



INTERNATIONAL LAW
JOURNAL

**WHITE BLACK
LEGAL LAW
JOURNAL**
**ISSN: 2581-
8503**

Peer - Reviewed & Refereed Journal

The Law Journal strives to provide a platform for discussion of International as well as National Developments in the Field of Law.

WWW.WHITEBLACKLEGAL.CO.IN

DISCLAIMER

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Editor-in-chief of White Black Legal

– The Law Journal. The Editorial Team of White Black Legal holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Team of White Black Legal. Though all efforts are made to ensure the accuracy and correctness of the information published, White Black Legal shall not be responsible for any errors caused due to oversight or otherwise.

WHITE BLACK
LEGAL

EDITORIAL TEAM

Raju Narayana Swamy (IAS) Indian Administrative Service officer



Dr. Raju Narayana Swamy popularly known as Kerala's Anti Corruption Crusader is the All India Topper of the 1991 batch of the IAS and is currently posted as Principal Secretary to the Government of Kerala . He has earned many accolades as he hit against the political-bureaucrat corruption nexus in India. Dr Swamy holds a B.Tech in Computer Science and Engineering from the IIT Madras and a Ph. D. in Cyber Law from Gujarat National Law University . He also has an LLM (Pro) (with specialization in IPR) as well as three PG Diplomas from the National Law University, Delhi- one in Urban Environmental Management and Law, another in Environmental Law and Policy and a third one in Tourism and Environmental Law. He also holds a post-graduate diploma in IPR from the National Law School, Bengaluru and a

professional diploma in Public Procurement from the World Bank.

Dr. R. K. Upadhyay

Dr. R. K. Upadhyay is Registrar, University of Kota (Raj.), Dr Upadhyay obtained LLB , LLM degrees from Banaras Hindu University & Phd from university of Kota.He has succesfully completed UGC sponsored M.R.P for the work in the ares of the various prisoners reforms in the state of the Rajasthan.



Senior Editor

Dr. Neha Mishra



Dr. Neha Mishra is Associate Professor & Associate Dean (Scholarships) in Jindal Global Law School, OP Jindal Global University. She was awarded both her PhD degree and Associate Professor & Associate Dean M.A.; LL.B. (University of Delhi); LL.M.; Ph.D. (NLSIU, Bangalore) LLM from National Law School of India University, Bengaluru; she did her LL.B. from Faculty of Law, Delhi University as well as M.A. and B.A. from Hindu College and DCAC from DU respectively. Neha has been a Visiting Fellow, School of Social Work, Michigan State University, 2016 and invited speaker Panelist at Global Conference, Whitney R. Harris World Law Institute, Washington University in St.Louis, 2015.

Ms. Sumiti Ahuja

Ms. Sumiti Ahuja, Assistant Professor, Faculty of Law, University of Delhi, Ms. Sumiti Ahuja completed her LL.M. from the Indian Law Institute with specialization in Criminal Law and Corporate Law, and has over nine years of teaching experience. She has done her LL.B. from the Faculty of Law, University of Delhi. She is currently pursuing Ph.D. in the area of Forensics and Law. Prior to joining the teaching profession, she has worked as Research Assistant for projects funded by different agencies of Govt. of India. She has developed various audio-video teaching modules under UGC e-PG Pathshala programme in the area of Criminology, under the aegis of an MHRD Project. Her areas of interest are Criminal Law, Law of Evidence, Interpretation of Statutes, and Clinical Legal Education.



Dr. Navtika Singh Nautiyal

Dr. Navtika Singh Nautiyal presently working as an Assistant Professor in School of Law, Forensic Justice and Policy studies at National Forensic Sciences University, Gandhinagar, Gujarat. She has 9 years of Teaching and Research Experience. She has completed her Philosophy of Doctorate in 'Intercountry adoption laws from Uttranchal University, Dehradun' and LLM from Indian Law Institute, New Delhi.



Dr. Rinu Saraswat

Associate Professor at School of Law, Apex University, Jaipur,
M.A, LL.M, Ph.D,

Dr. Rinu have 5 yrs of teaching experience in renowned institutions like Jagannath University and Apex University. Participated in more than 20 national and international seminars and conferences and 5 workshops and training programmes.

Dr. Nitesh Saraswat

E.MBA, LL.M, Ph.D, PGDSAPM

Currently working as Assistant Professor at Law Centre II, Faculty of Law, University of Delhi. Dr. Nitesh have 14 years of Teaching, Administrative and research experience in Renowned Institutions like Amity University, Tata Institute of Social Sciences, Jai Narain Vyas University Jodhpur, Jagannath University and Nirma University.

