



Rights Of The Unborn A Judicial Perspective

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Abstract: This study has been undertaken to study the Rights of the Unborn interpreted through Judicial Pronouncements wherein through each case the judiciary has evolved a right to life of the unborn which shall prevail over the right to abort of the mother.

“I feel that the greatest destroyer of peace today is abortion, because it is a war against the child, a direct killing of the innocent child, murder by the mother herself. And if we accept that a mother can kill even her own child, how can we tell other people not to kill one another ? .. **Mother Teresa**

Introduction

Within the past few years, the abortion controversy has generated a vast amount of literature, litigation, and legislation. In each case there has been much discussion about the morality of abortion as opposed to the alleged right of a woman to have an abortion if she so desires.

It must be noted that in attempting to define the legal status of the unborn child, one is immediately confronted with semantic problems. Perhaps the use of the phrase "unborn child" is somewhat imprecise and even indicative of preconceived conclusions. But the use of terms like "embryo" or "fetus," which may be medically precise, is grammatically awkward since they refer only to specific stages of gestation; and such words as "quick" or "viable" are equally unclear since the law's use of such words reflects little, if any, consistency with current medical theories or even with the actual definitions of the words themselves. Thus, the phrase "unborn child" will be used in this note to describe all stages of gestation from conception to birth, and any reference to the other above-mentioned terms will reflect the actual definition of the term unless otherwise qualified by the context.

Object of the Study

The object of this paper is to study the Rights of the Unborn interpreted through Judicial Pronouncements.

Research Methodology

The researcher has adopted doctrinal research method for present research. The doctrinal research involves the analysis of the statutes, case laws, existing secondary information accessed from various sources, e.g. books, articles, journals, websites etc.

Statement of Research Problem

Right to Life of an Unborn is not implemented to the extent of Right to Abort of the Women.

Judicial Pronouncements

In the case of **Wallis v. Hodson**ⁱ an English court, relying on the Roman civil law, as well as the common law, held that a posthumous child was entitled to an accounting of her father's intestate estate. The Lord Chancellor stated: Both by the rules of common and civil law, she [the unborn child] was, to all intents and purposes, a child, as much as if born in the father's life-time.

Following the same reasoning in Wallis, a second English court, in **Doe v. Clarke**ⁱⁱ, interpreted the ordinary meaning of "children" in a will to include a child en-ventre-sa-mere ("in its mother's womb") The Lord Chief Justice stated: "I hold that an infant en-ventre-sa-mere ("in its mother's womb") , who by the course and order of nature is then living, comes clearly within the description of 'children living at the time of his decease.'"

In the case of **Thellusson v. Woodford**ⁱⁱⁱ where the court, addressing itself to this point, said: "Why should not children en-ventre-sa-mere ("in its mother's womb") be considered generally as in existence? They are entitled to all the privileges of other persons."

In **Hall v. Hancock**^{iv} the Supreme Judicial Court of Massachusetts dealt with the question of whether a grandchild born almost nine months after the death of the testator was entitled to share with his four brothers in a bequest of his grandfather. The bequest was to certain grandchildren "as may be living at my decease." After stating that the jury was properly instructed that a child is to be considered in esse (in actual existence) at a period commencing nine months prior to his birth, the court held that a child en-ventre-sa-mere ("in its mother's womb") is within the description of "children living."

In **Barnett v. Pinkston**^v a child en-ventre-sa-mere ("in its mother's womb") at the time of her father's death was held to be a "living child" so that the remainder of an estate would vest in her at that time. However, no benefit ever accrued to the child since she died several hours after. birth, leaving her mother as sole heir.

The unborn child may be an actual income recipient prior to the time of his birth^{vi} as well as a tenant in common with his own mother.^{vii} He is considered an existing person at the time of his father's death and is thereby a beneficiary entitled to participate in any damages recovered in an action for the wrongful death of his father. Likewise, "the unborn child is recognized as a living heir for the purpose of taking any estate, whether by devise or by the statutes of descent. Some states have even gone to the extent of codifying this rule."

A further development in the law of torts has been the recognition of the right to maintain an action for the wrongful death of a child resulting from prenatal injuries. Where the child is born alive and then subsequently dies as a result of injuries received prior to birth, the courts which have considered the question are almost unanimous in allowing the child's estate to bring an action for wrongful death. Although the cause of action for wrongful death is purely statutory, the child born alive has always been considered a "person" regardless of how short a time he actually survives. Thus, in **Torigian v. Watertown News Co**^{viii} the Massachusetts court allowed recovery on behalf of an infant who died 2½ hours after birth as a result of injuries sustained during the fourth month of gestation.

