishes that all human rights begin at birth, and was intentionally adopted to exclude any prenatal application. This is evidenced by the fact that an amendment was proposed in a resolution by the United Nations General Assembly 1948, to remove the word 'born', in part to protect the right to life from the moment of conception. Nevertheless, the proposal was rejected, which goes to show that the unborn child has no right under the UDHR, 1948. The gender-neutral term 'everyone' used in the latter half of the article to define the holders of human rights is only referring to a human who is born (Copelon, et al., 2005, p. 121).

Similarly, the right to life protected under article 6(1) of the International Covenant on Civil and Political Rights ('ICCPR'), 1976, also does not apply before birth. The history of negotiation (*travaux préparatoires*) shows that an amendment was proposed to extend this protection from the moment of conception but was rejected, and the Commission ultimately adopted article 6 of the ICCPR, 1976, with no reference to conception (UN General Assembly resolution, 1948, p. 122). Moreover, the Human Rights Committee ('Committee'), which interprets and monitors state parties' compliance with the ICCPR, 1976, has repeatedly highlighted the harms of laws prohibiting abortion, and has urged states to liberalise laws on abortion, a position that would be self-contradictory if the ICCPR's protection of the right to life (ICCPR, 1976, article 6(1)) extended to life before birth (Copelon, et al., 2005, p. 121).

The Pro Life Campaign have contended that article 6(5) of the ICCPR, 1976, which prohibits the carrying out of a death sentence on pregnant women, implies that the unborn child has a right to life (Pro Life Campaign, 2015). However, a reasonable explanation for this can be inferred from article 7 of the ICCPR, 1976, which prevents a person from being subjected to 'torture or cruel, inhuman or degrading treatment or punishment' (ICCPR, 1976, article 7). The Committee recognises that the prohibition in article 7 of the ICCPR, 1976, covers acts causing both physical and mental sufferings to the victim, and asserts that the death penalty should be carried out in such a way as to cause the least possible physical and mental suffering (UN Human Rights Committee, 1992). In this case, carrying out a death sentence on a pregnant woman is likely to cause her extreme mental suffering. Moreover, it is possible to carry out the death penalty after the baby is born, without subjecting the mother to additional mental

suffering caused by the death of her unborn baby. In light of this, it could be said that death sentences are not to be carried out on a pregnant woman in order to comply with article 7 of the ICCPR, 1976, and not because the unborn child has a right to life (ICCPR, 1976, article 6(1)).

Furthermore, the Convention on the Rights of the Child, ('CRC'), 1990, does not recognise a right to life before birth. A premise arguing to the contrary would be based on paragraph 9 of the CRC's preamble, which mentions, 'legal protection, before as well as after birth' (CRC, 1990, preamble, paragraph 9). The safeguards referred to, deal with states' duty to promote, through nutrition, health and support directed to the pregnant woman, a child's capacity to survive and thrive after birth, which does not translate into the unborn baby having a right to life (Copelon, et al., 2005, p. 122). Although the phrase 'before as well as after birth' was ultimately adopted, its limited purpose was reinforced by emphasising that this was not meant to prejudice the interpretation of article 1 of the CRC, 1990 (Copelon, et al., 2005, p. 123). In accordance with the UDHR, 1948, the definition of a child in article 1 of the CRC, 1990, begins from birth. Additionally, the Committee has continually stressed the need for adolescent girls' access to safe abortion services. In its concluding observations on various state reports, the Committee has acknowledged, that safe abortion is part of adolescent girls' access to adequate health under article 24 of the CRC, 1990 (Copelon, et al., 2005, p. 123). All of this indicates that the unborn child does not have a right to life under the CRC, 1990.

Regional Treaties

The European Convention on Human Rights, ('ECHR'), 1950, has been greatly influenced by the UDHR, 1948. Accordingly, there was no debate on the question of dating rights from conception (Council of Europe, 1975, p. 194). The preamble of the ECHR, 1950, states that the purpose of the Convention is 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration' (ECHR, 1950, preamble). Hence, it is clear that the term 'everyone' used in article 2 (protecting the right to life) of the ECHR, 1950, is consistent with the UDHR, 1948, and thus, it does not apply before birth. Such a view can also be evidenced by the long-standing jurisprudence of both the European Commission on Human Rights ('Commission') and the European Court of Human Rights ('ECtHR').

