

Chapter 3

The Justification of the Abortion Law in Hong Kong: A Comparative Study

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Abstract Abortion presents a moral dilemma from the perspectives of both Western and Confucian traditions. This chapter will examine how the law of Hong Kong compromises the conflicting rights and values involved in abortion. In Hong Kong, although abortion is legally permissible under certain conditions, abortion on demand is outlawed. We argue that, in order to justify this legal restriction, the law has to consider the fetus as a potential person, who has a right to life, which is close to, but not up to, that of a full-blown person. However, such restriction is incongruent with Confucian ethics, which emphasizes the harmony of the family and the community. At least, Confucian ethics would allow abortion based on social or economic reasons.

Introduction

The moral permissibility of abortion is a very complicated issue because it involves many difficult questions: Is the fetus a person? If so, when does the fetus become a person in the process of gestation? If the fetus is a person, can its right to life override the mother's right of controlling her own body? Does the voluntariness of pregnancy matter to the permissibility of abortion? If so, why?

There is no consensus to the answers of the above questions. That explains why the debate between the pro-choice camp (supporting abortion by appeal to the choice of the woman concerned) and the pro-life camp (opposing abortion in

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defense of the life of the fetus) has been going on for so many years. In Hong Kong, abortion is legally allowed if the pregnancy threatens the mother's life. Or, it is allowed if the gestation is with 24 weeks and meets one of the following conditions: (a) the pregnancy threatens the physical or mental health of the mother, (b) the pregnancy results from rape or the mother is under 16, and (c) the fetus has serious medical problems or birth defects, such as Down's syndrome (Section 47A). Any other instance of abortion on demand (including abortion based on social or economic reasons, e.g., the mother is divorcing or her family is not able to support the forthcoming child) is outlawed in Hong Kong.

First of all, why does the law require that abortion is permissible only if the pregnancy is 24 weeks or less, except where abortion is necessary as a lifesaving measure? We should note that the law was made in the 80s. Based on the technology of that time, a fetus having prenatal age of 24 weeks or beyond was considered viable on its own.¹ Thus, the law is made in the spirit of prohibiting killing a fetus at a stage of independent existence.

This chapter will only briefly discuss the history of abortion laws in Hong Kong; the main discussion is rather to examine whether it is morally justified to maintain such laws. We will see whether the abortion laws are morally justified in both Western and Eastern (or Confucian) ethics. Abortion presents a moral dilemma for both traditions. From the Western perspective, abortion involves the conflict between the mother's right of autonomy and the fetus's right to life. From the Eastern tradition, abortion involves the conflict between individual value (i.e., the life of the fetus) and the family or community value (i.e., the harmony of the family or the community).² This chapter will see how the abortion laws in HK compromise between these rights and values. In the following, we will first examine each of the above conditions under which abortion is legally permissible; hence, we will also show how the Government should respond to the questions listed in the beginning of this chapter.

Before our discussion of the abortion laws starts, we want to clarify a confusion in ethics. Some people may think that the moral permissibility of abortion depends on whether abortion is a killing or letting-die.³ Given that the duty to save another's life is much weaker than the duty not to kill (Brody 1972; Quinn 1989), abortion is more likely to be morally permissible if it is a letting-die. Nonetheless, on the one hand, killing may also be morally permissible in some cases. For example, if a trolley is heading toward several people who are trapped on the main track, it is permissible to redirect the trolley from the main track into a side track on which

¹Today, the viable state is around 22 weeks' gestation.

²Chan and Tse (Chap. 2 of this book) highlight a similar conflict between individual value (i.e., the intrinsic value of life of a terminally ill patient) and the family and community value (i.e., the healthcare burden such patient may impose on family and society, thereby causing disharmony) in the case of euthanasia.

³For a discussion of the possible moral difference between killing and letting-die in this book, see the section in Chan and Tse's chapter on active and passive euthanasia. Chan and Tse also discuss the difference between withdrawing and withholding medical treatment.

a person is trapped although, in this case, redirecting the trolley will kill the one. On the other hand, it is impermissible to let a patient die in order to harvest his organs for transplant so that we can save several people. Therefore, whether abortion is a killing or letting-die is not the main issue in deciding its moral permissibility. In fact, we agree with Rachels (1975) that the difference between killing and letting-die is not morally significant in itself. In other words, an action being an instance of killing and another an instance of letting-die is not sufficient to effect moral difference between these two actions.

