Does the Foetus have a Right to Life?

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This article was originally submitted as a seminar paper as part of the Philosophy of Law study-unit (CVL1024) and is being reproduced on the OLJ with the author's permission. In it, Giuseppe Gatt explores the ethical dimension of personality in relation to the foetus and the legitimacy or otherwise of abortion.

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1. Introduction

There is no doubt that the topic of whether the unborn child has the right to life or not is a heated and perplexing debate. A debate which I found quite a challenge to try and condense whilst not making this essay too cramped within its word-count limit.

When one comes to research and examine the vast array of academic literature one is met with many outlooks: the purely medical; the legal; and, last but not least, the philosophical/ethical outlook. It would serve well and be useful for one to analyse all these in order to get a fully-educated opinion. However, for the purpose of this exercise I will be mostly evaluating the philosophical outlook, whilst (very) briefly discussing how legal systems reflect different moral outlooks so as not to pigeonhole this essay as being a philosophical one (being that this is a question pertaining to 'Philosophy of Law').

In addition, in this essay I will not delve into the 'hard' cases of abortion, in cases of, for example, rape or when the pregnancy is life threatening to the mother etc. This essay tries to open the dialogue of whether or not the unborn should be recognised as having the right to life, through ethical dialogues.

2. How do contrasting legal systems see the foetus?

Like every topic of discussion there are views which are extreme and views which are more towards a more reasonable middle-ground. It goes without saying that this is reflected in various legal systems. For example, by taking a look at ourselves and our neighbours.

Malta is the last European country which totally criminalises any form of abortion through the 'shadow ban' in the Criminal Code, Articles 241-243(a),[1] with the only exception being the double effect principle, which is not specified in any law, however it is adopted practically, where the abortion would be an unavoidable result of saving a woman's life.[2] Furthermore, apart from the right to life being enshrined in Article 33 of the Maltese Constitution (only mentioning the word 'person'), the court found that the foetus did have the potentiality of becoming a Maltese citizen in the case of E***milio Persiano vs Commissioner of Police***,[3] which is 'the most explicit reference in Maltese case-law to the rights of the unborn child in Malta'.[4]

[1] Criminal Code, Chapter 9 of the Laws of Malta.
[2] [2]Elena Fenech Adami, 'A Comparative Legal Analysis Of The Pro-Choice And Pro-Life Movements' Arguments: Is There The Possibility Of A Restricted Choice?' (LL.B. Thesis, University of Malta 2019).
[3] 2836/2000 *Emilio Persiano vs Commissioner of Police*, Civil Court (First Hall) 24 August 2000.
[4] Tonio Borg, *Leading Cases in Maltese Constitutional Law* (Kite Group 2019) 94-96.

On the other side of the coin, there is the liberal Pro-Choice legal approach, in countries such as Denmark and Sweden, which allow abortion without any restrictions before the 12th and 18th week of pregnancy, respectively, and permission may be granted to carry out the abortion after these spans of time by respective authorities.

More interestingly, there is a sort of legal 'middle ground' which is occupied by countries such as Ireland and Germany, where in both countries an abortion would be presumed illegal, unless fitting into specific and detailed circumstances which are specified in their laws.

Ireland, being a 'restrictive Pro-Life' jurisdiction, used to affirm the right to life of the unborn in their Constitution up until recently.[5] However, an election in 2018 overturned this ban with an astonishing 66% who voted in favour of overturning the ban.[6]

This very (very) brief overview of the legal situation regarding abortion would still be incomplete if I didn't at least mention the landmark judgement of the 1973 United States Supreme Court in ***Roe v Wade***.[7] In which, in a nutshell, the US Supreme Court ruled that, at least until the third month of the pregnancy, it is unconstitutional for the State to interfere if the woman wishes to have an abortion performed on her. But also, that after the third trimester of pregnancy, a State could not prohibit the abortion except in special circumstances, as the foetus may be able to live on its own.

3. Is the foetus a person?

The word 'foetus' or 'fetus', is a derivation from Latin for the word 'offspring', however today it usually denotes 'a young human being or animal before birth, after organs have started to form'.

The question is this: As Article 2 of the European Convention on Human Rights and our very own written Constitution affirms the right to life of the 'person' (without actually defining what 'person' means), does the unborn child qualify as being a 'person', and if not, what is it?