More than 25 Publications in renowned National and International Journals and has authored a Text book on Cr.P.C and Juvenile Delinquency law.



Subhrajit Chanda

BBA. LL.B. (Hons.) (Amity University, Rajasthan); LL. M. (UPES, Dehradun) (Nottingham Trent University, UK); Ph.D. Candidate (G.D. Goenka University)

Subhrajit did his LL.M. in Sports Law, from Nottingham Trent University of United Kingdoms, with international scholarship provided by university; he has also completed another LL.M. in Energy Law from University of Petroleum and Energy Studies, India. He did his B.B.A.LL.B. (Hons.) focussing on International Trade Law.

ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

PRO-LIFE VERSUS PRO-CHOICE? THROUGH THE DOBBS CASE

AUTHORED BY - ADITI SINGH

Introduction

Women's rights campaigning began in the 14th century, although reproductive rights were neglected for the longest time. Reproductive rights had never received government intervention since women were considered as "life-bearing machines". The "taboo" of sexuality, as well as the ways in which religion and morality compete, had resulted in a complete disregard for various aspects of women's reproductive health, leaving women with only limited access to healthcare. The freedom to choose whether or not to use contraception, and adequate healthcare facilities are all now recognized reproductive rights and are considered to be important human rights. Abortion has been an issue of controversy for decades, which has made rise to the "pro-life" and "pro-choice" debate.

The "pro-life" versus "pro-choice" debate

These "pro-life" and "pro-choice" concepts encapsulate the prevailing ideas about abortion rights. Abortion should be prohibited, according to pro-life advocates, a label that others argue is inherently prejudiced because it implies the opposition's disregard of human life. Proponents of the pro-choice perspective, on the other hand, push for the preservation of lawful and easily accessible abortion procedures.

The pro-life movement adamantly believes that even nonviable and underdeveloped human life is precious and deserves government protection. Abortion is judged impermissible under this paradigm and should not be conducted even if it is legitimate. Proponents of the pro-choice, on the other hand, argue that individuals have unrestricted autonomy over their reproductive systems, as long as such autonomy does not impinge on the autonomy of others. (Destro, September 1975) The basic premise of the pro-choice argument is to make sure there is no government interference in the decision of an individual's decision regarding their pregnancy, particularly before the fetus reaches viability. Pro-life activists discourage women from exercising their right to abortion.

Dobbs Case: Downfall of gender equality and individual's right

There are now significant worries about human rights breaches as a result of the controversial and profound change in reproductive rights brought about by the overturning of *Roe v. Wade*. With this landmark ruling in 1973, the Court believed the value of women's reproductive rights by recognizing their right to an abortion. However, in the case of *Dobbs v. Jackson Women's Health Organization*, in 2022 by the US Supreme Court. The Mississippi Gestational Age Act, which forbids abortions beyond 15 weeks of pregnancy with some exceptions such as fatal abnormalities, was up for constitutional review by the Supreme Court. The Court reversed 1973 *Roe v. Wade* (1973) and maintained the Act, holding that the Constitution does not protect the right to an abortion.

The judge's for this judgement relied on the determination that access to abortion was a "fundamental right" deriving would mean intervening in an individual's privacy. (*Roe v. Wade* 1973) Even though the Constitution has nowhere mentioned "privacy", the court concluded that it is a broader term. This fundamental private right served as the foundation for numerous landmark decisions in the courts recognizing individual rights, such as access to contraception, and same-sex marriage etc. (Wald, 2022) And so overruling of this case, will have implications not only on women's human rights but also on others.

In *Dobbs v. Jackson Women's Health Organization* (2022) has been viewed as a crucial act of antidemocratic backsliding in the decades-long progress of women's rights. A high court of three women and six men, representing a small percentage of United State of America's intellectual, moral, and gender diversity, decided in favour of overturning fifty years of women's rising power over their bodies, identities, and life decisions. (Jasanoff, 2022) It overlooks scientific and technological advances that have radically altered our view of reproduction.

Women's lives and health are impacted after this decision in many ways. These legal limits imposed by the US on abortion has not only diminished the concepts of equality, independence, and dignity by also human rights. They have denied "right to bodily autonomy" and decision-making power of women. This has destroyed the years of fights on gender equality and again taken a downward turn. (Human Rights Crisis: Abortion in the United States After Dobbs, 2023)

The Dobbs ruling emphasises that it is up to the states to decide on abortion laws. More direct

democracy comes about through allowing local and state governments to decide these issues rather than the federal government. Delegating abortion policy choices to various states presents considerable issues, notably in terms of accessibility and equality injustices. Different state rules can result in significant disparities in reproductive healthcare access. Women in jurisdictions with restrictive abortion laws might encounter additional challenges in accessing their reproductive rights, increasing pre-existing socioeconomic and territorial inequalities in healthcare access.