One of the earliest references to the criminal nature of abortion was by the thirteenth-century English jurist, Henry Bracton. Bracton wrote: "If there be anyone who strikes a pregnant woman or gives her a poison whereby he causes an abortion, if the foetus be already formed or animated, and especially if it be animated, he commits homicide."^{ix}

The common law rule that the unborn child could not be the subject of homicide was therefore well established.^x In fact, at common law the abortion of an unborn child prior to quickening was no crime at all if the woman consented; if the woman did not consent to the abortion, the offense was merely an assault and battery.

Early in 1969, an unmarried student was aborted in a Scottish hospital. The certifying doctors ringed the clauses on the certificate which concern "greater risk to the mental and physical health of the pregnant woman..." and "substantial risk of abnormality." In fact the fetus was more than twenty-eight weeks old and after the abortion lived for nine hours, being discovered to be alive when the porter carrying it to an incinerator in a paper bag heard its cries.^{xi}

In **Vo v. France**^{xii}, In this case, the European Court of Human Rights ruled that France's refusal to grant legal recognition to embryos conceived by in vitro fertilization (IVF) did not violate the European Convention on Human Rights. The decision highlights the varying approaches to the legal status of the unborn across different jurisdictions and the complexities involved in determining their rights.

In **Re F**^{xiii} This case, heard in the English Court of Appeal, concerned a pregnant woman who was declared brain dead. The court had to decide whether to continue life support to allow the fetus to develop to

viability. The ruling emphasized the importance of preserving the unborn child's life in certain circumstances, even when the mother is deceased or incapacitated.

In the case of **Suchita Srivastava v. Chandigarh Administration (2009)**, the Supreme Court held that the right of an unborn child to life and personal liberty is protected under Article 21 of the Indian Constitution. The Court held that the State has a duty to protect the life and health of a pregnant woman and her unborn child. The Court further held that the right of an unborn child is not absolute and must be balanced with the right of the mother. The concept of the "right of the unborn child" has evolved over time, particularly with regards to legal protection and recognition. In the past, an unborn child was not considered a legal person with rights. However, with advancements in medical technology and changing attitudes towards the fetus, many countries have enacted laws granting various forms of protection to the unborn.

For example, in the United States, the landmark case of **Roe v. Wade in 1973** established a constitutional right to abortion, but also recognized that the state has a legitimate interest in protecting the life of a fetus, particularly as it approaches viability.

More recently, several states have passed laws restricting abortion, often based on the argument that the fetus has a right to life. In other countries, such as Ireland, the right to life of the unborn is explicitly protected by the constitution. This has led to debates and court cases over the balancing of the right to life of the fetus against the right to bodily autonomy and reproductive rights of the pregnant person. In international human rights law, the right to life is considered a fundamental right, and some treaties, such as the Convention on the Rights of the Child, extend this protection to the unborn. However, the extent to which this protection applies in practice and how it is balanced against other rights remains a subject of ongoing debate and legal interpretation.

In **Shahishtha and Others V. The State, 2022 SCC OnLine Kar 1596^{xiv}** The Karnataka High Court stated that "It is shocking that an agreement is entered into between the parties in respect of an "unborn child". It is for the District Child Protection Unit to take the responsibility of all such cases. It is well settled that 'an unborn child has a life of its own and rights of its own and the rights of unborn are recognised by law. No doubt, only if the unborn can be treated as a person, the right to life of the unborn can be equated with the fundamental right of the mother guaranteed under Article 21 of the Constitution. True, an unborn is not a natural person, but it is well known that after six weeks, life is infused into the embryo, thus converting embryo into foetus and once an embryo evolves into a foetus, the heartbeat starts. In other words, the unborn has life from the stage it transforms into foetus. If the unborn has life, though it is not a natural person, it can certainly be considered as a person within the meaning of Article 21 of the Constitution, for there is absolutely no reason to treat an unborn child differently from a born child. In other words, the right to life of an unborn shall also be considered as one falling within the scope of Article 21 of the Constitution of India'."

Conclusion

Everyone is aware that this is the age of "women's freedom." "But at this point the evolution favoring freedom for women encounters the evolution favoring the recognition of the fetus as a living person within the womb-an evolution supported by the data of biology and the precedents of property, tort, constitutional, and welfare law." Upon what basis, therefore, can abortion be legally justified?

