



RESEARCH PAPER

A Comparative Analysis of Legal Status of Fetus in Pakistan and the European Union

Jawwad Riaz¹ Zaheer Iqbal Cheema² Rao Qasim Idrees³

1. Assistant Professor, University Law College, University of Punjab, Lahore, Punjab, Pakistan
2. Assistant Professor, University Law College, University of Punjab, Lahore, Punjab, Pakistan
3. School of Law, University of Gujrat, Punjab, Pakistan

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**Corresponding
Author**

qasim.rao@uog.edu.pk

ABSTRACT

This treatise aims to ascertain the status of the human fetus in Pakistan and European Union. In particular, is the fetus a person carrying legal personality, a form of property or something else? Additionally, whether moral status and legal status coexist in case of the fetus, and if so, how? These questions would be addressed by examining relevant legal and moral arguments and theories. The relevant case law and legislation have been taken into account. The researchers conclude that the Courts in Pakistan have gone a step forward than their EU counterparts in extending personhood to the fetus, however, the status in enactments is inadequately determined

Introduction

The Fetus is the result of sperm and an ovum fusion that leads to the development of potential human life whose growth is marked by visible steps in an ongoing process. It is a misnomer that the fetus has always been in the womb of the mother. The fetus can be located in the vitro. Moreover, the word embryo can be used interchangeably for fetus. The embryo is a more generic term in nature. It denotes to different prenatal stages regardless of whether or not it is in the body of the pregnant women or not (Derck and Hondius, 2002). Development of the human body, during its prenatal period, is in steps. Thus, the prenatal stage is categorized as pre-embryo, embryo and fetus. Pre-embryo is the time between the first days of fertilization of egg until the fourteenth day (the Warnock Report, 1984). After that the embryo stage is until the 3rd month. This is the time when the body organs start

to develop. Then fetus stage is onwards before birth. During this time, the organs can be differentiated and they continue to develop till birth (Cherry, 2020).

Jacques Alexandre was the first person who researched fetus in the XIXth century. The fetus was historically acknowledged when the heartbeats were heard by the National Assembly on Medicine in 1821. Previously, it has been taken as a sacred procedure and parents wait for the child to arrive peacefully. However, issues related to abortion, obstetrics and improvement in parental screening have led to raising the interest of the public in the fetus.

International and European Rules

The Oviedo Convention (Article 1) talks about the application of biology and medicine on human beings. It set forth that dignity and identity of all human beings shall be protected and they shall have freedom towards the application of medicine and biology. The drafters of the convention carefully avoided any conflict by not giving any definition, however, researchers did a good deal of deliberation whether the fetus was on the mind of the drafters of the convention or not.

Personhood and Fetus: An Uncertain Legal Status

E. Robertson (1997) states that the greatest barrier towards extending protection to the fetus is the concept of personality.

The Summa Division: Persons Vs. Things

The legal fraternity is confused between two main categories: the things and the persons. The legal status of fetus hangs between these two notions. Ethico-legalist defines a thing in respect to a person. They propagate if something is not a person, it is a thing. Hence they define thing negatively (Andorno, R. 1994).

The relationship between things and persons is of inequality and subordination. The person dominates over the thing and can act upon it. The relationship has vested certain rights in person. The right to use, the right to profit from and the right to dispose of. This relationship leads to the concept of property (Andorno, R. 1994).

Concept of Personhood

The concept of personhood dates back to Enlightenment period and was first used by Immanuel Kant (Bernat, 2008). However, the definition of legal term personhood was given by Erwin Bernat (2008) in the words that personhood is attributed to every human being by virtue of him being a human. Personhood is a legal characteristic through which one acquires rights and discharge liabilities. It is pertinent to mention here that the right to freedom and dignity of the human being has been universally admitted and guaranteed right (Art 1, UNHR 1948). In the light