Others are concerned about the possibility of reproductive rights being completely neglected and destroyed if abortion policy is handed over to the states. States with conservative majorities will be more inclined to implement restrictive laws, jeopardising the rights protected by the landmark *Roe v. Wade* decision.

Flawed Arguments in *Dobbs v Jackson*

It is necessary to delve into the arguments adopted by the majority bench, which was led by Justice Samuel Alito, to understand the criticism lingering behind this flawed judgement.

It is necessary to understand that the ideology adhered to by Justice Alito played a major role in this decision. There has been a consistency in his judgements due to the Originalist perspective he has adopted. He is a keen believer in interpreting the Constitutional in a literal sense, by refusing to go beyond what is written. Due to this, he refused to extend the right to abortion as a fundamental right guaranteed by the Fourteenth Amendment Clause that highlights substantive due process of the law (Johnson, 2022). He refused this due to two reasons. The first justification given by Justice Alito was that it would pose a threat to another “*potential life*.” (*Dobbs v. Jackson Women's Health Organization*, 2022). This would seem suggestive of the fact that the court refuses to consider the numerous situations that arise which call for an abortion and, implies that abortions are not justified. This is a problematic consideration made by the Justice. The second justification goes against the principle of *stare decisis*, which has been previously upheld in *Casey v Planned Parenthood* (1992) as well. He reiterated that for extension of rights like this, it must be “*deeply rooted in this Nation's history and tradition*.” (*Dobbs v. Jackson Women's Health Organization*, 2022). Abortion has always been a part of the United States’ tradition and history. The sources utilised to negate this point of contention were not from the recent past, instead, mediaeval, and ancient sources of literature were used. Experts and scholars have argued that the judgement has “*selectively cited*” laws related to anti-

abortion whilst not considering the accurate picture at hand (Hurley, 2022). It is important to take the present situation into account as our society is constantly growing and developing.

While Justice Alito acknowledges that innate fundamental rights, such as right to privacy for the media, are a result of an extension through due process protected by the Fourteenth Amendment, he did not expand upon the same any further. An exclusion or reading down of the right to abortion from the status of a fundamental right puts other such derivative rights in danger as the same logic can be applied to negate their status.

The judgement has also failed to take the international laws revolving around abortion law into account. The *Convention on the Elimination of All Forms of Discrimination Against Women* has codified that “*special measures protecting pregnancy shall not be considered to be discriminatory*” in *Article 4*. The *Montevideo Consensus on Population and Development, 2013* progressed this fight further by urging every country to reconsider their laws on abortion and legalise the same. The *Committee on Economic, Social and Cultural Rights General Comment No. 22 (2016)* passed a recommendation where they said the following: “*to repeal or eliminate laws, policies and practices that criminalise, obstruct or undermine access by individuals or a particular group to sexual and reproductive health facilities, services, goods and information.*” These provisions can be interpreted in a way where abortion rights should be protected.

Furthermore, Justice Amy Coney Barrett highlighted certain problematic arguments as well. She proceeded to say that if there is someone who wants an abortion, they should just carry out the whole gestational period and give birth after waiting it out. She described adoption is the solution to not having an abortion and parenting “*take[s] care of the problem.*” (Dobbs v. Jackson Women's Health Organization, 2022). This very statement harms and reduces the emotional turmoil suffered by a woman who might not want to give her baby away and of someone who has suffered an unwanted pregnancy, by forcing them to give birth. Justice Alito proceeds to expand on this notion by suggesting that there is a reduction in the “*domestic supply*” (Dobbs v. Jackson Women's Health Organization, 2022) of infants and new-borns which can be countered by the argument made by Justice Barrett.

Consequences

It is also crucial to delve into the consequences arising out of such a decision, whose impact can not only be felt on the reproductive rights of women, but also on the federal law due to the Supreme Court overruling a judicial precedent which leads to a setback on the democracy as a whole.

The judgement in *Dobbs* has sparked controversy among US political parties, with both taking opposite positions on the ruling's implications for the authority it confers to state legislators and raising doubts about what rights the Supreme Court may adjudicate upon (Hodge, Graith & Krumholz, 2022). There has also been an impact on the authority of states to regulate abortion, substantial social and legal implications, as well as questions about the judicial and political stability of the nation (Harle 2023), all of which will be discussed in the following paragraphs.

