

Social Sector Hotline

June 27, 2022

ROE V. WADE OVERRULED, NGOS MAY FACE REDUCED INTERNATIONAL FUNDING

- *Dobbs, State Health Officer of the Mississippi Department of Health, v. Jackson Women's Health Organization* Overruled *Roe v. Wade* and *Planned Parenthood v. Casey*
- Significant impact on broader rights-based public health policies in the United States ("US") including global south
- International organizations focused on rights-based approach to maternal health may face reduced funding
- Public health organisations may look towards European Union ("EU") for further philanthropic and programmatic support

BACKGROUND

On 24th June 2022, the Supreme Court of United States overturned *Roe v. Wade* in *Dobbs, State Health Officer of the Mississippi Department of Health, v. Jackson Women's Health Organization*. In a 6:3 majority the Court held the following:

- The Constitution does not confer a right to abortion;
- *Roe*¹ and *Casey*² are overruled; and
- The power to regulate abortion laws rests with the elected representatives.

The Gestational Age Act of Mississippi states that "*except in the case of a medical emergency or a severe fetal abnormality, a person shall not intentionally or knowingly perform... or induce an abortion of an unborn human being if the unborn human being's probable gestational age has been determined to be greater than fifteen (15) weeks.*"

The Respondents in the case, an abortion clinic, challenged the said Act citing violation of legal precedents (specific referencing the *Roe* and *Casey* case) establishing the constitutional right to freedom set by the Courts. On the other hand, the Petitioners argued that the Act satisfies a rational basis review determining it as constitutional while the earlier precedents (*Roe* and *Casey*) were erroneous.

The crucial question is whether the Constitution, when correctly interpreted, grants the right to an abortion. Although the Constitution includes no direct reference of the right to an abortion, numerous constitutional provisions have been proposed as prospective homes for an implied constitutional right.

CONSTITUTIONAL ASPECTS OF THE JUDGEMENT

Roe ruled that the right to abortion is part of the right to privacy guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. Therefore, the Court first examines the test that the Court has used in previous instances to establish whether the Fourteenth Amendment's reference to "liberty" guarantees a specific right to the people.

According to the Court's rulings, the Due Process Clause protects two types of substantive rights:

- Rights provided by the first eight Amendments to the Constitution; and
- Rights deemed fundamental but not stated elsewhere in the Constitution

The challenge in determining whether a right comes into any of these categories is whether the right is "deeply established in [United States] history and culture" and important to the Nation's "scheme of ordered liberty." However, one must understand that the Respondents' contention that this history is irrelevant contradicts the very standard the Court has used in deciding whether an alleged right that is not specified in the Constitution is still protected by the Fourteenth Amendment.³

The dissenting opinion very aptly concluded:

"In overruling Roe and Casey, this Court betrays its guiding principles. With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent,"

In fact, Supreme Court of India routinely in several constitutional judgments, rely heavily on the constitutional principles posited by its US counterpart for developing its constitutional jurisprudence. Either US Supreme Court will lose its global value as a bastion of constitutional rights or other major global constitutional courts will start shrinking their constitutional jurisprudence if they refer to US Supreme Court.

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Overturning *Roe v. Wade* jeopardises the United States' International Family Planning initiatives, which are mostly located inside development cooperation. Despite the tremendous advances, in the past, in maternal and child health and family planning access accomplished with major assistance from US financing schemes, more than 218 million women in low- and middle-income countries still have unmet Family Planning ("FP") requirements. Pregnant women's health and economic stability are jeopardised in both low- and high-income nations due to limited access to safe abortions and Family Planning services.⁴

Fiscally, the US Congress might put both bilateral and international assistance into question.⁵ In 2020-2021, the United States provided around \$700 million to the World Health Organization ("WHO"). In March 2022, the WHO, one of the world's leading abortion research and advocacy organizations, issued new abortion care guidelines⁶ that urge for unrestricted access to safe abortions.

Through a Program named 'Healthier Populations' channel, receiving approximately US\$431 million as a minimum per year, a portion of WHO's budget in low- and middle-income countries is devoted entirely to abortion care, sexual and reproductive health and rights, and sex education; sexual and reproductive health and rights are also addressed in different pillars of the WHO budget.

Roe v. Wade's overturning has cast the path for the United States to remove government funding for overseas development programmes that fund, support, and provide sexual and reproductive health services, including, but not limited to, abortion treatment, through subsequent court actions. The United States Agency for International Development ("USAID") is one of the biggest bilateral Family Planning contributor in the world. Overturning *Roe v. Wade* might result in tighter constraints on USAID's capacity to assist the millions of individuals globally who require access to FP services. Furthermore, greater limits on abortion access in the United States may have an impact on the Family Planning 2030 alliance, which focuses on rights-based family planning, and the Global Financing Facility.⁷

Moreover, US organizations working for social welfare that give FP and conceptive wellbeing financing low- and middle-income nations through different social institutions may face reduced funding. Center for Disease Control and Prevention, the Department of State, National Institutes of Health, and the Peace Corps are such organisations, to name a few. While USAID's Maternal and Child Health ("MCH"), FP, and conceptive wellbeing endeavours also face tremendous risk, the President's Emergency Plan for AIDS Relief could likewise be impacted given the association's emphasis on sexual schooling and dissemination of contraceptives to diminish HIV/AIDS rates, which frequently matches with FP programs.