of the definition provided by Erqin Bernat and related international rules, we can understand that to apply personhood to an entity the characteristic of Human being is sufficient. However, this is not completely true and is indeed very complex when it comes to the fetus. The concept of personhood requires many characteristics and indicators before granting any legal status to the fetus. Thus, being alone having the character of human is not sufficient to grant the status of a person. Julian Savulescu (2003) argues that a being should gather and possess in one body qualities like to have a conscience, to comprehend rules and ethics, to cohabit in society and enter into relationships and to have faith etc. Some indicators may be relaxed and vacated; however, Savulescu argues that "capacity to act autonomously" is the minimal requirement. The fetus must be able to live independently from the body of its mother on its own. This originates from the concept of "capable of being alive" from Common Law. Jurists have used other indicators to ascertain the possible beginning of likely personhood. The concept of viability is accepted by international rules. In the C v. S. case, an attempt was made to differentiate between survival and viability though the difference is not well clear (Grubb & Pearl 1997). The definition of viability relies on the observation of biological factors: such the weight, the height, the gestational age. Viability consists in setting a limit according to biological criteria. Another indicator could be the sentience. Citing Mary Anne Warren (1997), sentience may be defined as the 'capacity to feel pain or pleasure'. It implies that it does not include the capacity to realise rather just feel it (Summer 1981). In the opinion of Summer, a right to life shall be given to fetus as soon as it becomes sentient. In the opinion of Carson Strong (1997), viability has noticeable relevance since it lays stress on the social relationship of the fetus regardless may be in utero as being a potential patient. Moreover, sentience is also a fair argument as "it is necessary and sufficient for having moral interests" (Strong 1997).

Different Approaches to the Concept of Personhood

Positivism

Positivist considers the person in his environment. They argue that a person, under all circumstances, remains the holder of a legal relationship under all possible realities. In their opinion, a person is a purely abstract concept created by the will of the state and resultantly it is granted or withdraw mandate by the state/legislature regardless of it being Human or not. To them, personhood is a logical concept having no nexus with being Human being. Their approach has been criticised being an unrealistic and unfair approach. Firstly, it denotes that law does not imply to think that there is nothing else in the margin of the persons; the law doesn't exist out of this consideration. This is false. Furthermore, the lack of connection with the reality of the Human being results in denying the personhood to the weakest ones (Andorno 1996).

Realism

Opposite to positivism, the realist approaches the concept as seeing the person as subject to the law with rights and obligations. Thus, to them, there is no

difference between the physical person and the legal person (Andorno 1996). This approach tends to incorporate the human dimension in the concept of Personhood (Andorno 1996).

Common Agreement: the Moral Status of the Fetus

It is difficult to answer the different philosophical question regarding grant of legal status to the fetus. Legal status to fetus offers debates as to substantialism which is difficult to answer (Williams, 1994). In comparison to that, moral status depends on belief. The central point to the debate, nonetheless, is the concept "The human life is sacred" (Williams, 1994). The fetus keeps enjoying more and more moral status as much as it approaches near to the predicted date of birth. Moral status is directly proportionate to the gestational age of the fetus (Strong, 1997). It appears that the moral standing of the fetus is deducted from its ability to become a potential human life. Wherein a lot of hope expectation is attached to it even before its birth. Application of the principle "in dubio pro vita" can be used to extend at least some more protection to the fetus if not legal status. The legal protections may be extended from the date of fertilization of the egg i.e. the day from where it becomes in existence (Andorno, 1994).

The Cautious Approach of the ECHR towards the Fetus; the Margin of Appreciation Theory

A Clash of Values

The right to life has been granted under Article 2 of the European Convention on Human rights (ECHR). It is stating that every life shall be protected unless lawfully required to be taken in case of a sentence passed by a court of law. The Right to Life has been safeguarded by imposing positive obligations on member states. Ovey and White (2006) have suggested three aspects to it: First prevention of unlawful killing by state agents, second, sceptical deaths shall be seriously investigated, third safeguards to avoid preventable loss of life. It is pertinent to mention here that like Oviedo Convention, Article 2 of the ECHR have avoided protecting the fetus, the embryo or in generic term the right of the unborn child. The term "everyone" has been used which is vogue in its meaning and it cannot be extended to fetus since there has been no indication (Dute 2004). In contrast, Article 8 refers to the mother and her right of self-determination and prohibits interference of public authorities towards the lawful exercise of this right.