So this begs the question… Who or what is a person? Are all human beings persons? Are all persons human beings? It is in fact Michael Tooley who begins his authoritative essay[8] on this matter by stating the unfortunate misplacement of the terms 'person' and 'human being' in philosophical and every-day texts. He clarifies that 'human being' should be used as a biological term, as a mass of human cancer cells could be said to be human, while

[5] Article 40 sub-section 3. '*The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, as far as practicable, by its laws to defend and vindicate that right*'.
[6] The Constitution was amended by the Thirty-Sixth Amendment to the Constitution Act 2018.
[7] *Roe v Wade* [1973] United States Supreme Court, 410 US 113.
8 Michael Tooley, 'Abortion And Infanticide' (1972) 2(1) Philosophy & Public Affairs 37 <http://www.jstor.org/stable/2264919> accessed 8 April 2021.

'person' should be used as a moral term (as it is synonymous with having a serious right to life). In fact, Tooley criticises philosophers like Wertheimer and Thompson for falling prey to this misuse.

Michael Tooley coins the so-called 'self consciousness requirement'[9] which means that one who has a right should be also capable of understanding and desiring that right. Also, the notion of 'desire' would mean that the person who is desiring would be the subject of experiences and other mental states.

This is why, for Tooley, the 'right to life' is often pigeonholed into meaning just 'the continued existence of a biological organism'[10] without taking into account the experiences and mental states which are a result of that very life. His proper definition of a right to life is: 'a right to continue to exist as a subject of experiences and other mental states'.[11] In simpler terms, for one to enjoy the right to life as he opines, one must be able to appreciate one's 'self', appreciate that he is thinking and experiencing life, which reminds me of René Descartes's '*cogito ergo sum*'.[12] It should go without saying that the statements above have their caveats, where one's desires are altered or misty due to reasons external to one's control, like depression or indoctrination.

Similarly, I find that Joel Feinberg's thoughts on personhood would resonate well with Tooley's, as his so called 'commonsense personhood' is more or less a notion with the same bases:

> The characteristics that confer commonsense personhood are not arbitrary bases for rights and duties, such as race, sex, or species membership; rather they are the traits that make sense out of rights and duties and without which those moral attributes would have no point or function. It is because people are conscious; have a sense of their personal identities; have plans, goals, and projects; experience emotions; are liable to pains, anxieties, and frustrations; can reason and bargain, and so on -- it is because of these attributes that people have values and interests, desires and expectations of their own, including a stake in their own futures, and a personal well-being of a sort we cannot ascribe to unconscious or nonrational beings. Because of their developed capacities they can assume duties and responsibilities and can have and make claims on one another. Only because of their sense of self, their life plans, their value hierarchies, and their stakes in their own futures can they be ascribed fundamental rights. There is nothing arbitrary about these linkages.[13]

[9] ibid.
[10] ibid.
[11] ibid.
[12] 'I think therefore I am' – René Descartes. Silvio Meli, *The Philosophy of Law: A Brief Introduction* (Kite Group 2020).
[13] 'Joel Feinberg: Abortion' (*Ditext.com*, 2021) <http://www.ditext.com/feinberg/abortion.html> accessed 14 April 2021.

The conservative side of things are also explored in Tooley's article, with the most sound argument being that of the 'potentiality principle', where the idea is that foetuses should not be killed, as, even if they aren't currently persons while they are in the womb, they will by virtue of potentiality become persons in a normal course of action, which, after this development, could be vehicles of the right to life.

However, the 'self-consciousness requirement' would also prove a purpose to be the only way the conservative potentiality principle could be shot down, as at the time of the pregnancy, the foetus still cannot desire or experience; it cannot perceive itself to be such an entity. It is my opinion that this requirement, when put against the potentiality requirement, does not hold as much water as Edward A. Langerak's argument, which is that humans are temporal beings. This to me makes more sense. Langerak paraphrases S.I. Ben who says that 'A potential president is not already commander in chief', which, to me, totally makes the potentiality principle an irrefutable one.[14]

Furthermore, Tooley cites Judith Jarvis Thompson's 'A Defence of Abortion',[15] when discussing the reality that the foetus's life is dependent on another life, and that if the foetus does in fact have a serious right to life, having this right still would not mean that it gives one the right to use another person's body. Then Tooley compares the unborn foetus to a parasite, in that even if the parasite did enjoy personhood and this right, the woman's right to freedom from this parasite (which could cause health problems) would still supersede. This is more or less similar to the double effect principle, akin to self-defence, where the woman ought to be freed from the foetus, not commission its death.[16]

Moreover, Tooley argues in favour of the 'moral symmetry principle',[17] which in simpler terms, is the notion in which intercourse is the action that initiates the process of pregnancy, and the birth of a child would be the outcome of said pregnancy. Abortion, 'being an action involving the minimal expenditure of energy',[18] stops the process of pregnancy before the outcome (childbirth) happens. So therefore, according to this principle, 'there is no moral difference between' intentionally performing an abortion and abstaining from having intercourse, assuming that they do not have any other consequences. He compares this to two scenarios that, to him, would have no moral difference:[19] that of not warning a man about to be killed by a bomb, and the second scenario of shooting a man and killing him. This argument to me is most sound when reading Tooley's works, however is still very hypothetical.