In *Paton v United Kingdom*, 1980, the Commission rejected the argument that the foetus was protected under article 2 of the ECHR, 1950. It explained that the word 'everyone' in the article or anywhere else in the Convention did not apply to the foetus and highlighted the potential drawback of allowing such a proposition. A similar approach was adopted in *R.H. v Norway*, 1992, and *Boso v Italy*, 2002. Most recently, the issue was raised again in *Vo v France*, 2004. The court refused to extend the right to life (ECHR, 1950, article 2) to the foetus, and discussed that even if such a right were extended, it would have to be limited by the mother's rights and interests. However, what was peculiar about this case is that the mother's interests were aligned with the foetus. As such, there was no balancing act required on part of the court.

Despite this, the court chose not to extend the right to the foetus, demonstrating the strong position adopted by the court on this issue. On a different note, it can be argued that article 12 of the ECHR, 1950, could have been the basis of complaint in *Vo v France*, 2004, enabling the mother's autonomy and freedom to procreate as the focus of legal reasoning instead of the foetus' right to life (O'Donovan, 2006, p. 121).

The Inter-American Human Rights Agreements also do not extend the right to life to unborn babies. Similar to the UDHR, 1948, the preamble to both the Inter-American Human Rights System and the American Declaration on Rights and Duties of Man, 1948 contain the phrase 'All human beings are born free and equal in dignity and rights' (UN General Assembly resolution, 1948, p. 124), indicating that human rights begin at birth. The jurisprudence of the Inter-American Human Rights System rejects the claim that the foetus is entitled to a right to life. This is demonstrated by the Commission's interpretation of article 4 of the American Convention on Human Rights, 1969, which protects the right to life 'in general, from the moment of conception' (American Convention on Human Rights, 1969, article 4) as not conferring a right to life on a foetus (UN General Assembly resolution, 1948, p. 125).

Based on the aforementioned analysis of international law and regional treaties, it is clear that the right to life (ECHR, 1950, article 2) does not extend to unborn babies.

Abortion and the Right to Life of Unborn Babies

Even if the proposition that unborn babies have a right to life is accepted as true, it does not translate into abortion being impermissible. The right to life can be interpreted as a right to be given the bare minimum that one needs for continued life. However, if the minimum one needs to survive is the use of someone else's body, the right to life does not guarantee such a use. Thomson gives the example of a man needing the use of someone else's kidney to survive and states, that the fact that it is the minimum he needs to survive does not entitle him to demand such a use (Thomson, 1971, p. 55). On the other hand, the right to life can also be interpreted as the right 'not to be killed' (Thomson, 1971, p. 56). Returning to the same analogy, the minimum the person needs is the connection to someone else's kidney. Let's suppose he drugs someone, and acquires the use of his kidney, disconnecting the kidney would not violate his right to life, because he was not entitled to the use; the fact that he will die does not mean that we must allow him continued use of the wrongfully acquired kidney. Hence, establishing a right to life for the foetus would not automatically make a case against abortion. The right to life neither guarantees the right to be given the minimum use of, nor a right to the continued use of the mother's body, even if that is the minimum the foetus needs for life itself (Thomson, 1971, p. 56).

Moreover, it is suggested that the right to life does not equate to a right not to be killed, but rather, a right not to be killed 'unjustly' (Thomson, 1971, p. 57). In the previous scenario, if consent was obtained, then for us to step-in and disconnect the kidney would not only amount to killing the patient, but killing him unjustly. This proposition, if accepted, requires abortion to be an unjust killing in order for it to violate the foetus' right to life. Subscribing to such a view, it could be argued that when the mother voluntarily engages in sexual intercourse, aware that it may result in a pregnancy, then by her action she has given the foetus a right to use her body and so aborting the foetus would amount to an unjust killing. However, in the case of pregnancy resulting from rape, the mother cannot be held to be responsible, and it can't be inferred that the foetus is entitled to the use of the mother's body and thus, the abortion would not be an unjust killing. The same can apply for pregnancies occurring despite the use of contraceptives. While it can be said that in such a case, the mother was aware of the risk of pregnancy and still decided to engage in sexual intercourse, so despite her precaution, she gave the foetus a right to use her body and, thus, an abortion would be unjust. Thomson counter argues this by comparing it to the risk a person takes when he opens his window. Despite installing bars around the window, a burglar might still get in if they turn out to be defective (Thomson, 1971, p. 59), suggesting that for the foetus to have a right in such a case, because the mother could have avoided pregnancy by not engaging in sexual intercourse at all, would be incorrect. If such is the case, pregnancy due to rape may also be avoided by undertaking a hysterectomy, or by never leaving home without an army (Thomson, 1971, p. 55).