Impact on 501(c)(3) funders

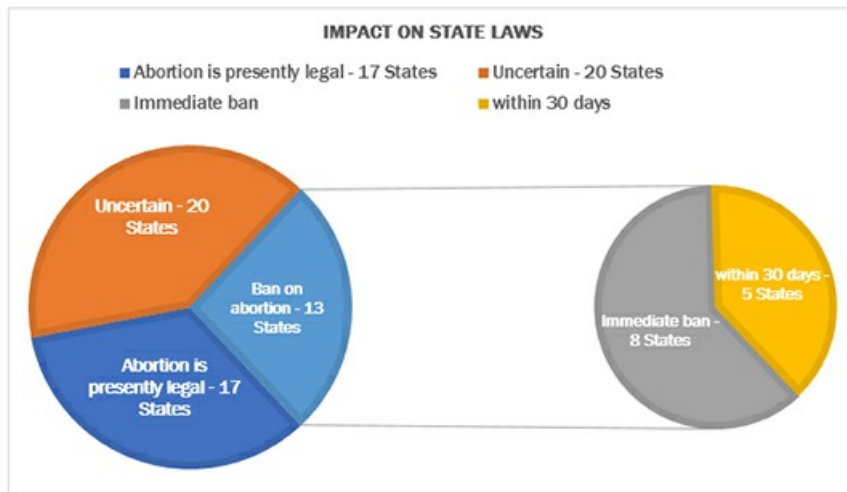


Chart No. 1 denoting the status of abortion laws in different states in the US

Section 501(c)(3) is a tax category for not-profit organisations in the U.S. Organisation meeting the requirements under Section 501(c)(3) are exempted from federal income tax. As can be seen from the chart above, every state in the U.S. shall be witnessing changes in their abortion laws which would directly impact organisations working towards women's rights and focus on maternal health of women during pregnancy and access to safe and successful abortions to women who wish to terminate their pregnancies.⁸ The same can also be concluded by the fact that the previous administration had put a ban on foreign donations to organisations that provided abortion counselling and aid.⁹

Most NGOs, working towards safe abortions and FP in India, rely on international funding. The 501(c)(3) entities that provide reproductive health funding India, could be at risk of reduced funding. The same can be concluded from a similar episode in 2017 when US Government, prohibited federal funding for organisations providing information on terminating pregnancy. This move directly impacts India since international funding is a vital economic source for Indian NGOs spreading awareness on safe abortions and promoting FP, MCH.

Pertinently, changes will also be seen in the budgetary allotments on healthcare in the US and this will in turn effect the priorities of the funders/investors in the private markets. Most NGOs in the global south working on such issues are dependent upon their funding from US 501(c)(3) funders. Organizations focussed on reproductive healthcare and family planning may face diminished budget as a result of this judgement.

Fearing such budgetary cuts, several organisations in US that support family planning and reproductive rights have stated calling on supporters to donate in the wake of this decision. For example, National Network of Abortion Funds, an organization that allows givers to donate in one place and have their money spread between 80 local abortion funds. The money goes toward "funding, travel, lodging, and other wrap-around supports," to make "abortion access possible for anyone, wherever they live and wherever they are seeking care," have put out a public appeal for support. National Abortion Rights Action League that supports pre-natal healthcare and Centre for Reproductive rights, which

supported the Jackson Women's Clinic in the case, have also put out donation pleas.

Indian law has followed a liberal approach as compared to US with regards to its position on abortion rights of women. Even before the ruling of *Roe v Wade*, in 1971, Indian parliament enacted the Medical Termination of Pregnancy Act ("MTP Act") which allowed registered medical practitioners to carry out abortions under certain specified circumstances. The law did not give absolute right to abortion to women but allowed abortions under specified circumstances up to a period of 20 weeks. MTP Act was amended in 2021 and after the 2021 amendment abortion is permissible upto 24 weeks in cases of women under specified conditions. Additionally, there is no upper limit for abortion if "substantial foetal abnormalities" are diagnosed by a medical board. On October 12, 2021, the Union Government notified the Medical Termination of Pregnancy (Amendment) Rules 2021, which detailed the categories of women eligible for getting abortions up to 24 weeks of pregnancy. The list included survivors of sexual assault, minors, women whose marital status changes during ongoing pregnancy, women with physical disabilities, in cases of a foetal malformation which poses a threat to either the unborn child or the mother etc. Moreover, even before the 2021 amendments in the MTP Act, the High Courts across the country had passed several orders permitting abortions in cases relating to rape or foetal abnormalities.