[14] Michael F Goodman (ed), *What Is A Person?* (Humana Press 1988).
[15] Judith Jarvis Thompson, 'A Defence Of Abortion.' (1971) 1(1) Philosophy & Public Affairs 47 <http://www.jstor.org/stable/2265091> accessed 9 April 2021.
[16] ibid.
[17] Tooley (n 8).
[18] ibid.
[19] Goodman (n 14).

However I was still left craving a more whole and well-rounded explanation of what personhood really meant, and when reading 'The Internet Encyclopedia of Philosophy'[20] on abortion, I was met with an article by Jane English titled 'Abortion And The Concept Of A Person'[21] which was exceptionally helpful for this exercise. This all comes with the caveat that her list is still up to scrutiny, as English herself says that 'an advanced robot'[22] may still qualify for the majority of these qualities but would still not be considered a person – she says that the features which constitute a person are 'more or less typical'.[23] I find this more convincing because it is not trying to define something which cannot be defined.

In short, the elements which would constitute 'personhood', according to English, could be summed up in five factors: *Biological factors* like having the genetic make- up of a homo sapiens, performing basic human functions, eating, sleeping, breathing, etc.; *Psychological factors* like having a concept of self (explored in detail by Feinberg and Tooley above), perception, desires, interests, language, etc.; *Rationality factors*, amongst which being able to reason and draw conclusions, sacrifice, ability to learn, etc.; *Social factors*, such as the ability to work well in a group, respond to peer pressure, value the interest of 'other minds', encourage, love, and work with others; and, finally, *Legal factors*, consisting of qualities such as being able to sue, own property, and so on and so forth.[24] But I would ask, where would the foetus fit in this 'framework'? As is pointed out the foetus shares very little of these features, however it starts fitting more and more into them as it is born and grows up. As stated above this list is typical, as someone who is not very sociable is not denied personhood. Neither should the foetus be denied on the basis that it does not satisfy them, but when should it be granted personhood?

This brings me to Edward A. Langerak's paper, which is aptly titled 'Abortion: Listening to the Middle',[25] which, firstly, defends the potentiality principle by stating that humans are temporal beings, then brings in the factor of probability – basically stating that the more a pregnancy advances, the higher the chance of a spontaneous miscarriage happening, thus the higher the moral consequences: here he differentiates between the zygote and the older foetus.

In his conclusions (in which he takes all the above into account) he makes the distinction between implantation, quickening, viability, and birth clear as day. Langerak makes reference to the case of ***Roe v Wade***[26] in which it was found that before the third trimester it is up to the mother, not the State, if she wants to carry out an abortion or not. However, he disagrees with this notion

[20] 'Internet Encyclopedia Of Philosophy: An Encyclopedia Of Philosophy Articles Written By Professional Philosophers.' (*Iep.utm.edu*) <https://iep.utm.edu/> accessed 15 April 2021.
[21] Jane English, 'Abortion And The Concept Of A Person' (1975) 5(2) Canadian Journal of Philosophy 233.
[22] ibid.
[23] ibid.
[24] ibid.
[25] Goodman (n 14).
[26] *Roe v Wade* (n 7).

and argues that the line should be drawn even earlier at the beginning of the second trimester or 'the quickening' phase – this is when spontaneous movements, the shape of the foetus, and its behaviour start developing. Therefore, it begins to create a bond with the mother and the rest of society, so abortions after this point would have serious personal and social repercussions.[27]

To sum up, I would say that my conclusions would be similar to those of English and Langerak, by which I mean that this topic is highly ambiguous. I find it obsolete to sit with one extreme or the other, so I must stray somewhere in the middle. I believe in a cut-off point by which abortions should be permitted; after such cut-off point I find them to be morally problematic. If someone were to ask me if the foetus has a right to life, my opinion would be that it does, after a certain cut-off point which is determined by the probability of the foetus being viable so that the potentiality principle could be close to certain.

[27] Goodman (n 14).


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