

WOMEN'S RIGHT TO CHOOSE VS. RIGHT TO LIFE FOR THE UNBORN CHILD: REVISITED

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ABSTRACT

The radical feminists of the 1960s have always been peculiar about the right they possess to determine whatever happens to their bodies. They are bent on determining whether or not to carry a pregnancy to term. Coincidentally, the much celebrated case of Roe v Wade (1973) paved the way for the liberal abortion law, wherein the court recognizes the woman's right to privacy. This is a right which extends even to a woman's right to choose abortion. Consequently, in 1979, the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), under Article 16 provides that women should have the right to decide freely and responsibly on the number and spacing of their children. The Right to Choose under CEDAW has constantly been interpreted to stand for the right a woman has to choose abortion. If all these contentions and interpretation are true and correct, the right to life of the unborn child as provided for under all International Human Right Instruments will be in jeopardy. Hence, this work attempts to show case that, the dignity and sanctity of human persons whether born or unborn underpins the principle of all international human right laws of which both the right to life of the unborn child and right to choose for women are basic components.

I. INTRODUCTION

The right to choose according to the radical feminists of the 1960s means, the right women have to determine what happens to their bodies.¹ To radical feminists, this right extends to the decision whether or not to carry a pregnancy to term. This decision should be left absolutely with the women. This view was boosted in 1973, by the Supreme Court of the United States of America in the

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¹ According to Firestone, a radical feminist, the connection which women usually have with men is an invasion of the women's body, and the resultant effect of that connection which is pregnancy, should be left at the mercy of the women. See, West R., "Jurisprudence and Gender" in Smith, P. (ed.), *Feminist Jurisprudence* New York, 1993, pp. 505-506, at p. 506, See also, Nassbaum, M. C., "R. West, Jurisprudence and Gender, Defending Radical Feminism" 75 (2008) *University of Chicago Law Review* pp. 985-996, at p. 985. See also, the declaration by the Administrator of the United Nations Development Programme, when speaking of a 1995 worldwide survey of the status of women, that 'life is dramatically unfair to women', in McElvaine, R. S., *Eve Seed: Biology, the Sexes and the Course of Human History*, New York, 2000, at p. 1.

case of *Roe vs Wade*.² By this decision, the court recognizes the right to privacy, a right which extends even to a woman's right to choose abortion. This was guaranteed under the 14th Amendment to the American Constitution.

Before *Roe vs Wade*, it must be stressed; US State laws accorded right to the unborn, but these rights were abrogated and declared unconstitutional by the Supreme Court, thus becoming a matter of constitutional law.³ Furthermore, according to the English Common Law, the unborn have all the full rights of the born and these rights have been embodied in the 9th Amendment.⁴ All the rights in the Bill of Rights apply to the unborn, as well as the born. The laws on abortion which are of English Common Law origin was meant to ensure that the unborn child in its mother's womb does not suffer any form of destruction.⁵ That was in sum, the substance and legal content of those laws.⁶

The Common Law can be characterized as being flexible. This flexibility will enable it (Common Law) to meet and adapt to changing times and

² 410 (1973) U.S. (SC) 113. The Supreme Court of the United States has further reaffirmed its stand on abortion right for women by striking down parts of a restrictive Texas Law in the case of whole woman's *Health vs Hellerstedt* 579 (2016) US.15-274.

³ Right to privacy has been held to mean the right an individual, married or single, has to be free from unwanted government intrusion in matters so fundamentally affecting a person as decision whether to bear or beget a child. This was the statement made by the court in the case of *Eisenstand vs Baird* 405 (1972) U.S. (SC) 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349. The court has also employ the right of privacy clause in *Griswold vs Connecticut* 381 (1965) U.S. (SC) 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510, where law banning the use of contraceptive by married couples was declared unconstitutional on the grounds of intruding into the privacy of persons.