Abortion on Demand

The reason why abortion on demand is outlawed in Hong Kong is more of a pragmatic one than for the reverence of life. Before the abortion law was amended in 1981, the Working Group on the Law Relating to Abortion actually considered of bringing in legal abortion on demand. But the group concluded that “this could unleash a suppressed demand for abortion far beyond the capacity of the facilities of the Medical and Health Department, which may cause other services of the Department to suffer” [Report of the Working Group 1977, quoted in Liu (1992, 28)]. So abortion on demand was not introduced because of a lack of resources. On the other hand, Liu points out that “the practice of abortion had general acceptance within the Chinese community” (1992, 283). So she concludes:

In light of the domestic law on abortion and the prevalence of abortions outside the statutory framework, the foetus does not have a legal right to be born or a legal right to life (1992, 287).

In fact, in most places of the world, the fetus does not have a legal right to life. Liu suggests that the right to life movement is to a large extent rooted in the Western religious idea that the fetus is *ensouled* by God at the moment of conception (1992, 284–285).

To outlaw abortion on demand is to limit the mother’s ability to control her body, i.e., to limit the autonomy of the mother. Hence, the restriction of the mother’s autonomy in banning abortion on demand must have an overriding moral justification. It seems that we cannot avoid granting a certain right to life to the fetus. This concession is inevitable unless we take the hard line to insist that the fetus is just like a tumor or outgrowth of the mother’s body. Yet, granting a right to life to the fetus does not mean that the fetus has same right to life as a full-blown person. We can well agree that the life of a full-blown person is more valuable than that of the fetus. That is to say, the right to life is gradational, rather than a matter of all or nothing.

Given that the concept of rights comes from Western ethics, we can still ask how Chinese moral philosophy would respond to the abortion problem, viz. does Confucian ethics allow abortion on demand? In very general terms, Confucianism reveres human life. According to this view, “of all things born between Heaven and Earth, human beings are the most valuable. 天地之性人為貴” (*Xiaojing* 孝經

or *The Book of Filial Piety*) and “Of all creatures, man is the most highly endowed. 人為萬物之靈” (*Shujing* 書經 or *The Book of Documents*).⁴ Even though the fetus is not a full-blown human being, it is a stage a full-blown human being must go through. So its value can be derived from that of a full-blown human being. On the other hand, Confucian ethics also emphasizes the harmony of family and community, which may be threatened by the birth of an unwanted child. Since we do not have classical Confucian texts discussing any issues resembling the abortion case,⁵ we need to extrapolate the most plausible response from them. Suppose that the mother already needs to take care of several children and that her family cannot bear the burden of an additional child. Forbidding her to have abortion will thus destroy the harmony of her family and even that of the community. (If her family cannot support the child, the other community members need to.) Furthermore, it is evident that the fetus is not yet a member of the family or of the community: From the perspective of Mengzi, the fetus does not yet have the four sprouts (*siduan* 四端) of humanity. Given the prioritizing of maintaining familial or communal harmony and the dubious status of the fetus, it would be fair to say that Confucianism has no strong objection to abortion on the grounds of reducing disharmony. That is the reason why Liu points out that “the practice of abortion had general acceptance within the Chinese community,” given the fact that Confucianism is regarded as the dominant moral code of Chinese. This is evidenced by the fact that in other Chinese societies, including China, Singapore, and Taiwan, abortion based on social or economic reasons is legally permissible.⁶

In sum, although Confucian ethics values all forms of life, and human beings particularly, a human fetus is not yet a member of the family or of the community. Given that this tradition gives priority to familial or communal harmony, it will not object to aborting a fetus whose future birth will cause disharmony. So, in this aspect, the abortion law is incongruent with Confucian ethics.⁷

Pregnancy that Threatens the Mother’s Life

When the pregnancy threatens the mother’s life, not to abort the fetus is tantamount to letting the mother die. Hence, the dilemma in this case involves the conflict between the life of the mother and that of the fetus. We can morally justify the law to the effect that abortion is permissible when the pregnancy threatens the mother’s

⁴Even though the fetus is not a full-blown human being, it is a stage a full-blown human being must go through. So its value can be derived from that of a full-blown human being.

⁵The reason is that abortion is not a real option (because of medical and technical limitations) until modern time. In the past, the closest equivalent to abortion was infanticide.

⁶In China and Singapore, there is even no need to give any reasons in order to have abortion.

⁷Although Liu (1992, 282) argues that the wide wording of the abortion law may provide adequate scope to accommodate the practice of abortion on economic ground, no one has ever succeeded in challenging the law based on this interpretation.

life only if the fetus's right to life can be overridden by that of the mother. In other words, we need to have a reason to see the mother's life as more valuable than the fetus's. Maybe we could consider the fetus as a *potential person*, who has a right to life close to, but not up to, a full-blown person. As discussed before, the right to life can be gradational. To say that the fetus is a potential person is equivalent to say that his right to life is not on a par with that of a full-blown person.