As previously stated, Justice Alito contended that abortion is not a part of American history and, as such, this issue should only be decided by the states. Many republican politicians celebrated this judgement, arguing that the “inherent authority of states” had been greatly restricted by the judgements of *Roe v Wade* and *Planned Parenthood v Casey* (Hodge et al., 2022, p. 849). Justice Kavanaugh further concurred in the *Dobbs* judgement that abortion is an “issue for the people and their elected representatives to resolve through the democratic process in the States” (*Dobbs v. Jackson Women's Health Organization* 2022, p. 2), bowing to the autonomy of states. They failed to recognize, however, that federalism is designed to defend people's liberty and provide varied protections for individual rights. The Court's decision to restore regulatory authority over abortion based on states' interests is contradictory to the fundamental principle of federalism, which aims to protect and strengthen individual liberties. The fundamental freedoms of Americans, established by the Supreme Court more than fifty years ago, need ongoing deference for the granted rights even when they are hastily taken away (Harle 2023). There have been numerous cases that the Supreme Court has adjudicated upon that have had significant effects on individual liberties of the people of America. These include cases on gun possession, gambling and numerous other issues (Hodge et al., 2022). These issues are also related to individual liberties of the people, however, the Supreme Court had upheld its authority in deciding upon these matters.

After the *Dobbs* decision, there was a rush by numerous states to enact their own abortion laws, which caused a major shift in power between federal and state level players (Hodge et al., 2022). Due to

this, the rules about reproductive rights would also vary from state to state if the law is so fragmented and the authority of the Supreme Court is threatened. The right to an abortion is mostly unrestricted in many states. Indeed, the right to abortion is explicitly guaranteed in the constitutions of several states or has been upheld by state supreme courts in rulings that interpret such constitutions. A number of states have made it very difficult, if not illegal, to obtain an abortion, and several of these states have explicitly stated this in their constitutions (Smith et al., 2023).

Such a fragmented landscape would cause issues between state and federal governments. For states that have not adhered to the *Dobbs* ruling and have instead expanded the scope of the right to abortion through state laws, federal policies may be enacted “punish states that fail to conform to federal rulings” (Mayer et al., 2023, p. 394). The relationship between the federal government and individual municipalities is intricate and differs from one state to the next. On the other hand, we can identify a potential source of contention: cities that lean more liberal in states that lean more conservative. (Mayer et al., 2023).

All things considered, the *Dobbs* judgement has laid to rest a significant judicial precedent in the United States. The decision has further polarised opinion on the subject of abortion by shifting the focus from the federal government to the individual states. In order to protect democracy and provide power to elected officials to decide on abortion, the court ruled that the procedure should be illegal. But by doing so, the Supreme Court has shirked from its duty to protect the American people’s rights and dignity.

The Way Forward

The *Dobbs* (*Dobbs v. Jackson Women's Health Organization*, 597 US (2022)) judgement is a major setback not only to the United States but also to the changing world at large. The citizens of the United States are going through a human crisis after the *Roe v Wade* judgement was overturned. Through this appeal we are approaching the United Nations Human Rights Council to take action for the breach of international human rights law committed by overturning *Roe v Wade* (1973) and giving the flawed judgement in *Dobbs v Jackson Women’s Health* (2022).

The fundamental right to live with dignity and with freedom is enshrined in the US constitution. The argument that a foetus is already a human person right from the moment of conception is someone’s

personal belief and not an actual argument. You cannot establish personhood until birth. One should not confuse an opinion with a 50 year old established law. A democratic state like the USA cannot impose someone's personal belief through the legal system.

The Supreme Court clearly disregarded its legal mandates under the International Human Rights Law. The ICCPR clearly mentions that a woman needs to be protected from the harmful scenarios that come with the restrictions on abortion. This position was also reminded to the Court and judges but they turned a blind eye towards it.

In countries with legal restrictions or systemic barriers, safe abortion becomes a luxury for the wealthy, while women with limited resources are forced to rely on unsafe providers and methods. This court ruling makes possible "structural discrimination", which has already become a common practice in the US. The pre-existing discrimination of women of color (primarily women of color and indigenous women) of lower socioeconomic status and other vulnerable situations, such as migrant women, people with disabilities, and victims of sexual violence and prostitution, face additional barriers in the way of reproductive health services. Denial of legal and professional procedural abortion and safe post traumatic abortion care leads to torture, and various inhumane treatment of pregnant women. America's abortion laws and regulations threaten the lives and health of ones getting it aborted and ones who are in urgent reproductive assistance. This has violated the basic human rights of the citizens of the United States.

