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Reproductive Rights & Judicature

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The historic Roe v Wade ruling from 1973, which gave abortion a constitutional right up until a foetus could live outside the womb, usually established at 22 or 24 weeks of pregnancy, was overturned by the United States Supreme Court on June 24 with a 6:3 majority. The US is one of only a handful of nations that have severely restricted access to the procedure, depriving women of their right to control their bodies. This decision was made at a time when significant progress has already been made in ensuring women's access to abortion, with about 50 countries liberalizing their abortion laws.

Keywords: *pregnancy, reproductive rights, abortion, privacy, foetus, conservatism.*

INTRODUCTION: ROE v WADE

The landmark judgment of *Roe v Wade* by which the *Right to Decide whether to Continue Pregnancy or not entered the Realm of the Right to Privacy* transformed women's life by drawing a line between women's rights and the right of an unborn foetus. This delineation gave women right to their own bodies, which was until this judgement, rested in mercy with arbitrary timelines decided by the prior peremptory judgments of the US Supreme Court.

FACTS OF THE CASE

The Texas Abortion Statue of 1961 criminalised procuring or even attempting abortion unless prescribed for saving the life of the mother. Roe, the appellant, and an unmarried woman filed a suit against the district attorney, Wade, as she was denied access to abortion because she did not fall into the exception bracket which was a sign of a threat to her life due to foetus. She contested that denial of abortion which infringed upon her right to privacy was in stark conflict with the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. District Court acknowledged Roe's contentions and adjudicated the Texas Abortion Statue of 1961 as constitutionally vague and provided her declaratory relief but not an injunction. Roe appealed for an injunction and Wade did the same for questioning declaratory relief.

ISSUES

The question which unfolded was,

- Whether US Constitution encompasses the Right to Abortion under women's Right to Privacy which itself realms under the Right to Life.

STRINGS THAT LED TO THE JUDGEMENT

US Supreme Court examined the complete history of why actually these abortion laws came into place before coming on to the verdict. They concluded and highlighted two prominent reasons. The first being that these laws take pre-natal life' right into consideration by providing foetus right to life. Texas homicide statute, article 1205 of the penal code, intends to protect a person in existence by actual birth and thereby implicitly recognizing other humans' life that is not in existence by actual birth. Thus, this article becomes the soul of anti-abortion legislation. The second reason that the court framed out was to protect and prevent women from using hazardous medical procedures to end up their pregnancy as a state recognized that it has a definite legal interest in protecting and safeguarding women in the late stages of her pregnancy. The court opined that as Right to Privacy is not explicitly mentioned in the constitution, but it is duly recognised by Court in various judgements, the first one being *Union Pacific Railway Co. v Botsford*. [In *Union Pacific Co. v Botsford*, the court held that "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the

possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.”] Court acknowledged that the Right to Privacy is implicit in the Due Process clause of the Fourteenth Amendment. It was found that this clause was broad enough to include the Right of woman to terminate or continue her pregnancy. Court further opined that the state’s historically recognised legitimate reasons to criminalise abortions must be aligned and balanced with modern society and its expectations and the Due Process Clause. [Fourteenth Amendment also known as the Reconstruction Amendment prohibits the state from depriving any person of “life, liberty, or property, without due process of law” and from denying anyone within a state’s jurisdiction equal protection under the law without due process of law. Due Process of law is ‘a course of legal proceedings according to rules and principles that have been established in a system of jurisprudence for the enforcement and protection of private rights.’¹

JUDGEMENT

Court after critically analysing all the significant information, adjudicated with a 7-2 majority that the Right of a woman to terminate their pregnancy comes under the ambit of the Right to Privacy but with qualifications, resulting in it not being absolute. Court asserted that the state’s legitimate interest in safeguarding maternal health, maintaining medical standards, and preservation of potential life could act like conditions to women's right to abortion, but these restrictions will be under ‘strict scrutiny’ of constitutional review.

The court rejected Respondent’s arguments for the right of the foetus to life under the ambit of the Fourteenth Amendment, by marking that the fourteenth amendment does not wholly recognize unborn persons as humans. Court also stated that the Right to Privacy for a pregnant woman is not like as for other citizens, because women when pregnant hold an embryo, and later a foetus, thus maternal health, medical standards, and prenatal life are important factors to be taken cognizance of. With this decision of the Supreme Court, the handle of regulating the pregnancy of women transferred from the State to the women themselves, thus the state could

¹ ‘Equal Protection-United States Law’ (*Britannica*) <<https://www.britannica.com/topic/equal-protection>> accessed 22 October 2022

not interfere until and unless there exist some 'compelling interest'. However, after foetus viability state could ban abortion to safeguard the prenatal's interest.