If accepted, this line of argument would, at best, establish that there are some cases in which abortion would violate the foetus' right to life but not all. Even in cases where the foetus is entitled to the use of the mother's body, what would happen if the pregnancy causes a risk to the mother's health or life? A view that is largely held, even by people who support the foetus' right to life is that in such a case, the mother can have an abortion because it would be viewed as the mother's right to self-defence. However, Nancy Davis argues that since the foetus is only a passive threat, self-defence would not be appropriate. Instead, she makes a case for agent relative permission and argues that intervention by a third party would be justified because of the asymmetrical nature of the relationship between the foetus and the mother, concluding that the foetus could not be considered a mother's moral peer (Davis, 1984, pp. 192-197).

Nevertheless, it might be argued that abortion would still be impermissible, as it involves the direct killing of the unborn child, whereas withholding any action would not be regarded as killing the mother but letting her die. Subscribing to this view would make a mother who aborts the child herself in order to save her own life a murderer (if directly killing an innocent person amounts to murder). Surely, the law cannot expect the mother to do nothing because refusing her a right to self-defence would relegate her to a mere vessel and deny her the same humanity, which is so firmly insisted upon for the unborn child (Thomson, 1971, p. 52).

This view can be weakened to argue that while abortion is permissible to save the mother's life, it must not be performed by a third party (Thomson, 1971, p. 52). However, such an argument ignores the very nature of pregnancy, since it assumes that the third party would be unable to choose between the mother and the foetus. This can be compared with a choice between two people, both of whom need the jacket to survive the cold, except that one of them owns the jacket. It is obvious that the person who owns the jacket has a much stronger claim than the other (despite him needing it just as much) (Thomson, 1971, p. 53). Based on this, it is argued such a restriction would be nonsensical, since the mother most likely cannot perform the abortion herself, and, if viewed objectively, it is clear that there is no real difficulty that faces the third party in choosing the mother over the foetus in such a scenario.

Furthermore, the law does not demand any person to make large sacrifices to sustain the life of another who has no right to demand them (Thomson, 1971, p. 62), because to do so would be imposing a standard of an extraordinarily good Samaritan, which although may be aspired for in a society, it cannot be reasonably enforced by law. Therefore, while it may be said that a pregnant woman ought to allow the foetus the use of her body, it does not mean that she must, or that she would be acting unjustly if she does not.

However, this does not mean that abortion should always be allowed, for there might be situations in which giving birth may only require the mother to be a decent Samaritan. For instance, it might be impermissible to abort an unborn child during the seventh month of pregnancy, because it may only require the mother to be a decent Samaritan, which is an expectation that the law can and should have (Alward, 2002, p. 101). Additionally, it matters the way in which the abortion is performed. While a pregnant woman may have the right not to allow the foetus the use of her body, she does not have a right to secure its death. This would make any abortion practices that instead of just removing the foetus from the womb, engage in its direct killing (such as 'partial birth' abortions) impermissible unless the continued pregnancy poses a risk to the mother's life.

To summarise, even if we assume that a foetus has a right to life, it is only violated by abortion if it not only causes its death but does so unjustly.

Access to Abortion

In 2016, the UN Special Rapporteur stated in his report on 'Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' that restriction imposed on abortion amounts to torture because it forces women to subject themselves to clandestine abortions in unsafe and unhygienic conditions (UN General Assembly resolution, 2016, p. 12), which is the third leading cause of maternal death globally (Guttmacher Institute and World Health Organization, 2012). As Williams notes, abortion is a form of population control (Williams, 1994, p. 74),

actively utilised in countries such as Japan as the primary form of birth control (Berer, 2017, p. 21). This makes access to abortion important, especially in developing countries where poverty is a real concern and adding an extra family member could make the family destitute. Moreover, in some developing countries, cultural and religious stigmas prevent sex education and, as such, make contraceptives largely unavailable. Besides, prohibitions on abortion are deeply ineffective as evidenced by the fact that despite strict laws against abortion in the Republic of Ireland, a large number of women still seek abortion by travelling to the UK (Mahony, 2014, p. 5). This shows that all such laws achieve is to create a division between the citizens who can afford such travelling and those who cannot, and result in making countries with liberal abortion laws, a hub for securing abortions (Addison, 1970, p. 20).

Conclusion

This article concludes that abortion does not violate the unborn babies' right to life. It has demonstrated this by critically analysing the argument in favour of the foetus having a right to life and through careful inspection of international law and regional treaties. Additionally, it argued that even if we assume that the foetus enjoys a right to life, abortion does not violate such right, unless it is performed unjustly. The article emphasised the importance of access to abortion and highlighted the harms which undue restrictions can lead to.