As said, Confucian ethics has an easier task at hand even though the issues of right to life and killing remain murky. According to Ivanhoe (2010), “[t]he pregnant woman is a member—a “sister” within Confucian society—who has a history and many connections with other members of our larger community” (43). By contrast, the fetus has no social history and is only a potential member of the community. So killing the fetus will create fewer disharmonies than letting the mother die. In the jargon of Confucianism, not letting the mother abort, given the circumstances, is not practicing benevolence (*ren* 仁) since everyone must have the compassion (*bu ren ren zhi xin* 不忍人之心) to feel the plight of the mother.

Pregnancy that Threatens the Physical or Mental Health of the Mother

According to the law, abortion is permissible when “the continuation of pregnancy would involve risk ... of injury to the physical or mental health of the mother, greater than if the pregnancy were terminated” [Section 47A (1)].⁸ So, from the perspective of rights, we can say that not only is the life of a fetus less valuable than that of a full-blown person, it is also less valuable than a full-blown person's health.^{9, 10}

The permission of abortion in this case is also consistent with the Confucian view. The mother's physical or mental health will have direct impact on her relation with her family members and other community members. For instance, the mother may need to be taken care of by her family members or medical staff for an extended period of time if she continues her pregnancy. So Ivanhoe states the Confucian view as follows:

If there are good reasons to believe that carrying [the] fetus to term will significantly harm the pregnant woman, by threatening her health, undermining her ability to pursue reasonable life goals, or severely damaging her relationships with other members of society, this may offer good grounds for terminating the pregnancy (2010, 43).

⁸Liu points out that “[s]uch a formulation can, however, be interpreted as allowing abortion on demand: statistics show that maternal mortality is greater than the mortality rate from abortion during the first trimester” (1992, 281). But no one has ever succeeded in challenging the law based on this interpretation.

⁹Accepting this will provide a strong reason to accept stem cell research for medical advance.

¹⁰For a discussion of the variety of values and the possible ways to handle multiple values, see Yu's chapter in this book, pp. 205–206 in particular.

Involuntary and Underage Pregnancy

The law does not state explicitly that abortion is permissible if the pregnancy results from rape or the pregnant woman is under 16. Rather, it provides that:

If a registered medical practitioner is in doubt as to whether the continuation of woman's pregnancy would or would not involve risk of injury to the woman's mental or physical health greater than if her pregnancy were terminated, there are two cases in which he may presume that the balance of the risk points to termination: firstly, where a woman is under 16, and secondly, where the woman is a victim of a certain sexual offence... (Liu 1992, 282).

So the permissibility of abortion in the case of involuntary or underage pregnancy is in fact grounded on a medical reason: The victim or the underage mother would be under severe stress and mental anguish if she is forced to bear the fetus to term (even if we assume that they do not need to take care of the baby after birth).

One may think that the legal permissibility of abortion in this case can also be justified by appeal to the concept of responsibility. In the case of voluntary pregnancy or the case in which the pregnant woman is mature enough to consent to sexual relation, she needs to bear the consequence of her behavior. Since she knows that sexual relation may lead to pregnancy, and given that the fetus is a potential person, she has the responsibility to bear it to term.¹¹ But there is a problem: Although it is clear that she has the responsibility if she has not used contraceptives, does she have the responsibility if she has used contraceptives properly? Consider the following case. You well know that even using the road properly you may still be injured or killed in traffic accidents because there are drunk drivers and because machines can fail. If you are injured in a traffic accident without violating any traffic laws, do you need to be responsible for your injury?¹² If the answer is "no," then a pregnant woman who has performed proper contraception should not be responsible for her pregnancy either. Since abortion is outlawed in this case, the law cannot be justified by appeal to responsibility.

As discussed above, Confucian ethics considers the mother's mental health and her relation to her family and community as more important than the life of the fetus. Forcing a rape victim or an underage mother to bear the fetus to term will be detrimental to her mental health and social relation: In a typical Chinese family, an illegitimate child and a mentally unsound daughter are a source of threat to familial harmony. We may, thus, conclude that abortion is morally permissible in the case of involuntary or underage pregnancy under the Confucian tradition.

¹¹Regarding pregnancy resulting from incest, in most cases, the mother is either underage or a rape victim. Consequently, she does not need to bear the responsibility of bearing the fetus. Hence, abortion is permissible.

¹²Thomson (1971) has a more detailed discussion in this issue.