⁴ The Ninth Amendment to the United States Constitution acts as a safety net to ensure all individuals are afforded their fundamental rights, even if they are not specifically mentioned. This Amendment works in conjunction with the first 8 amendments to make up the Bill of Rights. The Ninth Amendment includes rights that are not specifically listed in the Constitution. The main purpose of the Amendment is to protect individual basic rights such as life, liberty and the pursuit of happiness, which are listed in the Declaration of Independence. The founding fathers of America believed that these natural rights or inalienable rights are gift from God or natural and cannot be denied, at <<http://legaldictionary.net/ninth-amendment/>>. (Last visited on October 26, 2016). See also, Stevens, C., "The Right of the Unborn from Common Law to Constitutional Law" *Priest for Life, Political Responsibility Center*, at <<http://www.priestsforlife.org/government/stevens3.htm>>. (Last visited on July 7, 2013).

⁵ This was why several attempts were made since 1995 to ban the procedure of Intact Dilation and Extraction, also commonly known as Partial Birth Abortion. The US Supreme Court finally upheld a nationwide ban on the procedure in the case of *Gonzales vs Carhart*, on April 18, 2007.

⁶ *supra* note 4.

circumstances as it reflects in the making of new laws and application of same. Political, social and economic changes entail the recognition of new rights, and the Common Law in its vitality, in its eternal youth, grows to meet the demands of the society.⁷ Since the Constitution of the United States, particularly the Bill of Rights, draws upon the genius of the Common Law, it too recognizes new facts in the application of laws, embodied in concrete cases to which it must be applied.

Hence, it could be said that with *Roe vs Wade*, the legal circle has witnessed a unique and unprecedented incident: the application of constitutional objective and principle to the embryonic world of the unborn child. The legal question is: Do the rights and immunities granted by the constitution apply to the unborn?⁸

The answer, drawn from history of constitutional law, suggests that: by the deliberate nature of gestation, the rights and immunities granted by the Constitution truly applies to the unborn, especially when looked at from the angle of the provisions of the Bill of Rights as well as the Constitution of the United States of America.⁹ The legal problem comes from the very nature of gestation, since it brings into the legal arena a relationship unique in human life and unique in law. The critical question is how to define that relationship?¹⁰

⁷ *ibid*, The flexibility of the common law to adapt itself to changing social attitudes has been expressed by the House of Lords in *R vs R*, 610 (1992) (A.C), at <<http://www.leeds.ac.uk/law/hamlyn/rvr.htm>>. (Last visited on July 7, 2013). See also, "Legal System" *The News Manual, A Professional Resource for Journalists and the Media*, at <http://www.thenewsmanual.net/Manuals%20Volume%203/volume3_63a.html>. (Last visited on July 7, 2013).

⁸ *supra* note 4.

⁹ The Inter-American Council of Jurists wrote the 1st draft of the American Convention on human Rights which codified the principle of right to life of the unborn in the American Declaration of 1948. Hence, the contention by the Inter-American Commission on human Right majority resolution in 1980 that, the principle of the right to life of the unborn has just been reintroduced cannot be true because, this right has been there since 1924. The resolution was made in the *Baby Boy case*. See Inter-American Commission on Human rights in Resolution No 23/81, case 2141, United Nations. The court stated that, the *fetus* can be regarded as a human being, to whom the Court stands in *Parens Patriae*, and to whom the Court has an obligation to protect. The Courts are aware of the main principle of human right law, and are bent on protecting it. Many decision has lend weight to this fact, both before and after *Roe vs Wade*. See the following cases , *Re Application of Jamaica Hospital*, 491 (1985) N.Y S (sup) 2d 898; *Hoerner vs Berninton* 171 (1961) N.J. (A). 2d 140; *Raleigh Fitkin-Paul Morgan Memorial Hospital* 201 (1964) N.J. (A). 2d 537; *Jefferson vs Griffin Spalding County Hospital Authority* 274 (1981) S.E. (Ga) 2d 457; *State ex rel Angela M.W.V. Jeruzicki*, 541 N.W.2d 482.

¹⁰ *supra* note 4.