In India, though the laws do recognize the unborn child as a legal person, rights are not conferred on the unborn child until it takes birth. In other words, the state can intervene only when the unborn child takes viability and not before. The position in the Indian scenario remains unclear as to how the law will protect the rights of an unborn child and what is the degree of liability that is owed to such an unborn child.

Judiciary has, thus, played a crucial role in development and evolution of society in general and in ensuring good governance by those holding reigns of power in particular. I believe that judiciary has played its role well in protecting the Rights of Unborn.

ⁱ High Court of Chancery, 1740, This was not the first reported case where the English courts protected the property rights of the unborn child. Earlier cases include *Marsh v. Kirby*, 21 Eng. Rep. 512 (Oh. 1634) (a gift of rents and profits from certain leases to a child en ventre sa mere held to be valid); *Hale v. Hale*, 24 Eng. Rep. 25 (Oh. 1692) (posthumous child held to be within the meaning of a trust created for testator's children who shall be living at his death); *Burdet v. Hopegood*, 24 Eng. Rep. 484 (Oh. 1718) (gift over to testator's cousin in case testator should leave no son at time of his death held not to have taken effect owing to birth of posthumous son).

ⁱⁱ Court of Common Pleas, 1775, "Doe, on the Demise of Clarke, against Clarke and Others." VLex, <https://vlex.co.uk/vid/doe-on-the-demise-804287357>. Accessed 09 May 2024.

ⁱⁱⁱ High Court of Chancery, 1827, "Thellusson v Woodford." VLex, <https://vlex.co.uk/vid/thellusson-v-woodford-805778105>. Accessed 28 August 2024.

^{iv} Court of Appeal (Criminal Division), England, "R v Hancock ; R v Warner ; R v Michael." VLex, <https://vlex.co.uk/vid/r-v-hancock-r-793580785>. Accessed 28 August 2024.

^v 1939 (Alabama), <https://www.courtlistener.com/opinion/3226860/barnett-v-pinkston/> Accessed 28 August 2024.

^{vi} *Industrial Trust Co. v. Wilson*, Rhode Island Supreme Court, 1937, CAPOTOSTO, Justice. "Indus. Trust Co. v. Wilson." VLex, 29 June 1937, <https://case-law.vlex.com/vid/indus-trust-co-v-893851405>.

^{vii} *Biggs v. McCarty*, 86 Ind. 352 '(1882). <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2972&context=ndlr>. Accessed 28 August 2024.

^{viii} *United States State Supreme Judicial Court of Massachusetts Supreme Court*, 1967, WILKINS, Chief. "Torigian v. Watertown News Co." VLex, 09 May 2024, <https://case-law.vlex.com/vid/torigian-v-watertown-news-890684866>.

^{ix} <https://scholarship.law.nd.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=2972&context=ndlr>. Accessed 28 August 2024.

^x *Regina v. Trilloe*, 174 Eng. Rep. 674 '(N.P. 1842); *Regina v. Wright*, 173 Eng. Rep. 1039 (N.P. 1841); *Regina v. Reeves*, 173 Eng. Rep. 724 (N.P. 1839); *Rex v. Sells*, 173 Eng. Rep. 370 (N.P. 1837); *Rex v. Crutchley*, 173 Eng. Rep. 355 (N.P. 1836); *Rex v. Bain*, 172 Eng. Rep. 1272 (N.P. 1834); *Rex v. Enoch*, 172 Eng. Rep. 1089 (N.P. 1833); *Rex v. Poulton*, 172 Eng. Rep. 997 (N.P. 1832).

^{xi} FINNIS, Three Schemes of Regulation, in *THE MORALITY OF ABORTION* 213-14 (J. Noonan ed. 1970). It is interesting to note in this particular case no attempt was made to keep the child alive, as various medical witnesses later testified, since the object of abortion is to prevent the child's survival.

^{xii} 2004, European Court of Human Rights, <https://www.cambridge.org/core/journals/german-law-journal/article/does-the-unborn-child-have-a-right-to-life-the-insufficient-answer-of-the-european-court-of-human-rights-in-the-judgment-vo-v-france/43F06BB66112648B7273CB7C7ACE1059>

^{xiii} (1988), Fam. 122- 132; *Re F (in Utero)* (CA) [1988] Fam. 132 -145., <http://classic.austlii.edu.au/au/journals/SCULawRw/2001/7.pdf>

^{xiv} 2022 SCC OnLine Kar 1596