By overturning Roe v Wade, the United States has clearly dismissed right under the International Human Rights law. The US has ratified ICCPR, ICERD and CAT. It has also signed but not ratified, ICESCR, CEDAW, CRC and CRPD. As a signatory and ratified member of these treaties, the US needs to act in accordance with these conventions instead of passing judgements that go against the sole idea of signing these treaties. Even the Human Rights Committee has said that countries that have signed the ICCPR should not enact anti-abortion laws because they are contrary to the "right to life of a pregnant woman or girl".

We request the UNHRC to take all the steps to mitigate the potential challenges caused by the Dobbs judgement. A few things that can be done is by releasing funds to states for creating a safe place for abortion for the marginalised community. The state has the power to provide access to abortion and

the best example for this is the State of New York. Other states should also try to learn and follow the practice that is used by New York. It's the state's duty to make the process of abortion accessible so that the pregnant woman does not have to travel to another state for abortion and pay a hefty fee on travel. The removal of Roe v. Wade abortion rights is a massive setback that would cement systemic discrimination and violence against women and girls, as well as to anyone who is capable of becoming pregnant. What happened in America today is a serious setback on gender equality and basic rule of law. Abusing legislative, executive, and judicial power to restrict and punish abortion, rather than expanding abortion and ensuring equitable access to safe abortion services, represents a fundamental deterioration of democratic ideals and processes.

Bibliography

1. Destro, R. A. (September 1975). Abortion and the Constitution: The Need for a Life-Protective Amendment. *California Law Review* 63, no. 5, 1250-1351.
Human Rights Crisis: Abortion in the United States After Dobbs. (2023, April 18). Retrieved from Human Rights Watch: https://www.hrw.org/news/2023/04/18/human-rights-crisis-abortion-united-states-after-dobbs#_ftn13
2. Jasanoff, S. (2022, June 28). *Seize back the political discourse on life*. Retrieved from Roe v. Wade has been overturned. What does that mean for America?: <https://www.hks.harvard.edu/faculty-research/policy-topics/fairness-justice/roe-v-wade-as-been-overturned-what-does-mean#sheila-jasanoff>
3. Wald, S. (2022, June 28). *ROE V. WADE HAS BEEN OVERTURNED. WHAT DOES THAT MEAN FOR AMERICA?* Retrieved from Harvard Kennedy School: <https://www.hks.harvard.edu/faculty-research/policy-topics/fairness-justice/roe-v-wade-has-been-overturned-what-does-mean#sarah-wald>
4. Smith, A. B., & Jones, C. D. (2023). The Implications of Federalism in Post-Dobbs America. *Publius: The Journal of Federalism*, 53(3), 378-396. <https://doi.org/10.1093/publius/pjad012>
5. Hodge, J. G., Jr, Ghaith, S., & Krumholz, L. (2022). Federalism's Fallacy at the Forefront of Public Health Law. *The Journal of law, medicine & ethics : a journal of the American Society of Law, Medicine & Ethics*, 50(4), 848–851. <https://doi.org/10.1017/jme.2023.26>
6. Harle, D. M. (2023). "the people and their elected lawmakers": an update on democracy and federalism in post-dobbs america. *Texas Review of Law and Politics*, 27(3), 649-662.

7. Mayer, M. K., Morris, J. C., Aistrup, J. A., Anderson, R. B., & Kenter, R. C. (2023). Dobbs, American federalism, and State Abortion Policymaking: Restrictive policies alongside expansion of reproductive rights. *Publius: The Journal of Federalism*, 53(3), 378–404. <https://doi.org/10.1093/publius/pjad012>
8. Johnson, R. (2022). *Dobbs v. Jackson* and the revival of the States' Rights Constitution. *The Political Quarterly*, 93(4), 612–619.
9. *Dobbs v. Jackson Women's Health Organization*, 597 US (2022).
10. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).
11. Hurley, L. (2022, May 7). *Alito's abortion history lesson in dispute*. Reuters. <https://www.reuters.com/legal/government/us-supreme-court-justice-alitos-abortion-history-lesson-dispute-2022-05-06/>
12. UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, art.4, A/RES/34/180.
13. *The Montevideo Consensus on Population and Development*, 2013, LC/TS.2019/896.
14. Committee on Economic, Social and Cultural Rights, *General comment No. 22* (2016), 2 May 2016, E/C.12/GC/22.



WHITE BLACK
LEGAL