In such backdrop, Indian not-for-profits which were funded by 501(c)3 entities of US, working towards sexual and reproductive rights had no roadblocks from either the government or from the funders, until this ruling. After this ruling the position of US on the issue of abortion has changed in international viewpoint. Such a change will force the Indian entities to look for funders or supporters who aligns with Indian liberal views on reproductive rights and specifically abortion related laws. This decision will give rise to an established network of capable, but underfunded groups of not-for-profits which will be missing the resources to set their plans and programmes on sexual and reproductive rights fully in motion. This decision will place abortion regulation firmly in the hands of states which in turn will intensify state-level policy battles, therefore, 501(c)3 entities in certain states which decide to completely ban abortions, are also likely to follow in and completely ban their funding.

The brunt will mostly be faced by the not-for-profit groups which are deeply rooted in communities as they are the first or primary responders to women seeking abortions. Such not-for-profits are already underfunded due to the taboo and social stigma around abortions. Such groups often depend on bigger not-for-profits which are funded by international funds. To add to their plight, one must also understand that this trickling down of funds is now contrary to law as per the Foreign Contribution Regulation Amendment Act, 2020. Despite having a comparatively liberal standpoint, Indian subcontinent will be facing the economic effects of overruling of *Roe v Wade*.

GLOBAL IMPACT ON OTHER SOUTH ASIAN COUNTRIES

Social norms "heavily influence" how abortion laws are applied and understood. Global legislation may change as a result of *Roe v. Wade* being overturned. For instance, in the case of Indonesia, it might encourage Indonesian lawmakers to pass a family resiliency measure that would curtail women's rights, deny them access to contraceptives, and make homosexuality and extramarital affairs illegal.

The judgement may lead to strengthening of anti-abortion and anti-rights women's sentiment and set a precedent even in nations where there has been progress in the past decades. For instance – Mexico, where its Supreme Court decriminalised abortion to reassess the approach countries take on curtailing or broadening sexual and reproductive health and rights.

The results are already evident. After the *Dobbs v. Jackson Women's Health Organization* draft was leaked, groups that opposed to the expansion of sexual and reproductive health and rights in Bangladesh were "using this as additional fuel for why access to abortion and SRHR is not something Bangladesh should be moving forward with."

CONCLUSION

As observed in 2017, US abortion laws and funds pertaining to abortion and FP directly impact Indian NGOs and their funding. The budgetary cuts by the then US government had led to reduced funding in India limiting abortion-related services to women. The estimation of funding cuts went as high as 10 million in American dollars. This led to many NGOs, for instance Family Planning Association of India (FPA), to potentially reduce outreach services and satellite centres. Thus, it can be conclusively determined that the US Supreme Court's recent ruling in the *Dobbs v. Jackson* case will impact the functioning of Indian NGOs and may also impact their very survival.

Abortion rights connect with global public health, sexual equality, sexual and reproductive health and rights, women's employment empowerment, education opportunities, and sanitation, food, and health access, making them relevant to the global development agenda. Charities and NGOs must promote access to appropriate and inclusive healthcare because the global COVID-19 pandemic frequently causes disruptions in FP and reproductive care. Stakeholders should be ready to step up their advocacy efforts with other donor nations in the event of a US withdrawal from the sector given the significant involvement of US in funding these concerns.

Considering the global ramifications, grantees may consider approaching the European Commission for getting grants to serve the issues of safe abortion, maternal rights inter alia. European Commission aims to award grants to beneficiaries either through the general budget of EU or the European Development Fund. It follows a very transparent procedure through call for proposals for awarding grants to beneficiaries that strictly follow the no-profit rule.¹⁰

Members of the European Parliament have already started demanding a global right to a safe access to legal abortion.¹¹ They have passed a resolution in whooping numbers, exhorting EU Treaties to protect right to abortion.¹² Mostly all deaths from abortions come from states/countries that have forbidden abortion. It is estimated that if abortion becomes illegal then the deaths due to unsafe abortion will surge by 21%.¹³ This marks a considerable shift in the way US is perceived as a torch-bearer of liberal principles, and particularly in the context of rights-based gender movement and discourse. Gendered rights-based organizations in India may look at generational shift in devising fund-raising strategies and may want to look at EU as a potential donor jurisdiction.

– Nitish Raj, Rahul Rishi & Dr.Milind Antani

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¹ Roe v. Wade, 410 US 113 (1973).

² Planned Parenthood of Southeastern Pa. v. Casey, 505 U. S. 833

³ https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf

⁴ https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf

⁵ <https://donortracker.org/insights/end-roe-v-wade-implications-global-development>

⁶ <https://www.who.int/news/item/09-03-2022-access-to-safe-abortion-critical-for-health-of-women-and-girls>

⁷ <https://www.forbes.com/sites/alisondurkee/2022/06/25/overtuming-roe-v-wade-heres-how-abortion-bans-will-hurt-state-economies-and-the-gdp/?sh=6ef5a9923c6d>

⁸ <https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/>

⁹ <https://www.nytimes.com/2017/01/23/world/trump-ban-foreign-aid-abortions.html>

¹⁰ https://ec.europa.eu/international-partnerships/grants_en#:~:text=A%20grant%20is%20a%20financial,one%20of%20our%20policy%20objectives.

¹¹ <https://www.brusselstimes.com/236167/roe-v-wade-meps-demand-global-right-to-safe-and-legal-abortion-access>

¹² *Ibid.*

¹³ *Ibid.*

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