Decisions of the European Commission on Human Rights (EComHR) about Abortion

In the case Bruggemann and Scheuten, the relationship between the mother and the fetus has been recognised, however, the court refused to consider an extension of the Right to Life under the Article to the fetus (Mason 2005). The same approach was adopted by the Commission in case X. The unconditional Right to Life

has been refused in maternal-foetal nature conflicts. In *H v. Norway*, the fetus was not excluded from the ambit of Article 2, however, the Commission excluded from its jurisdiction to determine the applicability (Mason 2005). Judges concluded similarly in *Paton* case.

Vo v. France case: An atypical case

It was the first time in *Vo* when the European Court of Human rights (the ECHR) was asked to determine if article 2 extends to the fetus (Hewson 2004). The court had more wide scope to discuss the matter since it was not a complaint regarding the state of abortion (Hewson 2005). It was about the termination of desired pregnancy due to doctor's negligence. Unexpectedly, fourteen judges observed against application Article 2 to the fetus, whereas, three judges observed against the majority. Seven judges, among the majority, expressed their opinion as to interpretation (Braake 2004).

Facts

Mrs *Vo*, a Vietnamese woman, living in France but with a poor understanding of the French language, was Pregnant for six months. She went for medical check-up and fell victim of "mistaken identities"(Braake 2004). Since there was another lady with a similar surname who was there for removal of the contraceptive coil. The doctor vainly tried to remove the coil on Mrs *Vo* that she was not having. During the process, due to the heavy loss of amniotic fluid, Mrs *Vo* had a termination of pregnancy(Hewson 2004). The doctor was sued for medical negligence by Mrs *Vo*. She rested her case on the former Article 319 of the French Criminal Code and alleged the doctor responsible for causing homicide to the fetus unintentionally.

It is pertinent to mention that pending adjudication former article was replaced by article 221-6 of the new Criminal Code. **The Court of First Instance acquitted the doctor on the ground that fetus is not a person.** In Appeal, the decision was reversed. Judges held the doctor liable while relying on the mandatory provisions of the article 16 of the Civil Code that ensures respect and protection from any kind of assault on the dignity of every human being from the beginning of its life (*Vo V. France*). However, the Court of cassation did not uphold the decision of the Court of Appeal of Lyon (Hewson 2004).

Mrs *VO*, being aggrieved, preferred to file an appeal in front of the ECHR.

The Decision of the Court

The wording of Article 2 has led to an "Immediate issue"(Donovan 2006). The important issue which was to be determined by the European judges was to ascertain whether the fetus is a person and when life begins in essence.

In VO, the Court observed that no consensus has been reached within Europe on the status of fetus and beginning of life. The Court adopted the approach of “margin of appreciation” and declined to answer if an unborn child is a person for application of Art. 2 of the Convention.

The judges did not avail the opportunity to deliberate into the matter provided to them after Paton and H v. Norway cases. It has been argued that the Court did not address the grievance of Mrs Vo by avoiding the core issue raised by her. The Court stressed on evaluating the procedural accountability that whether France has discharged her positive obligations or not. It is pertinent to discuss here that the court considered quite strangely 'even assuming that' formula to let the field open for a possible application later. While appreciating the fact France provides an administrative remedy to individuals, the Court observed that France has not breached Article 2. The Court observed that Mrs Vo Could have gone to administrative Court and an action for damages would have brought her remedy.

Dissenting Opinions

The judge Rozaki, although agreeing that Article 2 has not been violated, but observed that the Court did not reach the right conclusion. Rozaki observed that the life of an unborn child cannot be equated to a born child regardless the law provides it with some protections. He observed that there shouldn't be any confusion towards the application of Article 2 to the fetus. However, another judge, Costa, observed that plain reading of Article 2 makes him believe that there is life before death and it needs to be protected within the strict framework of rules.

The judge Res gave a dissenting opinion to the majority. He wrote that Article 2 applies to the fetus. He observed that Member States regulation of abortion denotes that life of fetus shall be protected. Moreover, he believed that France has not discharged her positive obligation and administrative courts cannot provide sufficient and efficient protection in case of medical negligence”.

The judge Mularoni did not agree at all with the decision of the court. She observed that France has not adequately discharged her positive obligations. Moreover, she was of the opinion that the claimants shall have some choice among available legal remedies. While maintaining that personhood is acquired only at birth, Judge Mularoni points out the fact that Right to Life should be extended to everybody before its birth otherwise identity and the dignity of the Human being could be undermined. She recommended that Convention shall be interpreted in an evaluative way to address growing issues raised by genetic research.