But this event can be restricted if maternal health is in threat due to foetus viability by allowing abortion. Roe was critical in providing the Right to Abortion on equal footing with the Right to Speech & Expression and the Right to Religion and was significant in advancing gender equality in social, political, economic, and educational parks of society. ²

DOBBS v JACKSON WOMEN'S HEALTH ORGANIZATION

When the custodian abandoned its duty to protect fundamental rights. The decision of Roe v Wade, in which women were provided with the license to decide whether to continue the pregnancy, added tons of prestige and respect to the apex court but was overturned by the same court under Dobbs v Jackson Women's Health Organisation. Galvanizing hues and cries among proponents of Roe v Wade. This decision revived the power of the state to regulate, even prohibit, abortion.

The verdict of Dobbs v Jackson Women's Health Organisation came in while upholding Mississippi's abortion ban. Mississippi law makes most abortions illegal after 15 weeks of pregnancy, about two months earlier than Roe. The law was enacted in 2018 by the Republican-dominated Mississippi Legislature. The law bans abortions if "the probable gestational age of the unborn human" is determined to be more than 15 weeks, with narrow exceptions for medical emergencies or "a severe fetal abnormality³." but this was immediately challenged in federal court which then blocked its enforcement. The state contended that the fetus has made important physiological developments by 15 weeks and that abortions are riskier for the mother at this stage of pregnancy. Opposing the state's contention, the Jackson Women's Health Organization, which is the sole abortion clinic in Mississippi, gave evidence to a federal appeals court showing that fetal viability is impossible at 15 weeks. Federal District Court affirmed the lower court ruling by blocking the law and essentially saying that abortion is a right until a fetus

² *Roe v Wade* 410 U.S. 113 (1973)

³ Adeel Hassan, 'What to Know About the Mississippi Abortion Law Challenging Roe v Wade' (*New York Times*, 06 May 2022) <<https://www.nytimes.com/article/mississippi-abortion-law.html>> accessed 21 October 2022

is considered viable. The U.S. Court of Appeals for the Fifth Circuit affirmed the district court's decision in December 2019.

On March 19, 2019, then-Republican Governor Phil Bryant signed the Texas Abortion Law also called as "heartbeat" abortion law, an even more restrictive measure than Mississippi's Abortion Law. Texas Abortion Law banned most abortions once fetal cardiac activity could be detected – which is about six weeks. The heartbeat law said that physicians who performed an abortion after a foetal heartbeat was detected, could have their medical licenses revoked. The law made no exceptions for pregnancies caused by rape or incest⁴. This law too was blocked by a district judge, and in February 2020, the 5th Circuit Court of Appeals in New Orleans agreed with the decision of the district judge. The appeal for these decisions was made in Supreme Court, and the indication that the bench would uphold prior decisions of lower courts was quite clear. But the inkling turned out to be erroneous.

SLEDGEHAMMER OF CONSERVATISM ON COMMAND, ROE *v* WADE WHITEWASHED

Roe v Wade which gave women the right and authority to decide for their pregnancy till foetus viability was overturned by Mississippi's Case Verdict. This judgment could be framed as incalculable till past years, but the change in the composite structure and character of the nation's highest court with the appointments of conservative Justices during the presidency of Donald Trump gave rise to a fresh squirt of litigations around the issue.

The stark conservative majority in the Supreme Court has opened the gate for a series of seismic waves throughout the US by making 'well-settled judgments' turn upside down. The first seismic shock is evident in the form of the overturning of 'Roe'. The staggering episode which occurred during the formulation of the 'Anti-abortion' verdict was that the five-member conservative majority comprising of Justices Samuel Alito, Clarence Thomas, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett were divided on an issue, the issue being 'whether to limit abortion till 15 weeks, for then at least or to overrule Roe entirely', which implies that the

⁴ Selena Simmons-Duffin & Carrie Feibel, 'The Texas Abortion Ban Hinges On 'Fetal Heartbeat'. Doctors Call That Misleading' (NPR, 03 May 2022) <<https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion>> accessed 21 October 2022

rights of women were not even a consideration. Justice Alito confirmed while proceeding to the term for adjudication of the verdict that “the only real options” they have been to “reaffirm Roe or to overrule it.”