References

Addison, P. (1970) 'The Impact of the Abortion Act 1967 in Great Britain', *Medico-Legal Journal*, 38(1)

Alward, P. (2002) 'Thomson, the Right to Life, and Partial Birth Abortion or Two MULES for Sister Sarah', *Journal of Medical Ethics*, 28(2)

American Declaration of the Rights and Duties of Man (1948), Inter-American Commission on Human Rights

Berer, M. (2017), *Harvard Human Rights Journal*, 19(1)

Binchy, W. (2014) 'Human Dignity and the unborn child – a comment', *Medico-Legal Journal of Ireland*, 20(2)

Boso v Italy (2002) App no. 50490/99, Eur. Ct. H. R.

Bullock, R. (1994) 'Abortion Rights in America', Brigham Young University Law Review

Chemerinsky, E. et al. (2017) 'Abortion: A Woman's Private Choice', Texas Law Review, 95(1206)

Christie, S. (2006) 'Crimes against the foetus: the rights and wrongs of protecting the unborn', Medico-Legal Journal, 12(2)

Convention on the Rights of the Child (1990) United Nations Treaty Series, 1577, preamble 9

Copelon, R. et al. (2005) 'Human Rights begin at Birth: International Law and the Claim of Fetal Rights', Reprod Health Matters, 13(26)

Council of Europe (1975) Committee on Legal and Administrative Questions Report. Collected Edition of the Travaux Préparatoires. 1

Davis, N. (1984) 'Abortion and Self-Defense', Philosophy & Public Affairs, 13(3)

European Convention on Human Rights (1953)

Gillespie, N. (1977) 'Abortion and Human Rights', University Centre Peterborough, 83(3)

Guttmacher Institute and World Health Organization (2012) Facts on Induced Abortion Worldwide, Guttmacher Institute

Hicks, S. (1992) 'The Right to Life in Law: The Embryo and Fetus, the Body and Soul, the Family and Society', Florida States University Law Review, 19(3)

International Covenant on Civil and Political Rights (1976) United Nations Treaty Series

Mahony, R. (2014) 'Protecting life in real life – an essay', *Medico-legal Journal of Ireland*, 20(2)

O'Donovan, K. (2006) 'Commentary: Taking A Neutral Stance of the Legal Protection of the Fetus', *Medical Law Review*

Paton v United Kingdom (1981) App no. 8416/78, 3 Eur. H. R. Rep

Pichon, J. (2006) 'Does the Unborn Child Have a Right to Life – The Insufficient Answer of the European Court of Human Rights in the Judgement *Vo v. France*', *German Law Journal*

Pro Life Campaign (2015) Submission of the Pro Life Campaign to General Discussion on Article 6 (Right to Life) of the International Covenant on Civil and Political Rights

Puppink, G. (2013) 'Abortion and the European Convention on Human Rights', *Institute of Judicial and Legal Studies of Mauritius*, 3(2)

R.H. v Norway (1992) App no. 17004/90, Eur. Com.

Roe v Wade (1973) 410 U.S. 113

Scott, R. (2004) 'The English Fetus and the Right to Life', *European Journal of Health Law*, 11(4)

Siano, J. (1998) 'A Woman's Right to Choose: Wrongful Death Statutes and Abortion Rights – Consistent at Last', *Women's Rights Law Reporter*, 19(3)

Siegel, R. (2014) *Indiana Law Journal*, 89(1365)

Smith, R. (2018) *International Human Rights Law*. OUP 8th edition

Stretton, D. (2008) 'Defending Life: A Moral and Legal Case against Abortion Choice by Francis J Beckwith', *Journal of Medical Ethics*, 34(11)

Thomson, J. (1971) 'A Defence of Abortion', *Philosophy & Public Affairs*, 1(1)

Universal Declaration of Human Rights (1949), UN General Assembly, Res 217 A (III)

United Nations General Assembly (2016) Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Resolution A/HRC/31/57

United Nations General Assembly (1948) 3rd session – 3rd Committee 99th Meeting A/C.3/SR.99

United Nations Human Rights Committee (1992) CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) A/44/40

Veitch, E. et al. (1974) 'Abortion in the Common Law World', *American Journal of Comparative Law*, 22(4)

Vo v France (2004) App no. 53924/00, Eur. Ct. H. R.

Wikler, D. (1979) 'Ought We Try to Save Aborted Fetuses?', *The University of Chicago Press Journals*, 90(1)

Williams, G. (1994) 'The Fetus and the "Right to Life"', *The Cambridge Law Journal*, 53(1)

Williamson, E. (2012) 'The Right to Life of the Foetus under the European Convention of Human Rights', *Warwick Student Law Review*, 2(32)