Assessment of the Decision

The decision in Vo v. France has widely been criticised. It has been remarked as a ruling “a decision not to decide” (Goldman, 2005). The Court has severally been criticised for taking a runaway approach from her duty to interpret the Convention

as a 'living instrument' (Goldman, 2005)). Te Braake (2004) added that the Court has failed to account for the 'present-day conditions' and has failed to interpret the Convention progressively. Nevertheless, the judges did not altogether refuse the possibility to raise the potentiality of the fetus to become a person. The decision of the court has lingered on the hanging issue. Pichon (2004) laments the fact that "a judgment has been delivered but the conflict continues".

The Legal Status of Fetus under Pakistani Law

Under the Pakistan Penal Code (PPC), punishment against abortion/miscarry has been categorized against two different stages of pregnancy. Abortion performed during earlier stages of pregnancy is known as *Isqat-i-haml* (Sec 338) and punishment prescribed is 3 years when it is carried with the consent of the woman and extends to 10 years where it is performed without consent (Section 338-A). The second stage of pregnancy is *isqat-i-janin* i.e. when the fetus is at an advanced stage having limbs and organs. If a miscarry is caused to a woman at this stage, the law provides punishment in the shape of 1/20th of Diyat (when a child is dead born) and full diyat when a child is born alive but dies subsequently due to an act of the offender. Besides, imprisonment up to 7 years as *ta'zir* is also prescribed. An act of abortion carried/caused in good faith during the first stage for saving the life of the pregnant lady or to provide necessary treatment is no offence. *Isqat-i-Janin* is permissible only if it is caused in good faith to save the life of the woman. It is noteworthy that legislatures have avoided attracting the offence of homicide (*qatl*) in case of both *Isqat-i-haml* and *Isqat-i-Janin*. *Qatl* is defined as causing the death of a person (Sec. 299(j) PPC).

Zaman Shah V. State Case

In *Zaman Shah*, the High Court examined the legal status of the human fetus. Mazahar Naqvi, J. writing for the court held that the fetus had travelled beyond the stage of 338-C PPC and has become a child.

Facts

One, Zaman Shah among others were involved in FIR No 3 of 2009 for murdering his wife and an unborn child of 28 weeks. He was awarded death sentence as *Ta'zir* u/s 302(b) PPC (for killing his wife) and seven years RI u/s 338(c) PPC for *Isqat-i-Janin*. A Criminal Appeal was filed to assail the conviction by the accused and the trial court also forwarded the Murder Reference No 101/2010 for confirmation of the death sentence (U/s 275 Cr.P.C).

The Decision of the Court

The two-member bench of the High Court during the hearing was informed that Noor Bibi, the deceased lady, was carrying a 7 months old male child in her womb who could not sustain the injuries inflicted upon the deceased and also passed away before birth. The factum was confirmed by the statement of the lady

doctor who performed postmortem examination. The question before the court was whether the death of a 28 weeks old unborn child satisfies the provisions of section 338(b) PPC?

The court held that facts of the instant case do not attract section 338 (b) because as per developed medical jurisprudence the heartbeat develops in the fetus at 2 months. Further, the child becomes mature after six months of conception. Moreover, at times ladies do give birth to a child even after seven months of pregnancy give birth to healthy babies who do survive as well. Therefore, in the view of the above, it is ascertained that a 6 months old fetus in the womb of his/her mother falls within the definition of "child". The analogy was drawn from article 128 of the Qanun-e-Shahadat Order, 1984 which provides that any person who is born after six lunar months of a valid marriage or within 2 years of its dissolution, shall be considered as a legitimate child. Also, the court relied on the Islamic concept on the subject that Almighty blows the *soul* into the fetus after 120 days of conception.

The Sindh High Court, in *Hakim Ali* also reached a similar conclusion wherein it was held that murder of a woman, carrying a 7/8 months old fetus, tantamount to double murder.

Their Lordships held that the fetus had travelled beyond the stage of 338-C PPC. The case was remanded to the trial court to record relevant prosecution witnesses afresh while providing an opportunity of the defence to the accused and rewrite the judgment in respect of applicability of relevant provisions of PPC for killing an unborn child of 7 months. The honourable court, however, did not refer to a particular section in this regard.