HYPOCRISY DECRIED & RISE OF QUESTION MARKS

The 14th Amendment was used as a significant instrumentality to canvass Roe v Wade on paper and color United States with enlightenment and liberty, but this very same sketch of the masterpiece was used by a bench of Conservative Justices to whitewash whole of the canvass of Roe, by upholding Texas Abortion Law. This has clearly shown us how an amendment that was originally put in place to protect the US citizens can simply be twisted, turned, and reduced as a politicized tool to serve the interest of one community while overlooking the needs and concerns of the other, stripping them of their universal rights. Justice Samuel Alito had rejected ‘Roe’ as “egregiously wrong from the start”, and held that the right of women to terminate pregnancies up to the point of fetal viability – “must be overruled”.

Washington is considered the template for tech innovations, net wealth, economy, advanced infrastructure, and above all modern liberalism, but the judgment of Dobbs vs Jackson Women’s Health Organization has led the United States hit a sharp blow and is low in its stature of being a template for other countries. When countries all over the globe are practicing the international trend which leans in the direction of easing their abortion restrictions, the United States now queue with 3 other countries which have rolled back their abortion rights since 1994, it also lines up with countries with strict and restrictive access to abortion⁵.

REPERCUSSIONS OF CONSERVATIVISM

It is important to take cognizance that coercive abortion laws not only go against women’s rights but also against other universally acknowledged rights such as the rights to equality, health, and the independent choice of how many children to have. One of the most direct, immediate, and foreseeable consequences of this decision is that poor woman who would not be able to timely afford an abortion will be forced to carry their pregnancies to term. This will negatively impact

⁵ Eric Bazail-Eimil, ‘Here's What Happened When Other Countries Rolled Back Abortion Rights’ (*Reason*, 30 June 2022) <<https://reason.com/2022/06/30/heres-what-happened-when-other-countries-rolled-back-abortion-rights/>> accessed 24 October 2022

their financial holdings, making it more and more difficult for them to cover living expenses after giving birth, pushing them further into poverty, and being forced to take up petty jobs, which provide them with little to no security. The other very stark implication of Judicial Conservatism was women started using methods to self-abort their pregnancies by eating the contraceptive pill, morning-after pills, inserting objects into their vaginas, and ingesting hazardous health substances. There are many more undercover deleterious effects of this decision that are yet to be screened. This decision acted like a wrecking ball to abortion rights and utterly disregarded the reproductive rights of one in four women in America who decide to end a pregnancy.

This ruling is one in a recent run of Supreme Court decisions that have not only undermined the rights but also taken away constitutionally regarded liberty. It also raises the grave question of the yet to come decision of the apex court. This decision has already given the license to the state to decide on the right to make decisions about our intimate partners, how to raise children, whom to marry, and whether to use contraception. It is instinctive to raise question marks on till which extent citizens of the US could be strangled under the realm of laws of Modern Libertarianism and its Conservative Judicature.

CONCLUDING REMARKS

The U.S. Supreme Court has abandoned its duty to protect fundamental rights and reverse *Roe v Wade*, concluding that there is no constitutional right to abortion. This decision is tragic and will have long-lasting effects. The Supreme Court abolished a fundamental right for the first time in history, breaking with over 50 years of tradition. The case marked the first time the Court considered the constitutionality of a pre-viability abortion ban since *Roe v Wade*. By denying them authority over their own bodies and their destinies, this judgment will enable extremists across the nation to outlaw abortion and reduce women to second-class status. Due to this ruling, it is anticipated that half of the states will outlaw abortion, depriving the 36 million women of the fundamental freedom to choose whether or not to have children.

Excerpt of dissenting judgment: *With sorrow – for this Court, but more, for the many millions of American women who have today lost fundamental constitutional protection – we dissent.*⁶

⁶ Sucheta Sarkar, “‘With sorrow – for this Court, but more, for the many millions of American women...we dissent.’ Read SCOTUS dissent on Right to Abortion case’ (SCC Blog, 26 June 2022) <<https://www.sconline.com/blog/post/2022/06/26/right-to-abortion-not-constituional-right-dissent-opinion-supreme-court-united-states-women-body-autonomy-roe-wade-casey-dobby-legal-research-updates-news/>> accessed 29 October 2022