The Fetus that Has Serious Medical Problems or Birth Defects

The provision to the effect that abortion is permissible when the fetus has serious medical problems or birth defects is introduced to the law in order to

[S]ave a woman from the stress of bearing an abnormal child she would rather not have, and a family from the distress and burden of having an unwanted handicapped member which with advances in medical knowledge can be predicted in certain circumstances [*Hong Kong Hansard*, 19 November 1981, 204, quoted in Liu (1992, 282)].

So the reason for introducing this provision is, again, a medical one: It is for the sake of the mental and physical health of the mother and her family members.

Again the Confucian view will justify this provision as an abnormal child will threaten the mental health of the mother and the harmony of the family and community. But based on Confucian ethics, we can also justify this provision for the good of the fetus. According to this view, the *raison d'être* of the state is to promote a meaningful or flourishing life for each individual.¹³ The state must have a conception of meaningful life in order to make policies. And it is reasonable to say that in order to acquire a meaningful life, one has to attain a minimal level of physical and mental health. So if the medical problems of a fetus are so serious that it has no hope to acquire a meaningful life, for example, it will have very low cognitive abilities and need continuous intensive care in the future, and abortion will be permissible.¹⁴ Some may object that this view also implies that it is not wrong to kill a child with serious medical problems or birth defects. This may be true for a newborn baby who has no ability to form any social connections.¹⁵ But for a disabled child who is still able to establish a certain kind of social connections with other members of the family and the community, killing him or her will bring disharmony to the family and the community. So the Confucian view would reject infanticide even in this case.

Challenge to the Law

Warren (1973), an ethicist in the Western tradition, also argues for abortion on demand. She contends that any rights of an actual person must be higher than any rights of a potential person.¹⁶ Consider her thought experiment argument. Suppose an astronaut is captured by some Martians (imaginary inhabitants of Mars) who

¹³This is also true for Aristotle's virtue ethics.

¹⁴Of course, whether choosing abortion or not is up to the mother. To force the mother to abort the fetus will harm her mental health and cause disharmony to her family.

¹⁵Recall that gestation is a process of gradual development. No sharp line in psychology and physiology can be drawn between a fetus just before birth and a newborn baby.

¹⁶She thinks that the fetus and the newborn baby are potential persons.

intend to use some of his body cells to clone human beings. Suppose further that the process of cell taking is very safe and lasts for only a few seconds. Also, the clones in the future will be treated fairly. If the astronaut escapes, he will deny the right to life of those potential persons. But we would still think that the right of autonomy of the astronaut overrides any rights of those potential persons. Therefore, the mother's right of autonomy has priority over the right to life of the fetus in all circumstances.¹⁷

Of course, the body cells of the astronaut have right to life only if they are potential persons. But we cannot simply claim that they are not potential persons or have no right to life at all because they require an unnatural and extraordinary process, i.e., cloning, to survive. Some babies need to stay inside an incubator or have an extraordinary operation to survive. If staying in an incubator or having an operation does not deprive a baby of her status of a person, why should going through a cloning process deprive a body cell of its status of a potential person? We also need to notice that it is quite difficult to determine what is natural or unnatural, ordinary or extraordinary, especially in the era of biotechnology. Avoiding digressing too far from the main issue, we conclude from the above-thought experiment that even if we grant that the fetus is a potential person, that in itself does not mean that we have sufficient reason to justify the prohibition of abortion on demand.

Conclusion

Hong Kong outlaws abortion on demand. Nonetheless, we have canvassed some representative arguments to show that such law is incongruent with Confucian ethics, which would, at least, allow abortion on sound social or economic reasons. That explains why many HK women who have unwanted pregnancy go to Mainland China to have abortion. In the meantime, abortion (on demand) becomes legalized in more and more countries, e.g., USA, Australia, Austria, the Netherlands, Russia, France, Germany, and the Asian countries aforementioned. This trend does not indicate that we have less reverence for life now than in the past. We need to remind ourselves that regardless of emotional or religious factors, it is still a question, social or philosophical, whether the fetus has any right to life at all or whether its right to life can override any rights of an actual person. Hence, the stated trend only shows that we value more and more individual's right of autonomy, which has become a universal value.

¹⁷Although Warren's argument is more like a science fiction, we cannot reject her argument by simply pointing out that her thought experiment can never be true because many phenomena described by scientific theories, e.g., gas laws, also can never be true.

However, as a reminder, as long as we grant the fetus to a certain extent a right to life or regard it as potential community member, it is morally wrong to employ abortion as a major method of birth control. It is simply callous to kill a being for trivial reasons (e.g., neglect of the use of contraception), whose life has intrinsic value.¹⁸ In addition, we cannot underestimate abortion's risk of injury to the physical and mental health of the mother. Therefore, abortion should be the last resort in the case of unwanted pregnancy.

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¹⁸The same argument applies to killing and eating animals.