The Concept of Human Being in Sharia

Article 227 of the Constitution of 1973 requires that no law shall be enacted repugnant to Quran and Sunnah. Therefore, it is important to understand the status of the fetus in Islam. Islam has termed human beings of biological and intellectual nature (Quran, 32:6,9). The life of a human being is a sacred trust and no one is allowed to take it except under the law. It has been a heated debate among Muslim jurists that whether a fetus enjoys this protection or not. Islam extends certain rights to the fetus as soon as the egg is fertilized in the womb. It includes allowing the fetus to fully develop and take birth. It is an indication of the admissibility of Right to Life for the fetus (Alkali & others, 2015). Quran has discussed embryological stages, birth and life thereafter till its conclusion in various verses and Prophet Muhammad (PBUH) has also opined and discussed the same.

The status of an unborn child is that of a JANIN i.e. Fetus and not that of a person. A fetus right from conception until delivery will remain that of a Janin. The difference lies in the pre-natal and post-natal stage. Birth is a must to attract the offence of homicide if the delivered child is intentionally done to death. It is manifest

from various Islamic and statutory provisions. Infancy, childhood, adolescence, youth and old age are various stages of a person.

Janin means something hidden. Even grave is termed in Arabic as Janin as it is a hidden place. The plural of Janin is Ajinnation (Isfahani 1979). Reference may be made to "and when ye are hidden in your mothers' womb" (Quran 53:32). The Quran has revealed the beginning of human birth in Surah Fatir (Quran 35:11) wherein Allah states that the physical origin of man is dust and from sperm-drop. Quran has discussed the complete life cycle of human beings from pre-birth (from lifeless matter to seed to fertilized Ovum), then from fetus to birth and childhood, age and finally to death (Quran 22:5). In Surah Al Mominun, Allah has revealed various biological stages of the creation of mankind as a clot of blood from inanimate sperm, thereafter a fetus, which is clothed with bones flesh and blood. The fetus undergoes different changes in the womb of the mother and it takes birth quite into a different creation compared to its pre-birth biological stages.

Conclusion

From the perusal of the aforementioned verses of the Holy Quran, it is clear that *ikhraj* or delivery is a must to end the status of Janin. The same definition has been given by Mufti Muhammad Shafi Usmani in *Ma'ariful Qur'an*. It is pertinent to mention here that sometimes a fully developed fetus dies during delivery due to high blood pressure of mother. However, it remains Fetus and is not accounted for a person.

Section 128 of the Qanun-e-Shahadat Order, 1984 (law of Evidence) is meant for determining the legitimacy of a child. The words "was born" used in it are noteworthy. Birth is a pre-condition.

It is correct that sometimes delivery takes place after 7 months and the child so born survives. It is also a controversial point when the soul is poured by the Almighty in the fetus. The pregnancy varies from 3 to 4 months when the soul is infused. As long as a fetus is not delivered he/she cannot be termed as a human being/person. The undelivered child even up to 9 months will remain a Janin throughout gestation. The moment he is delivered i.e. taken out of the body as a baby he/she will become a person. The age of the child varies in the Constitution (Pak. Con. Art 11(3)), in various labour laws and Juvenile Justice System Ordinance 2002 and Section 82 and 83 of the PPC differ according to various reasons. Under Section 3 of the Majority Act, the age of the majority of male and female is 18 years and before that he/she would be considered minor/child. Still in Shariah laws, the adult is defined with a specified age/puberty. The child would mean as defined in the dictionary.

Birth is a pre-condition to cloth an offspring with civil rights. Before birth the fetus regardless of growth will remain a Janin and, presently there is no penal law except section 338 B and 338 C of PPC with which an accused can be charged for causing damage/ or killing a fetus and he cannot be charged with homicide before

birth. Birth, be it natural or through a medical operation. Needless to say, the laws laid down by the superior judiciary are binding on the lower courts as per provisions of the Constitution. The European Law regards the fetus as part of the mother and thus the rights are held by the mother. The ECHR also opined the same that the right to life does not extend to fetus whereas, in Pakistan, the decisions in *Zaman Shah* and *Hakim Ali* have opened up the door for granting personhood to an unborn child.

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